Level 7, 321 Pitt Street
Sydney NSW 2000
Australia
Ph +61 2 9699 3686

AFTINET Submission to the Joint Standing Committee on Treaties Inquiry into the Interim Australia-India Comprehensive Economic Partnership (AICEPA)

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Contact Dr Patricia Ranald
campaign@aftinet.org.au

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Introduction

AFTINET is a national network of 60 community organisations and many more individuals supporting fair regulation of trade consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair-trading relationships with all countries, based on the principles of human rights, labour rights and environmental sustainability. We recognise the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent and democratically accountable framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental sustainability.

In general, AFTINET advocates that non-discriminatory multilateral rules are better than preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make a submission to this inquiry on the interim Australia-India Comprehensive Economic Partnership Agreement (IACEPA). This submission deals with the transparency and democratic accountability of the negotiation process, and the areas of content of the agreement which are of concern. We also make specific recommendations about the consultation process for the proposed future more comprehensive negotiations, and what substantive issues should and should not be included, based on AFTINET principles outlined above and the new government's policy platform.

History of the negotiations, lack of consultation and transparency led to a hasty interim agreement

The AICECA negotiations began in 2012, were accelerated from 2014, and were put on hold in August 2016.

In June 2020, following the announcement of the Quad security arrangement between the US, India, Japan and Australia, Indian and Australian leaders announced a Comprehensive Strategic Partnership of Cooperation[1] on defence, security, maritime, economic, education, tourism and other issues. These cooperation arrangements did not include a legally enforceable trade agreement.

Further trade talks were held and the text of an interim legally binding trade agreement was signed and publicly released on April 2, 2022, shortly before the election was announced.[2]

[1] Department of Foreign Affairs and Trade (2021) Australia India Joint Statement on the Comprehensive Strategic Partnership between the Republic of India and Australia, https://www.dfat.gov.au/geo/india/joint-statement-comprehensive-strategic-partnership-between-republic-india-and-australia.

[2] Department of Foreign Affairs and Trade (2021) Text of the Australia-India Comprehensive Economic Partnership, https://www.dfat.gov.au/trade/agreements/negotiations/aifta/australia-india-ecta-official-text. All subsequent references to chapters and articles in the AICEPA refer to this text.

The decision to have an interim agreement and the completion of the negotiations in the relatively short time period of 10 months appears to have been driven by security considerations and Australia's election schedule. The negotiations were conducted in haste and the agreement only includes 14 of a possible 20 – 30 chapters, mostly dealing with tariff reductions and issues related to trade in goods. Within the 14 chapters there are many issues left open.

AFTINET believes that the process for the interim agreement negotiated in haste was not acceptable. There was no public consultation with civil society organisations about the negotiations, the text was not released until after it was signed, and there has been no independent evaluation of the costs and benefits of the agreement.

The text of the agreement proposes that a more comprehensive agreement be negotiated after the interim agreement. The previous government sought to curtail the time frame for the JSCOT inquiry and complete the process before the election. The negotiations for the comprehensive agreement were originally specified in the text to start 75 days after the signing of the agreement, which would have been in mid-June. This plan to curtail public and parliamentary scrutiny was abandoned after objections from civil society groups and Opposition parties.

We understand that the new government now plans to resume these negotiations after the JSCOT inquiry and parliamentary process for the interim agreement has been completed. The commitment to comprehensive negotiations in Chapter 14 Article 14.5, although listing some particular areas, makes it clear that such negotiations will proceed on a without prejudice basis and may include other issues:

> *The Parties hereby establish a Negotiation Subcommittee which shall be composed of government representatives of the Parties. Within 75 days after the date of signature of this Agreement, the Negotiation Subcommittee shall commence negotiations on amendments to this Agreement, on a without prejudice basis, on areas including inter alia market access for goods and services, a complete Product Specific Rules Schedule, a Digital Trade Chapter, and a Government Procurement Chapter, to transform this Agreement into a Comprehensive Economic Cooperation Agreement. Following such negotiations, the Parties may make amendments to this Agreement in accordance with Article 14.3 (Amendments), to transform this Agreement into a Comprehensive Economic Cooperation Agreement.*

This means that the government can seek to amend provisions in the interim agreement as recommended in this submission.

