BULLETIN

April 2018

Inside this edition:

Introduction

It's been another busy month for us. As the JSCOT and Senate inquiries on the TPP-11 got underway, Trump's double backflip on the TPP once again exposed the problems with the deal. Legal experts and advocacy groups have continued to publicly criticise ISDS, and a significant European Court decision ruled that ISDS is incompatible with EU legal autonomy. The US Trade representative has also announced that the US wants to withdraw from ISDS in the North American Free Trade Agreement. Disturbingly, three Canadian mining companies have separate lodged ISDS disputes over the Columbian government's decision to ban mining activities in environmentally sensitive wetlands that supply most of the country's water. Two more parliamentary JSCOT inquiries have begun, for the Peru-Australia Free Trade Agreement and the EU-Australia FTA framework agreement. A summary of our submissions for each inquiry is included in this bulletin. And finally, a reminder to book now for the AFTINET fundraising dinner on May 22.

Reminder: book now for the AFTINET fundraising dinner

The annual AFTINET trade justice fundraising dinner, on May 22, is fast approaching. It is going to be an evening of delicious Turkish food, entertaining speakers and great company. Our guest speaker this year is Kate Lappin, the Asia Pacific Regional Secretary for Public Services International, the global union federation covering 20 million workers delivering vital public services across the world. Kate has been based in Southeast Asia for the past decade, working to advance labour rights, women's human rights and development justice. She will talk about the impact of the TPP-11 on public services.

To attend, please pay via PayPal or fill out and return the booking form by May 15, 2018.

Details: 6pm, Tuesday 22 May
Erciyes Turkish Restaurant, 409 Cleveland St Surry Hills, 2010.
$77 per person or $616 for a table of eight.

AFTINET submission to the Joint Committee and Senate inquiries says no to the TPP-11

The main points in our submission are summarised below. Thanks to all those who sent submissions. The AFTINET full submission will be available on our website after it is released for publication by the Joint Committee. The Joint Standing Committee on Treaties is due consider submissions, hold public hearings and report on August 22, but the government may attempt to cut short the process. The Senate inquiry is accepting submissions until May 30, and is due to report on September 18. Parliament will then vote on the implementing legislation. Our assessment is that the TPP-11 is not in the public interest and we will campaign for the majority in the Senate to block the implementing legislation.

TPP-11 suspended clauses

Only 22 of the original TPP-12 provisions have been suspended, but not removed, pending the US re-joining the deal. Many of these provisions increase monopolies on medicines, including the most expensive biologic medicines, which would delay the availability of cheaper forms of these medicine, and others would increase copyright monopolies at the expense of consumers. The suspension of these provisions identifies them as unacceptable to all TPP countries, yet they could be resurrected if the US re-joins the agreement.

Australia has never before signed a deal containing essentially unacceptable provisions that could be re-activated if an outside party re-joins the deal. These clauses should be deleted.

ISDS: global corporations can sue governments in unfair international tribunals

This chapter is almost completely unchanged from the TPP-12. ISDS gives increased legal rights to global corporations which already have enormous market power, enabling them to bypass national courts and sue governments for millions of dollars in unfair international tribunals over changes in law or policy, even if they are in the public interest. These tribunals have no independent judiciary, precedents or appeals, and are based on legal concepts not recognised in national systems and not available to domestic investors. The "safeguards" for public interest legislation are inadequate, and governments can only clearly exclude tobacco regulation from ISDS cases.

Over the past 2 years, even more legal experts and legislators have condemned flaws in the ISDS system as the numbers of cases against public interest laws have increased. Even the EU and the

US are now negotiating agreements without ISDS. The two institutions that oversee ISDS arbitration systems are conducting ongoing reviews which have also identified serious flaws in the system.

Given these developments, the TPP-11 should not contain ISDS.

Trade in Services: governments restricted from regulating essential services

This chapter is unchanged from the TPP-12. The structure of the chapter treats regulation of services as if it were a tariff, to be frozen at existing levels or reduced over time, and not to be increased in future, known as the "ratchet" structure. The negative list structure means that all services are included, unless specifically exempted. Exemptions are intended to be reduced over time. The exemptions do not apply to ISDS, and do not prevent ISDS cases on exempted services.

