Submission to Department of Foreign Affairs and Trade on the Australia-India Comprehensive Economic Cooperation Agreement (AICECA) September 2015

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a second submission to the Department of Foreign Affairs and Trade on the AICECA negotiations.

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. We also support greater transparency and democratic accountability in trade negotiations. AFTINET supports fair trade with all countries, and supports efforts to develop Australia's positive trade, cultural and other relationships with India.

AFTINET made a submission at the commencement of negotiations. This second submission has been prompted by concern about recent developments in the AICECA negotiations. We are aware that governments have made a commitment to accelerate the pace of the AICECA negotiations and are concerned that a rush to finish could result in a poor quality agreement.

We are gravely concerned about the secrecy of the AICECA negotiations. It is clear that there has been very close consultation about the progress of the negotiations with some business organisations, but until recently, very little with civil society groups.

We are also gravely concerned about the discussion to include proposals for Investor-State Dispute Settlement (ISDS), and provisions about movement of temporary workers. This submission deals with transparency issues, recent research and evidence about ISDS and our concerns about movement of temporary worker provisions in the AICECA.

Summary of Recommendations

1. That AICECA draft texts be released, and that the final negotiated text of the AICECA be released for public and parliamentary discussion before the decision to sign it is made by Cabinet.

2. Failing release of texts, there should be regular consultation by Australian negotiators and discussion of the details of negotiations and of Australian policy positions with civil society groups as well as business.

3. That the AICECA exclude ISDS provisions because of its fundamental flaws of a lack of an independent judiciary, and lack of precedents and appeals

4. If the AICECA does contain ISDS provisions, they should include the following:

- ***recognition of the fundamental rights of states with regard to their development and their right to regulate for implementation of domestic policies in the public interest;***
- ***exhaustion of domestic legal remedies before any resort to ISDS;***
- ***no most-favoured nation clause, and a national treatment clause that is based on intentional, nationality-based discrimination;***
- ***definition of expropriation which clearly excludes non-discriminatory regulatory actions in pursuit of public health, environmental and other public welfare objectives, without any qualifying conditions that would allow such measures in rare circumstances;***
- ***exclusion of the "fair and equitable treatment" standard which has been interpreted very widely by tribunals in favour of corporations, and its replacement with more limited protections against denial of justice under Customary International Law, violations of due process or manifestly abusive treatment;***
- ***limits on compensation and reductions in compensation by mitigating factors; and***
- ***obligations on investors to not engage in corruption, to disclose information and to comply with host state law, including human rights, labour rights and environmental law, and provisions for the host state to bring counterclaims to enforce investor obligations.***

5. That there should be no removal of labour market testing for temporary contractual workers in the *AICECA.*

6. There should be no provisions in or associated with the *AICECA* similar in the to the ChAFTA side letter on removal of skills assessment.

7. There should be no provisions in or associated with the *AICECA* similar to the ChAFTA MOU on Investment Facilitation Arrangements.

8. There should be no provisions in or associated with the *AICECA* similar to the ChAFTA MOU on the Work and Holiday Visa arrangement.

9. There should be no provisions for expansion of the numbers of student visas in or associated with the *AICECA.*

Secrecy of negotiations and release of texts

Trade agreements increasingly deal with topics like medicines, regulation of investment and essential services and movement of temporary workers which can change or limit domestic legislation. These policies would normally be the subject of open and democratic parliamentary debate. They should not be decided behind closed doors as part of a trade negotiation.

There is a global groundswell of critical public discussion about the secrecy of trade agreements and the fact that the decision to sign them is made by executive levels of government before the text is released for public and parliamentary discussion. There are increasing numbers of examples of more open processes in trade negotiations.

Since 2003, World Trade Organisation proposed texts, offers and background papers have been placed on the WTO public website (WTO 2003). The text of the Anti-Counterfeiting Trade Agreement was released in 2011 before it was signed (ACTA 2011).

Most recently the European Union has been involved in a public debate about the lack of transparency in its negotiations with the US for a Trans-Atlantic Trade and Investment Partnership. The European Commission announced in January 2015 that it would release its own negotiating proposals, and would release the full text of the agreement at the end of the negotiations for public and parliamentary debate before it was signed. This is a very significant precedent for all trade negotiations (EU 2015).

