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**Submission to the Joint Standing Committee on Treaties and the Senate  
Inquiry on the TPP-11 April 2018**

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## 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 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.

AFTINET welcomes the opportunity to make this submission on the TPP-11, now re-named the Comprehensive Progressive Trans-Pacific Partnership Agreement (CPTPP), after the withdrawal of the US from the original TPP, or TPP-12.

The TPP-12, as President Obama put it, was about “the US writing the rules” for international regulatory standards driven by US global corporations. In the TPP-11, only 22 of its provisions have been suspended, but not removed, pending the US re-joining the deal. Many of these provisions increase monopolies on medicines, including the most expensive biologic medicines, which would delay the availability of cheaper forms of these medicine, and increase copyright monopolies at the expense of consumers. Appendix 1 provides more details about the suspended medicine provisions. Trade agreements should not be used to increase monopolies, which are the opposite of “free” trade. The suspension of these provisions identifies them as unacceptable to all TPP countries, yet they could be resurrected if the US re-joins the agreement.

Australia has never before signed a deal containing essentially unacceptable provisions that could be re-activated if an outside party re-joins the deal. This demands close independent scrutiny by both the Joint Standing Committee on Treaties (JSCOT) and the Senate inquiry.

Like the TPP-12, TPP-11 is still not mainly about tariffs or market access. Most of its 30 chapters are legally binding rules which suit global corporations but mostly restrain future governments from regulating in the public interest in areas like access to medicines, essential services, temporary migrant workers, food labelling and product standards, and many other areas ranging from data privacy on the internet, to financial regulation.

The TPP-11 still contains ISDS rights for foreign investors to bypass national courts and sue governments for millions of dollars in unfair international tribunals if they can argue that a change in law or policy has reduced the value of their investment. The question from a civil society point of view is still whether these rules that suit global corporations but tie the hands of governments from regulating them are in the interest of most Australians.

Most of the TPP-11 deals with policy issues that are normally decided through open democratic parliamentary debate. They should not be traded off against small market access gains which will benefit some specific industry sectors but may harm the interest of most Australians.

The recent announcement by President Trump that he intends to re-negotiate the deal raises even more questions.

If the suspended clauses are reinstated through negotiation with the US, this will change the nature of the deal again, demanding further parliamentary scrutiny. Trump has also said he would want a 'substantially better deal' for the US which is likely to mean even stronger monopoly rights on medicines than are in the suspended clauses, and other unacceptable demands on behalf of US corporate interests.

This submission gives an overview of seven major issues in the TPP-11: ISDS, regulation of services, temporary movement of people, labour rights, environmental standards, technical barriers to trade which include food labelling and product standards, and government procurement.

Other organisations will make more detailed submissions in areas of interest to them.

## Summary

### **A more transparent democratic and accountable trade agreement process**

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 only then 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.

AFTINET supports publication of negotiating texts, and publication and independent evaluation of the economic, health and environmental impacts of agreements before the decision is made to sign them. Parliament should vote on the whole text of the agreement.

### **ISDS**

The TPP-11 provisions for ISDS remain almost completely unchanged from the TPP-12. 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.

Over the past 2 years, even more legal experts and legislators have condemned flaws in the ISDS system as the numbers of cases against public interest laws have increased. This critical debate has affected all sides of politics, and many governments are reconsidering ISDS. Even the EU and the US are now negotiating agreements without ISDS. The two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID) are conducting ongoing reviews which have also identified serious flaws in the system.

Given these developments, the TPP-11 should not contain ISDS.

### **Trade-in-Services**

the TPP-11 trade-in-services chapter remains unchanged. The structure of the chapter treats regulation of services as if it were a tariff, to be frozen at existing levels or reduced over time, and not to be increased in future, known as the “ratchet” structure. The negative list structure means that all services are included, unless specifically exempted. Exemptions are intended to be reduced over time. The exemptions do not apply to ISDS, and do not prevent ISDS cases on exempted services.

The negative list and ratchet structure are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade.

But this structure ignores the need for democratic governments to respond to changed circumstances, like the re-regulation of the financial sector following the Global Financial Crisis, and the need for new regulation of carbon emission levels and energy markets in response to climate change. The structure can also prevent governments from responding to failures of privatisation and deregulation, as occurred with the need to re-regulate the provision of Australian vocational education services.

## **Temporary movement of people**

The TPP-11 commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of professional, technical and skilled trades occupations, without labour market testing to establish whether there are local workers available. The fact that they are tied to one employer and face deportation if they lose the job means that these workers are vulnerable to exploitation. Recent studies have provided even more evidence that exploitation is widespread. Australia has made far more extensive commitments for entry of contractual service providers than have other TPP countries.

The government has recognised some of these issues through its abolition of the visa 457 and claimed restoration of labour market testing for temporary overseas workers. During the TPP-11 negotiations, the Australian government could have chosen to reinstate labour market testing, as would be consistent with its claimed change of domestic policy, but it has chosen not to do so. The government did choose to restore labour market testing for contractual service providers in the Peru-Australia FTA, which was negotiated over the same period. This begs the question of why the two agreements are inconsistent.

## **Labour Rights**

The text of the TPP-11 Labour chapter is unchanged. However, there are legally binding side letters between Vietnam and other TPP-11 countries which have the effect of weakening Vietnam's obligations in relation to the chapter.

Labour law experts have criticised the chapter because much of it is aspirational rather than legally binding. For example, the clause on forced and child labour only commits governments to "recognise the goal" of eliminating forced and child labour. The enforcement process for those few provisions which are legally binding is more qualified, lengthy and convoluted than in other chapters of the agreement. These processes have not proven effective in other agreements. The labour rights chapter is not specifically exempted from ISDS cases, and there is no reference to labour regulation in the claimed ISDS safeguards. This means that future changes to labour laws could be the subject of ISDS disputes.

## **Environment**

Environmental law experts have criticised the chapter for its weak environmental standards, which are not enforceable in the same way as obligations in other chapters.

Despite promises that the agreement would include enforceable commitments by governments to at least seven international environment agreements, the text mentions only four, and only one - on trade in endangered species - has clearly enforceable commitments.

The text does not refer to climate change, but only to voluntary measures for lower emissions economies with no benchmarks or timeframes.

The non-binding nature of commitments and weak enforceability in the environment chapter contrasts sharply with the legal rights of corporations to sue governments over domestic laws, including environmental laws, under the provisions for ISDS described above.

## **Technical Barriers to Trade (TBT)**

The TPP-11 includes new commitments for Australia to mutually recognise product conformity assessment procedures in other TPP countries. Mutual recognition of regulatory standards across countries with different standards raises the question of how to maintain

and improve Australia's relatively high standards in areas like food regulation and building product standards. Harmonising standards may not be in the public interest.

Australia introduced a form of country of origin food labelling after the imported infected frozen berries scandal, and more regulation may be needed in future. After numerous reports of dangerous imports of asbestos products and flammable building cladding, a Senate inquiry has recommended that stronger regulation is needed to ensure that imported building products conform to Australian standards to prevent importation of such dangerous products. Future governments may need to introduce new regulation in these areas. The commitments to recognise other countries' conformity assessment procedures may impede future governments from regulating in these areas.

ISDS disputes are not excluded from the TBT chapter. In addition to government-to-government disputes described above, foreign investors could use ISDS to claim compensation for changes to food labelling requirements, or changes to building product conformity standards which might occur after the TPP-11 is in place. The wine and spirits annex could restrict future options for mandatory alcohol health warnings like those for pregnant women, and such regulation could also be open to ISDS cases.

### **Government procurement**

Australian procurement policy should follow the example of trading partners like South Korea and the US in having policies with more flexibility to consider broader definitions of value for money, which recognise the value of supporting small and medium-sized local firms in government contracting decisions.

