Submission to the Department of Foreign Affairs, Defence and Trade on the review of the services and investment chapters of the China-Australia free trade agreement (ChAFTA) and the associated Investment Facilitation Arrangement MOU

June 2017

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission on the reviews of the services and investment chapters of ChAFTA and the associated Investment Facilitation Arrangement MOU.

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 is founded upon respect for democracy, human rights, labour rights and environmental sustainability.

In general, AFTINET advocates that non-discriminatory, multilateral negotiations conducted through the WTO are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral, sectoral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

We are particularly concerned at attempts to use bilateral and regional trade agreements to create and expand rules which benefit global corporations but reduce peoples' rights.

The ChAFTA includes investor-state dispute settlement (ISDS) rules which allow foreign corporations to sue governments over public interest legislation. The associated Investment Facilitation MOU creates unprecedented rules for projects over $150 million which allow a large proportion of the workforce to be temporary workers brought to Australia without labour market testing. These workers will be tied to one employer and vulnerable to exploitation.

We advocate for both the process and the content of negotiations and trade agreement reviews to be based on principles of democracy, human rights, labour rights and environmental sustainability.

Summary of recommendations

1. ***Prior to commencing the review, the Government should table in Parliament a document setting out its priorities and objectives. This should include independent assessments of the projected costs and benefits of the modified agreement, considering the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.***
2. ***There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. The Australian Government should release its proposals and discussion papers during trade negotiations.***
3. ***Draft texts should be released for public discussion.***
4. ***The final text should be released for public and parliamentary discussion before it is authorised for signing by Cabinet.***
5. ***The current National Impact Analysis (NIA) process is inadequate. After the text is completed but before it is signed, comprehensive independent studies of the likely economic, social, health and environmental impacts of the agreement should be undertaken and made public for debate and consultation and review by parliamentary committees.***
6. ***Parliament should vote on the whole text of the agreement, not just the implementing legislation.***
7. ***The Memorandum of Understanding (MoU) on Investment Facilitation is not part of the text of the agreement and should be cancelled. Failing this, any changes to the MoU should be released for public and parliamentary discussion before being authorised for signing, and should be subject to a Parliamentary vote.***
8. ***The side letter removing mandatory skills assessment should be deleted.***
9. ***Commitments to remove labour market testing for skilled or semi-skilled workers should be removed from the text.***
10. ***The side letter removing mandatory skills assessment should be deleted.***
11. ***The Australian Government should not attempt to replicate text of the failed Trans-Pacific Partnership Agreement in the review.***
12. ***Investor-State Dispute Settlement (ISDS) should not be included in the agreement.***
13. ***Australia should use a positive list for investment and services.***
14. ***Public services should be clearly and unambiguously excluded and there should be no restrictions on the right of governments to provide and regulate services in the public interest.***
15. ***Government should retain the right to regulate all services to meet service standards, health, environmental or other public interest objectives.***
16. ***The agreement should require the adoption and implementation of agreed international standards on labour rights and environmental protection,***

enforced through the government-to-government dispute processes contained in the agreement.

17. ***There should be no extension of monopolies on patents or copyright in the agreement.***
18. ***The agreement should not contain any provisions which would prevent governments from supporting local firms in government procurement decisions.***

The review process should be transparent, democratic and accountable

The current Australian trade agreement process is secretive and undemocratic. Negotiations are conducted in secret, and the decision to sign agreements is made by Cabinet before they are tabled in Parliament and examined by the Joint Standing Committee on Treaties. The National Interest Analysis presented to the committee is not independent but is conducted by the same department which negotiated the agreement. Parliament has no ability to change the agreement and can only vote on the implementing legislation.

A Senate inquiry in 2015 entitled *Blind Agreement* criticised this process and made some recommendations for change. The Productivity Commission has recommended that before trade agreements are authorised for signing by Cabinet the final text should be released publicly and there should be independent assessments of the costs and benefits of the agreement. The EU has developed a more open process, including public release of documents and text during negotiations and release of texts before they are signed (Senate Foreign Affairs and Trade Committee 2015; EU 2015; Productivity Commission 2010).

