



BULLETIN - May 2020

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1. **AFTINET webinar**

The pandemic is exposing flaws in global trade policy: what should post-pandemic trade policy look like?

Tuesday June 23, 2020, 2pm

The realities of the pandemic have forced the Australian and other governments to act in ways which expose flaws in current trade rules. These flaws include dependency on global production chains, lack of local manufacturing capacity, deregulating and opening up essential services to private foreign investment and strengthening monopolies on medicines, which delay access to cheaper versions of those medicines. The Australian government has directed private hospitals to treat pandemic patients, assisted local firms to produce facemasks and ventilators and reintroduced screening of foreign investment to prevent predatory takeovers as prices fall.

Legal firms are already advising global companies on how to use ISDS clauses in trade agreements that could allow them to claim millions in compensation for government regulation during the pandemic which may harm their profits. See article in [The Conversation](#).

Experts will discuss the flaws in current trade policy and how they can be addressed in post-pandemic policies, followed by Q and A. The discussion can also inform submissions to the [Parliamentary Inquiry](#) into post-pandemic trade policy. See item below for more detail on the inquiry.

Registration information will be circulated soon: **save the date – June 23, 2pm!**

Speakers

Dr Deborah Gleeson, Latrobe university and PHAA: *Medicine monopolies and trade rules.*

Andrew Dettmer, National President, Australian Manufacturing Workers Union: *Local industry policy and government procurement policy.*

Sam Cosser-Gilbert, Friends of the Earth: *Trade rules, renewable energy and environmentally sustainable industries.*

Dr Patricia Randal, AFTINET Convener and university of Sydney: *Stopping post-pandemic ISDS cases and keeping ISDS out of trade agreements.*

Followed by Q and A

2. Introduction

Dear Members,

The COVID-19 pandemic continues to overwhelm health systems and economies around the world, and impact on trade and the global trading system. Australia, like every country, has had to intervene in ways that [contradict the neoliberal trade framework](#) in an effort to manage the health and economic impacts.

AFTINET and many of its member organisations joined 293 civil society organisations from 150 countries that endorsed a letter to the WTO calling for other trade negotiations to cease and for the WTO to focus on ensuring that medicines and medical equipment are available to all countries, especially low income countries. While the WTO decided to continue informal negotiations, especially on e-commerce, many states have said they will not be voting on any new agreements.

The US – China rivalry has only intensified during this crisis, including over the role of the World Health Organisation. However, the World Health Assembly on May 18-19, 2020, unanimously adopted a resolution which endorsed an independent review of the pandemic, emphasised cooperation and urged information-sharing on new medicines rather than abuse of patents by big Pharma. Unfortunately the US disassociated itself from this last aspect.

Meanwhile more evidence has emerged of an ISDS offensive by global corporations against government regulation needed to fight the pandemic.

Despite COVID-19, negotiations for the Regional Comprehensive Economic Partnership Agreement continue. India has rejected an offer to rejoin, and the other 15 countries still aim to sign in November 2020.

AFTINET relies on your support to continue our campaigns. Please share items from this Bulletin which are also linked to our [website](#), [Facebook](#) and [twitter](#). You can renew your membership [here](#) or donate [here](#).

Thanks and keep safe.

The AFTINET Team

3. Three Inquiries on Indonesia Investment treaty, Australia's post-pandemic trade policy and review of the China FTA

a) Termination of Indonesia-Australia 1992 Investment Treaty, submissions due 5 June

Termination of the 1992 Investment Treaty and its 15-year grandfathering clause will implement the recommendation by the Joint Standing Committee on Trade (JSCOT) on 9 October 2019 following its inquiry into the Indonesia - Australia Comprehensive Economic Partnership (IA-CEPA).

AFTINET supported the termination of this bilateral investment treaty in our submission to the JSCOT review of IA-CEPA because it is an old agreement with no qualifications on investor rights at all, and should have been terminated as part of the new agreement. We suspect that it was not terminated because of lobbying from the mining industry, because mining companies have launched several cases against regulation of mining in Indonesia.

