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Submission to the Joint Standing Committee on Treaties on the Trade Aspects of the Framework Agreement between the European Union and its member states and Australia

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Contents

Summary of Recommendations on Trade Aspects

1. Prior to commencing negotiations for a Free Trade Agreement, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
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 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. Investor-State Dispute Settlement should not be included in the Australia-EU free trade agreement.
8. There should be no extension of monopolies on patents, data protection or copyright in the Australia-EU free trade agreement.
9. The agreement should use a positive list to identify which services will be included in an Agreement.
10. 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.
11. Government should retain the right to regulate all services to meet service standards, health, environmental or other public interest objectives.
12. The agreement should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement.
13. The agreement should require the adoption and implementation of applicable international environmental standards, including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement.
14. Australia should make no commitments for the extension of temporary movement of workers other than senior executives and managers in the Australia-EU free trade agreement.
15. That the Australian government should not enter into any commitments on government procurement that undermine its ability, or the ability of state governments, to support local Australian businesses.

Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 community organisations and many more individuals supporting fair regulation of trade, consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET welcomes this opportunity to make a submission on the EU-Australia Framework Agreement.

We welcome many of the commitments in the framework agreement that commit the parties to implement democratic principles, human rights, and inclusive and sustainable growth for human development.

Our submission is focused on Title IV, Cooperation on Economic and Trade Matters, and sets out principles which should guide the parties in the event that negotiations commence for an EU-Australia free trade agreement.

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 protection.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral 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 create global rules through a network of bilateral and regional agreements which are strongly influenced by the needs of global corporations in areas like Investor-State Dispute Settlement and extension of monopoly rights on medicines and copyright. There will be enormous pressure for an Australia-EU free trade agreement to include such provisions.

This submission argues against the application of such provisions. We advocate and provide evidence for both the process and the content of negotiations to be based on principles of democracy, human rights, labour rights and environmental sustainability.

The trade agreement process should be transparent, democratic and accountable

The current Australian trade agreement process is secretive and undemocratic, with the text not made public until after the decision to sign it. 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 made recommendations for the public release of the final text and independent assessments of the costs and benefits of trade agreements before they are authorised for signing by Cabinet. 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).

Accordingly, we make the following recommendations.

Recommendations:

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

Trade agreements should not contain Investor-State Dispute Settlement processes (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.

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 domestic law or policy has “harmed” their investment.

Many experts including Australia’s former 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. 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).

Even if a government wins the case, defending it can take years and cost tens of millions of dollars. The US Philip Morris tobacco company moved some assets to Hong

Kong and used the Hong Kong-Australia investment agreement to sue the Australian government over its 2011 plain packaging legislation because there was no ISDS clause in the Australia-US Free Trade Agreement. It took over four years and reportedly cost $50 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 Canadian Chevron Company has lobbied for ISDS to be included in EU trade agreements as a deterrent against environmental protection laws (Nelson 2016).

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.

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).

Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the United Nations Conference 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 over 800 in 2017 (UNCTAD 2018). Most cases are won by investors or settled with concessions from governments (Mann 2015, UNCTAD 2018).

The June 2015 Productivity Commission study of ISDS confirmed its 2010 study that there is no evidence that ISDS has 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, Biron 2013, Uribe 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.

Claimed 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 in interpreting the meaning of “safeguards” (Tienhaara 2015).

The US-Peru FTA has similar general “safeguards” but this did not prevent 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).

There are growing numbers of cases against health, environment, Indigenous land rights and other public interest laws.

Swiss Pharmaceutical company Novartis threatened to sue the Colombian government over plans to reduce prices on a patented treatment for leukaemia (Williams 2016).

The Canadian Bear Creek mining company recently won $26 million from the government of Peru because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous land owners about the mine, leading to mass protests (International Centre for Settlement of Investment Disputes 2018).

The US Bilcon Company won millions of dollars of compensation from Canada because its application for a quarry development was refused by a local government for environmental reasons (Global Affairs Canada 2018).

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).

More recently, the European Court of Justice found that ISDS has an adverse effect on the autonomy of EU law and is therefore incompatible with EU law. The Court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal breached EU law (Court of Justice of the European Union 2018). This case involved two EU member states, but the Belgian government has also requested the court to consider whether the EU proposal for an ISDS investment court in the Canada-EU free trade agreement is compatible with EU law (Kingdom of Belgium 2017). This raises the question of whether the EU itself will be in a position to support the inclusion of ISDS in the Australia-EU trade agreement.

