RCEP
A secret deal

Trade talks fail the transparency and public participation test

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1 INTRODUCTION

The Regional Comprehensive Economic Partnership (RCEP) is currently being negotiated between 16 countries in the Asia and Pacific regions. It includes China, members of the Association of Southeast Asian Nations (ASEAN) and other key trading nations such as Australia, New Zealand, South Korea, Japan and India. Over 50% of the world's population lives in the countries party to RCEP, which account for over a quarter of global exports and almost 30% of the world's GDP.[1] Like other mega regional trade agreements, such as the Trans Pacific Partnership (TPP), RCEP negotiations are far-reaching, including trade and investment liberalisation, Intellectual Property Rights, services, competition policy and e-commerce. RCEP will impact on the lives of billions of people, from the quality of the food we eat to the energy we consume and the affordability of life-saving medicines *(see boxes 2 & 3)*.

Yet this report finds that the RCEP negotiations are being conducted almost completely in secret, with limited to no meaningful public participation. Most elected officials have, at best, limited access to the negotiating texts, which remain out of reach for civil society. Ad hoc or token stakeholder consultations are far from sufficient to make the process transparent or participatory. Meanwhile, big business lobby groups have a semi-official inside role in the RCEP talks, with privileged access and undue influence over many individual countries' policy-making processes.

Governments in the RCEP bloc have argued that secrecy in the process is inevitable, as the trade deal is a matter of international relations. Yet as the negotiations will impact people's jobs, domestic regulations and healthcare, citizens have a right to know how the deal is being negotiated, who is influencing it, and what is being put on the table. What's more, there are several examples of international negotiations that provide a greater degree of transparency (including the disclosure of negotiating documents) and openness to civil society than the RCEP negotiations:

United Nations Framework for Convention on Climate Change (UNFCCC)
Negotiating texts and submissions from the parties are circulated before the negotiations start. Observers, including external stakeholders, attend sessions, and can provide submissions on request.

World Intellectual Property Organisation (WIPO)
Draft negotiating documents are released throughout the process. Meetings are open to the public, and webcasted.

Intergovernmental Working Group (IGWG) on transnational enterprises with respect to human rights
Organisations with Economic and Social Council (ECOSOC) consultative status can actively participate in sessions of the intergovernmental working group, give written and verbal formal contributions. The agenda, reports and contributions from all parties are made public in a timely manner on the United Nations Human Rights Council (UNHRC) website, and many sessions are also webcast to the public.

RCEP negotiations are being conducted almost completely in secret, with limited to no meaningful public participation

World Health Organisation (WHO) Framework Convention on Tobacco Control includes clear-cut language to protect the process from corporate interference, which could impede on negotiations and implementation.

The precedents set by the UNFCCC, WIPO and IGWG show that the supposed inevitability of secrecy in international negotiations like RCEP is nothing more than a political smokescreen. Even the World Trade Organisation and Free Trade Agreements by the European Union seek to publish most negotiating texts, and reports by committee chairs are available on their websites. The lack of transparency in the RCEP talks threatens to undermine democratic rights in the region, and facilitates the corporate capture of the process of regional economic integration. This contravenes the ASEAN charter, which promises to adhere "to principles of democracy, the rule of law and good governance."

2
FAILING THE CRITERIA FOR TRANSPARENCY AND PUBLIC PARTICIPATION

Measured by experts against our Marking Criteria for Transparency and Public Participation *(see following page)*, an examination of the RCEP negotiations has a clear result: FAIL. Extremely non-transparent, there has been negligible official information made public on the state of negotiations, and no release of draft texts or adequate details of key government positions. There is a widespread lack of independent social, economic and environmental impact assessments, if any at all, and little to no public information on the role of vested interests in influencing the process. Public participation is minimal to non-existent, with at best token or ad hoc stakeholder engagements. Parliaments are shut out from a meaningful role, whilst big business lobby groups have a privileged, semi-official role. The RCEP negotiations undermine international legal principles of free, prior, informed consent (FPIC) and principle of participation deriving from the International Court of Justice Statute.

In this report we look at the records of some of RCEP's key players, on transparency and public participation in trade policy-making processes. The results show that just as RCEP as a whole gets a fail, none of the participating countries — Australia, Japan, India, South Korea, China, Philippines, Indonesia or Malaysia — deserve a passing grade. The report's key findings include:

- During some recent RCEP negotiation rounds, stakeholder engagement sessions have been held at the discretion of the hosting state, but they offer only a very limited, superficial opportunity for civil society to present substantive concerns, and lack any kind of accountability mechanism. They act instead as token gestures towards openness and public participation.
- Meanwhile, business lobby groups have undue and harmful influence onto the formulation of country's RCEP positions, and the negotiations themselves *(see box 5)*, from revolving doors between government officials and corporate lobbyists to the formal role of the East Asia Business Council. Other examples include inside access for lobbies like the Asian Trade Centre, and influential positions at national levels of industry groups like Keidanren and the Minerals Council of Australia.
- Opportunities for public submissions on RCEP vary among countries, but in no case is it clear if and how (and whose) positions are taken into account. There remains no transparency about the detailed negotiating positions (or how they were formed) of any participating country. Negotiating texts remain completely shrouded in official secrecy.
- In most cases, Parliaments do not have meaningful oversight of the negotiation of RCEP, often without access to the texts, or ability to influence their country's positions, and in some cases may not even be required to ratify the deal once signed.

Marking Criteria for Transparency and Public Participation

HIGH

All draft texts, negotiating processes and overarching government positions are made public in a timely manner.

Independent economic, environmental and human rights impact assessment studies, with their results having a discernible influence on the negotiations.

The role of all special interest groups in the process is made public, including publicly available information on number and participants of meetings, written communications, positions on advisory boards, etc.

Parliaments, and public consultation, are actively incorporated at all stages of the process (before, during and after completion of an agreement), with the ability to influence and help determine the outcome, with parliaments having full control over ratification.

Civil society and the public have an active and official role in the negotiating process, with the ability to attend all negotiations, give direct input and make propositions .

A diverse range of interests and viewpoints are pro-actively reflected in consultations, and constraints are placed on the undue influence of corporate lobbies.

Cancellation clauses enable future governments/public opinion to modify parts of the agreement and or leave the deal at any time.

LOW

Key propositions/ negotiating positions are made publicly available, and public or civil society have access to part of the process, yet a substantial part remains behind closed doors.