Australia and Indonesia have signed an Exchange of Letters agreeing to terminate (called the BIT Termination) the old agreement. **The BIT Termination was tabled in Parliament on May 14 and as per normal treaty processes will undergo consideration by the Joint Standing Committee on Treaties (JSCOT) before it can enter into force.**

Please note that because there is no legislation required, there will be no Parliamentary vote, which again shows one of the flaws in the process.

Once IA-CEPA enters into force on 5 July 2020 the Investment Chapter in IA-CEPA will apply, including Investor State Dispute Settlement (ISDS). Although there are more exclusions and protections for government regulation in this agreement than in some other agreements, it still has the basic right of corporations to sue governments which we opposed in our submission. For example, the exclusions cover health issues, but not environment or labour issues.

The text of the termination exchange of letters is [here](#).

For more information see the committee [website](#).

Submissions are due **5 June 2020** and can be sent to jsct@aph.gov.au

AFTINET will make a short submission supporting the termination of the old agreement, but maintaining our criticisms of ISDS, which we will circulate to members for comment before the deadline.

b) Parliamentary inquiry into the implications of the COVID-19 pandemic on Australia's foreign affairs, defence and trade, submissions due 30 June

The Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) has initiated this inquiry.

The [terms of reference](#) are broad and include issues of regional security, strategic alliances, human rights, quality and security of supply chains, and how to build a resilient national framework. See more information on the Committee [website](#).

Making submission and publicising them would be chance to promote the changes we want in trade policy amongst politicians and get some publicity for our views with media releases, op-eds et cetera.

Submissions are due on **June 30**, and can be sent to jscfadt@aph.gov.au.

AFTINET will make a short submission which we will circulate to members for comment before the deadline. We encourage others to make more detailed submissions about their areas of concern.

c) **DFAT's five-year Post-Implementation Review (PIR) of the China-Australia Free Trade Agreement (ChAFTA), submissions due 31 July**

This review is being conducted within five years of ChAFTA's entry into force on 20 December 2015 in accordance with the Office of Best Practice Regulation's [PIR Guidance Note](#), which explains the purpose, process and content requirements for a PIR.

This is a routine internal review by DFAT, so not as public as a parliamentary inquiry, but it is an opportunity to raise issues. It may get more submissions than usual from business and from others given the current US-China trade wars and [China's latest actions on Australia's barley and meat exports](#).

This is a chance to raise issues that we may be concerned about, including labour rights in Australia and China, which could be done through publicising our submissions with media releases, op-eds et cetera.

Terms of reference:

- the impacts of ChAFTA on businesses or other groups in the community; and
- whether ChAFTA has delivered a net benefit to the Australian community.
- how opportunities for Australian businesses may have changed under ChAFTA, such as the competitiveness of Australia's goods and services exports;
- whether the outcomes of ChAFTA have met business and other stakeholder expectations;
- whether there have been any unintended impacts of ChAFTA;
- the effect of ChAFTA on any administrative or regulatory costs on business.

Submissions are due 31 July and should be sent to chinafta@dfat.gov.au

AFTINET will make a short submission which we will circulate to members for comment before the deadline. We encourage others to make more detailed submissions about their areas of concern.

We will hold a zoom call early in July to discuss the issues. We may need to discuss the context of the US-China trade war, the growing tensions between Australia and China, and China's actions on Australian barley and meat exports. See the recent AFTINET website post on this [here](#).

AFTINET's policy is to support a fairer, rules-based multilateral trade system, and to oppose unilateral actions leading to trade wars which no-one can win. The escalation of all these tensions is the opposite of the international cooperation needed to deal with the pandemic. It is also clear that there is politicisation of this issue on the right in Australia that is reinforcing racist attacks on Australians of Chinese background, Chinese students and temporary workers in Australia.

4. India opposes rejoining RCEP over China concerns

Indian Prime Minister Narendra Modi [announced India's decision](#) to quit the Regional Comprehensive Economic Partnership grouping, which includes the 10 ASEAN nations, China, Japan, South Korea, Australia and New Zealand, in November 2019, and a [new deadline for India](#) to consider a new offer on market access expired on May 15, 2020.

