



BULLETIN - April 2019

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1. Introduction

Dear Members,

Investor-State Dispute Settlement was a major issue through March. The Morrison government signed a Free Trade Agreement and a new Investment Agreement with Hong Kong, which includes ISDS. This was despite the experience of the Philip Morris using a Hong Kong investment agreement to claim compensation for Australia's plain packaging law. An FOI case finally revealed that, although the company lost the case, the tribunal decided it only had to pay half of Australia's costs.

ISDS also featured strongly in debates about medicines and seed varieties in the proposed Regional Comprehensive Economic Partnership, and in the Labor Party's response to the inclusion of ISDS in the Indonesia FTA, which will be reviewed by the federal parliament's Joint Standing Committee on Treaties after the elections in May.

Labor's policy commits it to oppose ISDS, and to renegotiate the removal of labour market testing for temporary workers and the lack of chapters on labour rights and environmental standards in trade agreements.

France has bluntly told Australia that its level of action on global warming is insufficient and EU negotiators will be demanding more in the current talks for an EU-Australia FTA.

But the limits of the EU's "new generation" labour standards have been tested in its FTA with South Korea, which came into force way back in 2011. Despite its commitment in the FTA, South Korea has managed to avoid ratification of core International Labour Organisation Conventions up to now.

Brexit tensions and Trump's tariff war with China could have negative impacts on the global economy that will impact Australia. April promises to be a month of major developments on both fronts, which AFTINET will monitor closely.

If you haven't already done so, please [Sign the PETITION](#) to the Senate against damaging clauses in the proposed RCEP (Regional Comprehensive Economic Partnership) and in favour of enforceable workers' rights and environmental standards.

The AFTINET Team

2. Media Release: Hong Kong FTA would still allow foreign investors to sue our government, says AFTINET

Tuesday, March 26, 2019: "The [Australia-Hong Kong Free Trade Agreement](#) and separate [Investment Agreement](#) signed today still give special rights to foreign investors to bypass national courts and sue governments for millions of dollars in international tribunals if they can argue that a change in law or policy would harm their investment, known as Investor-State Dispute Settlement or ISDS," AFTINET Convener Dr Patricia Ranald said today.

"The investment agreement replaces the notorious 1993 Hong Kong investment agreement which the Philip Morris tobacco company used to claim hundreds of millions of dollars in compensation for Australia's tobacco plain packaging law," said Dr Ranald.

"The government claims that the new investment agreement has more safeguards for changes to public health laws than the 1993 investment agreement, which it replaces. The new agreement does exclude tobacco regulation and regulation relating to Medicare, the Pharmaceutical Benefits Scheme, the Therapeutic Goods Administration and the Gene Technology Regulator," said Dr Ranald.

"But the need for these specific exceptions shows that the general safeguards for other public interest regulation are not effective, and would not prevent cases in other areas, like changes to energy regulation to address climate change or changes in industrial regulation. This increases the rights of global corporations and reduces the right of future governments to make new laws in the public interest," said Dr Ranald.

"The agreement has no chapters on labour rights and environmental standards. This means that neither government has committed to implementing internationally-recognised labour rights nor environmental standards. Nor have they committed to not reducing these standards to achieve a trade advantage," said Dr Ranald.

"Labor adopted policy at its [national conference](#) and in a [draft Bill](#) that rejects ISDS and other harmful proposals, and pledges to renegotiate them if it wins government. The policy also pledges to conduct independent assessments of the economic, social and environmental impacts of all trade agreements before they are signed. The deal will be reviewed by the Joint Standing Committee on Treaties after the May election. We call on Labor to implement this policy," said Dr Ranald.

Download pdf of the media release [here](#).

3. When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging

Tuesday March 27, 2019: Patricia Ranald's article in [The Conversation](#) analyses the real costs of the Philip Morris tobacco company's challenge to Australia's plain packaging laws.