Basic or incomplete economic, environmental and human rights impact assessment studies undertaken.

Some publicly available information on the role of and level of access of special interests in influencing the negations, which is supplied when requested.

Elected officials have the opportunity to express opinions and give meaningful input into the process, through the parliament and specific working groups.

Civil society and members of the public have the opportunity to express opinions and give input through public hearings and/or regular advisory boards.

FAIL

No or little publicly available information on the state of negotiations, draft texts or key government positions.

No or biased social, economic and environmental impact assessments undertaken.

No or little publicly available information on the role/level of access of special interests in influencing the process, and public requests for this information are refused.

The public and civil society cannot participate, or only in token/ ad hoc stakeholder engagement forums.

Limited ability for parliaments or other public institutions to impact or influence the process.

Special interests have a privileged/ official role in the negotiation process.

Long-term or survival clauses make it very difficult or impossible to leave the agreement.

2.1
AUSTRALIA

Current trade treaty making processes in Australia are not transparent and offer little meaningful space for public participation. There is a lack of thorough, independent economic or environmental impact assessment of prospective agreements. The government does not systematically quantify the costs and benefits of an agreement's provisions, and is silent on the need for post-agreement evaluations of actual impacts. For these reasons, the government's Joint Standing Committee on Treaties called the recent TPP a "blind agreement".[3] In terms of institutional process, the power to enter into treaties is an executive power granted under the Australian Constitution.[4] Civil society and academics were forced to undertake a Health Impact Assessment on the TPP and found the deal would increase the cost of medicines and could undermine health measures in areas such as alcohol control.[5]

Decisions about negotiating, signing or becoming party to a treaty are taken by the executive and do not need to be approved or debated in Parliament

Decisions about negotiating, signing or becoming party to a treaty are taken by the executive and do not need to be approved or debated in Parliament. Decisions to pass implementing legislation (as treaty commitments are not automatically incorporated into Australian law) are, however, made by Parliament.

Trade negotiations are confidential, and texts can only be seen by cabinet ministers and public officials from the Department of Foreign Affairs and Trade (DFAT) and other departments negotiating the deal. Neither Parliamentarians, civil society stakeholders nor the general public are able to access draft negotiating texts or know their content.[6] As Knowledge Ecology International notes, negotiating the text in secrecy creates "risks of both intended and unintended harms to the public."[7] DFAT does conduct consultations on free trade agreements (FTAs) "with a wide range of stakeholders", such as State and Territory governments, industry bodies, companies, academics, individuals, trade unions, consumer groups, and other civil society organisations. However, DFAT's raison d'être for these consultations is that they "help to identify commercially significant impediments to increasing Australia's trade and investment in potential FTA partner countries".[8] In other words, they are oriented towards business-interests rather than civil society concerns. During the TPP talks, DFAT held over 1000 briefing sessions to provide updates and receive input and feedback,[9] but many unions and civil society groups criticised this process as a smoke screen lacking any meaningful public participation.[10] What's more, press reports have suggested that community groups are involved even less in RCEP than they were in TPP, whilst business groups remain in the Australian delegation's confidence.[11] DFAT also accepts written submissions from stakeholders on proposed FTAs, but there is no clarity about how these submissions are taken on board, and stakeholders can choose for their input to remain confidential. DFAT's website shows 21 written submissions on RCEP, including 12 from industry, 4 from civil society groups and one trade union; 7 of these remain secret.[12]

Australia hosted the second round of RCEP talks in Brisbane in September 2013, without any stakeholder engagement events. By the time it hosted the 12th round, however, in Perth in April 2016, public pressure for greater openness had increased. And so, for the first time in a RCEP negotiation round, it organised a general stakeholder engagement session, plus specific events on intellectual property and investor protection, which were attended by both business and civil society groups.[13] Organising stakeholder events that are open to civil society may be a step in the right direction, but big corporations still get privileged access to trade deal negotiators. A stark example of this was the "exclusive briefing on Australia's regional trade priorities" by the Chief RCEP trade negotiator, Michael Mugliston, during the Vietnam round that was for Australian Chamber of Commerce members only (which include the likes of the Commonwealth Bank of Australia, KPMG, PwC, and Meat and Livestock Australia).[14]

1 MINING INDUSTRY ACTIVELY INFLUENCING TRADE POLICY

Far-reaching trade and investment deals like RCEP are big business for mining companies. The investor protection mechanisms that allow corporations to sue governments for loss of profits have already been extensively used by mining multinationals against RCEP countries. Three of the seven ISDS claims made against Indonesia relate to mining and quarrying, including UK firm Churchill Mining suing Indonesia for $1.3 billion after its license for an environmentally destructive coal mine was revoked. India, the Philippines and Korea have also been hit with mining-related ISDS claims.[15] The mining industry is a big pro-RCEP lobby, pushing for ISDS provisions and other rules that would make it easier to invest in new mines in RCEP countries, regardless of the effects on communities, land rights, local environments and the climate.

One example of how influential the extractive industries can be on regional trade policy is the Minerals Council of Australia (MCA). Australia's mining industry association has been a prominent lobby on RCEP. MCA appears to have a close relationship with DFAT, writing in a DFAT quarterly publication called Business Envoy that the mining equipment, technology and services (METS) sector "stands to benefit" from RCEP, which will remove "restrictions and discriminatory measures related to trade in services".[17] DFAT confirms it is pushing the METS sector's interests in RCEP negotiations, promising to "seek quality outcomes" for the industry.[18]

So what are these restrictions and discriminatory measures that the mining lobby wants RCEP to remove? According to three former senior Department of Foreign Affairs and Trade officials that MCA hired to write a guide for Australian trade negotiators, they are "non-tariff barriers" like governments' ability to tax multinational mining companies, to promote local ownership of mines, to oblige multinationals to keep processing and refining operations in country, or otherwise pass laws to prevent all the profits from mining leaking out of the country, leaving only social and environmental costs behind. These kinds of "restrictions" are disparaged as the result of "resources nationalism" in South-East Asia, "anti-mining sentiment and environmental activism", and "political emotion over land use"![19] Legitimate public policy choices thus become "barriers" to trade that mining lobby groups like MCA have succeeded in getting Australian policy-makers to attack through deals like RCEP.