Neither the Indian Commerce and Industries Ministry nor the Ministry of External Affairs would confirm that they had even replied to the RCEP letter by May 15.

A Ministry of External Affairs (MEA) senior official indicated that [global post Coronavirus concerns over China](#) had [strengthened India's opposition](#) to the grouping.

“If anything the COVID-19 experience, and the experience of countries that have been overly dependent on imports from China or one country would have reinforced and revalidated the decision to stay out of RCEP,” said Ashok Malik, policy advisor in the MEA.

The remaining 15 countries in the RCEP negotiations have stated their intention to sign the agreement in November 2020, with or without India. Now it is without India. The text has been negotiated in secret, and will not be released until after it is signed.

While past Indian comments on the RCEP have focused on the big trade deficit with China, and possible impacts on agriculture, the main message now is about the Modi government’s ‘Make in India’ policy, which is only moving to Level 2 out of 10 Levels. The RCEP is not compatible with ‘Make in India’.

India’s absence from the RCEP means there will be little new market access opportunities in the RCEP for Australian exporters, making it hard to justify Australia signing the agreement.

5. US disassociates itself from cooperative access to medicines in unanimous World Health resolution

The World Health Assembly unanimously adopted [the draft resolution on COVID-19](#) which endorsed the central role of the World Health Organisation in the global response to the pandemic, called for the greatest cooperation between member states in providing resources and sharing knowledge about treatments and vaccines for the new coronavirus, and established two investigations – one into the origins of the coronavirus and how it was transmitted to humans, and one into the response to the pandemic.

The draft resolution was proposed by the European Union, the African Union, Japan, India, the Russian Federation, Turkey, the UK, Canada, New Zealand, Australia and 33 other countries.

With both China and the USA voting in favour of the resolution, the WHA has cooled down the war of words between the two states which inhibits the urgent actions required to cope with the pandemic.

However, the USA [formally disassociated](#) itself from operative paragraphs 4, 8.2 and 9.8: These paragraphs call for “the universal, timely and equitable access to and fair distribution of all quality, safe, efficacious and affordable essential health technologies and products,” and for the for “voluntary pooling and licensing of patents to facilitate timely, equitable and affordable access to them, consistent with the provisions of relevant international treaties including the provisions of the TRIPS agreement and the flexibilities as confirmed by the Doha Declaration on the TRIPS Agreement and Public Health.”

The US commented that it disassociated itself from these paragraphs

"because the language in these operative paragraphs does not adequately capture all of the carefully negotiated, and balanced, language in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the Doha Declaration of 2001 and instead presents an unbalanced and incomplete picture of that language at a time where all actors need to come together to produce vaccines and other critical health products. The United States recognizes the importance of access to affordable, safe, high-quality, and effective health products and the critical role that intellectual property plays in incentivizing the development of new and improved health products. However, as currently drafted, paragraphs 4, 8.2 and 9.8 send the wrong message to innovators who will be essential to the solutions the whole world needs.

"Going forward, given the need for innovation incentives in the development of new health products, the U.S. Government encourages member states to engage with innovators to find mutually-acceptable solutions that achieve increased access to affordable, safe, effective, and high-quality COVID-19 health products. By taking an unbalanced and incomplete approach to the issue of access to medicines and TRIPS, this resolution misses an opportunity to galvanize the world, beyond bureaucracy and UN bodies, toward the critical goal of accelerating research, development, distribution and access to affordable, safe, quality and effective COVID-19-related products. We remain committed to working with all partners toward that goal".

So, despite the careful wording of the WHA resolution, the US is objecting to the concept of new medicines not being under patent, and to states issuing compulsory licences for the import, manufacture or sale of medicines to treat or prevent COVID-19. This is the voice of the US pharmaceutical industry saying that it wants to such medicines under patent – the incentive is profit, not affordable access to medicines for all.

On March 30, 2020, *Forbes* reported a [US\\$456 million government contract with Johnson & Johnson](#) to develop a vaccine, and a US\$150 million contract to develop a treatment for COVID-19.

