Submission to the Foreign Policy White Paper public consultation process February 2017

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Foreign Policy White Paper consultation process.

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

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, 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.

The terms of reference for the White Paper ask how Australia's values should underpin Australia's foreign policy and trade policies.

Our values of respect for human rights, labour rights and environmental sustainability are enshrined in international agreements through the United Nations and the International Labour Organisation.

These have been ratified by and have enjoyed bipartisan support from successive Australian governments.

We are also committed to the values of transparency, democracy and accountability which underpin our parliamentary system.

These values of human rights, labour rights, environmental sustainability, transparency democracy and accountability should underpin Australia's foreign policy and trade policy.

These values are the opposite of those of Donald Trump in the United States and One Nation in Australia. However, these conservative and nationalist responses have tapped into genuine popular resentment of free trade rhetoric that has not delivered on exaggerated promised jobs and growth.

AFTINET is not anti-trade and does not support simplistic responses like the sudden introduction of high tariffs which are likely to provoke retaliation and trade wars. Nor

do we support victimising immigrants based on nationality, race or religion, or the development of discriminatory migration policies.

Rather we believe that governments need to rethink trade policy and produce credible and inclusive fair trade alternatives that benefit most people.

This submission will deal with the following issues in trade policy:

- The need for a more transparent, democratic and accountable trade negotiation process
- The need for independent assessments of the economic, social, health and environmental impacts of proposed trade agreements before they are signed
- Trade agreements should not give special legal rights to foreign investors which enable them to bypass national courts and sue governments in unfair international tribunals
- Trade agreements should not give additional monopoly rights for medicines and copyright, which reduce competition and are contrary to free-trade principles
- Trade agreements should not restrict the ability of governments to regulate services in the public interest
- Trade agreements should be based on internationally agreed and enforceable labour rights and environmental standards
- Trade agreements should not include provisions to increase the numbers of temporary migrant workers who are vulnerable to exploitation

Summary of recommendations

1. ***Prior to commencing trade 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. ***The Australian Government should release its proposals and discussion papers during trade negotiations. Draft texts should be also released for public discussion, as occurs in the WTO and is now the practice in some EU negotiations (EU, 2015).***
3. ***The final text should be released for public and parliamentary debate before it is authorised for signing.***
4. ***After the text is completed but before the decision is made to sign it, comprehensive independent studies of the likely economic, health and environmental impacts of the agreement should be undertaken and made public for public debate and review by parliamentary committees.***
5. ***Parliament should vote on the whole text of agreements, not just the implementing legislation.***

6. ***The Australian Government should not include Investor-State Dispute Settlement (ISDS) in trade agreements.***
7. ***There should be no extension of monopolies on medicines or copyright in trade agreements*.**
8. ***Trade in services provisions in trade agreements should use a positive list to identify which services will be included in an agreement.***
9. ***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.***
10. ***Governments should retain the right to regulate and introduce new regulation to meet service standards, and to meet health, environment, education or other public interest objectives*.**
11. ***Trade agreements 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.***
12. ***Trade agreements 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.***
13. ***Temporary movement of workers other than senior executives and managers should not be included in trade agreements.***

The trade agreement process and need for independent studies of trade agreement impacts

The current process for trade agreements is not consistent with the Australian values of transparency, democracy and accountability which underpin our parliamentary system.

In the past, trade agreements were mainly concerned with reductions in tariffs. But today trade agreements increasingly deal with policies which would normally be decided through an open democratic parliamentary process. These include investment policy, industry policy, government procurement, regulation of services, intellectual property policy including expansion of monopoly rights on medicines and copyright, e-commerce and internet regulation, financial regulation, privacy regulation and movement of temporary migrant workers.

All of these policies would normally be decided through the democratic parliamentary process. They should not be decided in secret trade negotiations.

The structure of trade agreements treats many of these forms of social regulation as if they were tariffs to be continually reduced, and not increased. This approach suits the needs of global corporations which seek to restrict and reduce government regulation resulting in uniform and predictable global rules that suit their needs and maximise profitability. However, the public interest demands that governments retain the flexibility to regulate and to increase regulation if needed.

More recent trade agreements have extended monopoly rights on medicines and copyright, both of which undermine the competition which is claimed to be the basis of free trade. They have also given special rights to global corporations to bypass national court systems and sue governments for millions of dollars in compensation in unfair international tribunals, known as Investor-State Dispute Settlement (ISDS).

The failed Trans-Pacific Partnership agreement (TPP) exemplified this pattern. Most of its 30 chapters sought to prevent or restrict governments from regulating in the public interest. It entrenched and expanded monopoly rights on copyright and medicines and included ISDS provisions. The claimed safeguards in the TPP for ISDS provisions to retain government rights to regulate were ineffective (Kawharu 2015, Peterson 2015, Stiglitz 2015, AFTINET 2016a).

