BULLETIN April 2021

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1. Introduction

Dear Members,

On April 16, 2021, AFTINET sent its submission to the parliamentary Joint Standing Committee on Treaties inquiry into the 15-nation Regional Comprehensive Economic Partnership. AFTINET argued that the RCEP fails the human rights test and does not relate to the COVId-19 pandemic world.

The COVID-19 pandemic is still dominating the trade policy debate.

The intense struggle continues in the World Trade Organisation over the proposal by South Africa, India and others, 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. Meanwhile the unequal distribution of vaccines world-wide continues to demonstrate the need for a radical change.

Investor-State Dispute Settlement provisions in Pakistan's many bilateral investment treaties, including with Australia, are now targeted for removal. Meanwhile, legal firms are urging petroleum companies investing in Mexico to prepare ISDS claims over its new regulations of the energy sector.

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Thanks and keep safe.

The AFTINET Team

2. RCEP fails the human rights test: AFTINET submission to JSCOT review of RCEP

AFTINET lodged its submission on the Regional Comprehensive Economic Partnership with the Australian parliament's Joint Standing Committee on Treaties on April 16, 2021.

The RCEP includes Australia, New Zealand, China, Japan, South Korea and the 10 ASEAN countries.

Despite gross violation of human rights in Myanmar, China and the Philippines, the RCEP has no commitments to human rights, labour rights or environmental sustainability.

The RCEP provides no increased market access for Australian goods exports, as Australia already has free trade agreements with all RCEP countries, and there has been no independent assessment of its costs and benefits.

The RCEP would also restrict government regulation of essential services like aged care and state regulation of carbon emissions, and restricts local industry development needed to improve local capability for producing essential products and assisting the recovery from the pandemic. The government should not ratify the RCEP, but should seek renegotiation to address its failures.

JSCOT is expected to report to the parliament about the RCEP in late August, 2021.

3. Inquiry into the expansion of the CPTPP submissions extended until April 30

The Joint Standing Committee on Foreign Affairs, Defence and Trade is conducting an inquiry into expansion of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which includes Australia, NZ, Japan, Chile, Peru, Mexico, Canada, Malaysia, Singapore, Brunei and Vietnam. The withdrawal of the US in January 2017 killed the original 12-nation TPP. But the remaining 11 rebadged the deal and suspended some of its most controversial clauses on medicine monopolies (but not ISDS). The text was tabled on March 26, 2018, followed by a JSCOT Inquiry, a Senate Inquiry and a Senate legislation committee inquiry.

Of the 11 signatories, Australia and six other countries have ratified the deal, which came into force on December 30, 2018, but four have not ratified. The Malaysian government is still assessing its impact on industry development, and may not ratify. Chile, Peru and Brunei have not ratified. See AFTINET submission summary here, op-ed on ISDS here and assessment of the deal here.

This inquiry is an opportunity to educate the Committee members and others about the pitfalls of the CPTPP, especially if the US re-joins, since the expansion of biologic medicine monopolies was suspended, but not deleted, after the US left, and could be resurrected. Other possible candidates are the UK (which also wants longer medicine monopolies), Thailand, the Philippines, Indonesia and Taiwan.

AFTINET will make a short submission summarising the problems with the CPTPP (ISDS, deregulation of services, more vulnerable temporary workers, restrictions on industry policy and government procurement, restrictions on regulation of product standards and labelling etc).

4. ACTU condemns Morrison Government over RCEP trade agreement with Myanmar military regime

The Australian Council of Trade Unions condemned the Federal Government at a parliamentary inquiry hearing into Myanmar on April 13, 2021, for pressing ahead with ratifying the Regional Comprehensive Economic Partnership (RCEP) trade agreement which includes trade with Myanmar.

Australia's inaction against the military junta is stark in comparison to other developed democracies, including the USA who recently suspended its 2013 Trade and Investment Framework Agreement with Myanmar.