Ranger uranium mine surrounded by Kakadu National Park
Alberto Otero Garcia/ Wikimedia

2.2
INDIA

The level of secrecy and non-transparency in the policy-making process surrounding RCEP in India is extremely high. As Ranja Sengupta, senior researcher with Third World Network, explains: "Texts are not shared with affected stakeholders, and the state government and the parliament's role remains cosmetic. No ratification by the parliament is needed in India and even impact assessment studies are not in public domain... the RCEP negotiations, in particular, have been one of most closely guarded secrets in the history of India's trade policy making."[20] The Indian Constitution puts the power to enter into FTAs in the hands of the Executive, with no requirement to seek Parliament's approval before signing, ratifying or enforcing any agreement. As the Commonwealth Human Rights Initiative (CHRI) notes, the absence of Parliamentary oversight "is a major gap in the constitutional scheme of checks and balances" in need of urgent correction.[21]

RCEP negotiations have been one of the most closely guarded secrets in the history of India's trade policy making

Modern trade and investment treaties have a direct bearing on people's right to life as producers, traders and consumers (as protected under Art.21 of the Constitution) and other areas that the Executive does not have sole (or any) jurisdiction over (like agriculture). Thus, consultation with Indian state governments and legislatures should be required.[22]

Transparency-wise, the Ministry of Commerce has rarely made public details of any of the issues under negotiation in an FTA, nor made it clear with which sectoral interest groups the government has held consultations. This is despite legal obligations on the government to proactively disclose information about the impact of FTAs to all citizens, under the 2005 Right to Information Act.[23] Instead, notes CHRI, the Department of Commerce has "stonewalled requests for access to information about the India-EU FTA",[24] with leaks remaining the only source of information.

A consortium of civil society groups (the People's Resistance Forum) dismissed as a "sham" the civil society consultation held during the 19th round of RCEP negotiations in Hyderabad, July 2017.[25] (India had not held any stakeholder events when it hosted the 16th RCEP talks in New Delhi, December 2014). The Forum rejected the consultation because the basic minimum steps to ensure it was meaningful had not been taken: no official announcement, no attempt to invite the multitude of affected constituencies, no dissemination of the chapters and negotiating texts. Instead, they held a parallel People's Summit, representing the real stakeholders of RCEP. The civil society actors that did not boycott the consultation found it unsatisfactory: "None of the answers provided to us was backed by data. I could say that it was not a consultation but more of a formality on the behalf of the organisers. We were only given assurances that RCEP won't affect people's livelihood but apart from what has been leaked, delegates refrained from disclosing information", described Pradip Chatterjee, of the National Fishworkers' Forum.[26]

Alongside this two hour "consultation" at which "each civil society organisation could only speak for about three minutes",[27] the Ministry of Commerce held a whole day's business consultation jointly with the Confederation of Indian Industry and EABC.[28] The business event provided "a unique opportunity for RCEP negotiators to hear directly from businesses what are the potential rewards that could be derived from the outcomes negotiated". It included speakers from Tata Steel, Volkswagen India and the Australian Industry Group, as well as a 1.5 hour schmoozing session with RCEP Chief Negotiators.[29] Reportedly, a Ministry of Commerce official said that after this consultation with industry, "the Ministry would prepare an initial offer on goods" for RCEP.[30] This clearly indicates whose interests RCEP is being negotiated in, and as the People's Resistance Forum put it, reveals that "industry and transnational corporations (TNCs) are the "super-stakeholders" whom the negotiators really want to include in the process".[31]

2 RCEP AND PRIVATISATION OF PUBLIC SERVICES

The intent of RCEP is to expand the potential for privatisation of services, even those essential for people's lives, such as education, healthcare, electricity, water and waste management. RCEP provides for a "ratchet" clause, the effect of which is to ensure that, over time, the regulations of services, including essential services, is reduced. Not only this, but it prevents governments taking back control of service provision, even in the case where private providers fail to deliver.

Further, RCEP curtails the ability of the government to regulate service providers in the public interest. For instance, it prohibits the requirement for local presence (office) for service providers. This severely restricts the public's ability to hold companies accountable for the provision of those services. Prohibitions on specific staffing requirements would prevent the government from regulating minimum staffing levels, for instance in the case of nurses to patient ratios in hospitals, as well as proportion of staff with certain levels of qualification. The regulation of prices — such as set rates for water and electricity services, or capping of cost of treatment — could also come under attack.

The drastic decrease in import duties can have significant impacts on developing countries. In India, around 17% of central government revenues currently come from import duties. While this source of revenues is eroding due to multiple trade treaties, the alternatives that are put in place affect the poor disproportionately. Indirect taxes such as the Goods and Services Taxes or Value Added Tax are regressive and therefore deepen inequality. On the other hand, corporations are increasingly using the trade and investment system to avoid paying their fair share of taxes, especially in developing countries. Through many channels, revenues that the government could use to fund quality public services are lost.

Sick child examined by doctor in Kolkata
Andrew Aitchison/Alamy

2.3
JAPAN

Traditionally, trade policy in Japan has been under the jurisdiction of the Ministry of Economy, Trade and Industry — METI, which describes itself as having a "ubiquitous" network extending to private companies "through seconded personnel"[32] — but central government reforms in 2001 strengthened the Prime Minister's hand in foreign policy making. The case of the TPP illustrates this. Prime Minister Shinzo Abe, strongly pro-TPP and supported by a vocal business community, used these reforms to bring "the entire policy process under the control of the Kantei"[33] (i.e. the Prime Minister and closest entourage). An Industrial Competitiveness Council, comprised of nine ministers and nine "private-sector experts" (8 from business[34]) including the Chairman of Keidanren[35] *(see box 3)*, was created, which recommended accession to the TPP as a part of Japan's growth strategy.[36] Public and parliamentary participation may have been lacking, but big business participation was not.

The close relationship of industry leaders with the political elite ensures business interests are central

The TPP also offers a transparency warning for RCEP. The Japanese Constitution requires that the Cabinet, when concluding treaties, "shall obtain prior or, depending on circumstances, subsequent approval of the Diet" (i.e. the Parliament).[37] However, the Diet only got to discuss the TPP several months after it had been signed. During the Diet's deliberation, conflict arose about the lack of disclosure of information on the negotiations, leading the government to disclose some of the documents. They were, however, practically illegible, with almost all of the text blackened out. The government cited the obligation of secrecy as justification for this excessive redaction, leaving the Diet to vote on the TPP based on almost no information about the (already completed) negotiations.