The associated Investment Facilitation MoU on temporary workers is not part of the trade agreement text, but made by diplomatic agreement between the parties. On the one hand, this is even less transparent and democratic than the trade agreement process. On the other hand, it means that the Australian government can simply cancel the MOU. AFTINET believes the MoU is unnecessary, exposes temporary workers to exploitation and should be cancelled.

Accordingly, we make the following recommendations.

Recommendations:

1. ***The Government should table in Parliament a document setting out its priorities and objectives for changes to the agreement. This should include independent assessments of the projected costs and benefits of the modified agreement, considering the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.***
2. ***There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. The Australian Government should release its proposals and discussion papers during trade negotiations.***
3. ***Draft texts should be released for public discussion.***
4. ***The final text should be released for public and parliamentary discussion before it is authorised for signing by Cabinet.***
5. ***The current National Impact Analysis (NIA) process is inadequate. After the text is completed but before it is signed, comprehensive independent studies of the likely economic, social, health and environmental impacts of the agreement should be undertaken and***

made public for debate and consultation and review by parliamentary committees.

6. ***Parliament should vote on the whole text of the agreement, not just the implementing legislation.***
7. ***The Memorandum of Understanding (MoU) on Investment Facilitation is not part of the text of the agreement and should be cancelled. Failing this, any changes to the MoU should be released for public and parliamentary discussion before being authorised for signing, and should be subject to a Parliamentary vote.***

Movement of people

Background

Australia is a nation built on immigration and has a permanent migration scheme. AFTINET supports this scheme. Those who migrate under this scheme have the same workplace 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 other than senior executives and managers 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. The inclusion of temporary labour arrangements in trade agreements removes this flexibility.

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 Senate inquiry into temporary work visas also provided similar evidence (Senate Standing Committee on Education and Employment 2015).

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, because of the inflexibility referred to above (Anderson, 2017). The effectiveness of these changes has been debated (Patty 2017).

Given that the government has changed its policy with the intention to restore labour market testing for temporary workers, it would be consistent with this policy for the government to use the review of the China FTA to remove provisions which abolish labour market testing, including the MoU on Investment Facilitation.

Temporary movement of people provisions in ChAFTA

The ChAFTA provisions on Temporary Movement of People are unprecedented, compared with any previous Australian trade agreement.

In addition to the Memorandum of Understanding (MoU) on Investment Facilitation, the subject of this review, there are references to movement of people in two different sections of the text, one in Chapter 10 and one in a side letter to the agreement. There is also a second MoU on Work and Holiday Visa arrangements. The four different aspects of these provisions are complex and must be read in conjunction with each other to be properly understood.

The scale and scope of these arrangements for Chinese temporary workers in Australia are greater than in any previous agreement. In contrast, provisions for Australian nationals to work in China are quite restricted, contained only in the Trade in Services chapter, and mainly apply to senior managers and other specifically skilled workers in specific service industries (ChAFTA Chapter 8 and Annex III, Schedule 2).

Memorandum of Understanding (MOU) on an Investment Facilitation

The Investment Facilitation MoU currently under review is an arrangement which removes mandatory local labour market testing, skills assessment, and limits on numbers and occupations of temporary workers for infrastructure projects with a relatively low investment threshold of $150 million, and which have between 15% and 50% of Chinese investment**.**

It is not part of the text of the agreement itself, but was negotiated at the same time. It is not legally enforceable through government-to government disputes in the same way as the trade agreement, but is an agreement between the governments “through diplomatic channels,” and changes can be made at any time by agreements between the parties (MOU Clause 9).

This means the MOU process is not even subject to the limited Parliamentary process which currently applies to trade agreements (see above section on transparency). This means the MOU is not subject to democratic scrutiny or accountability at all.

The MOU establishes special arrangements between the Department of Immigration and Border Protection of Australia or its equivalent, and a project company eligible for such arrangements. The project company will be eligible where either a single Chinese enterprise owns 50 per cent or more of the project company, or, where no single enterprise owns 50 per cent or more of the project company, a Chinese enterprise holds a substantial interest in the project company. A footnote defines a “substantial interest” as defined in Australia’s foreign investment policy, which occurs when “a single foreign person has 15 per cent or more, or several foreign persons and any associates have 40 per cent or more, of the issued shares, voting power, or potential voting power of the corporation” (MOU Clause 2a). This means that a project could qualify with 15 per cent to 50 per cent of Chinese investment.