The recent Joint Select Committee inquiry into changes to Commonwealth Procurement Rules recommended that the Australian government should not enter into any commitments in trade agreements that undermine its ability to support Australian businesses, taking the view that this would not conflict with Australia's international trade obligations.

The government has rejected this recommendation, and so appears to have a different and far less flexible interpretation of Australia's international trade obligations, including the TPP-11 procurement chapter. DFAT has said that TPP-11 will require changes to the Commonwealth Procurement Rules.

It is important that the Committee scrutinise any proposed changes to the Commonwealth Procurement Rules resulting from the TPP-11 before they are tabled in Parliament to ensure that they do not remove the flexibility to support local small and medium sized enterprises.

### **Conclusion**

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of the TPP-11 in Australia despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts. International predictive econometric studies based on unrealistic assumptions show tiny economic gains by 2030, which have not been assessed against the costs of other impacts. While emphasising gains for particular export sectors, the NIA does not provide an analysis of the impact of the TPP-11 on the economy as a whole, nor of the costs of government revenue losses, and unemployment, temporary labour, ISDS and future restrictions on government regulation. Given these severe shortcomings, the Committee should recommend against the implementing legislation.

## **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 only then 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, Defence and Trade Committee 2015, EU 2015, Productivity Commission 2010).

AFTINET's recommendations which support these and other changes were summarised in our submission to the Senate Inquiry. We support publication of negotiating texts, publication of the final text of agreements and independent evaluation of the economic, health and environmental impacts of agreements before the decision is made to sign them. Parliament should vote on the whole text of the agreement (AFTINET 2015).

## **Renaming of the TPP-11 not used and the new Preamble not legally enforceable**

The TPP-11 governments decided in November 2017 to rename the agreement the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and adopt a new preamble. They also suspended, but did not remove, 22 clauses initiated by the US government pending the return of the US government to the agreement.

Despite the name change, and the suspension of 22 clauses, most of the TPP text of 30 chapters remains unchanged.

It is noticeable that the DFAT documents do not use the new name, referring to the agreement as the TPP-11. The DFAT National Interest Analysis (NIA) does not mention the new preamble. Presumably this is because the aspirational statements in the preamble do not have any legal enforceability.

The new preamble is an aspirational document only. It has references to the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development, traditional knowledge and the right of governments to regulate in the public interest (DFAT 2018a: Preamble). However, these statements are cosmetic only and none are legally enforceable.

## **Investor-State Dispute Settlement process (ISDS)**

In recent years, the number of ISDS cases has increased and even more evidence has come to light about the flaws in the ISDS system. The critical debate has affected all sides of politics and had an impact in the EU and the US which are now negotiating agreements without ISDS. The two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID) are conducting ongoing reviews which have identified serious flaws in the system.

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, minimum standard of treatment and legitimate expectations 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 reduced the value of 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 by investors and governments 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 (Productivity Commission 2010, Kahale 2014, 2018, French 2014).

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.

Leading international investment law expert and practitioner George Kahale has recently criticized ISDS in an April 2018 lecture at the Brooklyn Law School titled “The wild, wild west of international arbitration law”.

Kahale uses examples from his own experience representing governments in ISDS cases to argue that the ISDS system based on commercial arbitration principles is not fit to arbitrate cases in which international companies seek compensation from governments for changes in health, environment or other public interest laws.

Kahale says, “It’s one thing to have party-appointed arbitrators negotiate a decision to settle a commercial dispute having no particular significance beyond the case at hand ... it is quite another to decide fundamental issues of international law and policy that affect an entire society” (Kahale 2018: 7).

Adding “there really are no hard and fast rules” in ISDS, he cites examples of claims of billions of dollars based on false documents, methodologies for calculations of future corporate income which are unacceptable in World Bank accounting practice, and similar claims before different tribunals resulting in inconsistent decisions (Kahale 2018: 14).

He notes the growth of third-party funding of ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation, and argues they fuel the growth of “surrealistic” claims and are “more about making money than obtaining justice” (Kahale 2018:17).

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 to governments for running cases was US\$8 million per case, with some cases costing up to US\$30 million (Gaukrodger and Gordon 2012). More recent studies indicate that costs to governments are increasing (UNCITRAL 2017).

The default position in ISDS cases, unlike national court systems, is that each party pays its own costs. Tribunals have discretion about whether they decide to award costs to the winning party and applying for costs to be awarded prolongs the duration and costs of the case. For example, the Philip Morris tobacco case against Australia was decided in 2015, the government won but the costs were not awarded until 2017, and only a proportion of the costs were awarded.

### **The Australian experience of ISDS**

The June 2015 Productivity Commission study of ISDS confirmed its 2010 study that ISDS gives additional legal rights to foreign investors not available to domestic investors and there is a lack of evidence of 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. Tribunals have enormous discretion in interpreting the meaning of “safeguards” (Tienhaara 2015b).

Once a case is under way, defending it can take years and cost tens of millions of dollars. The US Philip Morris tobacco company lost its claim for compensation for the 2011 plain packaging legislation in the Australian High Court. The company could not sue under the Australia-US Free Trade Agreement because the Howard government had not agreed to include ISDS in that agreement. The company moved some assets to Hong Kong and used the Hong Kong-Australia investment agreement to sue the Australian government. It took over four years and reportedly cost tens of millions 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 was awarded a proportion of the costs by the tribunal, but the proportion and total costs were blacked out of the tribunal decision, and the Australian government has refused to reveal them. The government is also appealing an FOI decision by the Australian Information Commissioner that the costs should be made public (Patrick 2018).

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).

International corporations are well aware of this freezing effect and use ISDS to attempt to prevent public interest regulation. 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.

### **UN human rights expert condemns ISDS**

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).

### **Recent ISDS cases on medicines, Indigenous land rights, environment**

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 850 in 2017 (UNCTAD 2018). Most cases are won by investors or settled with concessions from governments (Mann 2015, UNCTAD 2018).

There are growing numbers of cases against health, environment, Indigenous land rights and other public interest laws. Recent cases include the following:

- Swiss Pharmaceutical company Novartis filed an ISDS dispute against the Colombian government under the Switzerland-Colombia bilateral investment treaty 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 tribunal essentially rewarded the company despite the fact that it had violated its obligations in the ILO Convention on Indigenous Peoples to which Peru is a party.
- The US Bilcon Company won millions in compensation because its application for a quarry development was refused for environmental reasons. The exact amount is still being determined (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).

### **Ongoing Reviews conducted by ISDS institutions reflect community concerns about ISDS**

Growing community concern about ISDS has also had an impact on the two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), both of which are conducting ongoing reviews of the system.

The November 2017 discussion paper for the UNCITRAL review involving member states, identified the following issues:

“(i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties (“party-appointment”), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns ... have been said to undermine the legitimacy of the ISDS regime and its democratic accountability” (UNCITRAL 2017:6).

In October 2016, the Secretariat of ICSID initiated a consultation with its member States to identify areas of concern. The consultation was extended to the public in January 2017 and is ongoing.

The preliminary outcome of the consultations indicated 16 potential areas of concern, many of which were similar to the UNCITRAL list. They include arbitrator-related issues (appointment, code of conduct, challenge procedure), third-party funding, consolidation of cases, means of communication, preliminary objections proceedings, rules on witnesses, experts and other evidence, provisional measures, time frames and allocation of costs (UNCITRAL 2017:5)

### **EU and US governments retreating from ISDS**

Both the EU and the US have been major proponents of ISDS. However, recently there have been increasing numbers of cases taken against changes to EU and US laws and policy decisions, and there has been an enormous growth in public opposition to ISDS. Opposition has been expressed by legal experts, state and provincial governments, court decisions and the general public. Both the EU and the US are now retreating from ISDS in trade negotiations.