"Workers and trade unions are being targeted by the military junta – workers have been killed, arrested and intimidated for participating in peaceful protests and strikes; sixteen unions and workers' organisations have been declared illegal; and many union leaders are being hunted by the military and have been forced into hiding. The Morrison Government should be introducing sanctions and suspending ties with this brutal dictatorship – not deepening ties through a new trade agreement," said ACTU President Michele O'Neil.

In addition to not ratifying RCEP, the ACTU called on the Morrison Government to immediately implement sanctions against the Myanmar military, its leaders, its business interests, and business partners.

5. Pfizer exposed for unreasonable contract terms for COVID-19 vaccine in low income countries

The US pharmaceutical giant Pfizer has succeeded in imposing indemnity clauses in its vaccine contract with South Africa, but on exposure was forced to drop demands for sovereign assets to be sold to pay for any claims for compensation for adverse effects.

South Africa has a variant of the novel coronavirus which is resistant to the Oxford-Astrazeneca vaccine but still vulnerable to the Pfizer-BioNTech vaccine.

On April 14, 2021, the South African Health Minister Zweli Mkhize told his parliament's health committee that the demand for sovereign asset collateral was too risky. "As the government, we found ourselves in a precarious position of having to choose between saving our citizens' lives and risking putting the country's assets into private companies' hands," the Minister said.

This dispute delayed the provision of the urgently needed vaccines. South Africa will now pay US$10 per dose for thirty million doses of Pfizer vaccine, starting with the arrival of two million doses in May. The government had to make non-refundable down payments in its deals with Pfizer and Johnson & Johnson. "This is another onerous term that we had to concede as manufacturers were not prepared for it to be removed," Health Minister Mkhize wrote.

Unredacted draft contracts between Pfizer and the Dominican Republic, Albania and Peru show that the company sought to be indemnified against problems at any step of the supply chain — including packaging, manufacturing and storage. Experts told the South African *Mail & Guardian's* Bureau of Investigative Journalism that it was "unreasonable" to require governments to pick up the bill for any negligence by Pfizer.

Pfizer responded by saying that they have indemnity in the US legal system and they want that everywhere.

These examples show the urgent need to waive WTO rules during the pandemic so access to vaccines is not controlled by pharmaceutical companies.

6. Big Pharma influence exposed as civil society backs WTO rule changes for more equitable access to vaccines

The Corporate Europe Observatory has uncovered through a Freedom of Information request the pharmaceutical industry document outlining their position on COVID-19 vaccines to the European Commission in December 2020.

This International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) document said in response to the proposal by South Africa and India to suspend World Trade Organisation intellectual property rights during the pandemic: "This proposal represents an extreme measure for an unidentified problem." Even in December 2020 that was blatantly wrong. Today this statement reads as a denial of reality, and is going to cost millions of lives.

The European Union is a major blocker of the South African and Indian proposal at the WTO, at the cost of the common good.

Under the World Trade Organisation's 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights, patents provide a 20-year monopoly to pharmaceutical companies, allowing them to control the price and production of medicines and most important today, the vaccines for the COVID-19 pandemic.

Two hundred and fifty global, regional and national civil society organisations have delivered the strongest statement yet in support of the waiver of these intellectual property rights during the COVID-19 pandemic to World Trade Organisation Director General Dr Ngozi Okonjo-Iweala on 13 April. Signatories from Australia included the Australian Council of Trade Unions, the Public Health Association of Australia, Australian Council for International Development, and the Australian Fair Trade and Investment Network.

The international signatories include Amnesty International, Medecins Sans Frontieres (MSF), and the Third World Network. The letter challenged the Director-General to listen to the over 100 developing countries supporting the waiver. It asked her to reject the "third way" approach, which relies on existing exemptions in the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. This "third way" is being supported by Australia, Brazil, Canada, Chile, Colombia, Ecuador, New Zealand, Norway and Turkey.

Separately, over 170 former heads of state and government as well as Nobel Laureates on 14 April urged US President Joseph Biden to support the proposed TRIPS waiver.

At the more than five-hour virtual round table meeting chaired by Dr Ngozi on 14 April, trade ministers from India and South Africa as well as the World Health Organization director-general called for the temporary TRIPS waiver to ramp up production of diagnostics, therapeutics and vaccines across countries to prevent and treat the COVID-19 pandemic.

