Submission to the Joint Standing Committee on Treaties
Inquiry into China-Australia Free Trade Agreement
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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Joint Standing Committee on Treaties (JSCOT) Inquiry into the China-Australia Free Trade Agreement (ChAFTA).

AFTINET is a network of 60 community organisations and many more individuals which advocates for fair trade based on human rights, labour rights and environmental sustainability.

AFTINET supports fair trade with all countries, and supports efforts to develop Australia's positive relationship with China at all levels, including trade, diplomatic cultural and people-to- people relationships.

However ChAFTA differs substantially from other agreements, including the Korea-Australia Free Trade Agreement (KAFTA). The investment chapter is unfinished, with many important aspects left to a committee to negotiate, and there are additional provisions on temporary workers which are unprecedented and not found in any previous trade agreement.

These unprecedented aspects of the agreement indicate that, as with many bilateral agreements between governments from economies of very different size, the agreement is unbalanced.

The task of the JSCOT is to assess whether the ChAFTA is in Australia's national interest. The economic modelling done by the Centre for International Economics (CIE) includes the Japan and Korean FTAs as well as the ChAFTA, and actually provides no specific modelling of the ChAFTA. Even with very favourable assumptions, and the inclusion of the other two agreements, the modelling estimates very small economic benefits of 0.05% - 0.11% in Gross Domestic Product (GDP) after 20 years. The submission concludes that the National Interest Analysis (NIA) prepared by DFAT fails to assess the many costs of the agreement against these benefits.

This submission deals with the following aspects of the ChAFTA:

- the impact of temporary movement of people provisions, which are unprecedented in scale and scope
- the lopsided nature of the market access in the investment chapter, the impact of the inclusion of investor rights to sue governments over changes in domestic law or policy (Investor-State Dispute Settlement provisions or ISDS) and the implications of the unfinished nature of these clauses
- the lack of enforceable labour rights and environmental standards
- food labelling and product standards
- the claims of economic benefits from the CIE econometric study
- the limited nature of the Department of Foreign Affairs and Trade (DFAT) National Interest Analysis.

Summary

As with many bilateral agreements between governments from economies of very different size, the ChAFTA is unbalanced. China is Australia's largest trading partner, and one of the largest economies in the world. The unequal bargaining power between the parties is demonstrated by the fact that Australia has granted far greater market access in many areas than has China. Indeed, the text indicates that the Australian government has made unacceptable concessions in a rush to finish the agreement.

The ChAFTA provisions on Temporary Movement of People are unprecedented in scale and scope compared with any previous Australian trade agreements. Chapter 10 of the text of the agreement removes the requirement for local labour market testing for temporary skilled workers, to check if local workers are available. A side letter removes skills assessment for 10 skilled trades occupations without a clear means of assessing whether Australian occupational licensing and skills standards will be met.

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

The ChAFTA includes Investor-State Dispute Settlement (ISDS). ISDS gives foreign investors the right to sue governments over changes in domestic legislation which they can argue are harmful to their investments, 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. "Safeguards" intended to protect health and environment policy have not prevented cases from being taken in those areas.

The ISDS section of the ChAFTA investment chapter spells out a detailed procedure for these disputes. But the section is unfinished, with important definitions of the criteria that can be used to sue governments to be determined by a review process in three years' time. These include two of the most controversial aspects of ISDS, the definition of indirect expropriation and the definition of minimum standard of treatment for foreign investors. These are provisions often used to sue governments under other agreements. The Australian Parliament is being asked to vote for the implementing legislation for this agreement without having the details of what these future provisions may be. This is like asking Parliament to sign a blank cheque for an agreement which has been badly negotiated.

Unlike some recent trade agreements, there are no chapters on Labour and Environment. This means that neither the Australian nor the Chinese government have made any commitments not to reduce labour and environmental standards, nor to implement internationally recognised International Labour Organisation fundamental labour rights, nor internationally recognised environmental standards.

Despite the experience of the imported contaminated frozen berries scandal, there is no clear exemption for food labelling from ISDS cases in the Technical Barriers to Trade (TBT) chapter, which deals with food labelling. Despite evidence from industry about substandard imported products like electrical cables, and calls for stricter assessment of the conformity of imports with Australian safety and quality standards, the TBT chapter is ambiguous about whether conformity assessment bodies in China will be able to assess these goods without further Australian assessment.