The negative list and ratchet structure are not acceptable, because they are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade. But this structure ignores the need for democratic governments to respond to changed circumstances, like the re-regulation of the financial sector following the Global Financial Crisis, and the need for new regulation of carbon emission levels and energy markets in response to climate change. The structure can also prevent governments from responding to failures of privatisation and deregulation, as occurred with the need to re-regulate the provision of Australian vocational education services.

Temporary movement of people: more workers vulnerable to exploitation

This chapter is unchanged from the TPP-12. The TPP-11 commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of occupations, without labour market testing to establish whether there are local workers available. The fact that they are tied to one employer and face deportation if they lose the job means that these workers are vulnerable to exploitation. Recent studies have provided even more evidence that exploitation is widespread. Australia has made far more extensive commitments for entry of contractual service providers than have other TPP countries.

The government has recognised some of these issues through its abolition of the visa 457 and claimed restoration of labour market testing. The government could have chosen to reinstate labour market testing in the TPP-11, as would be consistent with its claimed change of domestic policy, but it has chosen not to do so. The government did choose to restore labour market testing in the Peru-Australia FTA, which was negotiated over the same period. This begs the question of why the two agreements are inconsistent.

Labour Rights and environmental standards not legally enforceable in the same way as the rest of the agreement

These chapters are unchanged from the TPP-12. Labour law experts have criticised the labour chapter because much of it is aspirational rather than legally binding. For example, the clause on forced and child labour only commits governments to "recognise the goal" of eliminating forced and child labour. The enforcement process for those few provisions which are legally binding is more qualified, lengthy and convoluted than in other chapters of the agreement. These processes have not proven effective in other agreements. The chapter is not specifically exempted from ISDS cases, and there is no reference to labour regulation in the claimed ISDS safeguards. This means that future changes to labour laws could be the subject of ISDS disputes.

Environmental law experts have criticised the environment chapter for its weak environmental standards, which are not fully enforceable. Only the international environmental agreement on trade in endangered species has enforceable commitments. The text does not refer to climate change, but only to voluntary measures for lower emissions.

The non-binding nature of commitments and weak enforceability in the environment chapter contrast sharply with the legal rights of corporations to sue governments over domestic laws, including environmental laws, under the provisions for ISDS described above.

Technical Barriers to Trade (TBT): threats to food labelling and product safety standards

The TPP-11 includes new commitments for Australia to mutually recognise product conformity assessment procedures in other TPP countries. This raises the question of how to maintain and improve Australia's relatively high standards in areas like food regulation and building product standards. Harmonising standards may not be in the public interest.

Australia introduced a form of country of origin food labelling after the imported infected frozen berries scandal, and more regulation may be needed in future. After numerous reports of dangerous imports of asbestos products and flammable building cladding, a Senate inquiry has recommended stronger regulation to ensure that imported building products conform to Australian standards. The commitments to recognise other countries' conformity assessment procedures may impede future governments from regulating in these areas.

ISDS disputes are not excluded from the TBT chapter. Foreign investors could use ISDS to claim compensation for changes to food labelling requirements, or changes to building product conformity standards after the TPP-11 is in place. The wine and spirits annex could restrict future options for mandatory alcohol health warnings like those for pregnant women, and such regulation could also be open to ISDS cases.

Government procurement chapter may reduce procurement access for local firms

Australian procurement policy should follow the example of trading partners like South Korea and the US in having policies with more flexibility to consider broader definitions of value for money, which recognise the value of supporting small and medium-sized local firms in government contracting decisions.

The recent Joint Select Committee inquiry into changes to Commonwealth Procurement Rules recommended that the Australian government should not enter into any commitments in trade agreements that undermine its ability to support Australian businesses, taking the view that this would not conflict with Australia's international trade obligations. The government has rejected this recommendation, and so appears to have a different and far less flexible interpretation of Australia's international trade obligations, including the TPP-11 procurement chapter.

The Committees should scrutinise any proposed changes to the Commonwealth Procurement Rules resulting from the TPP-11 before they are tabled in Parliament to ensure that they do not remove the flexibility to support local small and medium sized enterprises.

Conclusion

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of the TPP-11 in Australia despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts. International predictive econometric studies based on unrealistic assumptions show tiny economic gains by 2030, which have not been assessed against the costs of other impacts. The government emphasises gains for particular export sectors, but there is no assessment of the costs of government revenue losses, unemployment, temporary labour, ISDS and future restrictions on government regulation. Given these severe shortcomings, the Committee should recommend against the implementing legislation.

