



## BULLETIN September 2014

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## Farewell Jemma

Sadly Jemma Williams has found a full time job and finished at AFTINET on August 4. She has done wonders revamping our website and social media. We wish her well in her new job. Pat Ranald will be taking leave from her job and working for AFTINET from the end of September until December.

## TPP International Day of Action on Saturday Nov 8: Save the date

We are planning an event in the CBD to coincide with actions in other TPP countries leading up to a possible meeting of TPP Trade Ministers after the APEC meeting. More details to come.

## TPP negotiators meet as website reveals US congress could rewrite our laws after negotiations are completed

TPP negotiators are meeting in Hanoi from September 1-10 to discuss ongoing deep divisions over medicine patents, copyright, state-owned enterprises, labour and environment.

A new website was launched in July ([www.tppnocertification.org](http://www.tppnocertification.org)) which reveals that the United States claims the right to vet and approve other countries' laws before it will allow a trade and investment treaty to come into force

For Australia this would include laws for longer and stronger patents for medicines, which would make new medicines cost more. The US could also demand changes to Australian local content laws for television and radio, laws which require individual health data to be stored in Australia, and even requirements for blood products to be processed in Australia.

The website reveals that the certification process has existed for many years, but it has been used more intensively in the past decade because the US Congress was dissatisfied with how some countries had been implementing their US free trade agreements.

The draft Fast Track legislation introduced to Congress several months ago, but not yet passed, contains a new and extensive certification provision:

*CONSULTATIONS PRIOR TO ENTRY INTO FORCE – Prior to exchanging notes providing for the entry into force of a trade agreement, the United States Trade Representative shall consult closely and on a timely basis with Members of Congress and committees as specified in paragraph (1), and keep them fully apprised of the measures a trading partner has taken to comply with those provisions of the agreement that are to take effect on the date that the agreement enters into force.*

A comprehensive memorandum on certification explains the certification process and how it has been used.

The website also reveals the extraordinary degree of intervention by the US Trade Representative (USTR) in the drafting of Peru's laws as part of the certification process for the Peru-US free trade agreement. The USTR actually drafted Peru's legislation and demanded that it be accepted without change.

Letters from members of the US Congress to the President or the USTR, and the USTR's annual reports on perceived trade barriers in specific countries, provide indications of what the Congress may demand under certification. These are summarised on a country-specific basis on the website, including for Australia.

It is bad enough that domestic policies like the price of medicines, Australian media content laws, laws on health data storage and blood processing could be the subject of horse trading in secret TPP negotiations. This certification process means the US could demand even more changes in Australian legislation after the deal is supposedly done. This adds insult to injury and is completely unacceptable.

## Senate Inquiry reveals community opposition and dangers of foreign investor rights to sue governments despite claimed “safeguards”

*By Dr Pat Randal*

The [report](#) from a Senate inquiry into foreign investor rights to sue governments in international tribunals for damages over domestic legislation, known as Investor-State Dispute Settlement or ISDS were tabled in Parliament on the evening of August 27. The inquiry received 141 submissions and 11,000 letters which were overwhelmingly critical of ISDS. There are two other ongoing Parliamentary enquiries into the Korea-Australia Free Trade Agreement which includes ISDS. This level of public concern and Parliamentary scrutiny demonstrates that ISDS is a hot button issue.

The Senate Committee inquiry examined the Greens' *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, which seeks to ban governments from agreeing to foreign investor rights to sue governments in trade agreements.

The Government has a majority on the Senate Legislation Committee on Foreign Affairs, Defence and Trade which conducted the inquiry. The Coalition policy is to support ISDS in some trade agreements on a case by case basis, and it has agreed to its inclusion in the Korea-Australia Free Trade Agreement. It was therefore predictable that the majority report did not support a ban on ISDS.

However, the majority report had to acknowledge the overwhelming public opposition and critical evidence presented to the Inquiry. This showed fundamental [flaws in the ISDS system](#), which enable governments to be sued by foreign investors over health and environmental legislation, and have led many governments to review ISDS and consider substantial changes.

The ALP Committee members' comments noted the strong community opposition to ISDS and that many governments were reviewing its inclusion in trade agreements. They reaffirmed ALP policy opposition to ISDS, said ISDS clauses were unnecessary, and noted the flaws in the ISDS system. However, they did not support the specific wording of the Bill, claiming that Parliament did not have the authority to restrict the constitutional power of Cabinet to endorse trade agreements.

The Greens dissenting report supported the Bill.

Community opposition to ISDS has mounted because the Philip Morris tobacco company is using an obscure Hong Kong Australia investment agreement to sue the Australian government for millions of dollars of damages over our plain packaging legislation. This is an attempt to undermine Australia's High Court decision which found they were not entitled to any payment under Australian law.