The report of the economic impacts of ChAFTA prepared by the Centre for International Economics for DFAT uses econometric modelling which the Productivity Commission has concluded overestimates the economic gains from trade liberalisation and underestimates the losses. The modelling includes the Japan and Korean FTAs as well as the ChAFTA, and actually provides no specific modelling of the effects of the ChAFTA. Even with the modelling's very favourable assumptions, and the inclusion of the other two agreements, the modelling estimates very small increases in GDP of 0.05%-0.11% after 20 years. The two estimates result from the use of two different models with different assumptions This result after 20 years is almost statistically insignificant, and the variation in the result from models using different assumptions demonstrates the unreliability of such modelling, because of its dependence on the assumptions used.

The National Interest Analysis prepared by DFAT places much weight on the gains to particular sectors in services and agriculture, but does not emphasise the effect of ChAFTA on overall Australian economic activity or GDP. This means it does not weigh the estimated very small gain in GDP after 20 years against many of the risks and losses which will be experienced as a result of the agreement, either in employment losses or in other losses.

These include:

- loss of employment in manufacturing industry from increased imports resulting from zero tariffs
- loss of potential local employment and lower labour standards in Australia from expansion of temporary labour employed at minimum rates not market rates
- losses to government revenue from reductions in tariffs
- competition from imported goods produced without enforceable labour rights for workers and without enforceable environmental standards
- health and safety impacts of imported goods which may not conform to Australian safety standards
- possible regulatory risks and costs to government arising from ISDS.

Overall, the ChAFTA is an incomplete and poorly negotiated agreement and is not in the national interest. The committee should recommend against the implementing legislation.

ChAFTA Temporary Movement of People provisions

The ChAFTA provisions on Temporary Movement of People are unprecedented, compared with any previous Australian trade agreement. They are in in two different sections of the text, one in Chapter 10 and one in a side letter to the agreement. There are also two different Memoranda of Understanding which are not part of the text of the agreement itself, but were negotiated as a condition of reaching the agreement. The four different aspects of these provisions are complex and have to be read in conjunction with each other to be properly understood.

The scale and scope of these arrangements are greater than in any previous agreement. They apply to temporary workers working in Australia.

Provisions for Australian nationals to work in China are quite restricted by comparison, contained only in the Trade in Services chapter, and mainly apply to senior managers and other specifically skilled workers in specific service industries (ChAFTA Chapter 8 and Annex III, Schedule 2).

Commitments in the text of the agreement

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

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

This includes contractual service suppliers, many of whom come to Australia under the current visa 457 provisions (ChAFTA p.118, Annex 10a, Articles 10-11). There has been in the past labour market testing for categories of skilled workers under visa 457 provisions, to require employers to test if there are local workers available before bringing in temporary overseas workers, but this has not been enforced effectively.

There is both historical and recent evidence that current temporary visa 457 workers are exposed to exploitation by unscrupulous employers in conditions which have been compared to slavery. The *Sydney Morning Herald* reported on July 18, 2015, that a court had ordered a restaurant owner to pay $125,431 for wages, superannuation and annual leave for 16 months to a visa 457 worker with no English language skills who was met at the airport by the employer, had his passport confiscated and was forced to live and work on the premises without payment. The worker's legal representative claimed that his firm had handled dozens of similar cases (Gair, 2015).

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

There is a separate exchange of side letters on Skills Assessment "which constitute an integral part of the agreement" in which the parties agree to "streamline relevant skills assessment processes for temporary skilled labour visas, including through reducing the number of occupations currently subject to mandatory skills assessment for Chinese applicants for an Australian Temporary Work (Skilled) Visa (subclass 457)" (ChAFTA Side Letter on Skills Assessment: 1-2).

The side letters state:

"Australia will remove the requirement for mandatory skills assessment for the following 10 occupations on the date of entry into force of the Agreement.

Automotive Electrician
Cabinet Maker Carpenter

Carpenter and Joiner
Diesel Motor Mechanic
Electrician (Gen)
Electrician (Special Class)
Joiner
Motor mechanic (Gen)
Motor and Motorcycle Mechanic"

(ChAFTA Side Letter on Skills Assessment: 1).

The Chapter 10 Articles quoted above and the Side Letter provisions together mean the government has agreed to both the removal of local labour market testing to see if there are locally skilled and qualified workers available, and the removal of skills assessment for temporary workers in skilled occupations, which in these occupations are also licensed not only to ensure skill levels but to ensure occupational and public health and safety. There is no indication in the Side Letter of any process by which the Australian government or government agencies have assessed that the skills and qualifications to be recognised in these particular occupations are in fact equivalent to those required in Australia.