There were no independent assessments of the economic, health, human rights and environmental impacts of the TPP. The government relied instead only on the National Interest Assessment done by the Department of Foreign Affairs and Trade, which conducted the negotiations. The government declined recommendations and offers from the Productivity Commission to do an independent cost benefit analysis of the agreement (Productivity Commission, 2010, 2015, Hutchens, 2016)

Calls for independent assessments also came from a broad range of community organisations and from the Australian Competition and Consumer Commission and public health experts (Australian Competition Consumer Commission, 2015, Hirono *et al,* 2015).

The TPP generated strong community opposition in most TPP countries because it expanded corporate rights at the expense of peoples' rights. In the US, this movement resulted in opposition to the TPP from both major presidential candidates, and the US withdrawal from the TPP.

Although the TPP cannot be implemented in its current form, some governments are still trying to use it as a model in other trade negotiations. This includes the Regional Comprehensive Economic Partnership (RCEP) being negotiated between the 10 ASEAN countries plus China, India, Japan, Korea, Australia and New Zealand. Leaked documents show that TPP-like proposals on ISDS and medicine monopolies are being put forward by some governments. This has already generated strong opposition from public health and other community organisations (MSF, 2016, AFTINET 2016b).

This trade policy approach is not consistent with the obligations of governments to act to protect human rights, labour rights and environmental sustainability. The global financial crisis taught us that unregulated markets fail and that governments must intervene to stabilise the economy, ensure responsible investment and protect consumers. Responding to climate change requires government action to encourage investment from high to low carbon industries and develop new renewable energy. Exposure of global corporate tax evasion has shown that governments must act to ensure enough revenue to provide health, education and other essential services. All these policies require active government intervention which can respond to changes in circumstances and not be shackled by trade agreements reached behind closed doors.

Trade agreements now deal with a wide range of policy issues which would normally be decided through democratic parliamentary processes. This has led to a global movement for more open and accountable and democratic trade processes.

The current Australian trade process is that trade negotiations are conducted in secret, and the text is not made public until after it has been agreed. The decision to sign agreements is a Cabinet process, only after which the agreement is tabled in Parliament and examined by the Joint Standing Committee on Treaties. The text of the agreement cannot be changed. Parliament only votes on the implementing legislation, not on the whole agreement.

The 2015 Senate Inquiry into the Australian trade agreement process summarised the faults in this secretive and undemocratic process in its report *Blind Agreement* (Senate Committee on Foreign Affairs Defence and Trade, 2015). AFTINET made a detailed submission to this inquiry (AFTINET 2015).

Our recommendations for change to this process are summarised briefly below.

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. ***The Australian Government should release its proposals and discussion papers during trade negotiations. Draft texts should be also released for***

public discussion, as occurs in the WTO and is now the practice in some EU negotiations (EU, 2015).

3. ***The final text should be released for public and parliamentary debate before it is authorised for signing.***
4. ***After the text is completed but before the decision is made to sign it, comprehensive independent studies of the likely economic, health and environmental impacts of the agreement should be undertaken and made public for public debate and review by parliamentary committees.***
5. ***Parliament should vote on the whole text of agreements, not just the implementing legislation.***

Trade agreements should not include Investor-State Dispute Settlement processes (ISDS)

Background and recent literature 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 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.

There are many examples of ISDS cases against health and environmental laws and policy. The US pharmaceutical company Eli Lilly is currently suing the Canadian Government over a court decision which refused a patent for a medicine which was not sufficiently more medically effective than an existing medicine (Gray 2012). The US Lone Pine mining company is suing the Canadian Government because the Québec provincial government conducted a review of environmental regulation of gas mining (CBC 2012). The French Veolia Company is suing the Egyptian Government over a municipal 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).

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico through the North American Free Trade Agreement, the Howard Coalition Government did not include ISDS in the US-Australia Free Trade Agreement in 2004.

There is also widespread criticism of ISDS in the US itself. The recent Canadian TransCanada company suit against US Government over its 2015 decision not to approve the controversial Keystone tar sands pipeline for environmental reasons has been widely condemned as a threat to environmental regulation (Beachy 2016).

In September 2016, more than 200 US law and economics professors sent a letter to Congress warning that the ISDS regime threatens the rule of law and undermines democratic institutions. They included Harvard University's most senior Constitutional Law Professor Lawrence H. Tribe, and Nobel-Prize-winning economist and Columbia University Professor Joseph Stiglitz. They called on Congress to reject ISDS in the TPP and other trade agreements (Public Citizen 2016).