There does not appear to be formal civil society consultation in the trade policy-making process in Japan, but the close relationship of industry leaders with the political elite ensures business interests are central. What is critically referred to as the revolving door elsewhere (i.e. when public officials jump ship to big companies, or vice versa), is known in Japan as "descent from heaven" *(amakudari)*, with civil servants routinely retiring into lucrative industry positions. And whilst big business is on the inside, the public merely gets fed promotional materials: the government organised a "variety of explanation meetings, seminars, and lectures", particularly in rural areas, to gain support for governmental policy on the TPP.[38]

In the case of RCEP, there does not appear to have been any public consultations in Japan in the first four years of the deal's negotiation, including when it hosted the 8th round of talks in Kyoto in June 2015. But by the time it hosted the 17th talks in Kobe in February 2017, pressure from civil society had mounted. Over 100 Japanese and international civil society groups wrote to the government to express concern over RCEP's secrecy, whilst "commercial interests have been invited to share their views with negotiators at RCEP rounds".[39] In response, a dialogue was organised; but it was programmed for just one hour, at the Kobe Chamber of Commerce and Industry (i.e. at the offices of a business group), with limitations on space and a two day registration window.[40] People Over Profit, a network of people's movements and civil society groups, noted that the engagement did "not provide concrete mechanisms to ensure that people's demands and concerns are discussed by negotiators".[41]

3 HEALTH WARNING: JAPAN & KOREA PUSH BUSINESS-FRIENDLY IP PROVISIONS

Japan, together with South Korea, has proposed intellectual property (IP) provisions in RCEP that would be seriously detrimental to access to medicines, public health and food sovereignty, according to the leaked IP chapter. The proposed provisions would broaden and lengthen Big Pharma's patent monopolies, delay production and sales of generic medicines, and make IP subject to ISDS, putting public health safeguards in IP rules, hardwon by countries like India, at risk.[42] They would also push countries into making it illegal for farmers to save seeds from commercial varieties, by providing monopoly privileges to biotech and seed companies, like Bayer and Syngenta, at the cost of farmers' rights. Proposed data exclusivity provisions in the IP chapter could also extend agrochemicals patents, pushing up food prices.[43]

Japan's most influential big business group, Keidanren, is chaired by Sadayuki Sakakibara,[44] golfing buddy of the prime minister. Sakakibara sits alongside the PM and other ministers on the Cabinet's Council on Economic and Fiscal Policy,[45] and was appointed to the pro-TPP Industrial Competitiveness Council. Sakakibara is Senior Advisor at Toray Industries, a Japanese chemicals multinational with interests in pharmaceuticals.[46] Keidanren's members include numerous other pharmaceutical companies, both Japanese (e.g. Takeda and Astellas Pharma) and global giants (e.g. Pfizer and Sanofi).[47] So it is no surprise that Keidanren argues that FTAs — like RCEP — should bring about a "strengthening of the IPR regime", and is a strong advocate of "robust patent and intellectual property protection as well as enforcement" in the pharmaceutical sector.[48] The lack of transparency and public participation in RCEP has meant that "Pharma's role in these trade talks is overwhelming. For every pro-patient proposal advocates make, Pharma works with the world's most powerful countries to crush affordable medicines access", says Leena Menghaney from Doctors Without Borders.[49]

The role of the agrochemicals lobby is also hidden behind closed doors, but Keidanren's Vice Chair, Masakazu Tokura, and President of chemical and crop protection company Sumitomo Chemical,[50] sits alongside the PM on the Cabinet's Council for Science, Technology and Innovation.[51] Agrochemical and commercial seeds firms are well-represented in Keidanren's membership, with the likes of Syngenta Japan, Bayer, DuPont, BASF Japan and Nissan Chemical Industries; firms with an interest in stricter IP rules in RCEP that would increase their profits, at the expense of farmers' livelihoods.

Protest over suspected cover-up of a cronyism scandal involving Japan's PM and Finance Minister, Tokyo
Aflo Co. Ltd/Alamy

2.4
KOREA

The Korean constitution gives the National Assembly (i.e. parliament) "the right to consent to the conclusion and ratification" of trade treaties.[52] However, governments have interpreted this provision arbitrarily, "carrying out negotiations under the presumption that they can obtain post-facto approval from the National Assembly on the ratification of the FTA".[53] Academic analysis has highlighted that the Assembly's role as democratic oversight of trade negotiations remains very limited, "quite often impeded by lack of information or expertise", effectively serving a "merely symbolic function, because it cannot reconsider the substantive details of the treaty, after its conclusion". Similarly, various committees designed to bring civil society interests into the process do not appear to have "meaningful influence on the FTA decision-making process", with trade unions and civil society groups role being "as subordinate or even tokenistic partners, to give the appearance of democratic participation". The 2013 Trade Procedures Act requires the government to present information about FTA negotiations and their implementation to the National Assembly and the public.[54] But, the executive can keep information confidential "if it is in the public interest and relates to a successful negotiation strategy".

Korean civil society groups have expressed concern at the lack of transparent and democratic process to establish Korea's RCEP negotiation strategy

There are clear indications of the privileged role and inside access that the Korean government has given to business, with regards to RCEP. From July 2013 to July 2017, the Korean Ministry of Trade, Industry, and Energy (MOTIE) held around 30 meetings with various business sectors including steel, machine, auto, chemical and IT. In contrast, MOTIE met civil society organisations only one time for the same period. In February 2014, MOTIE announced that in the accelerating discussions on regional FTAs such as RCEP it would "reflect the demands of industry by sufficiently communicating with all relevant sectors through trade industry forums/private consulting committees."[55] In May 2017, MOTIE's Director-General for FTA Negotiations, Yoo Myung-hee, presided a meeting with industry representatives (including cosmetics, food and drugs, electronics and automotives) to hear their opinions on non-tariff measures under RCEP. Yoo, Korea's Chief Negotiator for RCEP, promised that the "Ministry will actively reflect industries' opinions heard in this meeting on the upcoming negotiations".[56] Given the pro-big business Intellectual Property provisions Korea has tabled in RCEP *(see box 3)*, this privileged access to industry looks even more troubling. Several Korean civil society groups, including the Korean Federation of Medical Groups for Health Rights, wrote to the government in July 2016 concerned at the lack of transparent and democratic process to establish Korea's RCEP negotiation strategy. They expressed particular concern that Korea's IP proposals represent the interests of US industry, and violate various human rights rules and norms.[57]