Summary and recommendations

The interim IACEPA was negotiated in haste and without consultation with civil society organisations under the previous government. Some of its provisions are not consistent with the current government's policy. The interim agreement contains only 14 chapters out of a possible 20 or 30 chapters and commits to negotiations for a comprehensive agreement which would include further chapters.

This submission recommends that those provisions in the interim agreement on industry policy, trade in services and temporary movement of natural people and which are inconsistent with government policy be removed before ratification.

Failing this, the government should ensure that such provisions are removed during the comprehensive negotiations. This submission makes detailed recommendations for a more transparent and democratically accountable process to be followed for the negotiation of the comprehensive agreement, consistent with the current government's policy.

Further the government should ensure that the framework of the agreement does not inhibit government policies of support for active local industry policies and the development of renewable energy industries, including government procurement policies. Other provisions like ISDS and the removal of labour market testing for temporary workers, which are not in the interim agreement and which are contrary to current government policy should be excluded from the comprehensive agreement. Government should also ensure that, consistent with its policies, the agreement includes enforceable international labour rights and environmental standards.

Summary of Recommendations

1. **Before negotiations for a comprehensive agreement commence, the government should table in Parliament the rationale for negotiations and the negotiating objectives for the agreement, based on the commitments in the government's policy platform. These should include not only tariff reductions and other market access provisions but also legally enforceable commitments to International Labour Organisation standards on labour rights, and to International environment agreement standards, including commitments to reduce carbon emissions. They should also make clear what the government's policy opposes, like Investor-- State Dispute Settlement, and removal of labour market testing for temporary workers.**
2. **There should be regular public consultation during negotiations, including submissions from and meetings with all stakeholders, release of negotiating texts, and regular reports to JSCOT and parliament.**
3. **The Australian government should follow the example of WTO multilateral negotiations and the European Union and should release the final text of agreements for public and parliamentary discussion before they are authorised for signing by Cabinet.**
4. **After the text is completed and released, but before it is signed, comprehensive independent studies of the likely economic, regional, health, gender and environmental impacts of the agreement should be undertaken and made public for debate and review by JSCOT.**
5. **Parliament should debate and vote on the whole agreement, not just the enabling legislation**
6. **The government should review the structure of the interim agreement and ensure that the framework of any comprehensive agreement has the flexibility to enable the government's policies for active industry development, including the development of local renewable energy industries and local procurement policies.**
7. **The government should consult with state governments and carefully review whether all existing regulations relating to services that needed to be exempted in Annex 8F have been exempted, and seek amendments if needed in the comprehensive negotiations.**
8. **Before the ratification of the interim agreement government should amend annex 8F part B to include the same paragraph 4 on qualifications, licensing and service standards from Annex 8F part A, to enable future changes to regulation of services like aged care according to government policy.**

Failing this, the government should seek to make such an amendment in the negotiations for a comprehensive agreement as allowed for in chapter 14 article 14.5 of the interim agreement.

9. **The government should ensure that there is full consultation with all relevant professional and other licensing bodies about any moves to mutual recognition of standards to ensure that there is no reduction in standards that could have negative impacts both for employees and consumers.**
10. **The entry of temporary workers should be based on the principle that they address genuine labour shortages evidenced by local labour market testing. Any arrangements for temporary workers should be separate government to government agreements which enable explicit protection of the rights of workers and specify the obligations on employers.**
11. **The government review the commitments for temporary workers in the interim agreement to ensure they are consistent with the above principles, and withdraw them before ratification if they are not.**
12. **There should be no commitments in the comprehensive agreement to removal of labour market testing or other provisions that are not consistent with the above principle.**
13. **The government should include in the comprehensive agreement enforceable commitments to ILO International standards on labour rights and enforceable commitments to international environmental standards including reduction of carbon emissions. These standards should be enforceable through state-to-state processes in the same way as other chapters in the agreement.**
14. **That ISDS should not be included in the comprehensive agreement negotiations.**