Trump's double backflip on the TPP exposes its problems: full parliamentary scrutiny needed

On April 13 US President Trump announced that he will renegotiate the TPP-11, but just days later backflipped on the backflip, tweeting that "While Japan and South Korea would like us to go back into TPP, I don't like the deal for the United States".

Trump's double backflip exposes the dodgy nature of the TPP-11 deal. The remaining 11 countries reached agreement on the basis that bad provisions sponsored by the US are identified as unacceptable but are only suspended and remain in the deal. These dormant provisions, which include longer monopoly rights on medicines and stronger copyright monopolies, could be reactivated if the US re-joined.

Australia has never signed a deal containing essentially unacceptable provisions that could be re-activated if an outside party re-joins the deal. This situation demands close, independent scrutiny by the Joint Standing Committee on Treaties (JSCOT) and the Senate inquiry, both of which are currently underway.

Government attempt to cut short TPP-11 inquiry would prevent democratic scrutiny

Two parliamentary inquiries into the TPP-11 are currently underway: the Joint Standing Committee on Treaties (JSCOT) inquiry and the Senate inquiry.

Normally, the text for category 1 (major) trade treaties is required to be tabled for 20 parliamentary sitting days. This would mean that the JSCOT report would be presented on August 22. The Senate inquiry is set to report on September 18. However AFTINET is concerned that the government may cut the JSCOT inquiry short, and according to the JSCOT secretariat the Trade Minister may bring the reporting date forward to June 25, after only 10 parliamentary sitting days.

This move would prevent proper democratic scrutiny by both JSCOT and the Senate inquiry, which may also be curtailed if JSCOT is cut short. JSCOT will make a decision on the reporting date when it meets next, on May 7.

US proposes withdrawal from ISDS, and international investment law expert slams it

There has been strong public opposition in the US to the inclusion of ISDS in trade agreements. In February 2016 the National Conference of State Legislatures confirmed that it would not support ISDS in any Trade Agreements. In October 2017, over 200 legal professors and economists published an open letter arguing that ISDS undermines the rule of law. In March

2018, US Trade Representative Robert Lighthizer confirmed that the US is seeking to exempt the US from ISDS in the NAFTA negotiations.

In a recent lecture, leading international investment law expert George Kahale also criticised the ISDS system. Kahale argues that because the ISDS system is based on commercial arbitration principles, it is not fit to "decide fundamental issues of international law and policy that affect an entire society". He notes that "there really are no hard and fast rules" under the system and cites claims of billions of dollars that have been made based on false documents and dodgy methodologies. He also commented on the growth of third-party funded ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation. But unlike those seeking to 'improve' the system, Kahale believes it is fundamentally flawed and has called for it to be dismantled.

European Court decision that ISDS is incompatible with national legal autonomy undermines ISDS in the TPP-11

In March, The European Court of Justice made a significant ruling on Investor-State Dispute Settlement. It ruled that ISDS between two EU member states have an adverse effect on the autonomy of EU law and is therefore incompatible with EU law.

The Court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal breached EU law. The ISDS claim was made by the company under a Bilateral Investment Treaty because the Slovakian government reversed a decision to privatise health insurance.

The Chair of the International Trade Committee of the European Parliament Bernd Lange (S&D, DE) welcomed the decision, saying ISDS is an "unacceptable mechanism" and "investors should not be able to attack sovereign democratic decisions through arbitration procedures".

Three Canadian mining companies lodge ISDS disputes over Colombian mining ban

Colombia's decision to ban mining activities in the Páramos, a range of environmentally sensitive wetlands that provide approximately 70% of the country's water supply, has so far led to three treaty-based arbitration cases from three different mining investors, under the Canada-Colombia Free Trade Agreement.

The first was lodged by Canadian mining company Eco Oro, who has now filed a detailed ISDS claim for damages, funded by Amber Capital hedge fund, seeking $764 million. Two other separate claims from Canadian mining companies, one from Red Eagle and one from Galway Gold Inc., have also been lodged at ICSID. Both companies, now represented by Washington D.C. law firm Clifford Chance, were forced to shut down their operations after the mining ban.

