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1. Introduction

Dear Members,

AFTINET presented evidence to the Joint Standing Committee on Treaties hearings on the proposed Australia – UK Free Trade Agreement on September 20, 2022, and also spoke to a visiting European Parliament delegation about the proposed Australia – EU Free Trade Agreement. AFTINET put forward its criticisms of these concerning Investor-State Dispute Settlement (ISDS), labour market testing for temporary migrant workers, and climate change.

Trade Ministers from 14 countries including Australia agreed on negotiating objectives for the Indo-Pacific Economic Framework (IPEF) for its "four pillars" But it is still not clear whether they will result in legally enforceable agreements.

An ISDS claim by an international investor against a pandemic-related measure emerged in Colombia, and a UK oil exploration company won an ISDS claim of $A365 million against Italy because it regulated off-shore drilling. The Albanese Labor government faces the prospect of massive damages claims from global corporations using ISDS provisions in Australia's many FTAs to resist action on climate change. The European Union and Canada already have this experience.

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Thanks and keep safe.

The AFTINET Team

2. AFTINET advocacy: Australia-UK FTA public hearing and meeting with EU Parliamentary delegation

AFTINET Convener Dr Patricia Ranald gave evidence to the Joint Standing Committee on Treaties (JSCOT) public hearing on the Australia-UK FTA on September 20. The Committee will report to Parliament on November 17, 2022, before Parliament votes on the enabling legislation for ratification.

The Committee heard evidence from a range of industry and community representatives including several AFTINET member organisations. Dr Ranald noted that the agreement was negotiated in haste by the previous government before the May election. While predicted benefits from tariff reductions on imports and expanded agricultural exports have been well publicised, it is less well known that the agreement could restrict government regulation for local industry development, especially at state government level.

There has been no independent evaluation of the economic, social and environmental costs and benefits of the agreement. The agreement also opens more Federal and state government entities, including TAFE training, to international competition for government procurement, and foreshadows applying international competition to local government procurement for the first time in any Australian trade deal.

She noted that these provisions present problems for the current Labor government's strategy for development of local renewable energy industries and other low-carbon industries to meet emissions reduction targets and to replace jobs in high-carbon industries The Labor strategy includes use of government procurement to assist local industry development.

The agreement also removes labour market testing for temporary overseas workers, which is contrary to the current government's policy of focusing on permanent migration and increased skills training for local workers. The A-UK-FTA commitments on labour rights and environmental standards are less legally enforceable than the other chapters in the agreement.

The AFTINET submission makes a number of recommendations for changes to the agreement before ratification including:

- review of the Investment and Services chapters to ensure that there is regulatory space to proceed with active government policies to support local renewable industries and other low-carbon industries
- review of government procurement commitments, and cancellation of future negotiations on local government commitments
- restoration of labour market testing for temporary skilled workers and review of other proposals for temporary workers to ensure they are consistent with government policies on permanent migration and skills training for local workers
- strengthening of the Labour and Environment chapters to ensure they are no less legally enforceable than the other chapters in the agreement.

Dr Ranald also welcomed the exclusion of ISDS from the Australia - UK agreement but warned about the danger of ISDS cases from UK companies if the UK joins the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This danger could be easily avoided if the

Australian and UK governments sign side letters with commitments that neither government will apply the ISDS provisions, similar to the CPTPP side letters signed between Australia and New Zealand. See her *Conversation* article below which documents how British fossil fuel company Rockhopper used ISDS to win A$365 million in compensation from the Italian government because it regulated offshore oil drilling.

AFTINET will pursue these issues with Members of Parliament before they vote on the enabling legislation in November.

European Union FTA

Dr Ranald also met with the visiting delegation from the EU Parliament to discuss the ongoing negotiations for the EU-Australia Free Trade Agreement. The EU has a more open process for trade negotiations, publishing some of its negotiating proposals at the beginning of the negotiations in 2017, and the EU Parliament takes a keen interest in the negotiations. The delegation met with a range of industry, union and environment organisations.