As host of the 10th RCEP round in October 2015, Korea "facilitated formal and informal meetings between negotiators and civil society organisations".[58] Prior to its hosting the 20th RCEP talks in Songdo, October 2017, 55 civil society groups wrote to Trade Ministers in RCEP countries, calling for meaningful civil society engagement at the Korean talks, specifically allowing "civil society to speak for long enough with chapter negotiators... to be able to provide this in-depth analysis". They asked to meet with the Intellectual Property, investment, e-commerce, services, and legal negotiators.[59] Reports of the 20th round state that negotiators from the Trade Negotiating Committee and the Working Groups on the above listed areas "met with representatives from international, regional and local civil society organisations".[60]

2.5
CHINA

China's Ministry of Commerce (MOFCOM) is responsible for negotiating bilateral and multilateral trade agreements. On MOFCOM's China FTA Network website, there is a statement regarding the "need to build consensus within the country and participate in and promote the RCEP negotiations".[61] It is not clear to what extent "building consensus" about RCEP within China could relate to public participation or engaging with critical voices in civil society. Some discussion about RCEP's progress and China's position in it appears in MOFCOM's regular press conferences, but without significant detail about negotiating positions, etc.[62] China hosted the fourth round of RCEP talks in Nanning, April 2014; no stakeholder engagement events were organised (but none were organised by any hosting state until the 12th round). China also hosted the 15th round of talks in Tianjin, October 2016; despite the precedent set by the hosts of the 12th and 13th rounds (Australia and New Zealand) of holding civil society stakeholder meetings, China did not do so.[63] Civil society organisations and people's movements do not traditionally play a significant role in Chinese policy-making, and trade policy does not appear to be an exception. China does appear to be promoting the interests of Chinese business and industry in RCEP, for example, "pushing for more ambitious investment chapter seeking to protect its growing investments across Asia and the Pacific".[64]

4 RCEP AND LABOUR RIGHTS

An independent study published by Tufts University (USA) showed that, if implemented, the TPP would cause employment losses in all TPP countries.[65] In the case of RCEP, there is no comparable study in the public domain, but there are reasons to believe that the impact on employment would be along similar lines. Observers have also highlighted that the increase in competition brought by an integration into the global economy that is facilitated by FTAs such as RCEP, not only do not deliver jobs but lead to contractualisation of employment.[66]

Further, the ISDS framework has already been used to challenge the outcomes of collective bargaining process, such as in the case brought by French corporation Veolia against the Government of Egypt. This case follows the decision of the government to raise the national minimum wage without reviewing the contract that Veolia had entered into with the government of the City of Alexandria. Increasing workers wages is a recognised economic stimulus that provides development opportunities for an economy. Yet RCEP and other FTAs that include ISDS provisions give immense powers to private players to pressurise governments to refuse the legitimate demands of workers.

Reports indicate that the ICSID has dismissed the Veolia case against Egypt. While the reasons behind the decision remain secret, the 6 year case has cost Egypt millions of dollars in litigation fees.

Electronics factory in Shenzhen
Steve Jurvetson/ Wikimedia

2.6
PHILIPPINES

The Philippines' constitution requires that international agreements, such as trade deals like RCEP, be ratified by at least two-thirds of the Senate (one of two houses of the elected legislature).[67] But the power of negotiating RCEP sits with the government Department of Trade Industry (DTI), with the President first establishing the country's negotiating position parameters.[68] Trade Justice Pilipinas, a broad platform campaigning for just trade and investment policies, notes with regard to the Philippines and the other RCEP countries, "the Legislative Branches of the different governments are almost entirely shut out of the process, even as the proposals on the table would in fact amend if not repeal existing laws."

Without access to RCEP's texts, civil society cannot conduct independent analysis, engage policy makers, and inform our constituents who stand to be most affected

However, the constitution also enshrines the "right of the people and their organisations to effective and reasonable participation at all levels of social, political, and economic decision-making" and requires that the "State shall, by law, facilitate the establishment of adequate consultation mechanisms." There have therefore been a number of stakeholder consultations, both during RCEP rounds hosted by the Philippines, and by government departments concerning the Philippines' position. What is less clear however, is the extent to which public participation is meaningful. It appears that while the private sector is treated as an inside partner, civil society merely gets an occasional soapbox to stand on, without their "participation" making much difference.

In April 2016, the DTI held a meeting with private sector stakeholders on RCEP and another trade deal; the consultation fell under a government program called One Country, One Voice (OCOV).[69] The DTI also has an ongoing "private sector-driven" process (i.e. private sector takes the lead in both crafting and driving the action) of developing industry roadmaps, which will "intersect with trade policy and provide a platform for sectoral negotiating positions".[70] So, whilst business is on the inside shaping RCEP positions, civil society consultation remains piecemeal, with uncertain impact.

In terms of public participation in RCEP rounds, an official stakeholders' engagement event was held during the 18th RCEP talks in Manila, May 2017, at which civil society organisations and social movements were able to present their positions. But, as with other stakeholder events at RCEP rounds, groups only had about three minutes each, severely limiting their ability "to provide analysis in enough depth, detail and technical specificity to be useful to negotiators".[71] At the event, trade union SENTRO called not only for full participation of parliaments in RCEP, but of the people affected by the treaty, if negotiations are to continue.[72] Civil society groups held a parallel No RCEP week of action, with the message that token participation was insufficient. The Health Alliance for Democracy called out the "closed-door meetings between world economic leaders, businessmen, and countries".[73]

In September 2017, the Philippines hosted an ASEAN Economic Ministers Meeting in Manila, including an intersessional RCEP meeting. At a stakeholder dialog facilitated by the DTI, "trade officials flatly rejected appeals made by civil society to gain access to official documents," according to People Over Profit, which "reveals the anti-democratic essence of RCEP".[74] Without access to RCEP's texts, civil society cannot "conduct independent analysis, engage policy makers, and inform our constituents who stand to be most affected".[75] Research group IBON also noted that meaningful public debate is hindered by governments keeping quiet about the actual proceedings and outcomes of the RCEP rounds.[76] Trade unions and civil society groups also expressed concern that the "official stakeholder" events held by the Philippines were "far too limited" to provide meaningful participation.[77]

5 AN INSTITUTIONALISED ROLE FOR BUSINESS IN RCEP

In 2013, at the start of RCEP negotiations, a business advisory group was formed under the East Asia Business Council (EABC), at the request of the ASEAN Plus Three Economic Ministers, who wanted a channel for "effective business inputs" into the talks[78] *(see Box 5)*. Since then, the EABC Working Group for RCEP exists to "ensure that the negotiations address business needs and priorities", with a "formal role in feeding business priorities and concerns" into the negotiations. It is made up of representatives of peak business organisations (i.e. industry lobbies) from the participating countries, and has "already identified some concrete matters which are being included in RCEP negotiations" including e-commerce and "access to global and regional value chains".[79] This is institutionalised privileged corporate access and influence, on a RCEP-wide scale. Meanwhile, no civil society engagement events were held in the first 11 rounds of talks.