Recommendations for the process for future comprehensive negotiations

AFTINET continues to advocate that the trade agreement process must be more transparent and democratically accountable. This would require publication of negotiating objectives before negotiations commence, consultation during negotiations, release of draft texts, that the final agreed text be released with an independent evaluation of economic, environmental, health and gender impacts for public and parliamentary scrutiny before it is signed, and that parliament vote on the whole agreement, not just the enabling legislation.

We note that the new government's policy platform[3] and the recommendations of the Labor members of the JSCOT inquiry into the trade agreement process held in 2021[4] recommend a more transparent and accountable process. AFINET recommends that the following process be followed for future comprehensive IACEPA negotiations.

R**ecommendations:**

Before negotiations for a comprehensive agreement commence, the government should table in Parliament the rationale for negotiations and the negotiating objectives for the agreement, based on the commitments in the government's policy platform. These should include not only tariff reductions and other market access provisions but also legally enforceable commitments to International Labour Organisation standards on labour rights, and to International Environment Agreement standards, including commitments to reduce carbon emissions. They should also make clear what the government's policy opposes, like Investor-- State Dispute Settlement, and removal of labour market testing for temporary workers.

There should be regular public consultation during negotiations, including submissions from and meetings with all stakeholders, release of negotiating texts, and regular reports to JSCOT and parliament.

The Australian government should follow the example of WTO multilateral negotiations and the European Union and should release the final text of agreements for public and parliamentary discussion before they are authorised for signing by Cabinet.

After the text is completed and released, but before it is signed, comprehensive independent studies of the likely economic, regional, health, gender and environmental impacts of the agreement should be undertaken and made public for debate and review by JSCOT.

Parliament should debate and vote on the whole agreement, not just the enabling legislation

Lessons of the pandemic not reflected in the structure of the agreement

Although the agreement was negotiated during the pandemic, there is little evidence that some of the lessons of the pandemic are reflected in the chapters of the interim agreement. The pandemic revealed an over-reliance on global production chains and imports, and the need for specific local

[3] Australian Labor Party, National Policy Platform, (2021) pp 90 – 91, https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf.

[4] Joint Standing Committee on Treaties (2021) Report 193 on certain aspects of the treaty making process in Australia, August 26, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Report_193.

industry policies to develop capacity for production of essential products, ranging from masks and ventilators to vaccines and medicines.

More broadly the new government has recognised that recovery from the pandemic and addressing the challenges of climate change require active policies to develop local industries, including renewable energy industries and other low carbon industries to meet emission reduction targets and provide local employment. This includes, for example value adding to raw materials like rare minerals to produce batteries locally, and local production of solar panels.[5] The government also has a policy for more active use of local government procurement policies.[6]

Recommendation

The government should review the structure of the interim agreement and ensure that the framework of any comprehensive agreement has the flexibility to enable the government's policies for active industry development, including the development of local renewable energy industries and local procurement policies.

Trade in Services Chapter 8

The rules for Services Chapter 8 are designed to open up the services market and to reduce regulation of services.

Public services are intended to be excluded from the chapter, (Article 8.2.3 c) A .1) but the definition of public services is ambiguous. They are defined as "services carried out in the exercise of governmental authority neither on a commercial basis nor in competition other service providers" (Chapter 8, Article 8.1). The move to competitive tendering means that many public services are now provided in competition with other service providers.

Regulation is treated as a tariff, to be frozen at current levels and reduced in future. There are prohibitions on certain forms of regulation, including numbers of service suppliers and numbers employed to supply a service (Article 8.6.2), and there are specific restrictions on domestic regulations concerning qualifications, licensing and technical standards (Article 8.14).