The project company must be involved in a proposed infrastructure development project with an expected capital expenditure of A$150 million over the term of the project. The project must be related to infrastructure development in food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment or tourism (MOU Clause 2b and c). This is a very low threshold which would include most building and infrastructure projects in a wide range of industries.

Twenty (20) days after advice from the project company, DFAT will assess that the project meets the relevant criteria and the Department of Immigration and Border Protection will negotiate the occupations to be covered, English language requirements, qualifications and experience, and calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold. Note that this means that the minimum wage to be paid to the temporary workers will be the subject of negotiation between the project company and the Department of Immigration and Border Protection before the workers arrive in Australia and that the workers will be excluded from the basic right to collective bargaining under the Fair Work Act. The rate paid may not be equivalent to the rates paid to local workers in the industry (MOU Clause 4). The current Temporary Skilled Migration Income Threshold is $53,900 (Commonwealth of Australia, 2015). This is well below the rates paid to local skilled workers in infrastructure projects.

Investment Facilitation Agreements between the Department and the project company will set out occupations and the terms and conditions against which overseas workers can be nominated for a temporary skilled visa for the purposes of the eligible project, valid for four years with the possibility of extension. The agreement will record any requirements and conditions that the project company

must comply with. There will be no mandatory requirement for local labour market testing (MOU Clauses 6-8).

The projects are intended to comply with Australian laws including workplace law, work safety law and licensing regulation and certification standards, but it is not clear how this compliance would be enforced, given the current widespread exploitation of foreign temporary workers discussed above.

The removal of skills assessment for the 10 occupations in the side letter discussed below means there is no clear way of assessing whether occupational licensing and skills standards will be met.

In summary, the MOU is an agreement not subject to Parliamentary scrutiny which enables investment projects meeting the low threshold of $150 million to bypass the local workforce and employ unlimited numbers of temporary workers who will be tied to one employer, with no clear means of skills assessment, including health and safety skills, and who may be paid a minimum rate below the rates of equivalent local workers. They will not have the right to collective bargaining under the Fair Work Act, will be isolated from the local workforce and extremely vulnerable to exploitation.

Commitments in the text of the agreement

a) Chapter 10, Movement of Natural Persons: removal of local labour market testing

The Australian Government has made the explicit commitment that there will be no labour market testing or economic needs test for any categories of temporary skilled workers in Chapter 10, Movement of Natural Persons. This means there is no requirement for employers to check whether local skilled workers are available to do the work (ChAFTA, p. 113, Article 10.4.3b).

This includes contractual service suppliers, many of whom come to Australia under visa 457 provisions (ChAFTA p.118, Annex 10a, Articles 10-11).

Since finalising ChAFTA, the Australian Government has abolished and replaced the 457 visa, and has a stated policy to restore labour market testing. It would be consistent with this policy for the Government to continue to seek to remove commitments to remove labour market testing in the ChAFTA.

b) Side letters removing mandatory skills assessment for 10 key skilled occupations, including licensed occupations like electricians

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 Chinese applicants for an Australian Temporary Work (Skilled) Visa (subclass 457)” (ChAFTA Side Letter on Skills Assessment: 1-2).

The side letters state:

> “Australia will remove the requirement for mandatory skills assessment for the following 10 occupations on the date of entry into force of the Agreement.
>
> Automotive Electrician
> Cabinet Maker Carpenter
> Carpenter and Joiner
> Diesel Motor Mechanic
> Electrician (Gen)
> Electrician (Special Class)
> Joiner
> Motor mechanic (Gen)
> Motor and Motorcycle Mechanic”
>
> (ChAFTA Side Letter on Skills Assessment: 1).

The Chapter 10 articles quoted above and the side letter provisions together mean the Government agreed to both the removal of local labour market testing and the removal of skills assessment for temporary workers in skilled occupations. This assessment is essential to ensure skill levels but also to ensure occupational and public health and safety. There is no indication in the side letter of any process by which the Australian Government or government agencies have assessed that the skills and qualifications to be recognised in these particular occupations are in fact equivalent to those required in Australia.