The licensing for these 10 occupations takes place at a State Government level. It is not clear whether State Governments have been consulted about this arrangement, and whether or how relevant licenses will be granted.

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

This could lead to a situation where there is no guarantee that temporary workers will have the same level of skills, health and safety knowledge and qualifications as are required for local workers, potentially endangering themselves, other workers and the public.

Commitments in Two Memoranda of Understanding

a) Memorandum of Understanding (MOU) on an Investment Facilitation Arrangement with no mandatory local labour market testing, skills assessment or limits on numbers and occupations of temporary workers

This is a document separate from the text of the ChAFTA, but it was negotiated alongside it, and presumably was a condition for agreement to be reached. It is not legally enforceable through government-to government disputes in the same way as the trade agreement, but is an agreement between the governments "through diplomatic channels". This means the MOU process is not even subject to the limited Parliamentary process which currently applies to trade agreements. The current limited process was recently criticised in *Blind Agreement*, the Report of the Senate Inquiry into the Trade Agreement Process (Senate Standing Committee on Foreign Affairs Defence and Trade, 2015). The MOU will be reviewed after two years, and changes can be made at any time by agreements between the parties through diplomatic channels (MOU Clause 9). This means there is no democratic parliamentary scrutiny or accountability at all.

The MOU establishes special arrangements between the Department of Immigration and Border Protection of Australia or its equivalent, and a project company eligible for such arrangements. The project company will be eligible where either a single Chinese enterprise owns 50% or more of the project company, or, where no single enterprise owns 50% or more of the project company, a Chinese enterprise holds a substantial interest in the project company**.** A footnote defines a "substantial interest" as defined in Australia's foreign investment policy, which occurs when "a single foreign person has 15% or more, or several

foreign persons and any associates have 40% or more, of the issued shares, voting power, or potential voting power of the corporation" (MOU Clause 2a). This means that a project could qualify with 15% to 50% of Chinese investment.

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

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

Investment Facilitation Agreements between the Department and the project company will set out occupations and the terms and conditions against which overseas workers can be nominated for a temporary skilled visa for the purposes of the eligible project, valid for four years with the possibility of extension. The agreement will record any requirements and conditions that the project company must comply with. There will be no mandatory requirement for local labour market testing (MOU Clauses 6-8).

The projects are intended to comply with Australian laws including workplace law, work safety law and licensing regulation and certification standards, but it is not clear how this compliance would be enforced. The current lack of enforcement of these standards for visa 457 workers was discussed above. The lack of enforcement for those on working holiday visas was recently exposed on the ABC *4 Corners* and *7.30 Report* programmes and is discussed further below.

Given the removal of skills assessment for the 10 occupations in the Side Letter discussed above, there is no clear way of assessing whether occupational licensing and skills standards will be met.

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

Memorandum of Understanding on Work and Holiday Visa Arrangement

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

The work is supposed to be incidental to the holiday, and visa holders are not supposed to work for the full 12 months, but there is no upper limit on the total period of employment. They may not be employed by any one employer for more than six months (MOU, Clause 2).

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

There is no mention in the Work and Holiday MOU of compliance with applicable Australian laws and workplace standards. This is surprising, given that current lack of enforcement of these standards for workers on working holiday visas was recently exposed on the ABC *4 Corners* and *7.30 Report* programmes (ABC 2015a and 2015b). The evidence of violations of Australian standards included failure to pay even minimum wages, lack of compliance with maximum hours of work and lack of health and safety training and standards leading to workplace injuries.

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

Investor Rights to sue Governments (ISDS)

Background and most recent evidence about ISDS

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional special rights to foreign investors to sue governments for damages in an international tribunal if they can claim that a change in domestic legislation has 'harmed' their investment.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments. But ISDS has developed concepts like "indirect" expropriation which do not exist in national legal systems. These enable foreign investors to sue governments for millions and even billions of dollars of damages or compensation if they can argue that a change in law or policy has "harmed" their investment.

Many experts including Australia's High Court Chief Justice French and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen from a pool of investment law experts who can continue to practice as investment law advocates. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest (Kahale, 2014, French, 2014, Productivity Commission 2015).

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider and appeal mechanisms to ensure consistency of decisions.