Australia has made its commitments in the form of a negative list structure, which means that all services have these rules applied to then, unless they are specifically listed as reservations or exemptions in Annex 8F, Part A and Part B. Part A lists current nonconforming services or forms of regulation, for which existing regulation that is contrary to the trade in services rules can be retained, or frozen, but not increased in future. Part B lists services or forms of regulation for which governments reserve the right to increase or make new regulation in future.

This means that governments have to be very careful to list as exemptions all services and forms of regulation for which they wish to retain current regulation and/or increase future regulation.

[5] Madeline King (2022) speech to the Sydney energy forum critical minerals dinner, July 13, https://www.minister.industry.gov.au/ministers/king/speeches/speech-sydney-energy-forum-critical-minerals-dinner.

[6] Australian Labor Party, National Policy Platform, (2021) p.19 https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf.

Removal of blanket exemption for all existing state government non-conforming measures

The removal of the blanket exemption for all existing state government non-conforming measures or exemptions means that all services exemptions at state government level have to be listed separately. There is a danger that not all exemptions that should be listed have been listed.

Recommendation

The government should consult with state governments and carefully review whether all existing regulations relating to services that needed to be exempted in Annex 8F have been exempted, and seek amendments if needed in the comprehensive negotiations.

Changes to Annex 8F Part B exemptions to enable increased regulation of Aged Care and other services

Annex 8F Part A, p. 3 para 4, applying to existing regulation of services, states that governments may have requirements relating to qualification requirements and procedures, technical standards, authorisation requirements and licensing requirements and procedures "where they do not constitute a limitation within the meaning of Article 8.4 (National Treatment– Cross Border Trade in Services) and Article 8.6 (Market Access – Cross-Border Trade in Services)." In other words, such regulation is not prohibited but still has to conform with the rules in the investment chapter and the trade in services chapter.

The same paragraph states that these measures "may include, in particular, the need to obtain a licence, to satisfy universal service obligations, recognised qualifications in regulated sectors, to have completed a recognised period of training, to pass examinations, including language examinations, to fulfil a membership requirement of a particular profession, such as membership in a professional organisation, to have a local agent for service, or to maintain a local address, or any non-discriminatory requirements that certain activities may not be carried out in protected zones or areas."

This would mean that governments can continue to have existing regulation of licensing, qualifications and service standards in any service if required by government policy, including services like aged care or disability services.

However, unlike the Australia-UK FTA, this exemption is not included in Annex 8F part B, which deals with the ability of governments to change or increase future regulation, for example to implement government policy changes like the recommendations of the Royal Commission into Aged Care Quality and Safety.

It makes no sense to exempt existing regulation on licensing qualifications on service standards from the rules of the agreement but not to exempt from such rules future regulation required by government policy, like the recommendations of the Royal Commission into Aged Care Quality and Safety which are still in the process of being implemented.

DFAT negotiators have not provided any explanation as to why the Australia UK free trade agreement specifically enabled governments to make new regulations in relation to future regulation of licensing qualifications and service standards, but the AICEPA does not.

Recommendation:

Before the ratification of the interim agreement government should amend annex 8F part B to include the same paragraph 4 quoted above from Annex 8F part A, to enable future changes to regulation of services like aged care according to government policy.

Failing this, the government should seek to make such an amendment in the negotiations for a comprehensive agreement as allowed for in chapter 14 article 14.5 of the interim agreement.

Annex 8c: consultative process for recognition of professional and other occupational qualifications

Despite some media reports at the time of the signing of the in the agreement in April, the interim agreement does not have legally binding commitments for immediate mutual recognition of professional qualifications other licensed occupations.

However it does commit to consulting with relevant bodies about mutual recognition and about temporary licensing.

