

ACTU Submission

ACTU Submission to the Department of Foreign Affairs and Trade
on the proposed Regional Comprehensive Economic Partnership



unions
australia

SECURE JOBS
BETTER FUTURE

Introduction

1. In a speech to the International Labour Organisation in 1999, Amartya Sen said:

It is a crucial moment because the first flush of globalisation is nearing its completion and we can begin to take a scrutinised and integrated view about the challenges it poses as well as the opportunities it offers. The process of economic globalisation is seen as a terrorising prospect by many precariously placed individuals and communities. And yet it can be made efficacious and rewarding if we take an adequately broad approach to the conditions that govern our lives and work.¹

2. In the more than ten years that have passed since Sen's speech, our experience with and the lessons we have learnt from trade liberalisation have broadened and deepened. Experience has demonstrated that trade liberalisation has the potential to contribute to economic growth but this does not guarantee that the benefits of increased trade will result in tangible benefits for workers or that these benefits will be evenly distributed. This is because trade agreements do not consider the (re)distribution of economic growth.
3. Given this context, and if we recognise and accept that the objective underpinning trade agreements is not only to liberalise economies but to promote sustainable economies with decent and secure jobs, this has implications for how and what is negotiated. Trade agreements are also increasingly broad – impacting on an ever broadening range of policy areas. The space for government to introduce policy in the interest of working people – quality public services, affordable health, environmental regulations and so on – must also be maintained. This submission will look at key aspects of the negotiations and provide recommendations on how best to achieve these two outcomes while further integrating our economy with our trading partners.
4. The Australian Council of Trade Unions – the peak council for organised labour in Australia – welcomes the opportunity to make this submission to the Department of Foreign Affairs and Trade on the proposed *Regional Comprehensive Economic Partnership* (RCEP) negotiations. Our position reflects our membership which consists of unions covering all sectors of the economy, across all states and territories, representing 2 million workers. Our comments also draw on our

¹ A. Sen, 'Address to the International Labour Conference', 15 June 1999, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/a-sen.htm>.

experience supporting workers to attain safe, secure and rewarding employment in Australia and internationally.

5. Our comments in this submission consist of general principles and we reserve the opportunity to make additional submissions as the negotiations progress.

Promoting Decent Jobs

6. Currently half of the world's labour force – some 1.52 billion people – is in vulnerable forms of employment (an increase of 136 million since 2000).² Approximately 456 million people work but do not earn enough to escape from poverty. In the Asia-Pacific region a large to very large decent work deficit persists.³ Further creation of jobs that are insecure, fail to provide a living wage, do not respect the rights of workers, and ignore serious occupational health and safety risks is not a means of achieving sustainable development.
7. In Australia, insecure work characterised by unpredictable pay, inferior rights and entitlements, irregular hours, lack of security, and lack of representation in the work place is a growing trend. Approximately sixty percent of workers only are engaged in full or part-time ongoing employment.⁴
8. Therefore job creation through trade liberalisation is important but insufficient. Trade liberalisation should not exacerbate precarious and vulnerable forms of employment. Instead, it should be promoting decent work creation. The inclusion of a strong labour chapter is central to this.

A Comprehensive Labour Chapter

9. The International Labour Organisation's eight core standards provide the rights-based framework for decent work. Freedom of association and the effective recognition of the right to collectively bargain, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and

² United Nations, *The Millennium Development Goals Report 2012*, New York: United Nations, 2012.

³ Ibid.

⁴ ACTU, *The Future of Work in Australia: Dealing with insecurity and risk*, Melbourne: ACTU, 2012

occupation are encapsulated in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*.⁵