Dr Ranald stressed that AFTINET opposed proposals from the EU pharmaceutical industry for longer monopolies which would delay the availability of cheaper medicines. She also argued that the agreement should not restrict government policies for local renewable energy development, and advocated against EU proposals to expand commitments on government procurement, including local government procurement. Finally she argued that commitments on labour rights and environmental standards should have the same legal enforceability as other commitments in the agreement. The EU delegation responded well to this presentation and followed up with detailed questions.

AFTINET has asked the Labor government to implement its policy for a more open and accountable trade policy process, which should result in more involvement by Australian parliamentarians in future trade agreements.

3. British investors could sue Australia over climate action if UK joins Trans-Pacific trade pact

The following article by Dr Patricia Ranald was published in *The Conversation on September 8.*

In August 2022, British oil and gas miner Rockhopper Explorations won £210 million plus interest (about A$365 million) in compensation over Italy's 2015 ban on oil and gas drilling within its 12 kilometre territorial seas.

It's a portent of claims Australia may face from British companies invested in Australia's fossil-fuel industries if the United Kingdom gets its way and joins the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to which Australia is a signatory.

Rockhopper had invested £33 million in plans to drill for oil off Italy's east coast in the Adriatic Sea. The compensation covers all profits it claims it would have made. Its claim was enabled by a so-called Investor-State Dispute Settlement (ISDS) clause in the Energy Charter Treaty signed by Italy and Britain in the 1990s.

All trade agreements have systems for settling disputes between governments. Some also have ISDS clauses that give private foreign investors the right to claim compensation for future lost profits due to changes in law or policy.

Since the late 1980s, British companies have lodged 90 claims against foreign governments using ISDS provisions – the third-highest number after US and Dutch companies.

This raises the question of what may happen if British mining and energy companies gain ISDS provisions to seek compensation from the Australian government over its climate policies.

Britain's interest in the CPTPP

ISDS provisions are what tobacco giant Philip Morris used to claim A$4 billion in compensation after the Australian government introduced plain packaging laws for tobacco products in 2011.

It did so under an Australian investment agreement with Hong Kong. Though this gambit ultimately failed, the case took years and cost the Australian government $12 million in legal costs.

Currently there are no ISDS provisions in treaties between Australia and the UK.

ISDS was excluded from the Australia-UK Free Trade Agreement (AUKFTA) signed in December 2021 due to "the confidence we share in each other's legal systems" – although only after a robust public debate. (The treaty, not yet in force, is being reviewed by an Australian parliamentary committee prior to ratification.)

But ISDS is included in the existing Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP) between Australia and ten other Pacific rim nations, which the UK is keen to join.

As UK Trade Secretary Anne-Marie Trevelyan outlined while in Australia early in September, the UK is aiming to accede by the end of this year, and joining CPTPP is a demonstration of its foreign policy focus aligning with the global economic tilt towards the Indo-Pacific.

British interests in Australian mining and energy

Australia and the CPTPP's other members – Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam – must agree for the UK application to succeed.

Trevelyan argued the UK would "bring a new, strong and persuasive voice" to the partnership as "a like-minded friend to Australia". But its membership would also expose the Australian government to ISDS cases by UK companies against climate action regulation.

The UK is the second-highest source of foreign investment in Australia. UK-based fossil-fuel investors include Anglo American, BP and Shell.

Climate concerns about ISDS claims

A comprehensive study published in May shows increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to phase out fossil fuels. The study's authors recommend ISDS mechanisms be removed from trade agreements.

The Intergovernmental Panel on Climate Change's May 2022 report Climate Change 2022: Impacts, Adaptation & Vulnerability also warns that ISDS clauses in trade agreements threaten action to reduce emissions.

For example, the Westmoreland Coal Company sought compensation from Canada over the province of Alberta's decision to phase out coal-fired electricity generation by 2030.

The US-based company, an investor in two Alberta coal mines, did so using ISDS provisions in the North American Free Trade Agreement (NAFTA). This case was unsuccessful, but only due to technicalities regarding changes in the company's ownership.

In Europe, German energy companies RWE and Uniper have ISDS cases pending against the Netherlands (under the Energy Charter Treaty) over its moves to phase out coal-fired power stations by 2030.