Australian experts, including Australia's High Court Chief Justice French and the Productivity Commission, have noted that ISDS is not independent nor 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 most comprehensive figures on known cases from the United Nations Conference on Trade and Development (UNCTAD) show that there has been an explosion of ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and 767 in 2016 (UNCTAD 2017). US-based companies are the most frequent users of ISDS (UNCTAD 2016). Most cases are won by investors or settled with concessions from governments (Mann 2015, UNCTAD 2017).

It has been argued that Australia is not likely to face future ISDS claims because there has been only one claim against Australia despite a number of agreements containing ISDS, and that Australia's robust legal system protects us from cases. This claim fails to recognise that Australia's previous agreements containing ISDS have been mostly with developing countries, which do not have global corporations with the resources to launch ISDS cases. Most ISDS cases come from US-based companies, with the next largest number coming from EU-based companies.

The reason there has only been one previous case against Australia is because the Howard Government did not agree to ISDS in the Australia-US Free Trade Agreement. This is why the US-based Philip Morris tobacco company had to move assets to Hong Kong to use ISDS in a Hong Kong-Australia investment agreement to sue Australia. Australia does not have an agreement containing ISDS with the EU, and so has not faced any EU cases.

Under the North American Free Trade Agreement, US companies have launched 56 cases against Canada and Mexico since 1994, an average of more than two cases a year. Thirty-nine of these cases were against Canada, which has a legal system similar to Australia's.

A recent study of Canada's experience of ISDS by leading expert Dr Kyla Tienhaara from the Australian National University show some of the possible costs of ISDS for Australia based on available global data and a direct comparison with the experience of Canada under the North America Free Trade Agreement. The report is entitled *The Canary in the Coalmine* because the author argues that Australia should use the opportunity to learn from the Canadian example before entering into similar agreements containing ISDS.

Based on comprehensive evidence, the report concludes:

- US investors are the most frequent users of ISDS globally. According to the most comprehensive UNCTAD data, they initiate 20% of ISDS cases globally
- US investors have initiated 39 cases against Canada since 1994, with cases becoming more frequent over the last decade
- US investor cases against Canada cover a wide variety of industries and services including agriculture, chemicals, construction, electricity generation, entertainment, finance, forestry, health, mining, pharmaceuticals, postal, pulp and paper, oil and gas, tourism and waste disposal
- most of these cases involve regulatory measures by governments, many against health or environmental regulation
- these cases ranged over regulation by all levels of government, and more than half of the cases brought against Canada have involved claims against provincial (state) or local governments
- global data shows governments lose or settle ISDS cases more often than they win. Canada has lost or settled 11 cases and won six, with many still outstanding
- even when states "win" they lose, because costs are not automatically awarded against the loser, resulting in unrecoverable legal costs

- damages or compensation awarded by tribunals or known settlements paid by Canada have totalled at least C$216.7 million. This is an underestimate because some settlements are not disclosed and there are current outstanding cases for hundreds of millions of dollars, for which awards or settlements have not yet been made

- ISDS cases are designed to discourage governments from regulating, a process known as 'regulatory chill'. Some settlements, like the case of Ethel versus Canada (over the banning of a petrol at additive on public health grounds), have resulted in reversals of regulation, although subsequent evidence showed the regulation was justified. The Chevron oil company has stated publicly that the "existence of ISDS is important as it acts as a deterrent" to regulation

(Tienhaara, 2016: 2 and 27).

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).

The previous ALP government adopted 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).

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. Tribunals have enormous discretion in interpreting the meaning of "safeguards" (Kawharu 2015, Peterson 2015, Hill, 2015, Tienhaara 2015a).

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).

Recommendation

6. ***The Australian government should not include Investor-State Dispute Settlement (ISDS) in trade agreements.***

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 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 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 shown 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 (Gleeson, 2015, 2016, 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). MSF and other community groups are also advocating against the inclusion of TPP-like provisions in the RCEP (MSF 2016).

Recommendation

7. ***There should be no extension of monopolies on medicines or copyright in trade agreements*****.**

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

The growing importance of commercial trade in services on a global scale was recognised when the World Trade Organisation negotiated the General Agreement on Trade in Services (GATS), which came into force in 1995. This was the first time that trade in services became subject to rules which were legally binding on governments and could be enforced through trade sanctions.

AFTINET does not oppose increased trade in commercial services. However, there are tensions between opening what many see as essential services to private investment and deregulation, and the need for continued public services and public regulation of services. This has given rise to an ongoing debate. Global services companies have lobbied for both increased privatisation and deregulation, while many community organisations and some governments have resisted these trends.