## The EU

The inclusion of ISDS in negotiations for the Trans-Atlantic Trade and Investment Partnership Agreement between the US and the EU prompted fierce public debate, resulting in a European Commission decision to pause the negotiations to allow for further public consultation about ISDS. In 2014, the European Commission launched an online public consultation on ISDS. The consultation received over 150,000 submissions, the majority of which were critical of ISDS (European Commission 2015, Donnan and Wagstyl 2014, European Parliamentary Research Service 2014).

The ongoing debate about ISDS has led to several EU court cases in which national governments have challenged the ability of the EU to make collective commitments on ISDS on behalf of national governments without such commitments being subject to democratic processes in each country.

On 16 May 2017, the Court of Justice of the European Union issued a landmark opinion on the investment and ISDS clauses in the EU-Singapore free trade agreement. It found that most of the agreement fell under the EU's powers, and that the EU could ratify it on behalf of member countries, except for some investment provisions, including ISDS. The court found that EU Member States' national and regional parliaments and the European Parliament must ratify provisions regarding investors, particularly ISDS (Court of Justice of the European Union 2017).

In March 2018, in a separate case brought by the government of Slovakia, the 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).

The Slovakian 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).

The European Union now faces a situation resulting from the 2017 decision in which any proposal for ISDS in a trade agreement must be subjected to parliamentary decision-making processes in each EU member country. The 2018 decision and the pending Belgian case also cast doubt on the legal competence of the EU to include ISDS in any agreement. These two decisions have contributed to the delay in the European mandate for negotiations for the EU-Australia free trade agreement and other agreements.

Because of the unpopularity of ISDS, European Commissioner Jean Claude Juncker has proposed a "fast track" process for agreements without ISDS, which would enable them to be approved by the European Commission alone, without seeking approval from national parliaments. Such agreements could not include ISDS (Von der Burchard 2017). This means that the EU is not likely to include ISDS in the EU-Australia free trade agreement and other future agreements.

## The US

Over the last two years, there has also been strong public opposition expressed in the US to the inclusion of ISDS in trade agreements, and from state governments and legal experts, which has influenced state and national governments.

In February 2016 the National Conference of State Legislatures declared that it “will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than US companies enjoy under the US Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors’ previous expectations” (National Conference of State Legislatures 2016).

In October 2017, more than 200 prominent law professors and economists signed an open letter arguing that ISDS undermines the rule of law and urging the US government to oppose ISDS in its renegotiation of the North American Free Trade Agreement (NAFTA). Signatories included Nobel Laureate Joseph Stiglitz, former Labor Secretary Robert Reich, former California Supreme Court Justice Cruz Reynoso and Columbia University professor and UN Senior Adviser Jeffrey Sachs (Public Citizen 2017).

The United States has since put forward a proposal to withdraw from the ISDS provisions in NAFTA because of the risk and costs of US governments being sued by foreign corporations.

The US Trade Representative Robert Lighthizer said in his testimony to the US House of Representatives Ways and Means Committee Hearing on June 22, 2017:

“There is a legitimate interest in people who go overseas and invest, and the United States has an obligation to do what it can to make sure that those people are treated fairly. On the other hand, as you suggest, Congressman, I am troubled by the sovereignty issue. I am troubled by the fact that anyone – anyone – can overrule the United States Congress, or the President of the United States, when it’s passed a law. That is troubling to me.” (US House Ways and Means Committee 2017).

Lighthizer also said in a media conference in October 2017:

“I’ve had people come in and say, literally, to me: ‘Oh, but you can’t do this: you can’t change ISDS. ... You can’t do that because we wouldn’t have made the investment otherwise.’ ... The bottom line is, business says: ‘We want to make decisions and have markets decide. But! We would like to have political risk insurance paid for by the United States’ government. And to me that’s absurd. You either are in the market, or you’re not in the market.

“It’s always odd to me when the business people come around and say, ‘Oh, we just want our investments protected.’ ... I mean, don’t we all? I would love to have my investments guaranteed. But unfortunately, it doesn’t work that way in the market” (Quoted in Ikenson 2017).

On March 21, 2018, Lighthizer confirmed in evidence to the US House Ways and Means Committee that the US was seeking in the NAFTA negotiations an opt-out provision to exempt the US from ISDS. He repeated the arguments quoted above about US sovereignty and that it was not the job of the US government to provide a political risk insurance policy for investors. He argued that investors were protected by state-to-state disputes processes and could also

include risk insurance in their individual investment contracts, and did not require ISDS (US House Ways and Means Committee 2018).

### **Other governments have done more to exempt themselves from ISDS provisions in the TPP-11 than has Australia**

As in the TPP-12 and in the ANZ-ASEAN FTA, Australia and New Zealand have exempted each other from ISDS provisions. New Zealand has gone further and exchanged legally binding side letters with four other TPP-11 countries (Malaysia, Brunei, Vietnam and Peru) which commit New Zealand and those countries not to apply ISDS provisions to each other (New Zealand The Ministry of Foreign Affairs and Trade 2018). Australia has made no attempt to obtain such commitments from other TPP-11 countries.

### **ISDS provisions in the TPP-11 unchanged from TPP-12 except for two minor exclusions: safeguards remain ineffective**

The ISDS provisions in the TPP-11 are unchanged from the TPP-12 with two minor exceptions.

The first is that foreign investors can no longer make claims for violations of specific private investment contracts with the government or for investment authorisations by government.

Specific investment contracts with governments and specific investment authorisations are very rare, and hardly occur at all in Australia. As DFAT's Regulatory Impact Analysis explains, in all other circumstances foreign investors can still bring an ISDS claims on the basis of direct or indirect expropriation or for violating the minimum standard of treatment or legitimate expectations obligations (DFAT 2017c: 29).

The second suspension is also very specific, that foreign investors in the financial services sector will not be able to bring an ISDS claim for violating the minimum standard of treatment obligation (DFAT 2017c: 30).

This means that all other ISDS provisions in the TPP-12 still apply in the TPP-11.

DFAT contends that "specific policy areas are carved out or excluded from certain ISDS claims" (DFAT 2018b: 12). These are claimed to include "social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities: measures with respect to creative arts, indigenous cultural expressions and other cultural heritage and Australia's foreign investment policy, including decisions of the FIRB."

In fact, this is not accurate, and is misleading. These exclusions or carveouts are listed in Annex 2 to Chapter 9 on investment, but they only apply to specific articles in the investment chapter (DFAT 2018a). They do not apply to any of the ISDS provisions.

Page 1 of Annex II to the investment chapter makes this clear by listing the specific articles in this chapter which cannot be applied to the list of excluded services. They are Article 9.4 (national treatment), Article 9.5 (most-favoured-nation treatment), Article 9.9 (performance requirements), and Article 9.10 (Senior Management and Board of Directors) (DFAT 2018a). They do not include any of the articles dealing with ISDS in Chapter 9.

The claimed "safeguards" which actually apply to the ISDS section of the investment chapter cannot be described as clear carveouts or exclusions.

The only clear carveout or exclusion is that governments have the option of excluding future tobacco control laws from ISDS cases (DFAT 2018a: Article 29.5). This is actually in Chapter 29, which deals with exclusions to the whole agreement. This is welcome, and should prevent future cases like the Phillip Morris tobacco company case against Australia's plain packaging law.

However, this begs the question of why other public interest laws are not clearly excluded, and means that the tobacco carveout can be described as the exception that proves the rule.

The “safeguard” articles in the investment chapter which do apply to key ISDS definitions have the same pitfalls as in previous FTAs, which have not prevented foreign investors from bringing cases against governments in areas of health and environmental regulation.