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. Even if a government wins the case, a 2012 OECD Study found ISDS cases last for 3 to 5 years and the average cost is US$8 million per case, with some cases costing up to US$30 million (Gaukrodger and Gordon, 2012).

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.

Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the United Nations Committee 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 608 in 2014 (UNCTAD 2015a: 5-7). The most recent UNCTAD figures show most cases are won by investors (Mann, 2015, UNCTAD, 2015b). There are increasing numbers of cases against health, environment and other public interest legislation. Tobacco companies are systematically using ISDS cases against Australia and Uruguay to undermine public health regulation of tobacco advertising.

The June 2015 Productivity Commission study of ISDS confirmed its 2010 study that there is no evidence that ISDS increases levels of foreign investment, or has any 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 have policies against or are reviewing ISDS. (Filho 2007, Ministerial Meeting of Latin American States 2013, Biron 2013, Uribe 2013, Carim 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. That is why the US Philip Morris Company had to move some assets to Hong Kong and claim to be a Hong Kong company so that it could use ISDS in a Hong Kong-Australia investment agreement to sue for billions of dollars. This case has been ongoing for 4 years and has already delayed the New Zealand government from proceeding with similar legislation (Voon et al, 2012, TVNZ, 2013).

The main reason the Australian government has not experienced more ISDS cases is that most of Australia's agreements containing ISDS are with smaller developing countries, which do not have the giant corporations with the resources to launch cases. The inclusion of ISDS in recent agreements with South Korea and China are likely to lead to more ISDS cases because South Korea and China now have international corporations capable of launching cases. The latest UNCTAD figures show that at least one Chinese company launched a case in 2014 (UNCTAD 2015a: 13).

There are only three known examples in which Australian companies have used ISDS, and two of these, Planet Mining and Tethyan Copper are subsidiaries of global corporations. Most Australian companies do not have the resources to launch ISDS cases. There are alternatives available to protect overseas investments, including investment and insurance agreements for specific projects. There is no need to give international investors additional general powers to sue governments which are not available to domestic investors (Tienhaara, 2012).

Recent ISDS "safeguards" for health, environment and other public welfare measures have not prevented ISDS cases. These safeguards do not address the main structural deficiency of ISDS tribunals, which have no independent judiciary, no precedents and no appeals process. This means that the tribunals have enormous discretion and no accountability in interpreting the meaning of "safeguards" (Tienhaara, 2015).

The US-Peru FTA has similar general "safeguards" but this has not prevented the Renco lead smelting company from suing the Peruvian government over a court decision which ordered it to clean up and compensate for lead pollution (Public Citizen, 2012). The US pharmaceutical company Eli Lilly is currently suing the Canadian government over a court decision which refused a patent for a medicine which was not sufficiently more medically effective than an existing medicine (Gray 2012). The US Lone Pine mining company is suing the Canadian government because the Québec provincial government conducted a review of environmental regulation of gas mining (CBC 2012). The French Veolia Company is suing

the Egyptian government over a contract dispute in which they are claiming compensation for a rise in the minimum wage (Breville and Bulard, 2014).

The ChAFTA ISDS provisions

The Investment Chapter is lopsided, in that Australia has given Chinese investors far more favourable access to invest in Australia than Australian investors will have in China. And some important provisions for ISDS are not complete, but have been delegated to a committee to review in three years' time. The lopsided market access provisions and the failure to finish the ISDS negotiations look as if the Australian government was desperate to finish the agreement, and that China was successful in defending most of its existing limitations and regulations on foreign investment.

Lopsided market access in the Investment Chapter

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

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

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

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

Unfinished ISDS provisions

The ISDS section of the Investment Chapter gives foreign investors the right to sue governments over changes in domestic legislation which they can argue are harmful to their investments, and spells out a detailed procedure for these disputes.

But the section is unfinished, with important definitions of the criteria that can be used to sue governments to be determined by review process in three years' time (ChAFTA p. 90, Article 9.9). These include two of the most controversial aspects of ISDS, the definition of indirect expropriation and the definition of minimum standard of treatment for foreign investors. These are provisions often used to sue governments under other agreements. The Australian Parliament is being asked to vote for the implementing legislation for this agreement without having the details of what these future provisions may be. This is like asking Parliament to sign a blank cheque for an agreement which has been badly negotiated.