The licensing for these 10 occupations takes place at a state government level. It is not clear whether or how relevant licenses are being granted.

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

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.

The Memorandum of Understanding on Work and Holiday Visa Arrangements

This document commits Australia to grant annually up to 5000 multiple entry “Work and Holiday” visas for young people with tertiary education and a level of proficiency in English, to stay in Australia for a period of 12 months for the purposes of a working holiday (MOU, Clause 1). There is no equivalent commitment for work and holiday arrangements for Australians in China.

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).

The MOU will be reviewed within three years, at which time a reciprocal arrangement may be considered for Australians on working holidays in China. As with the investment MOU, it may be changed or suspended through diplomatic channels (Clauses 3 – 7).

There is no mention in the Work and Holiday MOU of compliance with applicable Australian laws and workplace standards. This is surprising, given that current lack of enforcement of these standards for workers on working holiday visas has been widely documented (ABC 2015a and 2015b). The evidence of violations of Australian standards included failure to pay even minimum wages, lack of compliance with maximum hours of work and lack of health and safety training and standards leading to workplace injuries.

In the context of exploitation of workers under current work and holiday visas, these arrangements could create greater numbers of temporary workers vulnerable to exploitation.

Recommendations

8. ***The MoU on Investment Facilitation should be cancelled.***
9. ***The side letter removing mandatory skills assessment should be deleted.***
10. ***Commitments to remove labour market testing for skilled or semi-skilled workers should be removed from the text.***

The Trans-Pacific Partnership (TPP) text should not be used as a model for the services or investment chapter

The Trans-Pacific Partnership (TPP) negotiations between the US, Australia and 10 other countries failed after the US, the TPP's largest economy, withdrew from the agreement. However, there have been attempts to revive the failed TPP without the US (Mitchell, 2017) and to use the TPP text as a model for other agreements.

The TPP failed because of strong community opposition in most TPP countries. Civil society groups opposed the TPP because it restricted governments from regulating global corporations in the public interest. The TPP extended monopoly rights on medicines and copyright, restricted other forms of public interest legislation and allowed foreign investors to bypass national courts and sue governments in international tribunals (AFTINET, 2016).

In Australia, opposition to the TPP came from a diverse range of health, church, union, environment and aid organisations, representing more than two million Australians (AFTINET, 2016, 2017a,) This culminated in an Australian Senate inquiry which ultimately rejected the TPP's implementing legislation (Senate Standing Committee on Foreign Affairs Defence and Trade 2017).

The Australian Government should not use the flawed TPP text as a basis for future negotiations, including with China. Instead, the Government should develop fairer trade policies which protect human rights and labour rights and ensure governments retain their right to regulate for the public interest.

Recommendation:

11. The Australian Government should not attempt to replicate text of the failed Trans-Pacific Partnership Agreement

No 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 which are 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.

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. The United Nations Committee on Trade and Development has documented that numbers of known outstanding cases have grown steeply from 100 in 1993 to over 700 in 2016 (UNCTAD, 2015 and 2017).

There are many examples of ISDS cases against health and environmental laws and policy enacted by national, state and local governments. Swiss pharmaceutical company Novartis has lodged a dispute against Colombian government regulation to reduce the high monopoly price 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 local 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).

Australian 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 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 2015b).

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 June 2015 Productivity Commission examination of ISDS confirmed its 2010 study and 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 2010: 274, 2015: 82).

This prompted the previous ALP government to adopt a policy against ISDS from 2011. Many other governments, including 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).

ChAFTA opens Australia to ISDS lawsuits

The main reason the Australian Government has not experienced more ISDS cases is that most of Australia's agreements containing ISDS have been with smaller developing countries, which do not have giant corporations with the resources to launch cases.

The inclusion of ISDS in the ChAFTA is likely to lead to more ISDS cases because China does have international corporations capable of launching cases. The latest UNCTAD figures show that at least one Chinese company launched a case in 2014 (UNCTAD 2015: 13).