4. Media Release: Philip Morris paying only half of Australia's costs in ISDS case is outrageous, says AFTINET

Friday, March 22, 2019: "It has taken a [second FOI case](#) and another two years to reveal that Australian taxpayers were only awarded half of the costs of defending Australia's tobacco plain packaging laws against tobacco giant Philip Morris in March 2017. This shows yet again the unacceptable secrecy and lack of public accountability surrounding the [Investor-State Dispute Settlement \(ISDS\)](#) provisions in some trade agreements which allow foreign investors to sue governments over public health and other national laws," AFTINET Convener Dr Patricia Ranald said today.

"Even when governments win cases, it takes years and costs millions to defend them. Philip Morris, a US company, lost its case for compensation in Australia's High Court. It shifted some assets to Hong Kong, claimed to be a Hong Kong company, and claimed hundreds of millions in compensation under an obscure Hong Kong-Australia investment agreement," explained Dr Ranald.

"It is outrageous that a global company has special legal rights to bypass a High Court decision and claim compensation in an international investment tribunal that has less transparency and accountability than our national legal system. These special privileges for foreign investors should not be included in any trade or investment agreement," said Dr Ranald.

"It took nearly five years for an international tribunal of investment lawyers to decide in 2015 that Philip Morris was not a Hong Kong company, and that the case was an abuse of process. The tribunal took another two years to award some legal and arbitration costs to Australia. But the total amount of costs, and the percentage awarded to Australia, were blacked out in the publication of the original [costs decision](#)," said Dr Ranald.

The first [FOI case](#) to reveal the costs resulted in the Australian government releasing figures which showed total legal costs of \$39 million. The government refused to reveal what percentage of the total costs had been awarded to Australia in the Philip Morris ISDS case," said Dr Ranald.

"The second FOI case, taken by a [legal publication](#), to obtain the percentage of costs actually awarded in the ISDS case, has now revealed that Australia claimed a total of A\$23,045,242.33 in legal fees for its defence, and 666,119.82 Euros in arbitration fees (A\$532,530.35), but was awarded only half of these two amounts, a total of \$11,788,936 million, " said Dr Ranald.

"Assuming that Philip Morris has complied with these costs orders, defending the ISDS case and being awarded only half of the costs therefore cost Australian taxpayers almost \$12 million."

The PDF of full costs is [here](#).

5. Explainer - Indonesia - Australia Free Trade Agreement

Wednesday March 6, 2019: [Dr Patricia Ranald's article](#) in *The Conversation* explains that the new Indonesia-Australia Comprehensive Partnership Agreement has no independent assessment of costs and benefits.

There are no chapters committing both governments to United Nations standards for labour rights and the environment to prevent a race to the bottom.

But it does have a chapter allowing foreign investors to sue governments if the investor can argue that a new law or policy has harmed their investment (ISDS). And it greatly increases the number of working holiday visas to be issued to Indonesian workers despite the evidence that many of these workers face grave exploitation in Australia.

All of these issues contradict the new Labor Party trade policy. The agreement will be reviewed by the Joint Standing Committee on Treaties after the May election. AFTINET is calling upon Labor to implement the policy to remove the unacceptable provisions.

6. Labor to oppose ISDS in Peru and Indonesia FTAs

Monday March 25, 2019: [The Australian](#) reports that Federal Labor Trade Spokesperson Jason Clare has confirmed that Labor in government would seek to remove Investor-State Dispute Settlement clauses from the Peru and Indonesia FTAs, which the Morrison government has signed, but the implementing legislation has not passed the Senate.

Labor policy also commits it to oppose ISDS while in Opposition, and the Peru FTA implementing legislation could be put to the parliament before the federal election is called.

Peruvian Trade Minister Edgar Vasquez has ruled out renegotiating the FTA because his government has already ratified it. The Australian Department of Foreign Affairs and Trade stated that any attempt by Labor to remove the ISDS clauses would delay both the Peru and Indonesia agreements.

Jason Clare said that the DFAT advice confirms that ISDS could be removed without affecting the market-access gains made in the deals.

“This advice confirms that ISDS could be removed without market access issues ... ISDS was inserted at the Abbott-Turnbull-Morrison government’s request, so its removal does indeed benefit both sides,” he said.

