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Submission to the Department of Foreign Affairs and Trade (DFAT) on the review of the Australia-New Zealand-ASEAN Free Trade Agreement (AANZFTA) on Investor-State Dispute Settlement Provisions (ISDS)

January 2023

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Introduction

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 preferable to 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 the review of the Australia-New Zealand-ASEAN Free Trade Agreement (AANZFTA).

This submission will address the review of ISDS provisions in the agreement.

Experience of ISDS cases over the last decade has led to ISDS legitimacy crisis

The government has a policy against ISDS, and to negotiate to remove it from existing agreements.

We note that several ASEAN member countries already have exclusions or modifications to the ISDS clauses in the agreement, including an agreement between Australia and New Zealand not to apply ISDS provisions to each other. Moreover, we note that over the last decade more and more evidence has emerged that ISDS cases are being used to undermine legitimate public interest regulation.

Since the ASEAN agreement was negotiated, the number of reported ISDS cases has been increasing rapidly, reaching 1,190 as of November 2022.[1]

Scholars have identified that ISDS has suffered a legitimacy crisis that has grown in the last decade, with lack of confidence in the system shared by both civil society organisations and by a growing number of governments.[2]

Criticisms of the ISDS *structure* include: the power imbalance which gives additional legal rights to international corporations that already exercise enormous market power; the lack of obligations on investors; and the use of claims for compensation for public interest regulation.

Criticisms of the ISDS *process* include: a lack of transparency; lengthy proceedings; high legal and arbitration costs; inconsistent decisions caused by a lack of precedent and appeals; third-party

[1] UNCTAD (2022) Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.

[2] Langford M., Potesta M., Kaufman G.,(2020) "UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions" in *Journal of World Investment & Trade*, June 22, found at https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en.

funding for cases as speculative investments; and excessively high awards based on dubious calculations of expected future profits. Furthermore, arbitrators are not independent judges, but instead remain practising advocates with potential or actual conflicts of interest.

There have been increasing numbers of claims for compensation for public interest regulation. These include regulation of public health measures like tobacco regulation, medicine patents, environmental protections, regulation of the minimum wage and most recently, government action to reduce carbon emissions.

A comprehensive study published in the *Science* journal in May 2022[3] 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 (IPCC) May 2022 report *Climate Change 2022: Impacts, Adaptation & Vulnerability* also warns that ISDS clauses in trade agreements threaten action to reduce emissions.[4]

For example, the Westmoreland Coal Company[5] sought compensation from Canada over the Province of Alberta's decision to phase out coal-fired electricity generation by 2030. This US-based company, an investor in two Alberta coal mines, did so using ISDS provisions in the North American Free Trade Agreement (NAFTA). Its case was unsuccessful[6] but only due to technicalities regarding changes in the company's ownership.

In Europe, German energy companies RWE and Uniper have ISDS cases pending[7] against the Netherlands (under the Energy Charter Treaty) over its moves to phase out coal-powered energy by 2030.[8]

Legal experts and the United Nations Conference on Trade and Development (UNCTAD) have recognised the danger of ISDS claims against a wide range of government actions taken during the COVID-19 pandemic, recommending means of preventing such cases.[9]

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[3] Rachel Thrasher *et al* (2022) How treaties protecting fossil fuel investors could jeopardize global efforts to save the climate – and cost countries billions, *The Conversation* May 6, https://theconversation.com/how-treaties-protecting-fossil-fuel-investors-could-jeopardize-global-efforts-to-save-the-climate-and-cost-countries-billions-182135.

[4] Intergovernmental Panel on Climate Change (2022) Climate Change Impacts, Adaptation & Vulnerability, May, https://www.ipcc.ch/report/ar6/wg2/.

[5] Investment Arbitration Reporter (2018) Canada hit with investment treaty arbitration from US coalminer, 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/.

[6] Investment Treaty News (2022) NAFTA tribunal in Westmoreland v. Canada declines jurisdiction, finding that the claimant did not own or control the investment at the time of the alleged breach, July 4, https://www.iisd.org/itn/en/2022/07/04/nafta-tribunal-in-westmoreland-v-canada-declines-jurisdiction-finding-that-the-claimant-did-not-own-or-control-the-investment-at-the-time-of-the-alleged-breach/.

[7] UNCTAD (2022) Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/148/netherlands/respondent.

[8] Kluwer Arbitration (2021) The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations, August 24, http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/.

[9] UNCTAD (2020b) Investment Policy Responses to the COVID-19 Epidemic UNCTAD, Investment Policy Monitor Geneva: May 4. https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf.

Some governments are withdrawing from ISDS arrangements, the EU and the US are now negotiating trade agreements without ISDS, and the system has been reviewed by the two institutions which oversee ISDS arbitration systems. ISDS has been excluded from the Regional Comprehensive Economic Partnership (RCEP), the Australia-UK Free Trade Agreement (A-UKFTA) and the Australia-EU Free Trade Agreement (A-EUFTA) currently under negotiation.

This evidence supports the case for removal of ISDS from the agreement. The retention of ISDS in the AANZ FTA would be a continuation of a fundamentally imbalanced process which gives additional legal rights to global corporations which already have enormous market power.

"Modern" ISDS clauses have loopholes and do not effectively protect government rights to regulate

There have been attempts to qualify these legal rights for corporations through "modern" changes to ISDS provisions in the CPTPP and recent bilateral FTAs, including the recent revisions to the Singapore-Australia FTA.