This public debate prompted a recent Senate Inquiry into the Australian trade agreement process. Its report was entitled *Blind Agreement*, a title which encapsulated the strong criticism of secrecy and lack of accountability of the current trade agreement process (Senate Committee on Foreign Affairs and Trade 2015).

The report reflects the views of the overwhelming majority of submissions. These criticised the current process and called for the text of trade agreements to be released for public and parliamentary scrutiny and for an independent assessment of costs and benefits before Cabinet authorises them for signing.

Recommendations:

1. That AICECA draft texts be released, and that the final negotiated text of the AICECA be released for public and parliamentary discussion before the decision to sign it is made by Cabinet.

2. Failing release of texts, there should be regular consultation by Australian negotiators and discussion of the details of negotiations and of Australian policy positions with civil society groups as well as business.

ISDS

Background and most recent evidence about 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 which are contrary to the rules of the agreement. ISDS gives additional special rights to foreign investors to sue governments for damages in an international tribunal if they can claim that a change in domestic legislation has 'harmed' their investment.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments. But ISDS has developed concepts like "indirect" expropriation which do not exist in national legal systems. These enable foreign investors to sue governments for millions and even billions of dollars of compensation if they can argue that a change in law or policy has "harmed" their investment.

Many experts including Australia's High Court Chief Justice French and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen from a pool of investment law experts 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 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. Even if a government wins the case, a 2012 OECD Study found ISDS cases last for 3 to 5 years and the average cost is US$8 million per case, with some cases costing up to US$30 million (Gaukrodger and Gordon 2012).

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors.

Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the United Nations Committee on Trade and Development show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and 608 in 2014 (UNCTAD 2015a: 5-7). The most recent UNCTAD figures show most cases are won by investors (Mann, 2015, UNCTAD, 2015b). There are increasing numbers of cases against health, environment and other public interest legislation. Tobacco companies are systematically using ISDS cases against Australia and Uruguay to undermine public health regulation of tobacco advertising (Chan 2012, Voon *et al* 2012).

The June 2015 Productivity Commission study of ISDS confirmed its 2010 study that there is no evidence that ISDS increases levels of foreign investment, or has any economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses "considerable policy and financial risks" to governments (Productivity Commission, 2015). This is why the previous ALP government had a policy against ISDS from 2011, and why many other governments, including Germany, France, Brazil, India, South Africa and Indonesia are reviewing ISDS. (Filho 2007, Ministerial Meeting of Latin American States 2013, Biron 2013, Uribe 2013, Carim 2013, Mehdudia 2013, Bland and Donnan 2014).

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Coalition Howard government did not include ISDS in the US-Australia free trade agreement in 2004. That is why the US Philip Morris Company had to move some assets to Hong Kong and claim to be a Hong Kong company so that it could use ISDS in a Hong Kong-Australia investment agreement to sue the Australian government for billions of dollars over plain packaging legislation. This case has been ongoing for 4 years and has already delayed the New Zealand government from proceeding with similar legislation (Voon *et al* 2012, TVNZ 2013).

Recent ISDS "safeguards" for health, environment and other public welfare measures have not prevented ISDS cases. These "safeguards" do not address the main structural

deficiencies of ISDS tribunals, which have no independent judiciary, no precedents and no appeals process. This means that the tribunals have enormous discretion and no accountability in interpreting the meaning of "safeguards" (Tienhaara 2015).

The US-Peru FTA has similar general "safeguards" but this has not prevented the Renco lead smelting company from suing the Peruvian government over a court decision which ordered it to clean up and compensate for lead pollution (Public Citizen 2012). The US pharmaceutical company Eli Lilly is currently suing the Canadian Government over a court decision which refused a patent for a medicine which was not sufficiently more medically effective than an existing medicine (Gray 2012). 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 contract dispute in which they are claiming compensation for a rise in the minimum wage (Breville and Bulard 2014).

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning Report which argues strongly that trade agreements like the TPP 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).

This evidence supports the Productivity Commission recommendation that ISDS should not be included in trade agreements.

