BULLETIN March 2021

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1. Introduction

Dear Members,

On March 18, 2021, the Morrison Coalition government finally tabled the text of the 15-nation Regional Comprehensive Economic Partnership, triggering an enquiry by the Joint Standing Committee on Treaties (JSCOT). The RCEP fails the human rights test. AFTINET undertook a successful lobbying visit to Canberra on February 23-24, 2021, including a well-attended forum on the RCEP.

The intense struggle continues in the World Trade Organisation between rich nations who have signed up with several drug manufacturers for early access to any vaccine for their own populations, and poorer countries led by South Africa, India and others, trying to temporarily suspend WTO 20-year patent rules to enable universal, low-cost access to vaccines. Despite campaigns by AFTINET public health, unions and other community groups, Australia is still on the wrong side of this vital argument.

Underlying this growing COVID-19 vaccination debacle is the 20-year monopoly on medicines guaranteed by the World Trade Organisation TRIPS Agreement, which is the target of the temporary TRIPS Waiver being pushed by South Africa, India and others.

Some energy and mining companies continue to use Investor-State Dispute Settlement in the Energy Charter Treaty against government actions to implement the Paris Climate Agreement to reduce carbon emissions.

A more positive move is the EU, UK and US move towards a carbon intensity levy which would encourage lower emissions and apply to both imports and local production.

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Thanks and keep safe.

The AFTINET Team

2. RCEP JSCOT inquiry announced: submissions by April 16, implementing legislation after August

The Regional Comprehensive Economic Partnership Agreement (RCEP) between Australia, New Zealand, China, Japan, South Korea and the 10 ASEAN countries was tabled in parliament on March 18, 2021.

The Joint Standing Committee on Treaties (JSCOT) has called for submissions by **16 April 2021, and is expected to hold public hearings in April-May**.

Links to the treaty text and the National Interest Analysis and Regulatory Impact Statement are here.

The treaty must be tabled in Parliament for 20 sitting days, which expire in late August, and the JSCOT review will report after that. Then parliament will debate and vote on the implementing legislation on tariffs and rules of origin (see the NIA, p. 13).

AFTINET has argued that the RCEP fails the human rights test and will make a detailed submission which will be circulated to member organisations for comment.

3. More talk, No Action – Australia fails to support WTO changes for access to COVID vaccines

Australian government failure to support changes to World Trade Organisation monopoly rules on vaccines is negating its announcements about helping low-income countries to vaccinate their populations against COVID-19, according to Dr Deborah Gleeson.

Papua New Guinea's COVID-19 outbreak is a portent of the "catastrophic moral failure" the head of the World Health Organization warned of in January, due to poor countries being pushed to the back of the vaccine queue, Dr Gleeson argues.

Australians were shocked by the March 4, 2021, news that the Italian government, backed by the European Union, had blocked a shipment of 250,000 doses of Oxford-AstraZeneca COVID-19 vaccine to Australia. Dr Deborah Gleeson, explained in *The Conversation* Australia's role as both a contributor to this problem, and a victim of it in this case.

While the Italian blockage will hardly be noticed in Australia's COVID-19 vaccine rollout, the global distribution of COVID-19 vaccines has so far been extremely unfair. By November 2020, governments had negotiated pre-purchase agreements for almost 7.5 billion doses, 51% of which had been reserved by wealthy countries representing only 14% of the global population. While many rich countries will have vaccinated their populations by the end of 2021, the pandemic will continue to spread through the majority of the world's populations until 2024, with the risk of new variants that are resistant to existing vaccines.

The COVID-19 vaccines - overwhelmingly developed through public funding - are scarce because of WTO rules for 20-year monopolies on the intellectual property and other types of knowledge, data and information needed for making vaccines. While there is manufacturing capacity available globally to ramp up vaccine production, the exclusive rights to make and sell the vaccines are held by a small number of companies.

Two important mechanisms have been proposed to solve this problem of artificial vaccine scarcity and to enable production of COVID-19 medical products to be rapidly scaled up. Neither has received Australia's support to date.

India and South Africa put a proposal to the WTO in October 2020 that certain intellectual property rights in the TRIPS agreement be suspended for COVID-19 medical products during the pandemic. This proposal, known as the "TRIPS waiver", is supported by many developing countries, but opposed by the EU, US and other wealthy countries, including Australia.