There is a "safeguard" clause to protect public interest measures from ISDS, but because of the unfinished clauses discussed above, it is not clear how this would interact with future clauses on indirect expropriation and minimum standard of treatment (ChAFTA p. 92,

Article 9.11.4). In any case, as discussed above, all safeguard clauses are limited by the fact that the tribunals have enormous discretion in interpreting them.

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

No commitments to Labour Rights

Trade agreements should include commitments by governments not to reduce labour rights, and to implement internationally-agreed labour rights which are defined by the International Labour Organisation (ILO). These should be enforced by the government-to-government disputes process of the agreement. These rights include freedom of association, right to collective bargaining, no forced labour, no child labour and no discrimination in the workplace (ILO, 1998).

The KAFTA included a Labour Chapter, in which parties made commitments not to reduce labour rights, to implement the ILO fundamental rights, and their own labour laws, but these commitments were not legally enforceable through the state-to-state dispute process in the agreement (KAFTA, Chapter 17). There are proposals for a Labour Chapter in the TPP, but its enforceability is still under discussion.

In contrast, there is no Labour Chapter at all in the ChAFTA. This means neither government has made any commitments not to reduce labour rights, nor to implement the fundamental International ILO rights.

This is of particular concern because despite reforms to its labour law in 2007, China still has a poor record on labour rights, with regular reports of violations of the ILO basic rights listed above. China is listed as one of the world's 10 worst countries for labour rights, with limited rights to freedom of association and to collective bargaining, long hours of work and low health and safety standards (ITUC 2015). These violations occur not only in locally-owned enterprises, but in those under contract to global corporations like Apple and Walmart (Bilton, 2014, Chan, 2011, China Labour Bulletin, 2014). Recent strikes and protests by Chinese workers have been met with police repression (Tang, 2015).

The ChAFTA places no obligations on the Chinese government to improve labour rights. In fact it rewards these violations of labour rights by granting preferential market access to Australia for its products.

In addition, the Investment Facilitation MOU measures described above could reduce labour rights in Australia by denying temporary workers the fundamental rights of freedom of association and right to collective bargaining. These workers will not have access to collective bargaining under the Fair Work Act, but instead their wages and conditions will be determined through agreements between the investor and Australian government departments. These workers would be isolated from the rest of the Australian workforce and form a subclass with wage rates which are supposed to conform with a minimum rate for temporary workers, but could be below the local rates paid to skilled workers in the relevant industries.

No Commitments to Environmental Standards

Trade agreements should include commitments by governments to implement agreed international environmental standards which should be enforced by the government-to-government disputes process of the agreement. The KAFTA included an Environment Chapter, in which parties made commitments not to reduce environmental protections, and to implement multilateral environmental agreements, but it was not enforceable (KAFTA Chapter 18). There are proposals for an Environment Chapter in the TPP, but its enforceability is still under discussion.

The ChAFTA has no Environmental Chapter at all, which means that neither government has made any commitment to implement agreed international environmental standards. Despite recent central government policies aimed at reducing pollution, China still has very high levels of industrial pollution which harms both the environment and public health, and which have raised concerns amongst its own citizens (Kaiman, 2014, Reuters, 2014, Schiller, 2015).

Lack of compliance with environmental standards reduces costs for both local Chinese firms and global firms subcontracting in China, cost reductions not available to local Australian firms. The ChAFTA places no obligations on the Chinese government to improve its environmental standards. In fact it rewards current standards by granting preferential market access to Australia for its products.

Food Labelling and Product Standards

The ChAFTA Technical Barriers to Trade (TBT) Chapter deals with food labelling, commits to World Trade Organisation obligations and dispute settlement and excludes application only of the state- to-state dispute mechanism in Chapter 15 (ChAFTA p. 44, article 6.12.2).

ChAFTA also contains ISDS, but ISDS is not specifically excluded from application to the TBT chapter.

In contrast, the KAFTA explicitly excludes both the KAFTA state-to-state dispute settlement and ISDS from application to the TBT chapter, stating: “Neither Party shall have recourse to dispute settlement under this Agreement for any matters arising under this Section” (Section A Technical Barriers to Trade) (KAFTA, p. Articles 5.11 and 5.18).

In summary, the Australian government has **not** sought specific protection of food labelling from ISDS cases in ChAFTA.

Contaminated frozen berries imported from China were found to be a source of hepatitis infections in Australia in 2015. In response to this, country-of-origin food labelling is being designed to give consumers more information about whether products are actually produced locally (Clarke, 2015).