If ISDS is included in the AICECA, it should include the following provisions based on the draft Indian Bilateral Investment Treaty, which was made available for public discussion in April 2015 (Indian Government 2015). This draft does not remedy the fundamental flaws of ISDS, which are a lack of an independent judiciary and no system of precedents or appeals. However it does contain the following features, which limit corporate rights to sue governments more than other ISDS models:

- recognition of the fundamental rights of states with regard to their development and their right to regulate for implementation of domestic policies in the public interest;
- exhaustion of domestic legal remedies before any resort to ISDS;
- no most-favoured nation clause, and a national treatment clause that is narrowly based on intentional, nationality-based discrimination;

- a definition of expropriation which clearly excludes non-discriminatory regulatory actions in pursuit of public welfare objectives, without any qualifying conditions that would allow such measures in rare circumstances;
- exclusion of the “fair and equitable treatment” standard which has been interpreted very widely in favour of corporations by tribunals and its replacement with more limited protections against denial of justice under Customary International Law, violations of due process or manifestly abusive treatment;
- limits on compensation and reductions in compensation by mitigating factors and
- obligations on investors to not engage in corruption, to disclose information and to comply with host state law, including human rights, labour rights and environmental law, and provisions for the host state to bring counterclaims to enforce investor obligations.

Recommendations:

3. That the AICECA exclude ISDS provisions because of its fundamental flaws of a lack of an independent judiciary, and lack of precedents and appeals

4. If the AICECA does contain ISDS provisions, they should include the following:

- ***recognition of the fundamental rights of states with regard to their development and their right to regulate for implementation of domestic policies in the public interest;***
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- ***obligations on investors to not engage in corruption, to disclose information and to comply with host state law, including human rights, labour rights and environmental law, and provisions for the host state to bring counterclaims to enforce investor obligations.***

Movement of Temporary Workers

The unprecedented temporary skilled worker provisions in the China Australia Free Trade Agreement (ChAFTA) have prompted national debate and expressions of legitimate concern. Temporary skilled worker provisions were designed to address shortages of skilled workers at a time of relatively low levels of unemployment and in the context of a mining boom. The mining boom has now peaked, and unemployment levels are rising in the context of low economic growth and continued global economic instability. In this context, there is no justification for additional provisions to bring significant numbers of temporary skilled workers into Australia.

In addition to commitments on temporary skilled workers in the main text, the ChAFTA has two side letters and two Memoranda of Understanding which deal with the issue. This is unlike any other Australian trade agreement, in providing more liberalisation and more pathways for temporary skilled workers to be employed, without adequate safeguards to ensure that there will be labour market testing for the availability of local workers, and to ensure that temporary workers will have the same rights and conditions as local workers and will not be exploited. For these reasons, such provisions or similar provisions should not be used as a precedent for the AICECA.

Removal of Labour Market Testing for Contractual Service Providers

The removal of labour market testing for contractual service providers in ChAFTA chapter 10, article 10.3, and in Annex 10 – A, articles 9 -11, has some similarities to the provisions in the Korea FTA and the Japan FTA. However, the provisions go further. The length of stay for contractual service workers, which is the broadest category of workers for whom labour market testing has been removed, is four years in the ChAFTA and only one year in the Japan and Korea FTAs. In addition, the implications of this removal of labour market testing must be read in conjunction with the other provisions of the ChAFTA, especially the MOU on investment facilitation agreements, which is a completely new provision not found in any other trade agreement.

There has been in the past labour market testing for categories of skilled workers defined as contractual service providers under Visa 457 provisions, but these have not been enforced effectively.

There is both historical and recent evidence that current temporary Visa 457 workers are exposed to exploitation by unscrupulous employers in conditions which have been compared to slavery. The *Sydney Morning Herald* reported on July 18, 2015 that a court had ordered a restaurant owner to pay $125,431 for wages, superannuation and annual leave for 16 months to a Visa 457 worker with no English language skills, who was met at the airport by the employer, had his passport confiscated and was forced to live and work on the premises without payment. The worker's legal representative claimed that his firm had handled dozens of similar cases (Gair 2015).

5. Recommendation

That there should be no removal of labour market testing for temporary contractual workers in the *AICECA.*

The other pathways for liberalisation and increases in the numbers of temporary workers in the ChAFTA are unprecedented and not found in any other Australian trade agreements.