The World Health Organization has also set up a mechanism for sharing intellectual property, knowledge and data for COVID-19 products, known as the COVID-19 Technology Access Pool (C-TAP).

At the WTO meeting held on March 10-11, 2021, Australia and six other rich countries continued to block the South African proposal for a temporary waiver to some WTO rules supported by 100 developing countries.

A letter from 18 Australian national organisations on March 10, including AFTINET, the ACTU, the Australian Council For International Development, the Salvation Army and the Public Health Association called on the Australian government to support the waiver proposal. There have been a series of social media campaigns to pressure the Australian and other governments which are blocking the waiver, and the waiver proposal has been favourably reported in mainstream media, including the *Sydney Morning Herald*, *the Guardian* and the ABC.

Instead of supporting the waiver, Australia put up an alternative proposal on March 11 for the WTO to assist low-income countries to use existing rules to negotiate with pharmaceutical companies. AFTINET's media release criticised the proposal for putting the profits of those companies above the lives of billions of people in low-income countries. The temporary patent waiver is a quicker and fairer way of ensuring access to vaccines.

Meanwhile Pope Francis, who has an ambassador to the WTO, has come out is support of the suspension. On February 23, 2021, Archbishop Ivan Jurkovič, Permanent Observer of the Holy See to the WTO, told the TRIPS Council:

"In his Urbiet Orbi Christmas message, Pope Francis stated that vaccines, if they are 'to illuminate and bring hope to all, need to be available to all... especially for the most vulnerable and needy of all regions of the planet'. The decision of granting a waiver from the implementation, application and enforcement of Sections 1, 4, 5, and 7 of Part II of the TRIPS Agreement in relation to prevention, containment or treatment of COVID-19 would be a strong signal demonstrating real commitment and engagement and thus moving from declaration to action in favour of the entire human family".

The global advisory bodies for workers and civil society (L20 and C20) to the Group of 20 rich countries has also urged it to call on the WTO to support the suspension.

On February 20, their joint statement said, "Patent ownerships on the vaccines platforms and IP restrictions on the novel technologies such as mRNA vaccines and monoclonal antibodies are already limiting manufacturing and price flexibility, in the face of 93 billions of public investment in R&D during 2020.

"Confronted with a global situation of around 110 million confirmed cases and a toll of over 2.4 million deaths, challenged by the emergence of new threatening variants of SARS-CoV-2, the G20 leaders have the moral and political obligation **to take every measure that can put an end to this pandemic,"** the L20 and C20 said.

The L20 unites trade unions from G20 countries and Global Unions, including the ACTU.

The WTO waiver proposal is now set to be discussed again at a meeting in mid-April.

4. Big Pharma plans price hikes for COVID-19 vaccines

With significant problems emerging in global distribution of COVID-19 vaccines, the issue of vaccine prices is now emerging as another major problem for a fair, effective and rapid global vaccination program.

The World Trade Organisation rules give 20-year monopoly patents for medicines, which empowers a few global corporations to determine both supply and price, but these rules were never designed for a global pandemic.

According to a March 18, 2021, *Intercept* report, the Pfizer company is already reporting massive profits from its COVID-19 business, but at the same time arguing that the current prices are really not "commercial" and will go up significantly when the world moves from a "pandemic" to "endemic" conditions for the coronavirus. According to the *Intercept* report, this could be on July 1 this year!

Frank d'Amelio, the Pfizer Chief Finance Officer spoke at the Barclays Global Healthcare Conference on March 11, 2021, first about how good business will be in 2021, and then about the shift in pricing policy.

"In terms of the guidance that we provided for 2021, … the $15 billion in COVID revenues, revenues are growing operationally 41%. … our business without COVID, the top line next year is growing operationally 6%. [Earnings per share] is growing 11%. ...

"We believe it's becoming increasingly likely that an annual revaccination is going to take place …. for the foreseeable future. Now in terms of … current demand and current pricing … it's really been driven by kind of the pandemic state that we've been in and the needs of governments to really secure doses from the various vaccine suppliers. … what I believe is as we move … from a pandemic situation to an endemic situation, normal market forces, normal market conditions will start to kick in. And factors like efficacy, booster ability, clinical utility will basically become very important, and we view that as, quite frankly, a significant opportunity for our vaccine from a demand perspective, from a pricing perspective, given the clinical profile of our vaccine".