Unfortunately, these changes do not effectively protect the democratic rights of governments to regulate in the public interest, and the exclusions for particular policy areas are also limited.

For example the right of governments to regulate in the public interest is heavily qualified by the inclusion of the words highlighted in the following paragraph in article 9.16 of the CPTPP and replicated in some recent bilateral FTAs:

> Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure ***otherwise consistent with this chapter*** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental health or other regulatory objectives".[10]

Associate Professor Amokura Kawharu of Auckland University has commented that this is circular language which "appears to provide no additional protection, and only affirms the right to regulate in a manner consistent with the other terms of the investment chapter".[11] Other trade law experts have since reinforced this point.[12]

Another clause in the CPTPP investment chapter which is replicated in some recent bilateral FTAs attempts to limit the definition of indirect expropriation for which foreign investors can claim compensation:

> "Non-discriminatory regulatory actions by a Party that are designed and applied to protect ***legitimate public welfare objectives***, such as public health, safety and the environment, do not constitute indirect expropriations, ***except in rare circumstances."***[13]

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[10]Department of Foreign Affairs and Trade (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Article 9.16, https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents

[11] Kawharu, A. (2015) "TPPA Chapter 9 on Investment", *Expert Paper no. 2 on the TPPA*, The Law foundation, New Zealand, December, p. 9, https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf.

[12] Gleeson, D., and Labonte, R. (2020) *Trade agreements and Public Health*, pp.28-9, Palgrave studies in public health policy research, Palgrave Macmillan, Singapore.

[13] DFAT (2015) *op cit.*, Annex 9-B 3b).

This has large legal loopholes, as it does not prevent companies from launching cases in which they can argue that the measures are not legitimate, and that the circumstances are rare.

Neither of these clauses actually prevents claims from being brought against governments. They only provide some possible arguments governments can use in defending cases. Governments still have to spend time and legal costs defending cases.

Specific exclusions cover only tobacco regulation and some health regulation

Some public health measures have been excluded from ISDS claims in some recent bilateral trade agreements, although the provisions vary from only excluding tobacco regulation in the CPTPP to exclusion of public health measures relating to Medicare, the Pharmaceutical Benefits Scheme, the Therapeutic Goods Administration and the Gene Technology Regulator in some more recent FTAs.

However, there are no exclusions from ISDS claims for other important public interest regulation, which have been the subject of ISDS claims in the examples provided above. These include environmental regulation, including measures to reduce carbon emissions and address climate change, regulation of workers' rights and regulation of the rights of indigenous peoples, including land rights.

Procedural changes do not address fundamental imbalances

There are also some procedural changes in recent FTAs that seek to limit forum shopping by global or local companies, allow claims to be dismissed at a preliminary stage, permit publication of proceedings and outcomes, and attempt to address arbitrator conflict of interest. These are all welcome changes, but they do not address the fundamental imbalances that enable global corporations to claim compensation for public interest regulation.

The current procedural changes do not include proposals that would limit excessive claims like the $US5.8 billion awarded against Pakistan to Australian company Tethyan.[14]

Clive Palmer ISDS case shows that current provisions against forum shopping may not prevent it

The clauses intended to prevent forum shopping in the 2017 revisions of the Australia - Singapore free trade agreement have not deterred Clive Palmer from moving some assets to Singapore and threatening an ISDS case over legislation passed by the Western Australian. Parliament, despite the fact that his case against the legislation was defeated in the Australian High Court.[15]

It is an absurd situation when an Australian company can launch a claim against the Australian government from Singapore. The Singapore FTA has denial of benefits clauses and clauses which enable claims to be dismissed at a preliminary stage, but they do not prevent cases from being

[14] Tienhaara, K.,(2019) World Bank ruling against Pakistan shows global economic governance is broken, *the Conversation*, July 23, https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414.

[15] Raphael, A., (2022) Billionaire Clive Palmer plans to sue commonwealth for damages over iron ore project, October 26, News.com.au, https://www.news.com.au/finance/business/mining/billionaire-clive-palmer-plans-to-sue-commonwealth-for-damages-over-iron-ore-project/news-story/265d8f2828fbc3dfa290a6fb1afefa94.

launched. If the case proceeds the Australian government will still have to spend time and legal fees arguing that the Palmer company is not a Singaporean company.

Conclusions and Recommendations

"Modern" ISDS clauses in the CPTPP and other recent bilateral agreements have loopholes which do not comprehensively protect public interest regulation from ISDS cases, and would not do so in the AANZFTA.

Specific exclusions from ISDS cases for tobacco regulation and other areas of health regulation are welcome, but do not prevent cases in other areas of regulation, including the environment and climate change, workers' rights and Indigenous land rights.

Current procedural changes to ISDS do not include proposals that would limit excessive claims like the $US5.8 billion awarded against Pakistan to Australian company Tethyan.

The "modern" clauses intended to prevent forum shopping in the 2017 revisions of the Australia - Singapore free trade agreement have not deterred Clive Palmer from moving some assets to Singapore and threatening an ISDS case over legislation passed by the W. Parliament, despite losing in the Australian High Court.

The government should take the opportunity of the review to implement its policy on ISDS and propose that ISDS should be excluded from AANZFTA agreement.