Because food labelling is not specifically excluded from the ISDS provisions it is not clear whether an ISDS case could be taken over changes to food labelling regulation which might occur after the ChAFTA is in place, on the grounds that such labelling gave an unfair advantage to local products and discriminates against imports.

The Australian Industry Group on October 27, 2014, stated that a survey of its members found that many manufactured goods imported from China do not meet Australian safety and quality regulations, citing an example of dangerously faulty electrical cables which could have affected up to 40,000 homes and businesses (AIG 2014: 29). It concluded that:

> “Conformity of Chinese imports with Australian safety and quality standards needs to be strengthened and a process developed for legal enforcement of insurance claims and contract breaches.” (AIG 2014:4)

Despite this evidence, ChAFTA appears to reduce the possibility of strengthening the process of assessing the conformity of imports with Australian safety and quality standards by accepting existing Chinese technical regulations and conformity assessment bodies.

ChAFTA p. 45, Article 6.7.5 on p. 44 reads:

> "Each Party shall accredit or otherwise recognise conformity assessment bodies in the territory of the other party on terms no less favourable than those it accords to conformity assessment bodies in its territory."

This appears to be inconsistent with article 6.7.7 which states that "this article shall not preclude a party from undertaking conformity assessment solely within specific government bodies located in its own territory or in the other party's territory, subject to its obligations under the TBT agreement".

In summary, the ChAFTA does not provide specific protection for food labelling from ISDS cases. This means country-of-origin labelling introduced after the ChAFTA comes into force may not be protected from ISDS cases on the grounds that it discriminates against imports.

Despite evidence from industry bodies that many manufactured goods imported from China do not meet Australian safety and quality standards, the agreement appears to allow for current conformity assessment bodies in China to assess these goods and is ambiguous about further Australian assessment of whether they conform to Australian standards.

Loss of tariff revenue

The National Interest Analysis (NIA) prepared by DFAT estimates the loss of tariff revenue for Australia resulting from the move to zero tariffs on most imports will be approximately $610 million in 2015, and $4.15 billion over the next four years (DFAT: 9). In the current budgetary context, this is a significant loss of revenue.

The NIA states that these estimated costings do not include any flow-on impacts arising from increased bilateral trade with China, which could lead to additional lost tariff revenue if imports from China displace or divert imports from other countries. The NIA argues that increased domestic economic growth from the agreement will generate additional taxation revenue, but this is not quantified. Overall the NIA argues that, because of the increased trade resulting from reduction of Chinese tariffs on Australia's agricultural exports, "the government considers that entry into the ChAFTA will result in a net gain for the Australian economy" (DFAT: 9).

This is an optimistic estimate not based on any clear evidence, since there is no separate economic modelling of the specific impacts of ChAFTA.

Economic modelling

The report prepared by the Centre for International Economics for DFAT uses econometric modelling based on assumptions which the Productivity Commission has concluded in two reports, the latest in June 2015, generally overestimate the economic gains from trade liberalisation and underestimate the losses. The CIE modelling includes the Japan and Korean FTAs as well as the ChAFTA, and actually provides no specific modelling of the effects of the ChAFTA. Even with very favourable assumptions, and the inclusion of the other two agreements, the modelling estimates very small increases in GDP of 0.05%-0.11% after 20 years. The two estimates result from the use of two different economic models with different assumptions (CIE, 2015: 29).

This result after 20 years is almost statistically insignificant, and the variation in the result from models using different assumptions demonstrates the unreliability of such modelling, because of its dependence on the assumptions used.

National Interest Analysis counts only estimated gains, not losses

The NIA places much weight on the gains to particular sectors in services and agriculture, but does not emphasise effects of ChAFTA on overall Australian economic activity or GDP. This means it does not weigh the estimated very small gain in GDP after 20 years against many of the risks and losses which will be experienced as a result of the agreement.

These include:

- loss of employment in manufacturing industry from increased imports resulting from zero tariffs
- loss of potential local employment and lower labour standards in Australia from expansion of temporary labour employed at minimum rates not market rates
- losses to government revenue from reductions in tariffs
- competition from imported goods produced without enforceable labour rights for workers and without enforceable environmental standards
- health and safety impacts of imported goods which may not conform to Australian safety standards
- losses resulting from possible regulatory risks and costs to government arising from ISDS.

Conclusion

Overall, the ChAFTA is an incomplete and poorly negotiated agreement and is not in the national interest. The Committee should recommend against the implementing legislation.

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