10. International labour rights are important for distributing the benefits of trade to workers. By respecting freedom of association and the right to bargain collectively, workers are empowered to negotiate with employers for a decent wage. By eliminating discrimination in the workplace, women, the disabled and the marginalised have equal access to employment opportunities; thus benefiting from economic growth but also ensuring at least fifty percent of the working age population is also contributing to economic growth. By banning forced and child labour there are workers receiving a wage rather than being subject to modern day slavery as well as children with the opportunity to gain an education, providing them with skills to seek employment and gain a decent wage as an adult.
11. 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.
12. This requires the inclusion of a labour rights chapter that at a minimum:
 - Adopts a shared definition of labour rights that incorporates internationally recognised labour rights as captured in the ILO conventions;
 - Outlines a commitment by parties to adopt and maintain laws/regulations consistent with ILO core labour rights and effectively enforce those rights;
 - Brings labour laws into compliance with international minimum standards;
 - Prevents parties from derogating from these laws for any reason but in particular to enhance trade and investment;
 - 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;

⁵ International Labour Organisation, *ILO Declaration on Fundamental Principles and Rights at Work*, Geneva: ILO, 1998.

- 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 and its enforcement. While outlining the capacity building activities in the agreement, a commitment to utilising and resourcing the outlined mechanisms is also required.

13. Promotion and protection of labour rights should be a priority for all trade negotiations regardless of the trading partners negotiating an agreement. In the context of the RCEP, though, it is particularly important given the growing trend in trade. Respect for labour rights will assist in the distribution of the benefits of this trade in the region. Respect for labour rights will help to ensure the jobs created are decent jobs. However, the inclusion of the labour chapter is also important for developed countries including Australia, with research demonstrating that there is a risk of reduced labour standards in developed countries resulting from liberalisation.⁶

Economic and technical cooperation

14. For many countries in the region, the inclusion of capacity building support will be important to strengthen industrial relations regimes where resource constraints, not political will, are the challenge to meeting international standards. Therefore the economic and technical cooperation section of the agreement should include a focus on labour rights and resourcing cooperation that assists countries to meet their shared obligations under the agreement and enhances opportunities to improve labour standards.

15. This recommendation draws on the experience of the US with respect to enhancing labour standards through trade agreements. The four year review of the NAALC – the first labour clause to be included in a trade agreement, NAFTA – made a number of recommendations on how to strengthen cooperative activities. This included a recommendation on the allocation of greater resources to cooperation efforts.⁷

⁶ C. Haberli & M. Jansen, 'Regional Trade Agreements and Domestic Labour Market Regulation' in D. Loppoldt (ed.) *Priority Policies for International Trade and Jobs*, Paris: ICITE and OECD, 2012.

⁷ Secretariat of the Commission for Labor Cooperation, *Review of the North American Agreement on Labor Cooperation 1994-1997*, available at <http://www.naalc.org/naalc/4year-review.htm>

16. More recently, the US Government Accountability Office (GAO) assessed the role of the capacity building mechanism of four US trade agreements – Jordan, Chile, Singapore and Morocco – in improving labour standards. It found that each agreement spurred some labour law reform but there have been difficulties ensuring respect and enforcement of core labour rights. The research also found that capacity building opportunities were missed due to a lack of financial resources.⁸

Goods

17. At a glance, the argument for negotiating the RCEP seems clear. The Asian region now accounts for almost thirty percent of world merchandise trade and eight of Australia's top trading partners (China, Japan, Republic of Korea, Singapore, New Zealand, India, Thailand and Malaysia) are participating in the RCEP negotiations.

18. However, it is unclear what additional market access benefits will be achieved through the RCEP. Australia has already implemented trade agreements with Malaysia, Singapore and Thailand as well as a regional agreement with ASEAN and New Zealand. Australia is also negotiating agreements with China, Japan, Korea, Indonesia and India, as well as the Trans Pacific Partnership Agreement which includes New Zealand, Singapore, Malaysia, Vietnam, Brunei and possibly Japan.

19. Research by the Productivity Commissions is critical of economic modelling used to promote the benefits of previously negotiated agreements.⁹ The benefits have not eventuated. The benefits of agreements currently under negotiation have also not been demonstrated. Nor has a clear case of the benefits (economic and social) of the RCEP been made.