Dr Tedros said that "more than 800 million vaccine doses have been administered globally, but over 83% have gone to high-income or upper middle-income countries, while low-income countries have received just 0.2%."

There was no decision taken at the meeting. The next scheduled formal meeting of the WTO TRIPS Council is June 8-9, 2021, but there are likely to be further discussions before then.

Australian health sector urges Morrison government to act

The Public Health Association of Australia (PHAA) and Médecins Sans Frontières (MSF) are **calling on all healthcare and public health professionals and academics** to support the removal of legal and technical barriers to COVID-19 medical tools, including support for the temporary TRIPS waiver at the WTO. This will expand the production and distribution of vaccines, treatments, and other tools to help fight COVID-19. See the link to a webinar on the letter here.

They are gathering signatures in the sector to present an Open Letter to the Morrison government on April 28, 2021, just prior to another WTO meeting which will consider the proposed TRIPS waiver.

Democrats pressure Biden to support WTO rule change for equitable vaccine access

The new US Biden Administration has come under pressure from almost 100 Congressional Democrats to support the suspension of World Trade Organisation rules on intellectual property during the COVID-19 pandemic.

The major pharmaceutical companies who are controlling the COVID-19 vaccination rollout are resolutely opposing the suspension of current rules at the WTO and at the White House.

They say the IP suspension would undermine the global response to the pandemic and not have the intended effect of speeding up production. But the Congressional Democrats accuse the drug companies of prioritizing profits over saving lives.

So far an appeal from US lawmakers and over 400 health, labor, religious and other groups has not persuaded Biden to change the US position against the IP suspension. Backers of the proposed suspension believe a US switch would be a game changer.

Biden' has pledged US$4 billion in contributions to COVAX, the international alliance to distribute vaccines to 92 low- and middle-income countries. However, COVAX is based on subsidising poorer countries, rather than empowering them. COVAX is being outbid in purchase agreements by rich country governments, according to the new WTO Director General, Dr Ngozi.

Call for a new pandemic treaty

23 world leaders including the prime ministers, presidents and chancellor of Fiji, Portugal, Romania, United Kingdom, Rwanda, Kenya, France, Germany, Greece, South Korea, Chile, Costa Rica, Albania, South Africa, Trinidad and Tobago, Netherlands, Tunisia, Senegal, Spain, Norway, Serbia, Indonesia and Ukraine have called for a new WHO pandemic treaty. They are supported by the President of the European Council and the Director General of the World Health Organisation.

Their statement says: "The Covid-19 pandemic has been a stark and painful reminder that nobody is safe until everyone is safe. We are, therefore, committed to ensuring universal and equitable access to safe, efficacious and affordable vaccines, medicines and diagnostics for this and future pandemics. …

"To that end, we believe that nations should work together towards a new international treaty for pandemic preparedness and response. Such a renewed collective commitment would be a milestone in stepping up pandemic preparedness at the highest political level. It would be rooted in the constitution of the World Health Organisation, drawing in other relevant organisations key to this endeavour, in support of the principle of health for all".

Neither Australia nor the USA are among those calling for the new treaty. Australia continues to oppose the pandemic-related suspension of IP rules in the WTO.

7. COVAX vaccine program for low-income countries is failing – how to save it

Dr Deborah Gleeson explains in a new article in *The Conversation* why the COVAX plan for a fair global vaccine distribution is in trouble, and what can be done to recover it.

COVAX aims to vaccinate 20 per cent of the populations of 92 low-income countries by the end of 2021. By April 11, it had shipped only 38.5 million doses, but the target was 100 million doses by the end of March.

Overall, only 0.2 per cent of the 700 million vaccine doses administered globally have been given in low-income countries, whereas 87 per cent have been received by people in high-income and upper middle-income countries. By April 4, only one in 500 people in low-income countries have so far received a vaccine.

What is needed most is a dramatic boost the global supply of vaccines to ensure there's enough to go around.