Peru and Australia are both parties to the TPP-11, which has already been ratified. This means Australia will have access to Peruvian markets through that agreement.

7. India urged to stand firm against RCEP drafts on medicine and investor rights to sue governments

Monday, March 18, 2019: Third World Network Researcher [Prathibha Sivasubramanian](#) has pointed out the strong policy clash between India and leaked chapters in the Regional Comprehensive Economic Partnership over medicine patents and investor rights to sue governments (ISDS). She urged India’s government to stand by its policies.

[India’s stated position on](#) intellectual property rights in free trade agreements, including the RCEP, is that it would not accept any legal obligation which requires changes to India’s intellectual property laws.

India has reportedly objected to most of the proposals that came from Japan and South Korea for longer monopoly patents on medicines that would delay the availability of cheaper generic medicines. One proposal is to extend the term of a patents beyond the current 20 years, another is to apply ISDS to changes in intellectual property laws, such as those relating to medicine patents. This would give foreign pharmaceutical companies the right to sue governments over laws on medicine patents.

From 1995, India accepted ISDS in 84 Bilateral Investment Treaties (BITS) and a series of Free Trade Agreements. But after being sued five times for billions of dollars, India withdrew from 58 BITS, created its own model BIT in 2015 and asked the remaining 26 BIT partners to agree to align with that.

If you haven't already done so, please [Sign the PETITION](#) to the Senate against damaging clauses in the proposed RCEP and in favour of enforceable workers' rights and environmental standards.

8. RCEP Ministerial talks: Farmers, civil society bodies warn against patenting seeds and plants

March 5, 2019: Forty-one Indian farmer and civil society organisations have written to Prime Minister Narendra Modi stressing that India should not agree to proposals on seeds and plants at the on-going Regional Comprehensive Economic Partnership (RCEP) negotiations.

Similar representations have been made by farmer groups to their governments in [Malaysia, Philippines and Indonesia](#) stressing that they should not give in to pressure from some countries at the 16-country RCEP talks to take on intellectual property obligations that go beyond World Trade Organisation commitments.

"It is Australia that is pressing for IP rights on plant varieties and it is important for India to have the support of countries such as Indonesia, Philippines, Malaysia and Thailand to overturn it," a Delhi-based trade expert told *BusinessLine*.

"We stress that recognising any aspect of the UPOV system (1991 Act of the International Convention for the Protection of New Varieties of Plants) would be inconsistent with and undermine farmer seed systems in India and the international rights and obligations of India under the various international instruments. Most importantly nothing must affect the right of Indian farmers to freely save, use, exchange and sell farm-saved seeds/propagating material," the letter said. It warned that the UPOV system will reduce household income available for food, healthcare or education.

9. EU-South Korea trade deal stumbles over workers' rights

Thursday, March 21, 2019: The EU-Korea FTA came into force back in 2011, the first of the "new generation" trade agreements made by the EU. While the corporates have had a huge success with the deal, its promise to improve workers' rights has not been delivered.

This week the South Korean Employers Federation said it was "furious" at the prospect that the country's [National Assembly might ratify the core International Labour Organisation Conventions](#) on the Right to Organise and the Right to Collective Bargaining, which is a commitment in the FTA.

On January 21, 2019, Michael Reiterer, EU ambassador to the Republic of Korea, said that the [government needs to take more measures to fulfil the promises in the FTA](#). He

expressed concerns over Korea's insufficient efforts for core convention ratification, saying it should show at least some progress, given the FTA was signed eight years ago.

South Korean unions want the ratification of the ILO Conventions on the right to organise and to collective bargaining to enable industry-by-industry bargaining, to allow broader objectives for strikes and bargaining, to reduce or remove civil and criminal penalties for strikes, and to allow union action in essential services.

South Korean employers, in contrast, want to prohibit workplace occupation tactics, want less frequent collective bargaining, want to be able to use strike-breaking labour, and want tougher rules for strike votes.

The EU has refused to make labour and environment chapters in the "new generation" FTAs enforceable through trade sanctions in the same way as the other chapters in its agreements. A year ago a European Commission [discussion paper](#) stated that failure to fulfil the social and environmental commitments would not be addressed by trade sanctions, but instead by diplomatic pressure, as has been happening, but not working, in South Korea.