20. Finally, clarity is needed on the relationship between the proposed RCEP and existing trade agreements.

Services Sector

21. The services sector is playing an increasingly important role in the Australian economy, and likewise for other developed countries in the RCEP negotiations. Australia has taken steps to liberalise the sector. For developing countries this sector is of growing importance. The most

⁸ GAO, *International Trade: Four free trade agreements GAO reviewed have resulted in commercial benefits but challenges on labour and environment remain*, Washington: GAO, July 2009.

⁹ Productivity Commission, *Bilateral and Regional Trade Agreements*, Canberra: Productivity Commission, November 2010.

appropriate way to approach services in the RCEP is through the adoption of a positive list approach. It is a framework that avoids unintended impacts on the sector, with job implications, resulting from unforeseen and excessive liberalisation. The positive list approach does so by:

- Preventing the automatic application of liberalisation obligations to services that do not exist nor are contemplated at the time the agreement is negotiated;
- Checking unidirectional policy movement towards comprehensive liberalisation;
- Preventing inappropriate restrictions on the rights of government to regulate in the public interest; and
- Not limiting the regulatory options of future governments when, and after, the new services emerge.

Maintaining the Space for Good Government

Investment

22. The ACTU does not support investment provisions that lead to excessively broad interpretations that undermine public policy making and unfettered liberalisation. This would come about from an overreaching definition of investment, unrestricted Most Favoured Nation provisions, a definition of Minimum Standard of Treatment that creates uncertainty, the exclusion of general exceptions for public policy, and limitations on the use of capital controls and capital transfers.

23. With respect to capital controls, the International Monetary Fund has revised its position and now supports policy flexibility with respect to capital controls in order to address financial volatility.¹⁰ Limitations on the capacity of parties to restrict capital transfers for balance of payment reasons, undertake sovereign debt restructuring or introduce macro-prudential financial regulations designed to promote financial stability in response to a financial crisis are inappropriate. This is not in the interest of citizens or the stability of the global financial system.

24. Similarly restrictions on the ability of states to restrict capital transfers, especially in situations where an investor exits an investment without first meeting tax and social security obligations is

¹⁰ International Monetary Fund, *The Liberalisation and Management of Capital Flows: An institutional view*, Washington: IMF, November 2012.

in appropriate as the burden to meet social security and tax obligations inappropriately falls on the state, taxpayers and workers.

Investor Dispute settlement

25. We do not support the inclusion of investor-state dispute settlement (ISDS) procedures in the RCEP as ISDS constrains the policy-making role of government by providing an avenue (outside the domestic legal system) for foreign corporations to threaten and lodge claims for actual or potential harm resulting from changes in policy and regulation in the country in which they are investing.
26. In practice ISDS has provided foreign corporations with inappropriately broad rights; for example, the interpretation of the principle of *fair and equitable treatment* to mean regulatory actions that simply contradict what investors' argue were their 'reasonable expectations'. Similarly, claims against *indirect expropriation* have been interpreted by arbitration panels to include reduced investor expectations of future profits or a change in the level of regulatory scrutiny than investor might have had under a previous government.
27. The result is challenges to policy and a potential chilling effect on domestic policy making, even if it is for legitimate public welfare objectives. This:
 - Undermines the role of government and undercuts the domestic policy process;
 - Inappropriately and unnecessarily exposes the Australian government to litigation;
 - Constitutes a gross imbalance between private rights and the public interest; and
 - Confers greater legal rights on foreign businesses than those available to domestic businesses.
28. Cases that can be pursued through ISDS can affect every government policy area including health, consumer safety, land use, energy, transportation, financial regulation, and procurement decisions.
29. Argentina, for example, has been sued fifty-one times following the introduction of economic reforms by the government in response to the 2011 economic crisis. Awards against Argentina have reached US\$912 million and pending decisions are estimated at a further \$20 billion, almost six times Argentina's current public budget for health. Germany is responding to arbitration initiated by energy company *Vattenfall* following a government decision to phase-

out nuclear power. Canada is responding to a claim by *Lone Pine Resources* following Quebec's decision to introduce a moratorium on fracking of natural gas in order to conduct an environment impact assessment of the extraction method. Canada is also responding to a case initiated by *Eli Lilly*, a US-based pharmaceutical company, over a decision on a drug patent.