One claimed safeguard in Chapter 9 refers to laws or policies which can be seen by investors as “indirect expropriation”. This has the same wording as the equivalent article in the Korea-Australia Free Trade Agreement (KAFTA) and other recent agreements (DFAT 2014: Annex 2B).

The article in TPP-11 reads:

“Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances” (Annex 9-B 3b).

This has large legal loopholes, as it does not prevent companies from launching cases in which they can argue that the measures are not legitimate, and that the circumstances are rare.

Another claimed safeguard reads:

“Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent with this chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental health or other regulatory objectives” (Article 9.16).

Associate Professor Amokura Kawharu of Auckland University has commented that this is circular language which “appears to provide no additional protection, and only affirms the right to regulate in a manner consistent with the other terms of the investment chapter” (Kawharu 2015:9). Internationally recognised investment law practitioner George Kahale shares this view (quoted in Hill 2015).

A third claimed safeguard relates to the fact that governments are required to treat international investments in accordance with customary international law, which includes “fair and equitable treatment” and “full protection and security” (Article 9.6.1).

There have been controversial cases where tribunals have found in favour of corporations on the basis that government action has interfered with the company’s own expectations of the treatment they should receive. A recent example is *Bilcon vs Canada*, in which a tribunal found in March 2015 in favour of a company claiming damages because its application for a quarry development was refused by a local government authority for environmental reasons. The reasons for the decision included that the decision was contrary to the company’s expectations of treatment (Dundas 2015).

An additional protection for governments in such cases is claimed to be provided by Article 9.6.4 which says that “actions by governments inconsistent with investor expectations **alone** do not breach the requirement to give fair and equitable treatment to investors.” However, this is qualified by Annex 9-B which says that one of the criteria for the determination of indirect expropriation is government action which interferes with “distinct reasonable investment-backed expectations.”

Again, experts question the efficacy of the claimed protection about expectations in Article 9.6.4. Luke Peterson, respected editor of the *Investment Arbitration Reporter*, says that the

detailed language about investment-backed expectations in Annex 9-B could mean that Article 9.6.4 only gives protection against “subjective” expectations (Peterson 2015). Kawharu comments that governments, including the United States, have defended cases by suggesting that investor expectations should not form the basis of customary law fair and equitable treatment claims at all, and concludes that the TPP text “could have been more emphatic about the issue” (Kawaharu 2015:11-12).

It has also been claimed that the TPP contains obligations on corporations to behave in ways consistent with corporate social responsibility. This is not accurate. International corporations are only “encouraged” to voluntarily adopt socially responsible standards of behaviour (which are not defined) with no legal obligation or enforcement. Article 9.17 reads:

“The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that party.”

This vague encouragement contrasts with the many legally binding obligations on governments and international investor rights to sue governments.

### **Choice of ISDS arbitrators and other procedural issues in the TPP-11**

The TPP reflects provisions in previous agreements on selection of arbitrators, whereby each of the disputing Parties selects one arbitrator and the third is appointed by agreement. If Parties cannot agree about the third appointment, that person is appointed by a neutral third party. It has been claimed that this process is a protection against arbitrator bias.

This system of appointing arbitrators is not new, provides no additional protection, and misses the point as a defence against arbitrator conflict of interest. The point is not about individual arbitrator bias, but about a systemic failure. The pool from which arbitrators can be selected consists of investment law experts who can continue to be practising advocates, representing disputing parties one month, and sitting on an arbitration panel the next month. This is not an independent judiciary. The only way to ensure an independent judiciary is to ensure that arbitrators or judges cannot continue to be practising advocates.

It has been claimed that the TPP contains a code of conduct for arbitrators. This is not accurate. There is only a commitment to “provide guidance” on a **future** voluntary code of conduct for arbitrators which has not yet been developed (Article 9.22.6). In any case, a voluntary code of conduct does not address the fundamental conflict of interest described above.

It has also been claimed that the TPP contains an appeal system for ISDS. This is not accurate. There is only a reference to a future appeals mechanism, which may be developed outside the framework of the TPP. There is no commitment to use such a mechanism, but only to consider whether it should be applied to the TPP. The relevant article reads:

“In the event that an appellate mechanism for reviewing awards rendered by Investor-State Dispute Settlement tribunals is developed in the future under other institutional arrangements, the parties shall consider whether awards rendered under article 9.28 should be subject to that appellate mechanism” (Article 9.23.11).

Provisions for greater transparency of documents and hearings (Article 24) are welcome but reflect previous recent agreements and still give discretion to the tribunal to decide not to disclose protected information if it is so designated by the parties.

## **Selective application of ISDS provisions**

The TPP-11 also contains provisions that selectively and differentially apply ISDS provisions to different parties. The Australian and New Zealand governments have agreed not to apply the TPP ISDS provisions to each other. This commitment is not in the text, but is made in a legally binding side letter agreement between the parties (DFAT 2016a, Australia-New Zealand side letter 2015). The justification for this is that both governments have modern independent judicial systems which are available for the use of investors. It is legitimate to ask why this could not be applied to other parties.

Article 9.21.2 b) i) requires that investors submitting an ISDS claim waive their right to proceed with any domestic court proceedings relating to the same claim. However, the governments of Chile, Peru, Malaysia and Vietnam have chosen a more restrictive approach for ISDS in relation to domestic courts. If an investor initiates domestic court proceedings, it cannot use ISDS processes for the same dispute (Annex 9J).

Again it is legitimate to ask why the Australian Government did not seek such an arrangement, especially given the experience of the Philip Morris case. The company lost its claim for compensation in the Australian High Court, but was able to proceed with an ISDS case, which took over four years and cost a reported A\$50 million dollars to defend.

## **The TPP-11 ISDS model compared with other recent models**

DFAT claims that the TPP-11 is “one of the most protective treaties in existence worldwide in terms of its protections for legitimate regulation” (DFAT 2018a: 9).

This is not the case compared with two recent models developed by India and the EU, both of which were publicly available before the conclusion of the TPP-12 negotiations in October 2015. Australian and other TPP-11 negotiators were well aware of them. Australia has been engaged with India in both bilateral negotiations and through the Regional Comprehensive Economic Partnership negotiations between the 10 ASEAN countries plus India, China, Japan, South Korea, Australia and New Zealand. Australia has also been engaged in discussions for a bilateral agreement with the EU.

The India draft model Bilateral Investment Treaty was released publicly in March 2015, with a second draft in December, and the EU draft model investment chapter for its trade negotiations was released publicly on September 15, 2015, and has since been tabled in the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the US (Government of India 2015, European Commission 2015).

The Indian model has more robust assertions of the right of government to regulate for public policy reasons with fewer qualifications than the TPP-11. For example, the definition of expropriation in the draft India BIT does not contain the loophole “except in rare circumstances” discussed above (Government of India 2015: Article 5.5). The draft also avoids the pitfalls discussed above in the definition of fair and equitable treatment and legitimate expectations by omitting these concepts altogether.

The EU model attempts to address the structural flaws of the lack of an independent judiciary and appeals system by establishing a panel of qualified judges to serve on tribunals (EU Commission 2015: Section 3 article 9 p.17). It also establishes an appeals tribunal consisting of more senior qualified judges (EU Commission 2015: section 3 Article 10). However, the judges would not be full-time, could accept other work and would be paid a retainer. This would initially be a bilateral arrangement under the rules of the TTIP. While the use of more qualified arbitrators and the addition of an appeals tribunal is a step forward, Van Harten has argued that this is not an independent judiciary because part-time judges paid a retainer and

able to accept other work would not have the same independence as full-time judges in national court systems (Van Harten 2016).

The EU has foreshadowed that it wishes to establish in the future an International Investment Court similar to the International Court of Justice, which could be used multilaterally. Presumably these judges would be full-time and barred from accepting other work, and thus more independent and similar to national judicial appointments (EU Commission 2015: Article 12).