The Howard government did not agree to include ISDS in the 2004 US-Australia free trade agreement, which is why Philip Morris, a US company, had to use SDS in Hong Kong investment agreement. A 2010 Productivity Commission report found no economic benefits from ISDS, and recommended against it on the grounds that it gave greater rights to foreign investors than to domestic investors. The previous ALP government adopted a policy against ISDS in 2011.

ISDS tribunals lack the basic legal protections of domestic legal systems. They consist of investment law experts who can be arbitrators one month and lawyers the next. This means there is no independent judiciary. There are no precedents or appeals, so decisions can be inconsistent.

Australia's High Court Chief Justice French has canvassed these issues in a paper entitled [ISDS: A Cut above the Law?](#) expressing his concerns about the impact of ISDS on domestic court systems, He cited the Philip Morris case, and the US Eli Lilly pharmaceutical company case against a Canadian court decision which refused to grant a medicine patent on the reasonable grounds that it was not more effective than existing medicines. The paper also noted that governments have not consulted with the judiciary about ISDS.

The Committee heard evidence that 10 Latin American countries, Indonesia, India, South Africa and The European Union are reviewing ISDS. The EU the public inquiry on ISDS has received thousands of submissions. [Hundreds of academic experts](#) have argued that the proposed "safeguards" for health and environmental legislation proposed in a trade agreement between the EU and the US are inadequate. But these safeguards are far more extensive than those in the [Korea-Australia free trade agreement](#), which has been signed and is being reviewed by two other Parliamentary committees. ISDS is also being debated in the Trans-Pacific Partnership (TPP) negotiations next week between Australia, the US and 10 other countries.

Trade agreements are negotiated in secret. Cabinet decides whether to sign them, and the text is only tabled in Parliament after signing. The review by the Joint Standing Committee on Treaties, cannot change the text, but can only recommend whether the implementing legislation should be endorsed by Parliament. Implementing legislation only deals with those parts of the agreement which require changes to Australian law. ISDS clauses do not require changes to Australian law. Parliament can only express opposition to ISDS by voting against the implementing legislation for the agreement, and asking the government to re-negotiate on ISDS

This Inquiry has demonstrated the mounting critical evidence and growing community opposition to the ways in which SDS undermines democratic legislation and national courts. All Australian Parliamentarians should consider voting against the implementing legislation for trade agreements like the Korea FTA and the TPP if they contain ISDS.

See extract from [Pat Randal's](#) evidence and Radio National [interview](#) with Tom Faunce

## **ALP and Greens MPs reject Korea Free Trade Agreement after Parliamentary Committee review**

The Joint Standing Committee on Treaties issued conflicting [reports](#) in its review of the Korea Australia Free Trade agreement (KAFTA), which were tabled in Parliament on August 4, 2014.

The government has a majority on the committee, so it is no surprise that the majority report, although critical of aspects of KAFTA, recommends that Parliament should pass legislation to implement the agreement. But even this majority report contains strong criticisms of KAFTA clauses which enable Korean investors to sue Australian government for damages if a domestic law or policy is claimed to harm their investment, known as Investor State Dispute Settlement or ISDS. The majority report is also critical of changes to copyright law which would favour the rights of copyright holders over consumer rights.

The dissenting report from ALP MPs Kelvin Thomson and Melissa Parke reaffirms ALP policy against ISDS, citing strong evidence presented to the committee that ISDS would undermine democratic legislation. This report notes that many governments are reviewing ISDS and that submissions to a European review found that proposed safeguards in the US-European Transatlantic agreement would not prevent cases being taken against health and environmental legislation. These safeguards are far

more extensive than the ones proposed in KAFTA, and reveal that the KAFTA safeguards are not adequate.

This report also recommends against changes to copyright law which would favour copyright holders over consumers, forcing Internet service providers to report and punish consumers who breached copyright law. This would involve legislation to override a High Court decision. It recommends that such a major change in copyright law should be fully debated through the Parliamentary process, not rushed through as part of implementing a trade agreement.

Greens Senator Peter Whish-Wilson's dissenting report rejects KAFTA, citing provisions on ISDS and copyright, impacts on employment in manufacturing industry and argues for the release of the text of trade agreements for parliamentary debate before they are endorsed by Cabinet.

The authors of the dissenting reports should be congratulated for taking a stand against foreign investor rights to sue governments and the extension of copyright. These issues have nothing to do with free trade, but are about increasing corporate monopoly rights at the expense of the democratic rights of citizens and consumers,

The Senate inquiry into KAFTA will hold hearings from next week and report in the first week of October. The government does not have a majority on the committee, so it should be a better opportunity for a more thorough critical review of these issues based on the public interest. Unless the government tries to rush the implementing legislation through before the Senate Inquiry report, the legislation should come before Parliament early in October.