In November 2017, sandwiched between a RCEP Ministerial Meeting and RCEP Summit in Pasay City, Philippines,[80] President Duterte chaired the ASEAN Plus Three[81] Leaders' Interface with EABC, describing it as "fitting to have our regional business partners with us".[82] Discussions focused on "injecting business voice" into RCEP,[83] with business leaders briefing heads of state on their recommendations. At the end of the RCEP Summit, the heads of state issued a Joint Leaders Statement on the RCEP negotiations, which "welcomed ongoing engagement with representatives from the business sector, non-governmental organisations, and other stakeholders, and stressed the importance of such engagement in ensuring that RCEP remains inclusive."[84] Absurdly, this suggests that a deal practically co-negotiated by big business, whilst civil society remains unable to even see what's being negotiated, is "inclusive". The statement also included an annexed "Outline of the RCEP Agreement", but far from being an answer to civil society's demands for transparency, the two pages provide scant details, nowhere near enough for serious analysis. This is token transparency at best, around a deal that is being designed by and for big business, at the expense of farmers, workers, women, indigenous peoples, local businesses and communities.

Philippines President Duterte presides over RCEP meeting, Manila
Rey Baniquet/Presidential Photo/Wikimedia

2.7
INDONESIA

The Indonesian Constitution allows the President, with the "approval" of House of Representatives (the DPR, one of two elected legislative assemblies), to conclude treaties with other countries. It also makes it clear that DPR approval is needed "in making other international agreements that will produce an extensive and fundamental impact on the lives of the people".[85] It may seem obvious that this would cover a trade deal like RCEP, but analysis by Indonesia for Global Justice (IGJ) shows how various national laws have meant that "checks and balances functions that should be done by the DPR are lost", with many international treaties passed only by Presidential regulation. There is a "need for clear 'rules of the game' within the national legal framework to ensure people's control over governmental power in FTA negotiations undertaken by Indonesia, including in the RCEP negotiations".[86]

Indonesia did hold stakeholder events with both business and with civil society organisations in 2016. The contrast between them, however, was dramatic

The 2014 Trade Act should have fixed this lack of democratic oversight of Presidential powers. However, it is still up to the President to decide whether a trade agreement need be approved by parliament.[87] The issue comes from the scope of "international trade agreement" in the Trade Act; a narrow reading together with government discretion has left numerous trade-related ASEAN agreements without parliamentary input. Modern trade deals like RCEP aren't just about tariffs and import/export restrictions: they cover investment rules, IP, ISDS, etc, and are called "economic partnerships" rather than trade agreements. This leaves the government with large discretion to decide what is (not) a trade agreement. As a result, the DPR is still frequently deprived of its role as a check on the government.[88] Indonesia is also a long way from Parliamentary oversight of the negotiations themselves. Although there has been some discussion about RCEP within the DPR, the government "has never discussed the RCEP issue in a working meeting or a hearing with the DPR", according to Inas Nasrullah, DPR member in December 2016.[89] Another DPR member, Mercy Chriesty Barends, criticised RCEP as "very closed, not transparent" and not providing space for community and stakeholder input, calling on the government to "include a Human Rights Impact Assessment (HRIA) as a mandatory step, in advance", before RCEP is signed.[90]

Indonesia did hold stakeholder events with both business and with civil society organisations at the 16th RCEP talks in Tangerang, December 2016. The contrast between them, however, was dramatic. On the business side, EABC organised a two day RCEP Business Stakeholder Workshop, with sessions on Goods, Trade and Investment, small and medium enterprises (SMEs), eCommerce and Implementation, "timed around the schedule of the negotiators to enable the relevant negotiators to attend".[91] The event provided "an opportunity for business to communicate directly to the negotiators who will be negotiating the outcomes of the FTA", and for the "voices of individual businesses" — such as Google Indonesia, one of the speakers — to be heard.[92] Other speakers included the Asian Trade Centre *(see box 6)*, Australian Industry Group, and Japanese Chamber of Commerce and Industry in Indonesia.

At the civil society stakeholder engagement meeting, in contrast to the two days of access to negotiators that business lobby group EABC got to press their demands, civil society "got 90 minutes to give four minute speeches to negotiators expressing their concerns", notes Law Professor Jane Kelsey from the University of Auckland. Kelsey also points out that this was only the third opportunity (in 16 rounds) for even this level of engagement: "Decisions about stakeholder access are left to the host country" and so remain discretionary, whilst business doubtless continues "to enjoy the negotiators' ear."[93] Protests were also organised by groups including the Asian Peasant Coalition, concerned that RCEP would intensify land grabbing and militarisation, and drawing attention to the fact that there is still "no official draft text available to the public".[94] The Indonesia AIDS Coalition (IAC) has called for the democratisation of RCEP: the "public is entitled to know the contents of the agreement".[95]

6 LOBBY GROUPS AROUND RCEP TABLE: THE ASIAN TRADE CENTRE

In December 2016, AmCham Indonesia hosted a private lunch meeting with the Asian Trade Center (ATC), which "was actively involved" in the 16th round of RCEP talks and "provided AmCham members with exclusive insights into the dynamics of the negotiations".[96] The ATC is a corporate-funded neoliberal trade policy group, or, as it describes itself, a "thought leader, advocate and educator for trade" which works "with businesses and governments across the Asia Pacific to make better trade policy". Funded by the likes of Google, HP, mining giant Rio Tinto, dairy firms Fonterra and FrieslandCampina, food industry giant BRF Asia, the US-ASEAN Business Council, and other organisations,[97] ATC has been "very active" in RCEP. It has been "on the ground at all RCEP negotiation rounds",[98] with "specific policy inputs" to the negotiations including in the form of "model language suggestions" on topics such as IP and Digital Trade and E-Commerce.[99] ATC also offers training for Asian government officials on "negotiating free trade agreements" and for businesses on how to advocate "positions to government in ongoing trade negotiations"![100]

Protesting forest fires caused by illegal land clearing practices in Indonesia
Luka Tomac/Friends of the Earth International