ISDS "safeguards" similar to those appearing in the ChAFTA 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. Tribunals have enormous discretion in interpreting the meaning of "safeguards" (Tienhaara 2015a).

Unfinished ISDS provisions

The ISDS section in ChAFTA is unfinished, with important definitions of the criteria that can be used to sue governments to be determined by this review process (ChAFTA p. 90, Article 9.9). These include two of the most controversial aspects of ISDS, the definition of indirect expropriation and the definition of minimum standard of treatment for foreign investors. These are provisions often used to sue governments under other agreements.

There is a "safeguard" clause to protect public interest measures from ISDS, but because the clauses are so far unfinished, it is not clear how this would interact with future clauses on indirect expropriation and minimum standard of treatment (ChAFTA p. 92, Article 9.11.4). In any case, as discussed above, all safeguard clauses are limited by the fact that the tribunals have enormous discretion in interpreting them.

The procedures for ISDS cases in ChAFTA are less transparent than other agreements, notably the Korea-Australia FTA (KAFTA). ChAFTA p.101, Article 9.17.2 says parties "may" not "shall" agree to make ISDS hearings and documents public. This is a backward step compared with the equivalent clauses in KAFTA, which state that both documents and hearings "shall" be open to the public (KAFTA Articles 11.21.1 and 11.21.2). A side letter referred to in Article 9.12.9 says neither government will apply the UNCITRAL new rules on transparency, which do require hearings and documents to be made public.

Given the issues discussed above, the Australian Government should seek to remove ISDS clauses completely in this review of the investment chapter of the ChAFTA.

Recommendation

12. ***Investor-State Dispute Settlement (ISDS) should be removed from the agreement's investment chapter.***

Lopsided market access in the investment chapter

The ChAFTA investment chapter is lopsided, in that Australia has given Chinese investors far more favourable access to invest in Australia than Australian investors

will have in China. Combined with the incomplete ISDS provisions, this suggests there was pressure to finish the agreement on the part of the Australian Government.

Lopsided market access

ChAFTA p. 86, Articles 9.3.1-9.3.4, state that Australia is obliged to give national treatment and non-discrimination to the establishment and acquisition of Chinese investment, as well as to ongoing investments. China does not have this general obligation for establishment and acquisition of Australian investment. This means there can still be limitations like requirement for joint ventures for new Australian investments in China, except for some specific service sectors which are discussed below. This difference in the levels of basic commitments to national treatment is very unusual. For example, the Korea-Australia FTA (KAFTA) has the same levels of commitment to national treatment (KAFTA, Article 11.3).

ChAFTA p. 88, Article 9.5.2 states that China has also exempted from the Investment Chapter all its other existing limitations on investment measures (known as nonconforming measures) across the economy.

However there is some relaxation of these limitations listed in its positive list of commitments for Chapter 8 on Trade in Services. This list is in Annex III of the agreement. A positive list means China includes only those services which it has decided to include in the agreement. Some of the services included in the list have less limitations for foreign investors in some sectors. Some examples of the removal of restrictions for investment in services are in transport, tourism, hospitals, aged care, education and financial and insurance services. These are the “breakthroughs” in market access for services which the Australian Government is promoting.

Australia has used a negative list for Annex III for both investment and services, which means everything is included (including future measures) unless specifically excluded, and its nonconforming measures are therefore far fewer than China’s.

Recommendation

13. Australia should use a positive list for investment and services

Trade in services

Trade agreements should not undermine the ability of governments to regulate in the public interest, particularly regarding essential services like health, education, social services, water and energy.

This review should seek to change Australia’s services commitments in ChAFTA to a positive list rather than a negative list system. A positive list allows governments and the community to clearly understand what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It avoids the problem of inadvertently including in the agreement future service areas, which are yet to be developed. It also means that governments retain their right to develop new forms of regulation needed when circumstances change, as has occurred with the need for financial regulation following the Global Financial Crisis and governments’ responses to climate change (United Nations 2009, Stiglitz 2016).