According to the *Intercept* report, Pfizer, in its latest investor disclosures, revealed that it received advance payments for its vaccine totaling US$957 million as of December 31. In the US, the company has agreed to a price of US$39 (A$50) per patient based on a two-dose vaccination. In the European Union, the company charges a higher rate, nearly US$64 (A$83) per patient. These figures, however, could increase. Pfizer's pneumococcal vaccine, Prevnar 13, for instance, costs US$200 (A$259) per dose on the private market.

5. EU urged to terminate the Energy Charter Treaty as more companies use ISDS against climate action

After three rounds of re-negotiation of the 1994 Energy Charter Treaty in 2020, a leading policy writer at Colombia University, *Martin Dietrich Brauch*, argues that the European Union member states should withdraw collectively from the Treaty.

He argues that they should agree not to use its Investor-State Dispute Settlement (ISDS) provisions among themselves, and if possible, to terminate the Treaty entirely, because of changes to EU law and the treaty's massive blockage to rapid reduction of carbon emissions.

The urgency was underlined on January 20, 2021, when the German electricity generation company RWE filed a request for arbitration against the Netherlands. This was based on the Dutch government's decision to phase out coal for electricity generation by 2030. RWE wants A$2.2 billion in compensation. This use of the ECT ISDS clause marks the first such case against the Netherlands. In 2019, another German power company, Uniper, threatened an ISDS case over the same law.

The treaty was designed in 1994, before emissions reduction policies, to regulate energy investments from Western Europe and other rich countries into the post-cold war states of Central and Eastern Europe and Asia. It included ISDS to enable international investors to sue governments.

There have been 135 ISDS cases launched under the Treaty, and 80 of them are between EU companies and states, including some against government moves to reduce carbon emissions. But European Law now outlaws ISDS cases between European Union member states, and it is no longer part of EU trade and investment treaties. But the Treaty's protection of fossil fuel investments makes it a massive problem for the Paris Agreement on Climate Change.

Worse, there have been determined but quiet moves to expand the Energy Charter Treaty into Africa and other regions outside Europe.

European civil society is pressing for the European Commission to get out of the Energy Charter Treaty, and the European Parliament introduced in the European Climate Law a mandate for the Union to "end the protection of investments in fossil fuels in the context of the modernization of the Energy Charter Treaty."

Changes to the Treaty require unanimous agreement, and it is now clear that the 2020 negotiations could not achieve removal or great restriction on the ISDS provisions. Even if the EU states withdraw, they will be subject to ISDS claims from continuing Treaty state investors for the next 20 years.

Brauch concludes that the best goal now is to "terminate" the Treaty, but that requires the unlikely "consent of all the parties after consultation with the other contracting states." The EU's next-best strategy would be to withdraw from the Treaty and neutralise the 20-year clause through an agreement among themselves, which non-EU withdrawing states should be welcome to join.

He argues that the great advantage of termination would be that negotiating partners could start with a clean slate, asking first the fundamental question: how can international law help our countries to phase out fossil fuel investments, ramp up low-carbon energy investment, and promote a just transition, in line with the Paris Agreement and the Sustainable Development Goal target to "ensure universal access to affordable, reliable, and modern energy services" by 2030.

The substantive provisions of a new model agreement are in the model Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation, and the Framework Convention on Investment and Sustainable Development, and with background papers here and here .

“Super-protections” for global corporations – New Dutch study of ISDS

The RWE case provoked a Dutch institute to compare investor rights under Dutch and EU law with investor rights under the 1994 ECT and the recent Canada – Europe Comprehensive Economic and Trade Agreement (CETA).

The Netherlands-based Centre for Research on Multinational Corporations responded by commissioning a study of how investment treaties and investor-state dispute settlement (ISDS) grant foreign investors greater rights than Dutch and EU law.

The study was conducted by the University of Amsterdam International Law Clinic, focused on four important elements of investment protection and compared the rights of companies under the ECT, CETA, Dutch civil and administrative law and the EU non-contractual liability regime.

During the CETA parliamentary debate in the first half of 2020, Ms Sigrid Kaag, the Dutch Minister of Foreign Trade, argued that CETA and the Energy Charter Treaty were equivalent to Dutch legal protection for domestic investors.

The most important conclusion from the study is that companies under investment treaties and ISDS have a better chance of receiving (higher) compensation than under Dutch and EU law.