Removal of Skills Assessment

There is a separate exchange of side letters on skills assessment "which constitute an integral part of the agreement" in which the parties agree to "streamline relevant skills assessment processes for temporary skilled labour visas, including through reducing the number of occupations currently subject to mandatory skills assessment" for Visa 457 workers (ChAFTA side letter on skills assessment: 1-2). The 10 occupations include three classes of electrician, four classes of carpenters and cabinetmakers, and three classes of mechanics.

These occupations are licensed not only to ensure skill levels, but to ensure occupational and public health and safety.

There is no indication in the side letter of the process by which the Australian government or government agencies has assessed that the skills and qualifications to be recognised in these particular occupations are in fact equivalent to those required in Australia.

It appears that these particular occupations were chosen because the licensing occurs at state government level. The Commonwealth has agreed to recognise paper qualifications for the purposes of granting visas, and has left any assessment to the state licensing bodies. It

is not clear how state-based licensing requirements will be enforced, especially for those workers involved in the proposed Investment Facilitation Arrangements.

This could lead to a situation where there is no guarantee that temporary workers will have the same level of skills, health and safety knowledge, and qualifications as are required for local workers, potentially endangering themselves, other workers, and the public.

Recommendation 6

There should be no provisions in or associated with the *AICECA* similar in the to the ChAFTA side letter on removal of skills assessment.

MOU on Investment Facilitation Arrangements

There is a separate Memorandum of Understanding on Investment Facilitation Arrangements (IFAs) for projects over $150 million in projects related to infrastructure development in food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment or tourism. This is a very low threshold which would include most building and infrastructure projects in a wide range of industries. These arrangements are quite different from previous Enterprise Migration Agreements which were not part of a trade agreement, but conceived at the height of the mining boom for very large projects worth over $2 billion, for which there was a proven labour shortage determined through compulsory labour market testing.

The MOU specifically states that there will be “no requirement for labour market testing to enter into an IFA.” After the initial approval of the IFA, the investor will negotiate with the Department of Immigration and Border Protection on the numbers, occupations, English language proficiency requirements and calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold (currently $53,900). Labour market testing is mentioned as an optional possibility at this point, but is not a requirement. The $53,900 wage level may be below the market rates paid to skilled local workers in similar projects. All of these conditions will be negotiated with the investor before the workers arrive in Australia.

These workers will be tied to one employer**,** will have no opportunity to negotiate their wages and conditions, and will be extremely vulnerable to exploitation**.**

Recommendation 7

There should be no provisions in or associated with the *AICECA* similar to the ChAFTA MOU on Investment Facilitation Arrangements.

Work and Holiday Visas

There is also a separate MOU associated with ChAFTA which commits Australia to grant annually up to 5000 multiple entry Work and Holiday Visas for young people with tertiary education, with a level of proficiency in English which is assessed as it least functional, to stay in Australia for a period of 12 months for the purposes of a working holiday. (MOU clause 1).

The work is supposed to be incidental to the holiday, and Visa holders are not supposed to work for the full 12 months, but there is no upper limit on the total period of employment. They may not be employed by any one employer for more than six months (MOU clause 2).

There is no mention in the Work and Holiday MOU of compliance with applicable Australian laws and workplace standards. This is surprising, given that the current lack of enforcement of the standards for workers and working holiday visas was recently exposed on the ABC *Four Corners* and *7.30 Report* programs (ABC 2015a and 2015b). The evidence of violations of Australian standards included failure to pay even minimum wages, lack of compliance with minimum hours of work, and lack of health and safety training and standards leading to workplace injuries.

Recommendation 8

There should be no provisions in or associated with the *AICECA* similar to the ChAFTA MOU on the Work and Holiday Visa arrangement.

Student Visas

The systematic exploitation of students from the Indian subcontinent and other countries working in 7-Eleven stores in Australia on student visas was recently exposed by the ABC *Four Corners* program, *The Price of Convenience*. The program revealed systematic underpayment of wages and violation of basic standards on hours of work and showed the need for much stricter implementation of visa conditions to prevent exploitation (ABC 2015c). This visa program should be reviewed and more resources made available to ensure compliance and prevent exploitation before any expansion of the program.

Recommendation 9

There should be no provisions for expansion of the numbers of student visas in or associated with the *AICECA*.

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