You can send a message to Senators in your state asking them to vote against the implementing legislation through our website [www.aftinet.org.au](http://www.aftinet.org.au)

## **India Criticised for putting food security first in World Trade Organisation**

*By Jemma Williams*

India has come under heavy criticism recently for blocking the implementation of a World Trade Organisation (WTO) agreement reached at Bali last December.

Proponents celebrated the Bali 'package' as a long-awaited achievement by the WTO, which had failed to reach a significant agreement since 1995. However, critics lamented that the Bali deal was skewed in the favour of developed nations above developing nations (read AFTINET's critique of the Bali package [here](#)).

The final package included a Trade Facilitation Agreement (TFA), which aimed to simplify logistics and customs, as well as parallel proposals for food security and agriculture which were important for developing countries. The TFA was controversial because it had required developing countries to invest in sophisticated customs technology regardless of their level of development.

It is now uncertain whether the Bali deal will actually be ratified, after India blocked the implementation of the TFA in July, citing that there had not been enough progress on food security and agriculture issues.

### **India's food security concerns**

In Bali, India was joined by 33 other developing countries who wanted to amend the existing Agreement on Agriculture in order to protect their ability to continue food security programs, which

involve governments buying food from farmers at above market rates in order to stockpile staples like wheat and rice to distribute at subsidised prices for their poorest citizens.

The existing rules meant that countries implementing these essential food security programs could face legal challenges if they went above the tight limit set by the WTO. An agreement was made in Bali to implement a temporary “peace clause” which would protect these countries from legal challenges in the absence of a permanent solution.

### **The double standards of the WTO**

This meant that while developed countries will [benefit disproportionately](#) from the customs reforms required by the Bali agreement, developing countries did not receive a permanent solution to one of their major concerns. Developing countries will also face much higher costs in implementing the high-tech customs reforms, when many are already struggling to provide adequate health and education services.

The Indian ambassador to the WTO was recently [quoted](#) criticising the implementation process of the Bali deal, which he said had not met developing countries needs and had been “heavily skewed in favour of trade facilitation”.

India has come under heavy [criticism](#) for undermining the future of the WTO. Yet India’s recent blocking of the Bali agreement is based on a perception that its needs and the needs of other developing countries are again becoming secondary to the needs of the more powerful wealthier nations.

In reality, it is the failure of the WTO to deliver meaningful outcomes for developing countries which is the real obstacle to a functioning multilateral trade system.

For more information, see *The Guardian’s* article [India faces criticism for blocking global trade deal, but is it justified?](#) (22<sup>nd</sup> August 2014)

## **Pacer-Plus Trade and Aid in the media**

In July, AFTINET teamed up with AID/WATCH to put out a [media release](#) which was critical of the PACER-Plus Free Trade Agreement currently being negotiated between Australia, New Zealand and Pacific Island Countries.

This received excellent coverage in Pacific Islands media, and was reportedly a front page story in Vanuatu as well as being printed in the [Pacific Island News Association](#) and [Islands Business](#). AFTINET campaigner, Jemma Williams, was also interviewed on [ABC Radio National](#) about the agreement.

International development news website Devex also picked up the story and quoted AFTINET in an article titled "[PACER-Plus - Boon or Bane for Pacific Island States?](#)"

As Pacific Islands Forum leaders met later in the month, AFTINET Convener Pat Ranald was interviewed on [ABC's The World TV](#) about the PACER-Plus negotiations.

## **AFTINET AGM November 19: Save the date**

The AFTINET AGM will be held on November 19 at 5.30 pm on Level 2, 321 Pitt St, Sydney.

More details will be sent shortly, but please save the date.

## Take Action: Email Shadow Trade Minister Penny Wong

As you know, the Korea Free Trade Agreement (KAFTA) contains an insidious ISDS clause, which allows Korean investors to sue Australian governments over policies which they claim to 'harm' their investment.

A Parliamentary Inquiry into the KAFTA was concluded on the 4<sup>th</sup> of September which, since the Government had the majority on the committee, recommended that the agreement be ratified despite the ISDS clause.

However, to be ratified, the KAFTA legislation has to be approved by the Senate, where the government does not have a majority.

Labor did make a minority report which was very critical of the ISDS clauses in the KAFTA, and it remains their policy not to include ISDS in trade agreements.

However, it will require community pressure for the Labor party implement their policy against ISDS and to oppose KAFTA in the Senate.

Senator Penny Wong is the Labor trade spokesperson and the leader of Labor in the Senate. It is critical that we let her know that we want her party to reject the KAFTA implementing legislation.

[Please email Senator Wong now and share the link with your friends.](#)