Negotiations for further dregulation through the WTO GATS from 2002 reflected this debate. Governments from the US, the EU and other industrialised countries advocated on behalf of their often-global service companies for further deregulation. These proposals were resisted by the emerging former developing countries like Brazil, India China and South Africa, and by most developing and least developed countries. These countries did not have developed services industries and wished to retain the ability of governments to regulate services in the public interest. Negotiations effectively stalled from 2010.

In 2013 a group of 50 mostly industrialised WTO member countries, calling themselves “the really good friends of services,” started negotiations for a separate Trade in Services Agreement (TiSA) outside of the WTO framework. The TiSA aims to deregulate services further than the GATS and open more services to cross-border private investment. The vast majority of the 164 members of the WTO are not involved in the negotiations. Those involved are mostly OECD countries, with a few developing countries, although Uruguay and Paraguay have recently withdrawn from the negotiations. Emerging countries like Brazil, India, China and South Africa are not involved[1].

The negotiations are taking place in secret, without access to draft proposals, offers or negotiating texts. This is less transparent than the WTO, where proposals, offers and draft texts on trade in services have been published since 2003.

Since 2013, there have been 18 rounds of negotiations, but only limited public briefings provided each year by the Department of Foreign Affairs and Trade. Without access to the proposals or draft text they lack detail and make meaningful input difficult. The only detail has been provided by leaked documents (WikiLeaks, 2016).

[1] The current TISA negotiating countries are Australia, Canada, Chile, Colombia, Costa Rica, European Union, (comprising 28 countries) Hong Kong, Iceland, Israel, Japan, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Korea, Switzerland, Taiwan, Turkey, United States

Services under negotiation range from water, health and education to financial and environmental services, all of which need regulation to ensure equitable access. Governments also need the flexibility to respond to changes like the global financial crisis or climate change. AFTINET believes national policies on the regulation and provision of essential services should be decided through transparent democratic parliamentary processes, not through trade negotiations conducted in secret.

The WTO GATS is a positive list agreement, which means that each government can choose whether to include particular services in the agreement. The TiSA applies a negative list to national treatment of services, which means that all services, including new services which might develop in the future, are covered by its rules, unless specifically exempted. Market access is based on a positive list, which makes the agreement very complex.

Public services are claimed not to be included in so far as they are “services supplied in the exercise of governmental authority and not on a commercial basis, nor in competition with other providers.” But this is an ambiguous definition which can include many public services.

The structure of the agreement treats government regulation as if it were a tariff, to be reduced and minimised over time in all service sectors, including new services, through “standstill” and “ratchet” provisions. This means that regulation is effectively frozen at current levels, cannot be increased unless specifically exempted, and must be reduced over time. These provisions reduce flexibility to increase regulation if circumstances change, or to introduce new regulation for new services which might develop in the future.

TiSA could also restrict the ability of governments to respond to failures in services privatisation. For example, the recent attempt in Australia to create a private market for vocational education services resulted in fraudulent advertising, failure to provide courses to students and misuse of government funds (Branley, 2016). The Government responded by passing legislation to re-regulate the sector to address these abuses (Conifer, 2016). If TiSA had been already in force, and private vocational education had not been specifically exempted, such legislation would have been in breach of the agreement, and the Government would have been prevented from re-regulating. This is unacceptable. Governments must be able to re-regulate and if necessary resume public service provision in the event of market failure.

There are also TiSA proposals to limit regulation in areas like licensing, qualifications and standards, to ensure they are not ‘more burdensome than necessary.” These proposals could restrict the ability to ensure safe and equitable access to essential services like water, to establish quality standards in areas like childcare and aged care, and for environmental standards.

TiSA has faced strong community opposition (EU Civil Society Organisations 2016). Negotiations are currently suspended, pending a review of all trade negotiations by the Trump administration, but may resume in 2017.

TiSA is not the only trade agreement dealing with trade in services. Over the last two decades, most bilateral and regional trade agreements have had trade in services chapters which were initially modelled on the WTO GATS Agreement. However, TiSA is now becoming the template for trade in services chapters in regional and bilateral agreements.

Recommendations

8. Trade agreements should use a positive list to identify which services will be included in an agreement.

9. 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.

***10. Governments should retain the right to regulate all services to meet service standards, and to meet health, environmental, education 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)
- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111)

The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

11, Trade agreements 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.

Support for and implementation of internationally-recognised Environmental Standards

Protection of the environment is a fundamental value which should underpin trade policy. 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

***12. Trade agreements 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 people

Australia is a nation of immigrants and has a permanent migration scheme. Those who migrate under this scheme have the same 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 were originally designed to address specific skills shortages, and were subject to local labour market testing to establish whether local workers were available. Now 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. This treats temporary workers as if they were commodities. The 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 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.

Recommendation

13. Temporary movement of workers other than senior executives and managers should not be included in trade agreements*.*

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