Australia and India have agreed to consult with their relevant national bodies about developing a framework to facilitate the mutual recognition of qualifications, licensing and registration procedures between professional services bodies and bodies dealing with other licensed occupations**.** The framework for this consultation process is set out in the AICEPA but is a separate process from the agreement (Annex 8C Article 8C5).

The consultation process may also "consider, if feasible, taking steps to implement a temporary, limited or project-specific licensing or registration regime based on a foreign service supplier's home licence or recognised professional body membership, without the need for further written examination" (Annex 8C Article 8C.6).

There are obvious potential impacts in this process on both professionally qualified and other licensed workers and on the health and safety of consumers.

Recommendation:

The government should ensure that there is full consultation with all relevant professional and other licensing bodies about any moves to mutual recognition of standards to ensure that there is no reduction in standards that could have negative impacts both for employees and consumers.

Temporary Movement of Natural Persons Chapter 9 and Annex 9A

AFTINET supports Australia's permanent migration scheme which has contributed to our vibrant multicultural society. Permanent migrants have the same rights as other workers, are not tied to one employer. They cannot be deported if they lose employment but are free to seek other work.

Numerous studies[7] show that the recent expansion of numbers of temporary migrant workers tied to one employer has resulted in exploitation of these workers, because they are tied to one

[7] Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (Migrant Worker Justice Initiative: 2017), 30, https://apo.org.au/sites/default/files/resource-files/2017-11/apo-nid120406.pdf.
Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Parliament of Australia, December 2017),

employer and can be deported if they lose the job. We support arrangements for temporary overseas workers where they are designed to address local labour market shortages based on local labour market testing. These arrangements should be government-to-government agreements separate from trade agreements. Such agreements like the Pacific Labour Scheme can have specific provisions to protect worker's rights and specific obligations for employers.

The movement of natural persons chapter in the interim agreement is not enforceable through the state-to-state disputes process, and unlike some previous agreements does not provide unlimited access for contractual service provider or other temporary workers. The text specifies that labour market testing "may be required" (Annex 9, p. 6).

However, there are a number of commitments in the text to specific numbers of temporary workers. These include:

a) 1800 qualified chefs and yoga teachers for four years (Annex 9a p. 6).
b) A list of other industries and occupations for those with specialised qualifications and experience to enter for one year (Annex 9a, Tables A and B pp 11-13).
c) A Side Letter on work and holiday visas which permits entry for up to 1000 people, 18-31 years old, who have completed 2 years of post-secondary study, and meet other current work and holiday visa requirements. These are more restrictive than the A-UKFTA conditions.

A Side Letter on post-study work visas permits longer post-study stays for ICT and STEM graduates of 2-4 years for those with higher degrees.

Recommendations:

That the entry of temporary workers should be based on the principle that they address genuine labour shortages evidenced by local labour market testing. Any arrangements for temporary workers should be separate government-to-government agreements which enable explicit protection of the rights of workers and specify the obligations on employers.

That the government review the commitments for temporary workers in the interim agreement to ensure they are consistent with the above principles and withdraw them before ratification if they are not.

That there be no commitments in the comprehensive agreement to removal of labour market testing or other provisions that are not consistent with this principle.

Chapters on enforceable labour rights and environmental standards

The interim agreement has no chapters or commitments to enforceable ILO international standards on labour rights nor any chapters with commitments to enforceable international environmental standards including carbon emissions.

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MonSlavery/Final_report.

Joanna Howe, Stephen Clibborn, Diane van den Broek, Alex Reilly and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, (2019), University of Sydney, https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf.

The government's policy platform supports the inclusion of enforceable ILO international standards on labour rights[8] and enforceable international environmental standards in trade agreements.[9]

Recommendation:

The government should include in the comp0rehensive agreement enforceable commitments to ILO international standards on labour rights and enforceable commitments to international environmental standards including reduction of carbon emissions. These standards should be enforceable through state-to-state processes in the same way as other chapters in the agreement.