These proposals attempt to address the issues of independence of arbitrators and an appeals system. However they do not address the basic issue that ISDS gives an unfair additional legal right to international corporations that already have enormous market power, and the definitions of indirect expropriation and minimum standard of treatment.

Moreover, as discussed above, recent EU court decisions have since cast doubt on whether any of these models would be compatible with EU law.

These attempts to adjust the ISDS system are responses to widespread recognition of its flaws, but none are included in the TPP-11 provisions. But regardless of future changes to ISDS systems, the basic question remains as to why any government would agree to ISDS at all. As the Productivity Commission has noted, there is no legitimate rationale for giving special legal rights to global corporations to sue governments over changes in domestic legislation resulting in financial and policy risks to governments.

## **TPP-11 Trade-in-Services Chapter: negative list and ratchet structure restrict future government regulation**

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

The TPP-11 Trade-in-Services Chapter is unchanged from the TPP-12. Its aim is to increase trade in services and treat them on a commercial basis, open them to international investment, and to minimise barriers to such trade. Considerations about the ability of governments to regulate access to essential services in the public interest are secondary to this aim.

Regulation of services is treated as if it were a tariff, frozen at existing levels or reduced over time, but not to be increased in future, known as the “ratchet” structure.

Public services are claimed to be excluded, but the exclusion is ambiguous because it 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,” (DFAT 2018a: Article 10.1). In Australia, as in many other countries, many public and private services are provided side-by-side, meaning few public services are covered by the definition.

The TPP services and investment chapters are both structured on a negative list basis, which means that all services are included unless specifically excluded in two Annexes, which are described in more detail below.

The negative list and ratchet structure are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade.

But this structure ignores the need for democratic governments to respond to changed circumstances. For example, most governments including the Australian government had to introduce new financial regulation following the Global Financial Crisis, which a United Nations study has shown would have been difficult if TPP-like services rules had been in place (United Nations 2009).

Governments are also responding to the need for new forms of regulation of energy markets and carbon emission levels to respond to climate change. The current debate about the National Energy Guarantee is just one example, and future governments will need to have the flexibility to adjust such policies. This flexibility should not be reduced by restrictions on new regulation.

The negative list and ratchet structure can also prevent governments from responding to failures of deregulation and privatisation. The recent failure of deregulation and privatisation of Australian vocational education services resulted in government reregulation of those services late in 2016 (Conifer 2016). If the TPP had already been implemented without very specific exclusions for private vocational education services, the ratchet structure could have prevented such reregulation.

The negative list also means that governments may not be aware of the implications of the inclusion of all services, and have to specify very detailed exclusions if they want to maintain policy flexibility for particular services or respond to new developments. New services which may be developed in future will be automatically covered, reducing government's ability to regulate them. The exclusions to the rules are listed in the two Annexes described below.

Annex I lists current non-conforming laws and policies that can be maintained, but they cannot be changed in ways which would make them more "trade restrictive" in future, and new restrictions cannot be introduced. Annex II lists non-conforming laws and policies that can be both maintained and changed in future. However the aim is to reduce over time the measures listed in both Annexes.

### **Services exclusions do not exclude ISDS cases**

The exclusions for public interest legislation in the Annexes of non-conforming measures do **not** prevent foreign corporations from suing governments over these forms of regulation under the separate ISDS provisions in the Investment Chapter for measures introduced at national, state or local government level. The DFAT NIA is misleading in quoting these exclusions and claiming they apply to ISDS, as is fully explained in the ISDS section of this submission, p.9.

What this means in practice is a potential double whammy of state-to-state and ISDS disputes. This is demonstrated by the example of the need to re-regulate Australian vocational education services after the failure of deregulation and privatisation described above. If the TPP-11 had already been in place, and private vocational education services were not fully covered by an Annex II exception, another TPP member government could have invoked the state-to-state dispute mechanism to prevent reregulation.

Even if there were an effective exclusion from state-to-state disputes, this would not prevent the possibility of an ISDS dispute. If there were a private vocational education service provider from a TPP-11 country which could argue that the value of its investment had been reduced, it could launch an ISDS case by alleging indirect expropriation and/or lack of fair and equitable treatment.

## **Examples of impacts of trade in services provision provisions on particular services**

### **State and Local government**

All existing nonconforming measures in state and local government (referred to as regional governments) are exempted in Annex I, which means that they can be retained, but not increased in future. This means that state and local governments are restricted from introducing new regulation in the future that could be regarded as barriers to trade. This could include many areas of new state government regulation, and new local government regulation for local purchasing policies, local land use, environmental or health regulation.

### **Community services like child care and aged care**

Market access provisions to provide national treatment and non-discrimination to international investors in services (Article 10.5a, pp10.4-10.5), mean governments cannot regulate on numbers of service suppliers, numbers of operations and numbers employed in particular services or operations. This may limit planning for the distribution of services and staffing levels in services like child care and aged care.

There are detailed obligations for governments on domestic regulation of services to ensure that regulations for licensing, qualifications and technical standards are “reasonable” and do not constitute “unnecessary barriers to trade” (Articles 10.8-9, pp. 10.6- 10.8). This could have an impact on future governments that regulate to lift qualifications in areas like childcare and aged care.

### **Air Transport Services**

The TPP-11 services chapter will now apply to certain services related to air transport, that were previously excluded from both the WTO General Agreement on Trade in Services (GATS), and bilateral trade agreements. These include airport operations services, ground handling services, aircraft repair and maintenance services, selling and marketing of air transport services, travel and tour operator services, advertising and distribution services.

Australia has also made, as part of the TPP-11, a series of additional commitments on the same air transport services under the GATS which were not previously included (Annex II, Appendix A, p. 23). This means that that Australia has made a series of additional commitments on national treatment, market access and cross-border supply of these services.

Note that the inclusion of these services in both the TPP-11, with 11 member countries, and Australia’s WTO GATS commitments which will eventually extend to 164 member countries, mean that there can be no policies which require these services to be supplied by local service providers. Such policies in the past have contributed to local employment and maintenance of Australian safety and security standards.

### **Temporary movement of people**

Australia is a nation built on immigration and has a permanent migration scheme which has created our vibrant multicultural society. Permanent migrants 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. However, the use of temporary overseas workers without labour market testing has greatly increased.

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 these provisions in legally binding trade agreements removes such 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).

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 visa 457 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 6,000 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).

More recent evidence was provided to the Joint Parliamentary Committee Inquiry into a Modern Slavery Act (Joint Committee on Foreign Affairs, Defence and Trade 2017). A survey by UNSW academics found temporary migrant workers experienced widespread wage theft (Berg and Farbenblum 2017).

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 recognised some of these issues in 2017 in its announcement of the abolition of the Visa 457 scheme and its replacement by the Temporary Skill Shortage (TSS) Visa which it claimed would restore labour market testing (Department of Home Affairs 2017).

This change in policy, which took place during the negotiation of the TPP-11, means the government could have chosen to restore labour market testing for contractual service providers in the context of the renegotiation of the TPP-11, but it chose not to do so. The government did choose to restore labour market testing for contractual service providers in

the Peru-Australia FTA, which was negotiated over the same period (DFAT 2018e: 6). This begs the question of why the two agreements are inconsistent.

### **Details of the TPP-11 provisions on contractual service providers**

Chapter 12 of the TPP-11 is entitled “Temporary Entry for Business Persons”. In fact, the chapter covers temporary entry arrangements for a much wider range of occupations than is commonly understood by “business persons”: that is, managers or senior executives. This chapter has not changed from the original TPP-12 text.