The inclusion of essential services like health, water and education in trade agreements limits the ability of governments to regulate these services by granting

full ‘market access’ and ‘national treatment’ to transnational service providers. This means that governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, numbers of staff or relationships with local services. Governments should maintain the right to regulate to ensure equitable access to essential services, service standards and staffing levels, and to meet social and environmental goals.

Public services should be clearly excluded from the ChAFTA and must be clearly defined. AFTINET is critical of the definition of public services in many trade agreements which defines a public service as “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.” This definition results in ambiguity about which services are covered by the exemption. In Australia, as in many other countries, some public and private services are provided side-by-side.

Even when essential services are not publicly provided, governments need clear rights to regulate to ensure equitable access and to meet other social and environmental goals.

Recommendations

14. ***Public services should be clearly and unambiguously excluded and there should be no restrictions on the right of governments to provide and regulate services in the public interest.***
15. ***Government should retain the right to regulate all services to meet service standards, health, environmental or other public interest objectives*.**

Support for and implementation of internationally-recognised labour rights and environmental standards

The Australian Government should ensure that trade agreements include commitments by all parties to implement agreed international standards on labour rights and the environment, with effective sanctions for non-compliance.

This includes the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work and the associated Conventions and an agreed-upon set of Multilateral Environmental Agreements.

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 labour rights or 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.

This should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

16. ***The agreement should require the adoption and implementation of agreed international standards on labour rights and environmental protection, enforced through the government-to-government dispute processes contained in the agreement***.

No extension of monopoly intellectual property rights on patents or copyright

Intellectual property rights as expressed in patent and copyright law are monopolies granted by states to patent and copyright holders to reward innovation and creativity. However, intellectual property law should maintain a balance between the rights of patent and copyright holders and the rights of consumers to have access to products and created works at reasonable cost. This can be a matter of life or death in the case of affordable access to essential medicines**.** Trade agreements should not be the vehicle for extension of monopolies that contradict basic principles of competition and free trade (Stiglitz 2015).

The 2010 Productivity Commission Report on Bilateral and Regional Trade Agreements concluded that, since Australia is a net importer of patented and copyrighted products, the extensions of patents and copyright imposes net costs on the Australian economy. The Commission also concluded that extension of patent and copyright can also impose net costs on most of Australia's trading partners, especially for developing countries in areas like access to medicines (Productivity Commission 2010: 263).

Based on this evidence, the Report recommended that the Australian Government should avoid the inclusion of intellectual property matters in trade agreements. This conclusion was reinforced by a second report in 2015 (Productivity Commission 2010, 2015).

The 2016 Productivity Commission report on Australia's Intellectual Property Arrangements demonstrated that intellectual property policy has been constrained by trade agreements. Global pharmaceutical companies have successfully lobbied for longer monopolies in trade agreements which have delayed the availability of cheaper medicines, resulting in higher prices.

The report criticises a 'more is better mind set' in relation to intellectual property protections and poor consultation and transparency resulting in agreements which typically involve trade-offs, in which the Government has capitulated too readily, resulting in longer monopolies, which are against Australia's interests (Productivity Commission 2016: 26).

Public health experts and humanitarian medical organisations like Doctors Without Borders (MSF) have demonstrated how successive trade agreements have strengthened patents and other monopoly rights on medicines to the benefit of global pharmaceutical companies and to the detriment of access to affordable medicines, especially in developing countries (Lopert and Gleeson 2013, Hirono *et al*, 2015). MSF's analysis of the TPP concluded that it would further delay price-lowering

generic competition by extending and strengthening monopoly market protections for pharmaceutical companies" (MSF 2015).

Recommendation

17. ***There should be no extension of monopolies on patents or copyright in the agreement.***

Government Procurement

There has been a controversial debate in Australia about both Commonwealth and state government procurement policies, and the ability of governments to use procurement policy as part of industry development policy. Past trade agreements have been interpreted in a way which limits the policy space in this area.

AFTINET believes that Australian procurement policy should follow the example of trading partners like South Korea and the US in maximising policy flexibility on government procurement. These should include 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 agreement should not contain any provisions which would prevent governments from supporting local firms in government procurement decisions.

Recommendation 15

18. ***The agreement should not contain any provisions which would prevent governments from supporting local firms in government procurement decisions***.

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