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Submission to the Department of Foreign Affairs and Trade on a proposed Malaysia - Australia Free Trade Agreement

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Summary

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 and environmental protection. AFTINET welcomes this opportunity to make a submission to DFAT on a proposed Free Trade Agreement between Australian and Malaysia.

AFTINET supports the development of 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 framework which is transparent, provides protection to weaker countries and is founded upon respect for democracy, human rights and environmental protection. In general, AFTINET supports multilateral rather than bilateral negotiations.

We believe that the following principles should underpin trading relations, and should guide Australia's approach to any agreement with Malaysia:

- Trade agreements should not undermine human rights and environmental protection, based on United Nations and International Labour Organisation standards,
- Trade agreements should not undermine the ability of governments to regulate in the public interest,
- Trade agreements should allow developing countries the flexibility to make laws and policies which will allow them to direct their own development,
- Trade negotiations should be undertaken through an open, democratic and transparent process which allows effective public consultation to take place,
- Australia's trade negotiations with developing countries should be consistent with Australia's development goals

- Before trade negotiations begin, comprehensive studies of the likely impacts should be undertaken and made public for debate and consultation. The issues studied should include the impacts on:
 - human rights and labour conditions
 - employment
 - environment
 - particular demographic groups, particular regions and particular industries
 - the ability of governments to regulate in the public interest
 - the ability of developing countries to direct their development.

The DFAT industry consultations issues paper does not mention these issues. DFAT should produce a broader, public issues paper which gives an assessment of these issues and indicates how the government will take them into account in:

- (a) considering whether to begin negotiations, and
- (b) pursuing negotiations.

Key Issues

A number of issues need to be addressed before it is decided that negotiations should begin. They arise from a recognition that the above principles should guide these trade negotiations. These issues include:

1. The relationship between the agreement and human rights, labour and environmental conditions

There should be an analysis of the current state of compliance by both Australia and Malaysia 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 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 Malaysia to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms.

The right to organise and to effectively bargain collectively is not universal in Malaysia. The electronics sector is effectively 'carved out' from national labour regulation. As part of the benefits granted to investors granted 'pioneer status', any collective bargaining agreement that it signs may not contain conditions for workers that are more favourable than the legal minimums. Furthermore, as a result of a series of administrative decisions there is no national union for workers in this sector (See Human Rights First, 'Electronics Workers in Malaysia and the Right to Organize' 24 July 2003

http://www.humanrightsfirst.org/workers_rights/wr_se_asia/wr_malaysia/wr_malaysia_01.htm).

While Malaysia's legislation governing lower-paid workers, the Employment Act 1955, sets out a number of minimum rights for Malaysian workers, Malaysian unions and human rights organisations continue to campaign for legislation providing for a minimum wage. The recent rejection by the Malaysian Human Resources Minister to consider a minimum wage regime has been strongly condemned by the Malaysian Trade Union Congress ('MTUC strongly objects Minister's position on minimum wages' 23 June 2004, <http://www.mtuc.org.my/press%20zainal%2023jun04.htm>). Suaram, the leading

Malaysian human rights NGO, has also called recently for the immediate implementation of minimum wage legislation ('Don't betray the rights of workers: implement Minimum Wage Act Now!', 8 September 2004 http://www.suaram.net/display_article.asp?ID=106).

In this context, the Australian government should at the very least conduct a thorough and public study, before any negotiations are commenced, into the matter of what impact a trade agreement will have on the conditions of low-income workers in both Australia and Malaysia.

2. Effective community consultation processes

AFTINET has expressed concern in the past about the need for the Australian government to commit to effective and transparent community consultation about trade agreements, with sufficient time frames to allow public debate about the impact of particular agreements before negotiations begin. At times DFAT's consultation processes seem to be rather *ad hoc*, and it would be appropriate for a clear structure and principles for consultation to be developed publicly.

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 (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 2003, Commonwealth of Australia, Recommendation 2, paragraph 3.91). 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
- Parliament will only decide this question after comprehensive studies are

- done about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise, and after public hearings and examination and reporting by a Parliamentary Committee
- Parliament will be able to vote on any trade treaty that is negotiated.

Processes such as these should be established from the outset for any negotiations for a Malaysia-Australia FTA.

A further question is how the need for transparent, accountable and representative community consultation processes will be met by both the Australian and Malaysian governments.

3. Ensuring that there are sufficient modelling and impact studies on regional areas and particular demographic groups

It is critical that any decision to commence negotiations for a Malaysia-Australia FTA be based on comprehensive and inclusive studies, including input from particular regional and demographic groups which will be affected by the agreement. This should include impacts on the environment, human rights, regulatory powers of government, and any restrictions on the ability of future governments at all levels to take actions in the public interest.

In Australia manufacturing industries are likely to be affected by an FTA with Malaysia. These industries employ large numbers of non-English speaking background workers in regional areas of high unemployment. Regional employment studies are needed to show the impact of tariff reductions.