The study found that the structure of arbitration proceedings under the ECT and CETA provides arbitrators with financial incentives to rule in favour of foreign investors, while the lack of transparency safeguards under the ECT prevent the general public and civil society from critically evaluating arbitration cases;

Foreign investors do not have to challenge a measure in an administrative court first, but can directly gain monetary compensation for having to comply with a disputed law or regulation.

The open-ended wording and expansive interpretations of substantive investment protections in ISDS constrain the public interest regulation in a way Dutch and EU law do not. Although CETA qualifies certain substantive ISDS standards, it still creates more legal uncertainty and restricts the regulatory space more than Dutch or EU law.

6. UK pressures Australia for carbon reductions in FTA talks as EU and US ponder carbon levies

Both new US President Joe Biden and UK Prime Minister Boris Johnson are headlining their determination to reduce net carbon emissions to zero by 2050. But Australia’s Morrison government is declaring that it will fight any proposal to impose border carbon levies, including in the current UK-Australia and European Union -Australia Free Trade Agreement negotiations.

The proposed EU carbon intensity levies would apply to all products, not only imported products, that do not meet a standard of reduced carbon intensity in their production. The lead negotiator for the EU-Australia FTA talks, Mr Valdis Dombrovskis, said in October 2020, that the proposed tax would have to be WTO compliant, meaning EU producers would be subject to the same carbon limits as those from Australia to "prevent discrimination between foreign and domestic products".

The Morrison government argues that carbon tariffs are not aimed at combating climate change, but rather at economic objectives including protecting local industries such as British and European meat, cheese and wine.

Trade Minister Dan Tehan has previously labelled carbon tariffs as “a new form of protectionism”, and now declares that Australia is “dead against” carbon tariffs.

However, Johnson is prioritising emission cuts at the June G7 Summit, to which Prime Minister Scott Morrison has been invited. The showdown will certainly come when Johnson hosts the United Nations climate change conference in Glasgow in November.

Johnson is reported to have directed British government departments to come up with options for carbon border levies ahead of several major international summits, which he believes could act as a global emissions trading scheme as the world strives to hit net-zero emissions by 2050.

In the EU-UK Brexit agreement, signed in late December, both parties reaffirmed "its ambition of achieving economy-wide climate neutrality by 2050". It was the first trade agreement ever to feature climate targets in this way. The deal's fine print also dictated that not taking sufficient action to reach net-zero would be in direct breach of the trade agreement.

The *Sydney Morning Herald* reports that Britain wants to use its FTA with Australia to promote trade in low-carbon goods and services, supporting research and development collaboration and maintaining both parties' right to regulate in pursuit of decarbonisation, as well as reaffirming their respective commitments to the United Nations Framework Convention on Climate Change and the Paris Agreement.

President Biden could also impose climate tariffs, with his "Buy American" economic plan endorsing a "carbon adjustment fee" at the border. Biden will host a climate leaders' summit on Earth Day, April 22, when he is likely to outline his carbon-reduction commitments under the Paris agreement. It is not yet decided if this meeting will be online or in-person, but Morrison will be there.

Labor Opposition trade spokeswoman Madeleine King said Australia's major trading partners were moving towards establishing climate border levies "aimed at countries like Australia that have weak climate change policies. "This government has its head in the sand about carbon borders. Our exporters, with the jobs they create, will pay the price," Ms King said.

7. WTO secret plurilateral negotiating texts leaked

World Trade Organisation secret documents on the plurilateral negotiations on e-commerce, investment facilitation and services domestic regulation have been leaked to a civil society group website. Unpublished texts on the multilateral fisheries negotiations are also available at https://bilaterals.org/?-other-

Normal multilateral WTO negotiations involve all 164 Member States and negotiating texts are published on the WTO website as negotiations advance. This is an important principle of transparency in the WTO.

However, in recent years there have been several "coalitions of the willing" negotiations in situations where the majority of developing countries has refused to negotiate on further liberalisation proposals from rich countries. In these "plurilateral" negotiations, mostly involving rich countries, the texts have been kept secret. This is a reduction in both democratic participation and transparency in the WTO.

Australia has led the plurilateral processes to further liberalise trade in services and in e-commerce.

An analysis of the leaked plurilateral ecommerce text by UN Conference on Trade and Development economist Dr Rashmi Banga for the economic impacts for low-income countries is available at https://bilaterals.org/?wto-plurilateral-ecommerce-draft.