This first requirement is to remove the intellectual property protections that allow vaccine developers to hold exclusive rights to control who can make and sell them. Australia and other rich countries have to stop blocking this proposal by India and South Africa at the World Trade Organisation.

Secondly, governments need to support mechanisms for sharing intellectual property, such as the WHO's COVID-19 Technology Access Pool (C-TAP).

Finally, governments need to invest money to build up manufacturing capacities in these low- and middle-income countries and facilitating technology transfers from companies based in high-income countries.

8. Pakistan prepares to eliminate ISDS from its Bilateral Investment Treaties, Mexico faces renewed ISDS threat

Pakistan's Board of Investment has prepared a strategy to withdraw from all inhibiting clauses in the 53 Bilateral Investment Treaties the country has with 48 countries, including Australia.

The major concerns are provisions related to investor-state dispute settlement (ISDS). These shrink the policy space for the government to adopt measures in the public interest.

So far, seven ISDS cases have been lodged by foreign investors at the International Centre for Settlement of Investment Disputes (ICSID) and three in the Permanent Court of Arbitration (PCA), exposing Pakistan to claims of billions of dollars in compensation.

Just one case, by the Australian subsidiary of Tethyan Corporation, was awarded US$5.8 billion in compensation in 2019. Pakistan is disputing this award.

Pakistan decided to review the entire BIT situation in 2013, and to develop a new model BIT.

The Board of Investment has now recommended the following strategy to the government:

- 16 un-ratified BITs will not be ratified;
- 23 ratified BITS which have completed their initial period of 10, 15 or 20 years will be terminated with six months or one year's notice and the contracting States asked to terminate the period for residual ISDS claims;
- if a contracting State does not accept, then the government will apply the option to terminate the BIT;
- all 9 contracting States whose BITs are not mature for termination will be asked to prematurely terminate their BITs as well as the right to residual claims.
- all the non-ratified/ratified treaty partners will be offered the new BIT template for re-negotiation after it is approved by the Cabinet.

The Cabinet is yet to consider and approve this strategy.

ISDS cases lined up against Mexico's energy reform laws

US-based global law firm Morgan Lewis & Bockius LLP is advising US investors to prepare Investor-State Dispute Settlement (ISDS) claims against Mexico over its Power Industry Law and its proposed Hydrocarbons Reform Bill which enable Mexico to take action against climate change.

The Power Industry Law deals with renewable energy and was adopted on March 10, 2021, while the Hydrocarbons Reform Bill is expected to pass through the Congress without resistance in the coming weeks.

The Power Industry Law strengthens the state-owned Comisión Federal de Electricidad (CFE) in relation to priority for sale of electricity to the national grid, embracing dispatch of renewable energy by private companies. The law is suspended due to a temporary injunction.

Under the proposed Hydrocarbons Reform Bill, the Mexican government would be able to regulate distribution, storage, import and export of fuels and oil, and allow the state-owned petroleum company PEMEX to take over the facilities of companies that lose their permits for reasons of national security, energy security, or national economic reasons.

While the legal advice explains that foreign investors in the Mexico petroleum sector can seek injunctions in the Mexican courts, the advice is to ignore the national courts and to use the international tribunals available under 29 Bilateral Investment Treaties (BITs) and two regional trade agreements.

The BITs allow investors (individuals or legal entities) from countries such as Spain, Italy, Denmark, United Kingdom, Korea, France, Germany, Netherlands, Switzerland, and China to bring compensation claims against the Mexican government.

US investors can also bring compensation claims under the United States-Mexico-Canada Agreement (USMCA) that entered into force on July 1, 2020, and replaced the North American Free Trade Agreement (NAFTA). This agreement banned ISDS cases between the US and Canada, but, following lobbying from energy companies, allows them for energy and some other industries in Mexico.

Mexico is also party to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that protects investors from Australia, Canada, Japan, New Zealand, Singapore, and Vietnam.

ISDS claims are heard by panels of investment lawyers, have a strong bias in favour of the investor, and have awarded billion-dollar compensations for dubious calculations of foregone profits. The government of Mexican President Andres Manuel Lopez Obrador may soon face a critical choice about whether to remove ISDS from all these agreements.