But there is a simple solution

The Australian government has an easy option to stop this exposure, based on two precedents: the exclusion of ISDS from the Australia-UK free-trade deal; and how Australia and New Zealand have dealt with ISDS in the CPTPP.

Before signing the CPTPP in 2018, Australia and New Zealand exchanged legally binding side letters excluding each other from using the ISDS clauses against each other.

It makes sense for the Australian government to do the same with the UK, given the disproportionate risk of ISDS claims by British fossil fuel investors.

The Albanese Labor government was elected with a policy platform opposing ISDS. It can easily implement this by making a similar exchange of letters a condition of agreeing to the UK joining the CPTPP.

4. IPEF negotiating objectives announced as India opts out of trade pillar and civil society protests

Trade ministers from the 14 countries involved in the Indo-Pacific Economic Framework (IPEF) met in Los Angeles on September 9, 2022, and published a more detailed statement of the negotiating objectives for the "four pillars" which aim to form a framework for trade and investment in the region.

The governments involved are the United States, Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand and Vietnam.

IPEF is an initiative of the US Biden administration mainly motivated by strategic competition with China in the region, and by US domestic politics. The US is not part of the two big existing legally binding regional trade agreements. These are the Regional Comprehensive economic Partnership (RCEP) of the ten ASEAN countries plus five other countries, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) of 11 Pacific Rim countries. There is bipartisan US Congressional opposition to legally binding trade agreements.

Initially the US proposed IPEF to be a trade and investment framework for US-aligned countries in the region, with the aims of achieving: high labour and environmental standards; a digital trade framework; diverse, open and predictable supply-chains; and greater investment in decarbonisation and clean energy. These are worthy goals, but it is not clear how they will be negotiated outside of a legally binding trade agreement framework.

The Los Angeles meeting clarified the "four pillars" of this framework as:

- **Trade** (Including labour and environment standards, agriculture and digital trade)
- **Supply chains** between IPEF partners, increased security and resilience (implying less dependence on China)
- **Clean economy**: cooperation on clean energy and climate-friendly technologies, enhance energy security and reduce overall greenhouse gas emissions
- **Fair Economy:** level the playing field by combatting corruption, curbing tax evasion, and enhancing transparency, recognizing the importance of fairness.

Governments can opt to join or not join each of the four pillars, but if they opt in, it appears that they must agree to all aspects of each pillar. India has opted out of the trade pillar. It is not clear how the development needs of lower-income countries will be considered, although there may be offers of aid projects. For example, big tech companies have offered digital training for women.

It is still unclear how commitments made in each pillar will be legally enforceable. The statement mentions the need for consultations with business, trade unions and civil society groups, but so far only business has been involved.

On September 9, before the meeting, 46 civil society organisations including AFTINET called for transparency and participation for a new trade model that prioritizes the interests of working people, as well as the environment, consumers, family farmers and indigenous peoples instead of just big corporations. There was also a rally of unions and civil society groups held outside the meeting. See photos here.

Dr Patricia Ranald, Convener, Australian Fair Trade and Investment Network (AFTINET) said, "IPEF cannot meet its claimed goals of improving workers' rights and environmental standards without a far more transparent process with genuine involvement of unions, environment groups and other civil society groups.

"Australia already has a series of legally binding overlapping bilateral and regional trade agreements involving IPEF countries, including the Regional Comprehensive Economic Partnership (RCEP), the CPTPP, the Australian New Zealand- ASEAN free trade agreement, the PACER-Plus agreement with Pacific Island countries and numerous bilateral agreements."

"IPEF adds an additional forum to already complicated Indo-Pacific trade architecture. The Labor government has a policy of a public consultation process and independent assessment of cost and benefits to Australia of such arrangements. We call on Labor to implement its policy."

A full copy of the letter is here.

Further negotiations on the content of each pillar will begin soon and the next meeting of trade ministers is scheduled for early 2023. AFTINET will continue to monitor the negotiations and ask the Albanese Labor government to implement its policy for a more transparent and democratic process.

5. First ISDS case over COVID-19 pandemic regulation lodged against Chile

The first known Investor-State Dispute Settlement (ISDS) claim concerning COVID-19 pandemic-related regulation was registered by French airport construction companies ADP International and Vinci Airports in August 2021 against Chile. The companies are claiming that Chile's decision to close its borders during the height of the pandemic cost them US$455 million. A decision by a panel of international investment lawyers on this ISDS claim, made under the France-Chile investment treaty, is expected in 2023 or later.