The category which includes the widest number of occupations is that of “contractual service providers” which includes trade, professional and technical skills now covered by the Temporary Skills Shortage Visa, which includes over 400 occupations (DFAT 2018 a: Chapter 12, Australia’s Schedule of Commitments: 3).

Under the heading of Implementation, the DFAT National Interest Analysis states:

“A Ministerial determination will need to be made under section 140GBA of the *Migration Act 1958* to exempt from labour market testing the intra-corporate transferees, independent executives and/or contractual service suppliers of those TPP parties to which Australia extended temporary entry commitments” (DFAT 2018b:19).

This makes it clear that the TPP-11 temporary entry provisions include contractual service suppliers and removes the requirement for labour market testing to establish whether there are Australian workers available.

In the light of the recent revelations of widespread exploitation of temporary workers it is not acceptable that the TPP-11 expands temporary entry without requiring labour market testing, and without any provisions to prevent such exploitation.

### **Lopsided commitments**

In relation to TPP-11 countries, the DFAT National Interest Analysis states:

“Australia offered commitments to allow the temporary entry of certain categories of business persons from those TPP countries that will provide acceptable levels of access for Australia” (DFAT 2018b: 14).

This is not accurate. In fact, Australia’s commitments for entry of contractual service providers are far more extensive than those made by other TPP-11 countries.

Australia’s commitments on contractual service suppliers cover a wide range of trade, technical and professional occupations. Other TPP-11 countries’ commitments for contractual service providers are far more limited.

For example, Chile’s commitments relate to business persons engaged in specialised occupations; Japan’s commitments specify that the persons must be employed by an overseas company or be in an advanced research position; Malaysia’s commitments are confined to professional education and financial services at an advanced level; and Vietnam only includes employees of companies with service contracts in Vietnam (TPP Chapter 12: Annexes of Chile, Japan, Malaysia and Vietnam).

In summary, the TPP-11 commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of professional, technical and skilled trades occupations, without labour market testing to establish whether there are local workers available. The fact that they are tied to one employer and face deportation if they lose the job means that these workers are vulnerable to exploitation. Recent studies have provided even more evidence

that exploitation is widespread. Australia has made far more extensive commitments for entry of contractual service providers than have other TPP-11 countries.

During the TPP-11 negotiations, the Australian government could have chosen to reinstate labour market testing, as would be consistent with its claimed change of policy, but it has chosen not to do so. The government did choose to restore labour market testing for contractual service providers in the Peru-Australia FTA, which was negotiated over the same period. This begs the question of why the two agreements are inconsistent.

## **Labour Rights**

The text of the TPP-11 Labour chapter is unchanged. However, there are side letters between Vietnam and other TPP-11 countries which have the effect of weakening Vietnam's obligations in relation to the chapter.

### **TPP-11 Text**

DFAT's National Interest Analysis states that the TPP-11 Chapter 19 on labour states:

“recognition and emphasis by TPP parties on the importance of internationally-recognised labour rights. Each party is required to adopt and maintain in its legislation and practices the rights contained in the International Labour Organisation Declaration such as elimination of forced labour, abolition of child labour, freedom of association and the right to collective bargaining. The agreement would also enhance cooperation and consultation on labour issues, and effective enforcement of labour laws in TPP parties” (DFAT 2018b: 14).

The inclusion of a chapter which refers to labour rights is welcome. However, this description paints a rosier picture than is revealed by the details in the text. Labour law experts have criticised the chapter because much of it is aspirational rather than legally binding and the enforcement process for those few provisions which are legally binding is more qualified, lengthy and convoluted than in other chapters of the agreement. These processes have not proven effective in other agreements (International Trade Union Confederation 2015).

The chapter does not refer to detailed International Labour Organisation Conventions, but only to the shorter and more general principles in the ILO Declaration (Article 19.3.1).

Governments are meant to adopt and maintain these general rights, but the lack of reference to the detailed ILO Conventions means that it is not clear how they will be implemented.

There is also an obligation for each government to adopt and maintain their own standards governing minimum wages, hours of work and occupational safety and health, as determined by each government (Article 19.3.2).

This means the standards can be varied by national governments, but are meant to remain consistent with basic labour rights (Article 19.4 (a)).

Article 19.4 (b) is more specific about obligations not to weaken or reduce adherence to both rights and conditions of work, but only in a special trade or customs area, such as an export-processing zone.

The reference to corporate social responsibility is particularly weak and unenforceable, stating only that that “each Party shall endeavour to encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party” (Article 19.7).

## **Weak enforcement provisions**

The most egregious omission in the enforcement provisions is that there is no enforcement for violations of the provisions on forced labour, including compulsory child labour. Instead, governments only “recognise the goal” of eliminating forced labour, and “discourage” through “initiatives they consider appropriate” the importation of goods produced in whole or in part by forced or compulsory labour (Article 19.6).

ILO studies have revealed that 21 million people, mostly women and children, are forced labourers, including in TPP-11 countries (ILO 2012). The US Congress in February 2016 passed an amendment to the US *Tariff Act 1930* which will ensure that all imported products of forced labour are banned (Larson 2016).

This is the only effective way to eliminate forced labour. The TPP-11 is a missed opportunity to progress this trend.

In general, the enforcement provisions which do apply in some areas are more qualified and complicated in this chapter than in other chapters.

Complaints about labour rights require evidence that there is a “sustained or recurring course of action or inaction” which violates the legal obligations in the chapter (Article 19.5.1). This is a more onerous requirement than for enforcement provisions in other TPP-11 chapters.

Complaints also require evidence of violation of labour rights “in a manner affecting trade or investment” between TPP-11 governments, which means that public sector workers and others in non-traded sectors are not covered (Article 19.5.1).

These two qualifications make it much more difficult to gather evidence to support a complaint, and mean that large parts of the workforce are exempted from enforcement of the obligations in the chapter.

The complaint and enforcement procedure require lengthy consultations before the state-to-state dispute process can be invoked (Article 19.15). Similar provisions have not been effective in previous agreements (International Trade Union Confederation 2015).

The labour rights chapter is not specifically exempted from ISDS cases, and there is no reference to labour regulation in the claimed ISDS safeguards in the ISDS chapter. This means that future changes to labour laws could be the subject of ISDS disputes if the TPP-11 comes into force.

## **New TPP-11 Vietnam side letter postpones means of enforcement of labour rights**

Vietnam has exchanged legally binding side letters with all other TPP-11 countries which specify that no other country shall seek to suspend other benefits of the agreement to Vietnam as a result of state-to-state dispute settlement in relation to all of the obligations in this chapter for a period of three years after the date of entry into force of the agreement. This effectively postpones the application of the chapter to Vietnam for 3 years (DFAT 2018d).

The side letter also contains a specific reference to article 19.3.1 a) which refers to freedom of association and the effective recognition of the right to collective bargaining. The letter agrees that other parties will refrain from seeking to suspend benefits under dispute settlement for this article for a period of five years after the date of entry into force of the agreement.

## **Environment**

DFAT states that the TPP-11 Environment Chapter 20:

“promotes high levels of environmental protection, including by liberalising trade in environmental goods and services, and ensuring that TPP parties effectively enforce their domestic environmental laws. TPP parties must also take measures in relation to a number of important environmental challenges” (DFAT 2018b: 14).

The inclusion of an environment chapter in the TPP-11 is welcome, and the provisions have not changed from the TPP-12. However, as with the labour chapter, this summary paints a rosier picture than is revealed by the detail of the chapter. Environmental law experts have criticised the chapter for its weak environmental standards, which are not enforceable in the same way as obligations in other chapters (Sierra Club 2015, Terry 2015).

Despite promises that the agreement would include enforceable commitments by governments to at least seven international environment agreements, the text mentions only four, and only one - on trade in endangered species - has clearly enforceable commitments (Article 20.17.2).