30. Australia is already exposed unnecessarily to litigation through previously signed agreements that include ISDS. Philip Morris is challenging the Government's plain packaging legislation using the Australia-Hong Kong Investment Treaty. It is seeking compensation for loss of revenue and profit, costs for complying with the legislation, and compensation for loss of the value of intellectual property (even though the High Court found that the legislation was not contrary to the 'acquisition of property on just terms'). It is important to note that the plain packaging legislation is consistent with obligations and recommendations in the World Health Organisation's Framework Convention on Tobacco Control.
31. And the number of cases is increasing. In 1995, five cases were reported. Forty-six new cases were filed in 2011 and by the end of 2011 there were a total of 450 reported cases. The number of countries that have faced arbitration had risen to eighty-nine in 2011.
32. Some business groups will strongly advocate for the inclusion of ISDS in the RCEP due to the high number of developing countries negotiating the agreement. In spite of this, we call on the government to maintain its opposition to ISDS for two reasons. First, decisions by companies to invest are informed by risk analysis, including the political and regulatory environment of the country. Companies have demonstrated a preparedness to invest in high risk environments due to the potential for high profits. It is absurd to argue that governments should underwrite the risks taken on by companies seeking to invest overseas when they initiate investments knowing full well the potential risks.
33. Second, in an agreement that includes a number of developing countries it is important foreign corporations are not granted disproportionate powers that undercut domestic policy making. A chilling effect in domestic policy making is a real possibility as developing countries are eager to secure foreign investment. This represents a gross imbalance between private rights and the public interest. It also ignores research that demonstrates no positive correlation between ISDS and foreign investment flows.¹¹

¹¹ See for example K. Gallagher & M. Birch, 'Do Investment Agreements Attract Investment? Evidence from Latin America', *Journal of World Investment and Trade*, Vol 7 No 6 (2006).

Intellectual Property and Public Health

34. For all countries negotiating the RCEP the provision of affordable health care is an essential role of government. For many developing countries participating in the RCEP negotiations, this presents a particular challenge due to already stretched health care budgets. For developed countries like Australia, government must maintain its important role in providing quality public health care.
35. The RCEP should not incorporate protections for pharmaceutical companies and patents in excess of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights or provisions that undermine pharmaceutical benefits schemes. Neither is in the public interest.
36. Generic medicines play an important role in providing access to affordable medicines. The extension of patents, the introduction of data monopolies and a range of other requirements introduced through TRIPS-plus provisions delay the entry of generic medicines into the market to the detriment of citizens. For example, the cost of HIV treatment has fallen by approximately 99 percent over the last ten years due to generic medicines entering the market. However, introducing TRIPS plus requirements through the RCEP would undermine the affordability of HIV treatment. In Costa Rica, for example, public spending on HIV treatments is expected to increase by at least fifty percent by 2030 following the introduction of TRIPS-plus provisions through CAFTA.¹² All medicines need to be affordable, not just those relevant to HIV treatment. The example of Jordan demonstrates the cost implications of introducing TRIPS-plus provisions. Since the US-Jordan trade agreement, which includes TRIPS-plus provisions, came into effect five years ago, medicine prices have increased by twenty percent.¹³
37. Public pharmaceutical schemes – like the PBS in Australia – play an important role in the provision of affordable public health care. Requirements to change such schemes so that companies can charge higher wholesale prices for medicines or challenge decisions about drug prices is not in the public interest. No commitments should be made in the RCEP that would undermine the role of government in providing quality public health care including the provision of affordable medicines.

¹² UNDP, *Global Commission on HIV and the Law: Risks, rights and health*, New York: UNDP, July 2012.

¹³ Oxfam International, 'All Costs no Benefits: How TRIPS-plus intellectual property rules in the US-Jordan FTA affect access to medicines', *Oxfam Briefing Paper*, No 102 (March 2007).