No special rights for international investors to sue governments over changes in law or policy (ISDS)

The government's policy platform opposes the inclusion of special legal rights for international investors to sue governments in international tribunals if they can argue that a change in law or policy harms their profits, known as Investor-State Dispute Settlement (ISDS). The government's policy platform opposes the inclusion of ISDS in new trade agreements and pledges to negotiate to remove it from existing agreements.[10]

There is mounting evidence against ISDS[11] and many governments are turning away from ISDS, especially since mining and energy companies have been using ISDS to sue governments over measures to phase out fossil fuels and reduce carbon emissions.

A recent comprehensive study[12] showed increasing cases by mining and energy companies claiming billions in compensation for government decisions to phase out fossil fuels to combat climate change, and recommended that ISDS be removed from trade agreements. The Intergovernmental Panel on Climate Change (IPCC) also recently warned that climate action is being threatened by ISDS clauses in trade agreements.[13]

Cases include the US Westmoreland coal company[14] suing the Canadian government because the Alberta province is phasing out fossil fuels, and the German energy companies RWE and Uniper suing the Dutch government[15] over similar policies. EU governments want to withdraw from the

[8] Australian Labor Party, National Policy Platform, (2021) p.88.
[9] Australian Labor Party, National Policy Platform, (2021) pp 87-8.
[10] Australian Labor Party, National Policy Platform, (2021) pp 93-4.
[11] AFTINET (2020) Submission to the DFAT Review of Bilateral investment Treaties, http://aftinet.org.au/cms/node/1929.

[12] Rachel Thrasher et al (2022) How treaties protecting fossil fuel investors could jeopardize global efforts to save the climate – and cost countries billions, May 6, https://theconversation.com/how-treaties-protecting-fossil-fuel-investors-could-jeopardize-global-efforts-to-save-the-climate-and-cost-countries-billions-182135.
[13] intergovernmental Panel on Climate Change (2022) Climate change 2022: mitigation of climate change April 6, https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf.
[14] Luke Peterson (2018) Canada hit with investment treaty arbitration from US coalminer, relating to province of Alberta's phasing out of coal-fired energy generation, Investment Arbitration Reporter, November 20, https://www.iareporter.com/articles/canada-hit-with-investment-treaty-arbitration-from-u-s-coal-miner-relating-to-province-of-albertas-phasing-out-of-coal-fired-energy-generation/.
[15] United Nations Committee on Trade and Development (2021) RWE v. Netherlands and Uniper v. Netherlands cited in UNCTAD database of known treaty-based ISDS cases https://investmentpolicy.unctad.org/investment-dispute-settlement/country/148/netherlands/respondent.

Energy Charter Treaty[16] because it includes ISDS provisions increasingly used against climate change policies.

In Australia, the LNP government policy on ISDS varied over the years. The Howard government did not agree to include ISDS in the Australia-US Free Trade Agreement. But successive LNP governments agreed to ISDS in the Comprehensive and Progressive Trans-Pacific Partnership between 11 Pacific Rim countries, including Japan. ISDS was also included in bilateral agreements with China, Korea, and Hong Kong. Companies from all these countries have fossil fuel and/or energy investments in Australia.

However, LNP governments were also influenced by the growing sentiment against ISDS. More recent agreements, including the Regional Comprehensive Economic Partnership between 15 Asia-Pacific countries, the Australia-UK Free Trade Agreement and the Australia-EU free trade agreement still under negotiation do not include ISDS.

There is no investment chapter in the interim IACEPA , meaning that ISDS has not yet been discussed. The government should implement its policy and ensure that ISDS is not included in the comprehensive agreement.

Recommendation:

That ISDS should not be included in the comprehensive agreement negotiations.

[16] Maxence Peigné (2022) ECT 'ecocide' treaty puts commission and the EU states at odds, Investigate Europe, 25 July, https://www.investigate-europe.eu/en/2022/ect-ecocide-treaty-puts-member-states-and-eu-commission-at-odds/.