ASEAN flags
Pipop Kangsiri / Alamy

2.8 MALAYSIA

The Malaysian Constitution does not explicitly set out a role for the Parliament in ratifying international agreements such as trade deals. It states that Parliament may make laws with respect to external affairs (treaties/ agreements with other countries, or their implementation),[101] but it does not explicitly give Parliament a role in entering into the treaties. This suggests the executive has authority to do so. In the negotiation of the TPP, the Malaysian Ministry of International Trade and Industry (MITI) told the Dewan Negara (the upper of two houses of Parliament) that the government would ensure that the nation's and the people's interests are not compromised by the "21st century trade pact". But as MP Nurul Izzah Anwar notes, in a 21st century trade deal, "the public, parliament and civil society in general should be given access to the treaty's official text — not denied as is".[102] Unfortunately, the negotiation of RCEP in Malaysia appears to be more of the same. With the TPP, a Parliamentary caucus on the TPP was formed, but though "engagements [were] made with MITI", MPs remained "very much in the dark with regards to the demands made to ensure Malaysia's interest are left intact in the final negotiated text".[103] MPs only got access to the final text when it was presented to Parliament after the negotiations were completed, and could no longer be changed.[104] Based on available information on MITI website and other sources, there appears to be even less transparency and engagement with civil society on RCEP than there was on the TPP. Another MP Charles Santiago *(see box 5)* asked the government if it had carried out a cost-benefit analysis of RCEP, particularly in relation to SMEs, but received no clear confirmation. Santiago warned against repeating the mistake of the TPP, when the cost-benefit analysis was produced only after the agreement was finalised.[105]

While corporate lobbies are invited to advise government officials, ordinary citizens who will live with the consequences have no say whatsoever

Malaysia hosted the third RCEP talks in January 2014, with no stakeholder engagement (nor did any of round before the 12th). The third RCEP Ministerial Meeting in August 2015, and Intersessional RCEP Ministerial Meeting in July 2015, were both held in Kuala Lumpur,[106] but neither with stakeholder engagement. In the absence of any official engagement, trade unions, farming communities, health networks, indigenous peoples, women's organisations, academia and civil society groups met in Kuala Lumpur in July 2015. They issued a statement noting that despite affecting 3.5 billion people, the negotiations remain behind-closed-doors: "While corporate lobbies are invited to advise government officials, ordinary citizens who will live with the consequences have no say whatsoever".[107]

7 ASEAN PARLIAMENTARIANS CALL FOR PARLIAMENTARY SCRUTINY

In August 2017, MPs from across South East Asia under the umbrella of the ASEAN Parliamentarians for Human Rights (APNR) "called for more transparency in the negotiations" of RCEP. Member of the Philippines' House of Representatives, Tomasito Villarin, elaborated that, "At minimum, we need to open up the negotiations to public scrutiny and parliamentary oversight, and we call on all our governments to commission a cost-benefit analysis of the final RCEP draft that will be made public before any agreement is signed".[108]

The ASEAN Parliamentarians also called for a human rights impact assessment of RCEP, as many of its provisions "will have drastic consequences on people's rights, particularly in Southeast Asia," said Indonesian MP Mercy Barends.[109] Chairman of APHR, Malaysian MP Charles Santiago, concerned about the imbalance between richer and poorer countries in RCEP, and who is going to profit from it, noted that "there always appears to be a link between big firms with negotiators coming to the talks".[110]

2.9 MYANMAR

In February, news about the delegates from Myanmar Ministry of Finance and Planning travelling to Jakarta to participate in another round of RCEP negotiation was published in the state-owned media. This is typically the extent of information that Myanmar citizens are able to receive relating to RCEP or any other treaties which the Government has signed or is planning to commit. Previously in August 2015, Myanmar hosted the ninth round of negotiation in Nay Pyi Taw. But there was no publication of any outcomes or consultations made with civil society organisations.

According to Myanmar's constitution, the president shall enter into, ratify or annul international, regional or bilateral treaties, which require the approval of the parliament. However, the constitution also may allow in some circumstances for the president to act without approval from the parliament. In current reality, most international agreements are mainly negotiated by Directorate of Investment and Company Administration (DICA), the President's Office, and the State Counselor's Office, and are signed without passing through the parliament. The absence of transparency and public consultations has made it near impossible for Myanmar civil society as well as international allies to reflect on the agreement and provide suggestions for improvements. This is particularly troubling since RCEP could have an impact on the majority of Myanmar's people — for example, 60% of the population working in the agriculture sector — due to stringent intellectual property measures.

Similarly, few others in the Government are aware of the process and understand the consequences. As the space for civil society organisations (CSOs) is very limited for engagement within the country, over 190 Myanmar CSOs joined a regional network last year to send a letter to the governments in 16 RCEP countries. The letter urged them to stop RCEP negotiations and demanded instead a new model that is based on cooperation and puts the development needs of the region above that of corporations.

3
CONCLUSIONS AND RECOMMENDATIONS

The process of negotiating RCEP has been far from democratic and transparent. Instead, it is characterised by corporate capture on a grand scale. Democratising the trade deal requires broad public debate facilitated by a truly transparent process, at both the level of national processes within participating countries, and at the level of negotiation rounds themselves. The issues covered by RCEP are not merely technical, but political: the privileges given to corporations vs the rights of affected communities; the future control of agriculture and food systems; access to medicines being based on health as a human right or the corporate

Trade should not be an end in itself, but a means to achieve social, environmental and economic objectives

"right" to profit maximisation; the ability of governments to regulate in the public interest, and of the people to shape the laws that govern them. Given this, a guiding principle for the negotiation of any trade or investment deal, including RCEP, should be that trade is not an end in itself, but a means to achieve social, environmental and economic objectives.[111] Trade deals shouldn't put trade liberalisation and reduction of costs for business above all else, but rather seek to contribute to public interest objectives like tackling climate change, securing decent jobs and protecting people's health. This means that trade deals must support the fulfillment of human rights and environmental agreements, like the Paris Climate Treaty, the Convention on Biological Diversity, Sustainable Development Goals and International Labour Organisation standards.