There are already concerns that the labour and environment chapters proposed EU-Australia FTA will suffer the same fate and not be enforceable.

On Wednesday March 27, 2019, over 10,000 members of the [Korean Confederation of Trade Unions](#) rallied outside the National Assembly to urge that it ratify the four core ILO Conventions.

10. France presses Morrison on carbon emissions, rules out 'double counting'

Thursday March 28, 2019: [French trade officials speaking in Paris](#) have laid out a series of priorities for climate negotiations including getting the Paris agreement "fully implemented", raising national ambitions for carbon cuts and getting more ambitious commitments from the signatories by 2020. This policy will be applied in European Union negotiations with Australia for a free trade agreement.

They said the Group of 20 leading economies – which includes Australia, the US, Japan and Britain as well as France, German, other leading European nations and emerging giants India and China – must take the lead in cutting emissions because they are responsible for four-fifths of global emissions.

The Morrison government has a Paris commitment to reduce its carbon emissions by 26-28 per cent from 2005 levels by 2030, but wants to cut that target to about 15 per by [carrying forward the "over-achievement" against past "Kyoto" targets](#), a tactic comparable nations have ruled out.

"That's what we mean by environmental integrity – real reductions in emissions, no double counting," a French official said.

EU negotiators were back in Canberra on March 28, 2019, for continuing negotiations on the proposed FTA.

ActionAid's Lucy Manne interviewed AFTINET Convener Dr Patricia Randal on the impacts of trade agreements on the environment. They discussed the growing use of ISDS cases by mining companies to sue governments for millions of dollars to prevent regulation to address climate change, and the global movement against this. Hear the full podcast [here](#).

11. Brexit deadlock challenges neoliberal trade dogmatists

Wednesday, March 13, 2019: With the [British Parliament again rejecting](#) Prime Minister Theresa May's plan for the UK's departure from the European Union by a huge 149 vote margin, the rapidly approaching deadline of March 29 is focussing global concern more than ever. [It was rejected again on March 29 by 58 votes.]

The Brexit political drama has global consequences, including for Australia, because a UK departure from the EU - deal or no-deal - would also have a significant economic impact on Europe, whose economy is slowing, and this in turn will impact on global markets. A no-deal Brexit would intensify the shocks because there would be no 20-month transition using current arrangements while a formal UK-EU trade agreement was negotiated.

The economic shocks involved will generate political shocks. The Brexit vote in many working-class communities in June 2016 reflected in part the failure of the EU and other neoliberal trade deals to deliver promised jobs and growth, especially in the wake of the 2008-09 Global Financial Crisis. But it was led by nationalist xenophobes like UKIP's Nigel Farage. Anti-immigrant prejudice is a key but now understated issue in the Brexit political fight.

Both the neo-liberal free trade extremism and the racism that have led to the Brexit crisis need to be challenged. Instead of trade serving the profit goals of global corporate supply chains, it must be re-oriented to serve labour rights, human rights and environmental sustainability.

The obvious damage that any Brexit would inflict on the British people is fuelling the intense political conflict now tearing apart the Conservative Party and also having a marked impact on the Labour Party.

The Brexiteers demonstrate by their criticism of the European Union that they would dispense with environmental and human rights provisions in current EU trade agreements when trying to make quick trade agreements with Australia, India, Canada, New Zealand and the USA in a post-Brexit world.

In President Trump's USA, the meat lobby wants the sale of growth hormone-fed beef, currently banned in the UK and EU. US Big Pharma wants changes to the NHS drugs approval process to allow it to buy more US drugs.

US farming groups say any deal should move away from EU standards, including rules governing genetically modified crops, antibiotics in meats, and pesticides and herbicides, such as glyphosate. They want lower tariffs on agricultural goods.

US technology groups are against the UK's proposed digital tax on Google, Microsoft and Amazon.

These demands have already [provoked strong opposition](#) in the UK, including from May's hardline Brexiteer Environment Secretary Michael Gove.