Recommendation

7: ISDS should not be included in the Australia-EU free trade agreement.

No extension of monopoly intellectual property rights on patents, data protection 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 which 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 Productivity Commission 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 2015).

Public health experts and humanitarian medical organisations like Doctors Without Borders (MSF) have demonstrated how successive trade agreements have

strengthened patent 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, MSF 2015).

More recently, there have been attempts to use trade agreements to extend another monopoly known as data protection. Data protection is a separate and additional type of monopoly, which applies to the clinical trial data submitted to regulatory agencies like the Therapeutic Goods Administration to demonstrate the safety and efficacy of medicines. During the period of data protection, the competitors who wish to manufacture cheaper versions of the medicine when the patent expires cannot use the clinical trial data from the original medicine to obtain marketing approval for their cheaper version. This effectively delays the availability of cheaper versions. The current legal standard for data protection in Australia is five years (Gleeson *et al* 2015).

Pharmaceutical companies have argued for longer periods of data protection for biologic medicines, used to treat cancer and other serious diseases, which cost tens of thousands of dollars for a course of treatment. Clauses in the original Trans-Pacific Partnership Agreement (TPP-12) would have effectively increased data protection from five to eight years, resulting in delayed availability of cheaper versions of these medicines. Studies have shown that such delays could have cost the Pharmaceutical Benefits Scheme hundreds of millions of dollars a year (Gleeson *et a*l 2015).

Recommendation

8: There should be no extension of monopolies on patents, data protection or copyright in the Australia-EU free trade agreement.

Trade in services: positive list, clear exclusion of public services, right of governments to regulate services in the public interest

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

To the extent that services are included in any trade agreement, a positive list rather than a negative list system should be used. A positive list allows governments and the community to know clearly what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It also avoids the problem of inadvertently including in the agreement future service areas, which are yet to be developed. This 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).

Regulation of services should not be treated as if it were a tariff, to be frozen at current levels and to be reduced over time. Governments should not be prevented from addressing market failures like the need to re-regulate the Australian TAFE system after the failure of deregulation and privatisation (Conifer 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 of those services. 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 trade agreements. This requires that public services are defined clearly. 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 them to ensure equitable access to them, and to meet other social and environmental goals.

Recommendations

9: The agreement should use a positive list to identify which services will be included in an Agreement.

***10*: 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.**

11: 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

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

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

The implementation of these basic rights, and national legal minimum standards of pay, working time and health and safety, should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

12: The agreement should require the adoption and implementation of agreed international standards on labour rights, and national legal minimum standards of pay, working time and health and safety, enforced through the government-to-government dispute processes contained in the agreement.

Support for and implementation of internationally-recognised Environmental Standards

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

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

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

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

Recommendation

13: **The agreement should require the adoption and implementation of applicable international environmental standards, including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement.**

Movement of natural persons

AFTINET does not support the inclusion of the temporary movement of workers other than executives and senior management in trade agreements. This is because their labour market position is different from that of executives and senior management. There is overwhelming evidence they are in a far weaker bargaining position, because loss of their employment can lead to deportation. This leaves them vulnerable to exploitation.

The current exploitation of many workers on Temporary Skill Shortage (TSS) visa arrangements has been exposed by recent studies by Monash University, a Senate Inquiry, a joint Committee Inquiry into Modern Slavery (Schneiders and Millar 2015, Senate Standing Committee on Education and Employment 2016, Joint Committee on Foreign Affairs Defence and Trade 2017).

The evidence of violations of Australian minimum work 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.

The expansion of temporary worker arrangements through trade agreements without testing whether local workers are available increases the numbers of temporary workers vulnerable to exploitation.

Recommendation

14: That Australia make no commitments for the extension of temporary movement of workers other than senior executives and managers in the Australia-EU free trade agreement.

Government Procurement

There has been a controversial debate in Australia about both Commonwealth and State government procurement policies. AFTINET believes that Australian procurement policy should follow the example of trading partners like South Korea and the US in that it should have policies with more flexibility to consider broader definitions

of value for money, which recognise the value of supporting local firms in government contracting decisions (AFTINET 2017).

Several Australian states have recently developed such policies, and the recent Joint Select Committee inquiry into changes to Commonwealth procurement guidelines recommended that the Australian government should not enter into any commitments in trade agreements that undermine its ability to support Australian businesses (Join Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017).

Recommendation

15: That the Australian government should not enter into any commitments on government procurement that undermine its ability, or the ability of state governments, to support local Australian businesses.

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