In previous agreements, such as the Thai-Australia FTA, DFAT's Regulatory Impact Statement made extensive mention of DFAT's efforts to ascertain the views of industry bodies and manufacturers throughout the negotiations. It is

important to recognise that workers also have legitimate interests in negotiations such as these, and that their representative bodies should be entitled to an equal level of consultation. DFAT should consult with unions before and during the negotiations regarding the impacts of the agreement.

Regional employment studies should be publicly available in time for effective input by members of the public.

4. Ensuring consistency between Australia's development goals and trade goals

Australia's trade negotiations with developing countries should be consistent with the development goals within Australia's foreign and trade policy.

DFAT formulates and disseminates development policies as a function of AusAID's work. AusAID defines its objectives as 'advancing Australia's interests by assisting developing countries to reduce poverty and achieve sustainable development' (AusAID (2001) 'AusAID Strategic Plan: Improving effectiveness in a changing environment', AusAID, Canberra).

However it is notable that when trade agreements are proposed, are being negotiated or have been completed, there is no discussion in DFAT and Ministerial documents of how any given trade agreement will promote or otherwise affect these development goals. Accordingly, it is difficult to know whether the goals are more than mere rhetoric when it comes to trade negotiations with developing countries.

It is important for the public and parliament to be able to assess whether Australia's trade and development policies are complementing or undermining each other.

Other countries have incorporated their development goals into their trade

policies. For example Canada and New Zealand have adopted particular measures within their GATS strategies to take account of the impact of trade negotiations on least developed countries. Such an approach offers a more internally consistent approach to foreign policy, and ensures that development issues are not confined to questions of aid provision.

5. Ensure that the ability of the Malaysian and Australian governments to regulate public services and investment is protected

It is important that trade agreements not undermine the capacity of government's to make laws and policies in the public interest, particularly in regard to public services. These services should be exempt from any trade agreement. To do so, it is important that they are defined clearly. The flawed definition of public services used in the USFTA, Thai and GATS agreements should be rejected. This definition seeks to exempt "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'.

Using this definition leads to 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, telecommunications, energy and many more.

In past discussion papers relating to GATS, DFAT has asserted that public services will not be caught under such a definition, and it has drawn a distinction, by way of example, between public education services and private education services. However no argument has been presented as to why these should be seen as qualitatively different within the definition used. Comments by the WTO Secretariat do not offer support for the government's assertion, and, rather, suggest a narrow interpretation of Article 1.3 (WTO (1998a) Report of meeting held on 14 October 1998, note by the Secretariat, Council for Trade in Services,

WTO, 12 November 1998, S/C/M.30).

The government has given assurances in other negotiations that it does not intend that public services or government's capacity to regulate services be diminished. If this is the case, public services should be formally and unambiguously exempted from trade agreements, including any agreement with Malaysia. If not, the likely resolution of this ambiguity will be through rulings of Dispute Panels, deciding on challenges by a government or an investor to a government's public service arrangements.

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. A positive list allows parties and the community to know clearly what is included in the agreement. 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.

Investment regulation

Developing countries have argued strongly that it is critical for them to be able to maintain the capacity to regulate foreign investment to ensure that it delivers development benefits. This is important for all countries, but particularly developing countries.

The DFAT issues paper notes a number of regulations that Malaysia has in place placing conditions on foreign investment to achieve social policy goals (DFAT issues paper p 14). The issues paper suggests that Australia will be targeting Malaysia's capacity to have such regulations (p 16). Australia should support the right of Malaysia to continue to have such regulations, and not seek to limit this capacity.

6. No Investor-State complaints process

There should be no investor-state complaints process giving corporations the right to complain to a trade tribunal and seek damages if their investments are harmed by a government law or policy. AFTINET has consistently opposed this process, as it gives corporations unreasonable legal powers to challenge government law and policy.

Recommendations

1. DFAT should produce a broader, public issues paper which gives an assessment of the above issues and indicates how the government will take them into account in:

- (c) considering whether to begin negotiations, and
- (d) pursuing negotiations.

2. This should include analysis of:

- the current state of compliance by both Australia and Malaysia with human rights, labour and environment standards, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.
- the impact of a trade agreement on the ability of Australia and Malaysia to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms.
- the impact of a trade agreement on the regulatory powers of government, and any restrictions on the ability of future governments at any level to take actions in the public interest
- the impact on particular regional and demographic groups which will be affected by the agreement
- how the proposed trade negotiations relate to Australia's development goals.

3. The government should establish parliamentary review processes (as set out in the Senate Foreign Affairs, Defence and Trade Committee report) for all trade agreements, including from the outset of any negotiations for a Malaysia-Australia FTA.
4. The government should set out the principles and objectives that will guide Australia's consultation processes for this proposed agreement, and should include unions and community organisations in its consultation processes.
5. The government should clearly and unambiguously exempt public services from this trade agreement.
6. The government should commit to putting services and investment under a positive list, not a negative list, should this agreement proceed.
7. Australia should not seek to limit Malaysia's capacity to regulate foreign investment to achieve social policy.
8. The government should commit to excluding any investor-state dispute process from this agreement.