The Peru-Australia Free Trade Agreement (PAFTA)

The AFTINET submission is summarised below. The JSCOT report is due on August 22, after which Parliament will consider the implementing legislation. Our assessment is there is insufficient information for support the implementing legislation. The AFTINET full submission will be available on our website after it is released for publication by the joint committee.

Relationship between PAFTA and the TPP-11

Peru and Australia have signed both the TPP-11 and PAFTA and both may eventually be ratified. This raises the question of the relationship between the two agreements. The standard answer is that companies or governments can choose to apply the terms of the agreement that is more

favourable to their interests. This means, for example, that companies wishing to trade or invest can choose to apply provisions in the TPP-11 which are more favourable to their interests but have less safeguards for public regulation than PAFTA. The summary below deals with the issues on which PAFTA differs from the text of the TPP-11.

ISDS

It is disappointing that PAFTA includes ISDS provisions, since there is increasing evidence of the flaws in the ISDS system including that the EU and US are moving away from ISDS, and that ISDS institutions have acknowledged its flaws and are reviewing it structures. AFTINET believes that ISDS should not be included in any trade agreements.

Nevertheless, we welcome the fact that PAFTA, unlike the TPP 11, excludes ISDS cases against public health measures, specifically mentioning cases related to the PBS, Medicare, the Therapeutic Goods Administration and the Office of the Gene Technology Regulator. There is no specific mention of tobacco regulation, so it remains to be seen whether the general exclusion for public health measures will deter tobacco companies from lodging claims.

However, the need for these specific carveouts casts doubt on the effectiveness of the general safeguards for other public interest legislation contained in the text and raises the question of why other public interest regulation like environmental regulation or labour regulation is not specifically excluded.

Also, because both TPP-11 and PAFTA agreements may eventually apply, it may be open to a foreign investor from Peru or Australia to choose to use the provisions in the TPP-11 which do not have the public health carveouts contained in PAFTA.

Temporary movement of people

Australia is a nation built on immigration and has a permanent migration scheme which has created our vibrant multicultural society. Permanent migrants have the same rights as other Australians. Their employment is not dependent on the sponsorship of one employer and they cannot be deported if they lose their employment.

Temporary migrant workers are in a far weaker bargaining position because they are sponsored by a single employer and loss of their employment can lead to deportation. This leaves them vulnerable to exploitation. AFTINET opposes the inclusion of temporary worker provisions in trade agreements because it treats workers as if they were commodities.

Nevertheless, we welcome the fact that the government has maintained labour market testing for contractual service providers in the PAFTA (DFAT 2018e: 6). However the removal of labour market testing for contractual service providers remains in the TPP-11, despite the fact that they were negotiated over the same period. This begs the question of why the two agreements are inconsistent.

Labour and environment

Both the labour and environment chapters in PAFTA have been truncated to a few pages compared with the TPP 11. There are far fewer commitments and none are legally binding or enforceable through the state-to-state dispute mechanism in the agreement.

They do not contain even the relatively weak commitments and convoluted dispute processes in the TPP. This means that the Peruvian or Australian governments could choose to use the weaker protections in PAFTA.

Conclusion

The Government has refused to undertake any independent studies of the economic, health, environmental and other impacts of PAFTA despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts. In the absence of such information, the committee does not have enough information to support the implementing legislation.

The EU-Australia FTA framework agreement

This framework agreement is not a legally binding trade agreement, but is a framework required as a legally binding instrument by the EU in order to assess whether potential trade agreement partners share EU values, before commencing formal free trade agreement negotiations. It deals with a wide range of issues in addition to trade agreements. The JSCOT inquiry submissions closed on April 20 and the committee is due to report on August 22. The AFTINET full submission will be available on our website after it is released for publication by the joint committee.

The committee will make a recommendation about the framework agreement but, since it requires no legislation, Parliament will not vote on it, which reinforces our comments below about the undemocratic nature of the trade agreement process.

AFTINET welcomes many of the commitments in the framework agreement that commit the parties to implement democratic principles, human rights, and inclusive and sustainable growth for human development.

Our submission is focused on Title IV, Cooperation on Economic and Trade Matters, and sets out principles which should guide the parties if negotiations commence for an EU-Australia free trade agreement.