On March 16, 2020, *The Guardian* reported [an attempt by the Trump administration](#) to get exclusive access to coronavirus vaccine project being developed in Germany.

TRIPS is the Trade-Related Intellectual Property Rights agreement of the World Trade Organisation, and the Doha reference is to the 2001 decision that allowed nations to manufacture or import drugs at low cost to treat address emergencies like the HIV pandemic. South Africa and Brazil had revolted against the use of TRIPS to impose high cost patented HIV treatments.

The WTO is yet to respond to [community calls for an urgent review of TRIPS](#) to make sure it is not an obstacle to measures needed in the current COVID-19 pandemic.

6. Health experts urge WHO to ensure global availability of COVID-19 medicines

Patents and other intellectual property rights could really slow down efforts to treat, contain and eradicate the new coronavirus, as was seen in the case of the A/H1N1 influenza pandemic in 2009, argues [Ellen 't Hoen](#), a specialist lawyer at Medicines Law & Policy, The Netherlands.

Pharmaceutical companies have monopoly patents on new medicines, which allow them to charge high prices for 20 years before cheaper versions of medicines become available. These monopolies have been entrenched in WTO trade agreements and have been extended in some regional and bilateral trade agreements.

Already leading pharmaceutical corporations Gilead Sciences and Roche have initially moved to profit at the expense of patients suffering from CoVID-19, and only decided to take a more pro-community approach when they came under criticism.

Gilead Sciences has a patent on remdesivir, which has been found to assist some patients with a severe case of COVID-19, and succeeded in extending this for seven years, before changing its mind. Remdesivir still remains protected by patents until 2029 or 2036 (depending on the claim) in many countries, which will bar competitors from supplying cheaper versions unless Gilead offers licenses.

Roche would not supply the formula for reagent used in its COVID-19 testing machines in Dutch hospitals, until the Dutch government persuaded it to do so.

In March 2020, Canada, Germany, Chile and Ecuador changed their patent laws to allow their governments to quickly grant a compulsory patent license when needed. A compulsory license gives competitors the right to produce, import and sell needed products.

[An urgent proposal by Costa Rica](#) in March 2020 to mandate the World Health Organisation to establish a voluntary global pooling mechanism for patents as well as rights to the data, knowledge and technologies useful in the prevention, detection and treatment of COVID-19 was incorporated into the [resolution](#) by the World Health Assembly at its virtual meeting on May 18-19, 2020.

If nations take up this idea, once medicines and vaccines become available, intellectual property rules will not be a barrier to making them accessible for all in need.

Costa Rica also asked that the [Global Observatory on Health R&D](#) create a database of R&D activity related to COVID-19, including estimates of the costs of clinical trials, and the subsidies provided by governments and charities.

[Leading Australian public health academics](#), Deborah Gleeson and David Legge, have urged Australia to be prepared to use flexibilities in WTO trade rules to over-ride patents, authorise import of low-cost medicines and to support the Costa Rica proposal. The Australian government has so far not made a public response to Costa Rica.

7. Opposition grows to global companies using ISDS to sue governments over action needed to save lives

Dr Patricia Ranald's article in [The Conversation](#) shows how legal firms are already advising global companies on how to use clauses in trade agreements which allow them to claim millions in compensation for government regulation during the pandemic which may harm their profits.

The [Trans National Institute has also predicted](#) that global corporations will use ISDS to claim billions in compensation because of government regulation to save lives during the pandemic.

The TNI study urges that governments should take urgent action to suspend all trade and investment treaty negotiations, terminate ISDS existing agreements and withdraw [consent](#) to ISDS, to [limit immediate exposure](#) to investor lawsuits.

Prominent US economist Professor Jeffrey Sachs and six other global figures have also called for [an immediate moratorium on all Investor-State Dispute Settlement claims](#) and a permanent restriction on all such claims related to government action to contain the COVID-19 pandemic.

The [United Nations Conference on Trade and Development](#) has also expressed concern at [possible Investor-State Dispute Settlement cases](#) being taken against government actions to cope with the Covid-19 pandemic, and acknowledged the calls for a moratorium.