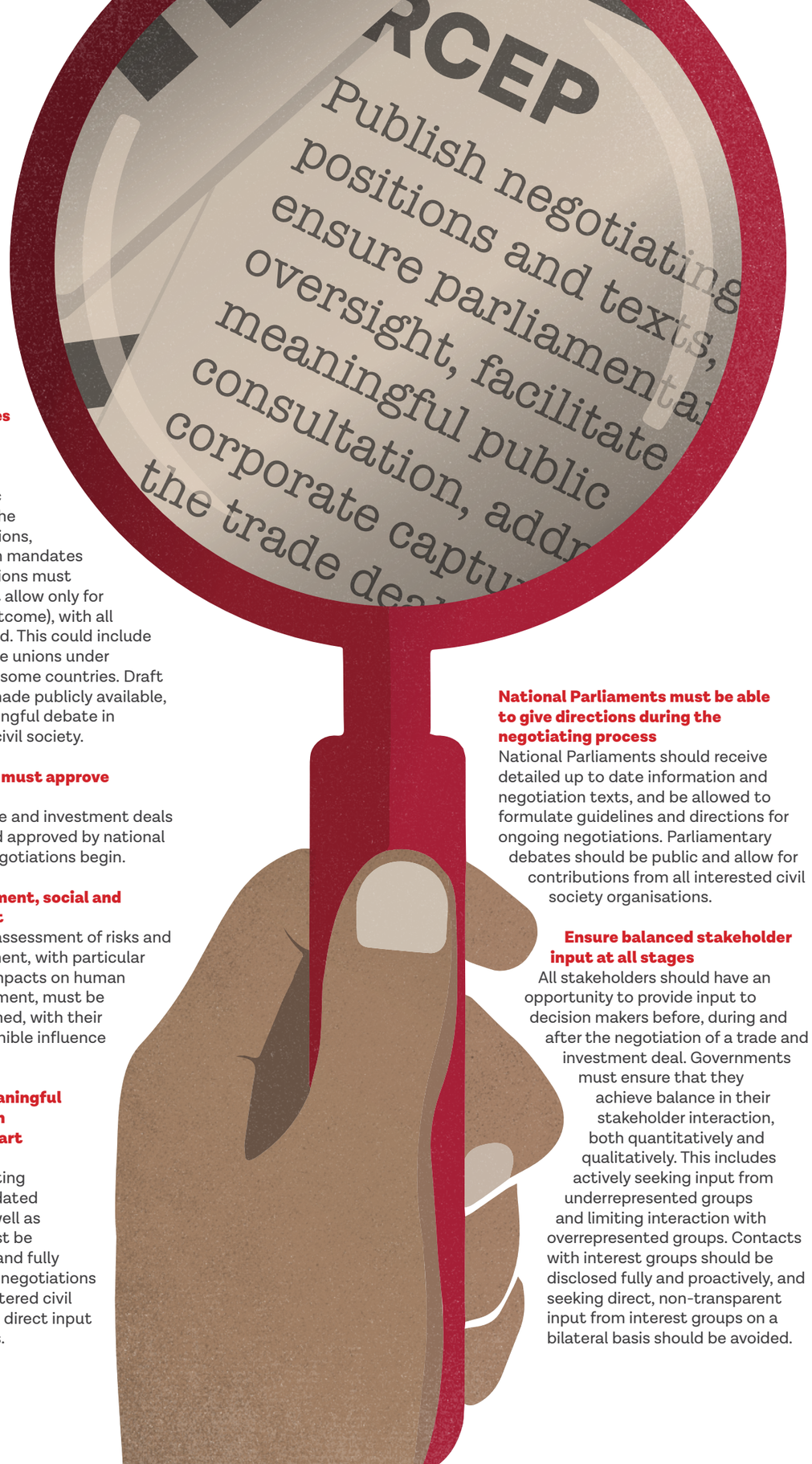
To achieve trade and investment deals that put the public interest in the driving seat, we make the following recommendations for a democratic, participatory and transparent policy-making process at both the national level and in international negotiations:

Open and inclusive public consultation before trade mandates are formulated
National governments should hold open and transparent public consultations before the launch of the negotiations, and before negotiation mandates are drafted. Consultations must be open ended (i.e. not allow only for one predetermined outcome), with all contributions published. This could include engagement with trade unions under Tripartite processes in some countries. Draft mandates should be made publicly available, to allow full and meaningful debate in Parliaments and with civil society.

National parliaments must approve the mandate
The mandates for trade and investment deals must be discussed and approved by national Parliaments, before negotiations begin.

Independent environment, social and economic assessment
Full and independent assessment of risks and benefits of the agreement, with particular consideration of the impacts on human rights and the environment, must be conducted and published, with their results having a discernible influence on the negotiations.

Transparency and meaningful public participation in negotiations, from start to finish
All mandates, negotiating proposals and consolidated negotiation texts, as well as stakeholder input, must be proactively published and fully publicly accessible. All negotiations must be open for registered civil society to attend, give direct input and make propositions.



National Parliaments must be able to give directions during the negotiating process
National Parliaments should receive detailed up to date information and negotiation texts, and be allowed to formulate guidelines and directions for ongoing negotiations. Parliamentary debates should be public and allow for contributions from all interested civil society organisations.

Ensure balanced stakeholder input at all stages
All stakeholders should have an opportunity to provide input to decision makers before, during and after the negotiation of a trade and investment deal. Governments must ensure that they achieve balance in their stakeholder interaction, both quantitatively and qualitatively. This includes actively seeking input from underrepresented groups and limiting interaction with overrepresented groups. Contacts with interest groups should be disclosed fully and proactively, and seeking direct, non-transparent input from interest groups on a bilateral basis should be avoided.

Ensure public debate and national parliament approval of trade agreements before signing and ratification
National parliaments must have the right to vote on the trade agreements, including the ability to send a proposed agreement text back to the negotiating table, even after negotiations are concluded. Relevant committees must be able to assess it, involving different interest groups and members of the public, before voting on it.

Ensure cancellation clauses that enable future governments/public participation to modify parts of the agreement and or leave the deal at any time.

The RCEP negotiations have failed to be participative and transparent from their earliest stages. But it is not too late to start democratising this flawed process, by publishing negotiating positions and texts, ensuring Parliamentary oversight, facilitating meaningful public consultation, and addressing the corporate capture of the trade deal, as exemplified by the vast imbalance of access and influence between business lobbies and public interest groups.

The current process around RCEP is undemocratic and illegitimate and must be halted. Truly transparent and participative trade policy-making, capable of forming trade policy that serves the interests of people and the planet, rather than the corporate elites, should then be built in its place.

It is not too late to start democratising this flawed process with transparent and participative policy making

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