Peru had also been threatened with an ISDS case. In April 2020, the Peru Congress passed a law to suspend payment of tolls on highways to ease the financial stress on citizens due to the pandemic. When foreign tollway investors threatened ISDS claims, the Peruvian government flipped, and persuaded the Constitutional Court to declare the law unconstitutional in August 2020. This is an example of the "policy chill" effect of ISDS threats.

The Chilean government may face yet more ISDS claims, this time because it legislated in April 2021 for citizens to be able to withdraw 10 per cent of funds placed with private pension funds. Three foreign-owned insurers ON Global Holdings, Consolidated Life Insurance and Metlife (which is currently also involved in an ISDS claim against Argentina) are now negotiating with the Chilean government. If the negotiations fail, those ISDS threats could become reality.

According to Bettina Müller of the Transnational Institute, there may be more ISDS cases related to COVID-19 waiting in the wings, as many investment treaties require a cooling off period of negotiations before a formal ISDS claim is registered; and as government pandemic support to businesses winds down business losses may emerge to trigger ISDS claims. Read her full article here.

AFTINET warned of the threat of COVID-related ISDS cases in 2020, here, here and here.

6. Glencore hits Colombia with ISDS claim to limit indigenous people's rights despite Constitutional Court decision

In 2017, the Colombian Constitutional Court decided in favour of local communities and to protect the Bruno River from an expansion of the huge Correjón open-pit thermal coal mine. In May 2021, Glencore, the giant Swiss transnational conglomerate, launched an ISDS claim with the International Centre for the Settlement of Investment Disputes (ICSID), alleging that the Court's decision was discriminatory, unreasonable and arbitrary, denying them "fair and equitable treatment".

This claim was based on a Switzerland-Colombia Agreement for the Reciprocal Protection of Investments. Glencore has not yet specified an amount for damages.

Over four decades, the mining project had allegedly dispossessed and displaced 35 Wayúu Indigenous and Afro-descendant communities from their ancestral territories, contaminated water, soil and air, including diverting, interfering with or drying up 44 local streams, including the Bruno River, a major tributary of the Rancheria River.

So in 2015 the affected Wayúu communities, supported by Colombian civil society organisations, complained to the Constitutional Court at the action of Glencore and the state institutions who authorised the diversion of the Bruno River.

In 2017 the Constitutional Court suspended the mine expansion, stating that the company and the state institutions had violated the Wayúu's rights to water, health and food sovereignty by authorising the diversion of the Bruno River to allow the mine to expand. The Constitutional Court is now reviewing the implementation of this decision.

In April 2022, the Interinstitutional Technical Working Group that had been set up by the Colombian government to address these issues came out in support of the expansion of the mine and denigrated the Wayúu concerns. This Working Group is chaired by the Ministry of the Environment. Thus the 2021 ISDS claim had its desired "chilling" impact on the Colombian government.

To support the Wayúu communities, *TerraJusta*, the Washington-based Institute for Policy Studies – Global Program, War on Want, Global Justice Now and the London Mining Network jointly presented an *amicus brief* to the Constitutional Court in September 2022. It urges the Court not to bend to corporate pressure, but instead to enforce its decision in favour of the Wayúu and protection of the Bruno River.

The Glencore case is one of ten ISDS cases by international mining companies against Colombia since 2016, claiming a total of US$2.5 billion. Most of these claims are against measures to protect human rights and the environment, and six of them are against Constitutional Court decisions.

Clearly ISDS is enabling the undermining of "judicial independence, state sovereignty to regulate in the public interest, as well as the self-determination of affected people and steps needed to protect people and the planet", says the summary of the *amicus brief*.

Read the media release here and the summary of the *amicus brief* here.

7. AFTINET in the Media

Dr Patricia Ranald's article on the threat of ISDS cases if the UK joins the CPTPP is here.

Dr Ranald was interviewed about the EU-Australia FTA negotiations on ABC Radio Melbourne here.