Provision of Services in the Public Interest

38. Governments have dual roles with respect to public services. On the one hand governments continue to play an important role in providing public services. Commitments on competition should not compromise the right of governments to provide these services on a privileged or monopoly basis, and to support economic development.
39. If provisions on state-owned enterprises are also included in the RCEP, there is a need to balance efforts to ensure a level playing field with respect for the legitimate role state-owned enterprises play in providing public goods. In Australia, this would include, for example the national broadband network, Australia Post, and the ABC; as well as maintaining the public policy space for future governments to establish agencies in the public interest.
40. Governments also play an important role in regulating services to ensure equitable access to high quality public services. Public services and ‘public goods’ social services such as health, education, water, waste, electricity, and post should be clearly excluded from the RCEP regardless of whether they are delivered by Government agencies or private providers so governments retain this role unimpeded.
41. With respect to financial services, no commitments in the RCEP should weaken government decision-making powers with respect to financial regulation or the enforceability of financial regulation. Commitments that lead to lowest common denominator financial regulation in the RCEP are inappropriate. Maintaining the policy space for governments to regulate is particularly important in response to imminent financial crises, an experience well understood in the region post-Asian Financial Crisis. The 2009 *Report of the Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System* emphasises that liberalisation ‘may restrict the ability of governments to change the regulatory structures in ways which support financial stability, economic growth, and the welfare of vulnerable consumers and investors’.¹⁴ The G20 has also emphasised that ‘regulation is first and foremost the responsibility of national regulators who constitute the first line of defence against market instability’.¹⁵

¹⁴ UN, *Report of the Commission of Experts on Reforms of International Monetary and Financial System*, Geneva: United Nations, 2009.

¹⁵ Leaders of the Group of Twenty, *Declaration – Summit on Financial Markets and the World Economy*, Washington: G20, November 2008.

Temporary Movement of People

42. We do not believe that a trade agreement is the appropriate instrument to make commitments on the temporary movement of people.

Transparency

43. Trade agreements like the RCEP have wide-ranging and deep implications for economies, workers and the role of government in providing services and regulation in the public interest. Consistent with democratic principles, civil society organisations must be able to regularly and meaningfully engage in these negotiations. To facilitate genuine stakeholder engagement, we call on parties to the negotiation to adopt processes that assist with civil society participation including:

- Early release of negotiating dates and topics to enable stakeholders to plan for meetings with negotiators;
- Early release of stakeholder presentation and stakeholder briefing dates (regular briefings during negotiating rounds and between rounds) to assist with organising participation;
- Stakeholder presentation sessions at a time when negotiations are not taking place and in a room that is sufficiently large to accommodate negotiators and other stakeholders;
- Invitations to stakeholders to attend negotiating round receptions;
- Stakeholder access to the negotiating venue and a space for meetings with negotiations; and
- Interest access at stakeholder and negotiating venues.

44. Further, we believe an essential component of transparency is the release of draft text, proposals and avenues for public review and comment. This is not an unrealistic expectation. During negotiations on the Free Trade Agreement of the Americas, for example, draft texts were posted at regular intervals. The World Trade Organisation regularly posts draft text on agriculture and non-agriculture market access modalities, among many others. Without access to such information, informed stakeholder participation in the negotiating process is not possible.

45. Finally, it is critically important that Parliament have an opportunity to conduct full and open hearings and to amend the agreement if deemed appropriate, consistent with basic democratic principles.

Further Comments

46. The Australian Government trade policy states that the Government will not take into account geopolitical considerations when considering negotiating or concluding trade agreements. We support this position. However, the integrity of this approach is at risk in the Government's current trade agenda.

47. Geopolitics is influencing trade agendas in the Asia-Pacific region. Negotiations are continuing in parallel on another regional trade agreement, the *Trans Pacific Partnership* (TPP). It consists of a number of parties from the Asia-Pacific region including the United States. The US sees the TPP as a means for furthering its interests in the Asian region. Unlike the TPP, China is a party to the RCEP negotiations and the US is not. The intention and design of both agreements is to provide a platform for other countries to join in the future. Thus there are competing regional agreements in which Australia is involved and therefore we recommend the Government exercise caution to ensure that it is not inadvertently entangled in the geopolitical interests of other negotiating parties, to the detriment of Australia's national interest.



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