The text does not refer to climate change, but only to voluntary measures for lower emissions economies with no benchmarks or timeframes (Article 20.15).

Each government commits only to “strive to ensure that its environmental law and policy provide for and encourage high levels of environmental protection” and not to “fail to enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties” (Articles 20.3.3 and 20.3.4).

Like the labour chapter, the requirement to prove sustained or recurring violations creates an additional barrier for enforcement provisions. There are also requirements for lengthy consultations before resort to the dispute process (Article 20.23).

The non-binding nature of commitments and weak enforceability in the environment chapter contrasts sharply with the legal rights of corporations to sue governments over domestic laws, including environmental laws, under the provisions for ISDS described above.

## **Technical Barriers to Trade, food labelling and product standards not exempted from ISDS**

The DFAT Regulation Impact Statement for the TPP-12 noted that the annexes to the chapter “promote common regulatory approaches across the TPP region” (DFAT 2016b Regulatory Impact Statement p. 29, paragraph 73). The 2018 Regulatory Impact Statement does not mention this, although the text of Chapter 8 of the TPP-11 has not changed.

Mutual recognition of regulatory standards across countries with different standards raises the question of how to maintain and improve Australia’s relatively high standards in areas like food regulation and building product standards. Harmonising standards may not be in the public interest.

Chapter 8 of the TPP-11 commits governments to the World Trade Organisation (WTO) rules on Technical Barriers to Trade (TBT), and to use of the WTO TBT disputes process for disputes that exclusively alleged violation of the provisions of that agreement (Article 8.4).

The WTO’s TBT Agreement restricts governments from implementing regulations and standards that create unnecessary barriers to trade, including no discrimination between foreign products and local products.

But the TPP-11 has additional WTO-plus commitments to consult with other TPP-11 parties and to encourage mutual recognition of conformity assessment procedures for labelling and

other forms of quality assessment of products (Articles 8.7, 8.8, 8.9, and 8.10). The TPP-11 also establishes a committee to oversee this process and to review the implementation of the chapter annexes and consider new annexes after five years (Articles 8.11 and 8.12.3).

This means that Australian testing authorities will be under pressure to accept overseas testing regimes and mutual recognition arrangements.

Two examples of possible impacts of these arrangements are provided by building product standards and food labelling standards.

### **Building product standards**

Over the past two years there have been numerous reports of imported building products which did not meet Australian standards, that are a danger to both building workers and the general public. These include highly combustible building cladding and products containing asbestos. Imported products containing asbestos are banned in Australia, and building cladding is required to meet Australian standards. The Senate Economics References Committee has conducted inquiries into both substandard building cladding and asbestos imports.

The asbestos inquiry recommended:

“that the Australian Government consider placing additional mandatory requirements on procurers of high-risk products to have a due diligence system in place for the prevention of the import and use of asbestos containing materials” (Senate Economics References Committee 2017: Recommendation 18: 54-55).

TPP-11 countries Japan and Vietnam have been identified as sources for illegal asbestos imports (Senate Economics References Committee 2017: 9).

It is clear from the committee’s findings and recommendations that current conformity assessment processes in some TPP countries are not ensuring that imported products meet Australian standards. The committee has recommended additional mandatory requirements for the prevention of the import and use of asbestos, which would require future new regulation. It also recommended increased resources for more frequent inspection of products at the border.

However the TPP-11 provisions to encourage mutual recognition of conformity assessment procedures in other countries could restrict additional mandatory requirements for imported products to meet Australian standards.

### **Food labelling**

In 2015, the WTO ruled against the US' mandatory country-of-origin meat labelling, finding that such labelling discriminated against imported meat products (Locke 2015).

This has implications for the Australian Government, which introduced a new system of country-of-origin labelling for imported food products in the wake of the hepatitis outbreak caused by imported frozen berries (Clarke 2015).

If a future government wished to strengthen such regulation, it could be restricted by both the WTO and the TPP-11 provisions for mutual recognition of conformity assessment procedures.

### **TBT Chapter not exempted from ISDS disputes**

The TPP-11 includes the added possibility of ISDS disputes.

In the Korea-Australia Free Trade Agreement, Australia ensured that ISDS disputes could not be applied to the TBT chapter (DFAT 2014: Articles 5.11, 5.18). However, there is no such exclusion in the TPP (Article 8.4.1).

A foreign investor could allege that future changes to country-of-origin regulation requirements, or stronger mandatory requirements for imported building products to meet Australian standards which might occur after the TPP-11 is in place, could harm their investment.

As discussed above, the general ISDS safeguards for health and environmental legislation in the TPP-11 are inadequate, and will not be effective in preventing ISDS cases.

It is possible that, based on new evidence, future governments may decide to introduce clearer country of origin labelling, other forms of labelling such as additional nutritional information, or more stringent labelling of GE products. Stronger mandatory requirements for imported building products are also possible. If the TPP-11 were implemented, a foreign investor could lodge an ISDS dispute to claim compensation.

### **Wine and spirits labelling**

There is a specific Annex which sets out rules for wine and spirits labelling (Annex 8-4). This provides for a standard labelling regime allowing a manufacturer to use the same main label in all TPP countries. Any additional mandatory labelling requirements by individual governments must be on a supplementary label, not on the main label. These rules reduce the flexibility of governments in the future to design labelling requirements based on new public health research.

For example, the requirement to use supplementary labelling could restrict options for future warnings on the health effects of alcohol for pregnant women. Such labelling is currently voluntary in Australia, and not widely in use. Where it is used, the warnings are often small and difficult to see. Although governments are not prohibited from introducing health warnings, the use of a supplementary label, which would typically be smaller and less noticeable than the main label, could restrict the options for future governments to introduce more prominent health warnings (O'Brien and Gleeson 2015).

Again, since the TPP-11 also includes ISDS provisions, there is an option for foreign alcohol companies to lodge a dispute about new health labelling requirements if they can allege they have harmed their investment.

### **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 having policies with more flexibility to consider broader definitions of value for money, which recognise the value of supporting local firms in government contracting decisions. There are also specific exceptions in trade agreements to enable preference for small and medium-sized enterprises (AFTINET 2017).

Several Australian states have 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, taking the view that this ability would not conflict with Australia's international trade obligations (Joint Select

Committee Inquiry into the Commonwealth Government Procurement Framework 2017: Recommendation 8: iv).

The government has rejected this recommendation, so it appears to have a different and far less flexible interpretation of Australia's international trade obligations, including the TPP-11 procurement chapter.

DFAT's NIA states:

"A legislative Instrument under the Public Accountability Act 2013 will need to be made to replace the Commonwealth Procurement Rules (January 2018) to make the changes required to meet the Agreements' obligations" (DFAT 2018b: 19.)

These rules will be re-written by the Department of Finance and tabled in Parliament, but they are not a disallowable instrument and Parliament cannot amend or vote against them. It is important that the committee scrutinise any proposed changes to the Commonwealth Procurement Rules before they are tabled in Parliament to ensure that they do not remove the flexibility to apply broader definitions of value for money, and allow support for local small and medium sized enterprises.

## **Weighing the costs and benefits of the TPP**

The NIA calculates that tariff reductions in the TPP-11 will result in a loss to government revenue of \$220 million over four years but concludes in general terms without specific evidence that there will be "a net gain to the Australian economy" (DFAT 2108a: 19).

There has been no Australian economic modelling of the specific impacts of the TPP-11 on the Australian economy as a whole measured by GDP. DFAT has instead relied on an updated predictive study by the US Peterson Institute which was conducted before the actual outcomes of the TPP-11 were known (Peterson institute 2017).

### **International econometric studies of TPP-12**

The US Peterson Institute produced a study of the TPP-12 which estimated a very small increase in Australia's GDP after 15 years, of 0.6 per cent. As Peter Martin, economics editor of *The Age* has calculated, this represents tiny growth of between zero and 0.1 per cent per year (Martin 2016, Peterson Institute 2016).