- Prior to commencing negotiations for a Free Trade Agreement, the Government should table in Parliament a document setting out its priorities and objectives, and an assessment of the expected economic, social and environmental and health impacts
- There should be regular public consultation during negotiations, and the Australian government should follow the EU example and release its proposals during negotiations.
- Draft texts should be released for public discussion.
- The final text should be released for public and parliamentary discussion before it is authorised for signing by Cabinet.
- The current National Impact Analysis (NIA) process is inadequate. After the text is completed but before it is signed, comprehensive independent studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate by parliamentary committees.
- Parliament should vote on the whole text of the agreement, not just the implementing legislation.
- Investor-State Dispute Settlement should not be included in the Australia-EU free trade agreement.
- There should be no extension of monopolies on patents, data protection or copyright in the Australia-EU free trade agreement.
- The agreement should use a positive list to identify which services will be included in an Agreement.

- Public services should be clearly and unambiguously excluded, and there should be no restrictions on the right of governments to provide and regulate services in the public interest.
- Government should retain the right to regulate all services to meet service standards, health, environmental or other public interest objectives.
- The agreement should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement.
- The agreement should require the adoption and implementation of applicable international environmental standards, including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement.
- Australia should make no commitments for the extension of temporary movement of workers other than senior executives and managers in the Australia-EU free trade agreement.
- The Australian government should not enter into any commitments on government procurement that undermine its ability, or the ability of state governments, to support local Australian businesses.

US e-commerce proposal for WTO ignores Facebook data scandal

Seventy WTO members recently agreed to 'initiative exploratory work' on 'trade-related aspects of [e-commerce]', and Australia has chaired the first informal meeting on this. This was not agreed by the majority of WTO members and is not an official WTO negotiation.

In a communication to other WTO members on April 12, the US government outlined seven areas for a possible WTO work program on e-commerce: free flow of information; fair treatment of digital products; protection of proprietary information; digital security; facilitating internet services; competitive telecommunications markets; trade facilitation.

The US position insisted on the free exchange of cross-border data, prevents data localisation and prohibits web blocking. This flies in the face of recent calls for the effective regulation of Facebook.

The US also wants future rules on e-commerce to protect source code, bar forced technology transfers and other regulation of technology requirements. These provisions would enhance monopoly and slow digital technology development.

Academics confirm temporary migrant workers more exploited than permanent migrants

We recommend this article by two Sydney university academics, Stephen Clibborn and Chris Wright, published recently in the SMH. They explain that from the 1940s-1990s, Australia's permanent immigration program and strongly enforced labour standards protected the workplace rights of permanent migrants. So, rather than fixating on the size of the permanent immigration intake, Clibborn and Wright argue Australia's political and community leaders need to fix the flawed policies that have allowed too many unscrupulous employers to steal the wages of temporary migrant workers.

By using trade agreements to boost number of temporary migrant workers, the government is blatantly treating these workers as tradable commodities, rather than as human beings. We

need both urgent action on union rights and a return to a permanent immigration program, and an end to the inclusion of temporary migrant workers in trade agreements like the TPP-11.

PACER Plus: debate about Tonga's signing could mean even more PACER-Minus

On April 8, the Kingdom of Tonga's Prime Minister Akilisi Pohiva cast further doubt over Tonga's commitment to the PACER-Plus free trade agreement. After online news outlet *Matangi Tonga* asked the Prime Minister of the status of the agreement, he replied that consultation was ongoing.

In the last month, there have been conflicting media reports (most notably from *The Diplomat* and the *Kaniva Tonga)* about Tonga's commitment to the deal. Fiji and Papua New Guinea, which form over 80% of the combined GDP of the Pacific Island nations, never signed the agreement. And if Tonga withdraws from the deal, the island signatories of PACER-Plus would account for just 11.4 per cent of the island economies. This is not a credible regional agreement.

Report says EU must change trade agreements to ensure climate action

A new report by the French Veblen Institute and environmental groups has urged the European Union to ensure that trade agreements do not undermine the 2016 Paris climate agreement. It recommends that the EU should only negotiate trade agreements with governments that comply with the Paris agreement.

The authors argue that trade agreements should enable positive climate change policies, and recognise the primacy of environmental agreements. They call for ISDS to be removed from all trade agreements, as it continues to be used to cynically undermine environmental regulation. The report will be presented at the meeting of the G7 governments in Québec on June 8-9, 2018.