The Peterson Institute uses a computable general equilibrium (CGE) econometric model. Like all such models it is based on assumptions which do not apply in the real-world economy.

The assumptions include that most tariff and nontariff barriers will be removed, that there will be full employment, perfect labour mobility (i.e. no unemployment outcomes), no income distribution effects and no trade balance effects. By assuming away negative effects, these models almost always produce results that predict future increases in economic growth, usually after 10 to 15 years. There is a substantial economic literature that has criticised GCE models and questioned their results (Taylor and von Anim 2006).

Despite these favourable assumptions, the Peterson Institute Study still predicted only tiny economic growth, and did not measure the TPP-12's impact on employment.

Studies of the impacts of preferential trade agreements based on more realistic assumptions, including both employment gains and losses, often show minimal change or negative impacts. A separate study of the TPP-12 from academics at Tufts University using a model that does measure employment impacts, found that job losses in Australia would total 39,000 after 10 years (Capaldo *et al* 2016).

The updated Peterson Institute study on the TPP-11 without the US quoted by DFAT uses the same GCE model. This is a predictive study, published in October 2017 before the final version of the agreement was reached in November 2017. Like the previous Peterson study, this study did not model employment effects. The study assumes no changes to the TPP text, and does not take into account the suspension of 22 clauses, nor the other changes agreed in 31 new side letters (Peterson Institute 2017: 6). The study estimates that the TPP-11 would increase in Australia's GDP by 0.5 per cent by 2030, less than the TPP-12 estimate of 0.6 per cent (DFAT, 2018b: 6 -7).

The reason for the tiny economic gains from the TPP-12 was that Australia already has free trade agreements with all but three of the TPP-12 countries. This means the additional market access in agricultural and services markets for Australian exports is very limited. The TPP-11 would have even tinier growth outcomes.

The NIA places much weight on the gains to particular sectors in services and agriculture, but does not emphasise effects of the TPP-11 on GDP as a whole. This means it does not weigh the estimated tiny gain in GDP of 0.5 per cent by 2030 against many of the risks and losses that will be experienced as a result of the agreement.

These risks and losses include:

- Losses to government revenue of \$220 million from reductions in remaining tariffs
- Net employment losses estimated by the Tufts study
- Costs of potential local employment and lower labour standards in Australia from expansion of temporary labour
- Losses resulting from possible regulatory risks and costs to government arising from ISDS
- Costs of other possible environmental, health and other impacts arising from other future restrictions on government regulation.

## Conclusion

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of the TPP-11 in Australia despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts. International predictive econometric studies based on unrealistic assumptions show tiny economic gains by 2030, which have not been assessed against the costs of other impacts. While emphasising gains for particular export sectors, the NIA does not provide an analysis of the impact of the TPP on the economy as a whole, nor of the costs of government revenue losses, unemployment, temporary labour, ISDS and future restrictions on government regulation. Given these severe shortcomings, the Committee should recommend against the implementing legislation.

## **Appendix 1**

### **Extension of data protection monopolies on biologic medicines in TPP-12 (suspended in TPP-11 but remains in the text pending US return to the agreement)**

The TPP-12 intellectual property chapter contains a series of rules which lock in strong monopolies for patents on medicines at the expense of affordable access to medicines. Australia has already adopted many of these rules. Some of these have been suspended. They will have the greatest impact in TPP developing countries, which would be obliged to adopt them if they were revived as a result of the US returning to the agreement in future.

In addition, the TPP-12 is the first trade agreement involving Australia to propose an additional longer monopoly on data protection for biologic medicines. These clauses have also been suspended pending the US return to the agreement.

Medicins sans Frontieres (MSF) has described the TPP-12 as “a bad deal for medicine: it’s bad for humanitarian medical treatment providers such as MSF, and it’s bad for people who need access to affordable medicines around the world” (MSF, 2015).

#### **Data protection, biologic medicines and costs to the PBS**

Pharmaceutical companies already have 20 years of patent monopoly during which they can charge high prices on new medicines before cheaper versions become available.

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.

Biologic medicines are produced through biological processes, resulting in new treatments for cancer and other serious diseases, and can cost tens of thousands of dollars for a course of treatment.

Pharmaceutical companies have argued for longer periods of data protection for biologic medicines, and were successful in obtaining 12 years in US legislation. This was strongly opposed by public health organisations, and by the US Federal Trade Commission, on the grounds that longer data protection was an unjustified extension of monopoly rights. This would delay access to cheaper versions of medicines and would potentially increase health expenditure (United States Federal Trade Commission 2009).

Pharmaceutical companies lobbied for eight to 12 years of data exclusivity in the TPP (Pharmaceutical Research and Manufacturers of America 2013). This was strongly opposed by national and international public health groups and most governments (Gleeson 2016:3).

The TPP is the first trade agreement to contain additional data protection for biologic medicines. This is a dangerous precedent because it locks in longer monopolies and will be used by the pharmaceutical industry a model for other trade agreements (MSF, 2015).

The Australian Government subsidises the price of approved prescription medicines, including biologic medicines, through the Pharmaceutical Benefits Scheme (PBS). The wholesale price of approved prescription medicines is negotiated through the PBS and the Government subsidises the retail price at the chemist. Currently, this ensures pensioners pay no more than \$6.40 and others pay \$39.50 for PBS medicines. Biologic medicines are a growing share of PBS expenditure and this will increase in the future. Ten of the most expensive biologics cost the PBS approximately \$1.2 billion in 2013-14, which was 14 per cent of the PBS' total expenditure (Gleeson 2016:3).

When the first cheaper version of biologic medicine (known as biosimilars) becomes available, a 16 per cent price cut is applied to all versions of the product. If biosimilars had been available for those 10 medicines in 2013-14, the PBS would have saved \$205 million in taxpayer-funded subsidies (Gleeson *et al* 2015). In the future, as more biologic medicines are approved for subsidy, each year of delay in the availability of cheaper versions would cost the PBS many more hundreds of millions of dollars.

### **The TPP-12 text on data protection of biologic medicines**

Article 18.51.1 on data protection of biologic medicines contains two options. Governments are legally bound to implement one of these options. The first is legislation for at least eight years data protection (Article 18.51.1 a). The second option is at least five years data protection accompanied by "other measures" to provide "a comparable outcome in the market" to the eight years in option one (Article 18.51.1 b). Article 18.51.3 also provides for a review of these arrangements after 10 years.

Australian law on five years of data protection will not change immediately. However, Australia is legally obliged by the TPP to ensure "other measures" which will have the market outcome of an extra three years, resulting in eight years of data protection.

DFAT has defended this outcome by saying that current delays caused by market conditions or administrative delays can already deliver an outcome of at least eight years of monopoly, rather than the five years in the legislation, which means there is no change in current practice (Hansard, 2016:7-8).

But the TPP could mean a change in the future. Currently such delays are only a possibility. The TPP text locks in these delays, creating a legal obligation to deliver the comparable market outcome of at least eight years. Each year of delay of cheaper forms of biologics will cost the PBS hundreds of millions of dollars. This cost will not show up immediately, but is a future time bomb for PBS cost blowouts. It is simply wasteful for public subsidies to be spent on extension of monopolies. Such increases will also create pressure to pass on some of those costs to consumers in the form of higher prices at the chemist.

It is not in the public interest for the Australian Government to agree in the TPP to lock in delays which in future will extend monopolies on biologic medicines and delay cheaper forms of these medicines from becoming available. Instead, the government should retain the flexibility to **reduce** delays in the availability of cheaper medicines, and obtain better value for money spent on the most effective medicines. The TPP reduces this possibility.

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