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1. Introduction

Dear Members,

Happy new year!

Negotiations for the Regional Comprehensive Economic Partnership Agreement have been delayed again. The text is now not likely to be finalised until the middle of the year and the agreement won't be signed until November 2020. If you haven't already done so, please Sign the Petition to the Senate against damaging clauses in the RCEP and in favour of enforceable workers' rights and environmental standards.

Negotiations for the Australia-EU FTA will also continue this year and it is likely that negotiations for an FTA with the UK will officially begin after the UK leaves the EU at the end of January.

AFTINET will continue to monitor all trade negotiations and campaign against trade provisions that have negative social, human rights and environmental impacts.

As part of its agreement to pass the enabling legislation for the Indonesian trade agreement last year, the ALP obtained commitments from the government to cancel the old Indonesian Investment treaty and to conduct a JSCOT review of the trade agreement process.

AFTINET will be monitoring these commitments and will make submissions advocating for a more transparent and accountable trade process, with release of texts and independent assessment of costs and benefits of agreements before they are signed. We will publicise the inquiry to encourage submissions expose the issues to broader public debate.

The AFTINET Team

2. RCEP negotiations delayed again as India does cost-benefit study and is asked to re-join

In November 2019, 15 governments announced they had concluded the talks for the Regional Comprehensive Economic Partnership (RCEP), but India withdrew from the negotiations. India's concerns included the impact of lower tariffs on its agriculture and industry, but there had also been ongoing differences over investor rights to sue governments (ISDS) stronger monopolies on medicines that could delay the availability of cheaper medicines, and issues about the regulation of e-commerce.

The RCEP text remains secret and will not be made public until after it has been signed. AFTINET and 93 other civil society groups in the region have written to trade ministers asking for the text to be made available for public and parliamentary scrutiny before it is signed.

There have been reports that some contentious issues like ISDS and medicine monopolies have been removed from the text. This would be a victory for civil society campaigning, but cannot be confirmed until the text becomes public.

India's withdrawal reduces the potential of increased market access for Australian products, since Australia has free trade agreements with all the other RCEP countries, but not with India. Australia's trade Minister has said that he hopes India will re-join the agreement. Japanese trade officials have also asked India to re-join and the 10 ASEAN governments have publicly invited India to attend an RCEP meeting on February 3-4. Indian External Affairs Minister S Jaishankar said on January 21:"We have not closed our mind to it. We have to look at cost and benefit. We will evaluate RCEP on economic and trade merit."

Media reports have confirmed that the deadline for completion of the RCEP text has been extended to June 2020, to accommodate further negotiations with India. If this deadline is achieved, the text will then be legally checked and will not be signed and become public until the ASEAN summit in November 2020.

3. Bushfires lead to global criticism of Australia's climate policy and EU flags carbon border tax if others fail to reduce emissions

The global response to Australian bushfires suggest that Australia will face strong international pressure to increase its action on climate change, including by transitioning away from fossil fuels.

Media reports across the world have made the link between climate change and the bushfires, criticising both the Australian government's response to the fires and its failure to take action to address climate change. The reports refer to Australia's high per capita greenhouse gas emissions and criticise the government's ongoing support for coal production and its recalcitrance at the UN climate meeting in Madrid in December 2019 where it worked with the USA and Brazil to block any genuine action on climate change.

Ursula von der Leyen, the new European Commission President, told business leaders at the World Economic Forum in Davos that the EU was determined to meet its target of carbon neutrality by 2050, and if necessary would use carbon intensity taxes "to prevent the import of CO2 from abroad". She said in a keynote speech:

"It is not only a climate issue; it is also an issue of fairness. It is a matter of fairness towards our businesses and our workers. We will protect them from unfair competition. One way for doing so is the Carbon Border Adjustment Mechanism."

EU Trade Commissioner Phil Hogan confirmed that the EU is doing a feasibility study in 2020 on the tax to ensure it would conform with WTO rules, and would need to devise a common system for measuring the carbon dioxide intensity of both domestic and imported products.

Von der Leyen, originally from the German conservative CDU party, committed to strong action on climate change, including through trade mechanisms, in her candidacy statement for the EC President's position. The French government has also supported such proposals. European cross-party support for strong action against climate change contrasts with partisan divisions in both the US and Australia.

A European carbon intensity tax could impact on the EU-Australia Free Trade Agreement negotiations which are ongoing in 2020. The Morrison government's emissions reduction targets are much lower than those of the EU and there is a risk that Australian products could be subject to the proposed tax.

4. US-China phase one tariff deal signed and released: a temporary truce in the tariff wars

The US-China phase one tariff deal that was announced on December 19 has been signed and the text has been released.

The US has confirmed that it has cancelled its threatened new tariffs of $156 billion on Chinese goods, and has reduced but not removed existing tariffs on mainly industrial inputs. In return, China has cancelled its threatened new tariffs and agreed to buy more US agricultural and good exports over the next two years. China has also agreed to change its practices in the areas of intellectual property, technology transfer, financial services and currency valuation. The text provides details in all these areas, and provides for regular consultations and a dispute process involving the US Trade Representative and China's equivalent senior trade official.

The US government is claiming that the agreement will ensure that US exports to China increase by $100 billion per year by 2021. However, the New York Times pointed out that US tariffs will remain on $360 worth of Chinese imports, and China will also maintain some of its retaliatory tariffs. US Trade representative Robert Lighthizer described the US tariffs as "motivation for further negotiations." The NYT quotes business commentators who question whether the deal has been worth the cost of tariffs paid by US business and consumers, and the global economic uncertainty caused by the tariff wars.

The de-escalation of tariff wars is welcome, as they undermine the multilateral trading system and have already had a negative impact on global economic growth. AFTINET rejects the strategy of unilateral tariffs which the US has also imposed on Europe, Canada and others, and supports a fairer multilateral trade system based on human rights and environmental sustainability.

5. US economists criticise cosy consensus for free trade agreements but agree that Trump's tariff wars not the solution

Noah Smith recently reported on a debate about US trade policy at an American Economic Association meeting that showed more economists are criticising the "cosy consensus" on corporate-dominated free trade agreements.

Smith reported criticism of the original theory of free trade that each country should specialise in its most efficient products. This can be a trap for poor countries that export natural resources and forsake manufacturing, which might have a gain in wealth in the short term, but in the long term "could miss out on technological improvement and productivity gains." Others argued that there are both winners and losers resulting from trade agreements and that increased competition can lead to job losses and "weaken environmental and labor standards at the national level."

Harvard economist Dani Rodrick argued that that "actual trade agreements tend to bear only a passing resemblance to the idealized notion of free trade in an economics textbook. Thanks to lobbying by business interests, real trade agreements are tangles of rules and regulations that can restrain competition."

These rules include longer monopolies on medicines, delaying availability of cheaper medicines, and special legal rights for foreign investor rights to sue governments over domestic laws. Proposed solutions included compensating for lost jobs through the tax and welfare system, removing corporate privileges from trade agreements and ensuring that trade agreements do not prevent governments from having effective local industry policies.

Smith reports that there was consensus that Trump's tariff wars "are a bad response to the drawbacks of free trade, serving mainly as a tax on domestic consumers. They also invite retaliation, causing more carnage."

6. ISDS updates

Uber threatens ISDS case against Columbia after government decision to block platform company
Uber has written to the Colombian President Iván Duque Márquez to officially notify him that it intends to sue the Colombian government using the Investor to state dispute settlement provisions in the Colombia-US free trade agreement in response to its decision to block the platform company from operating in the country.

The decision came after a lawsuit was brought against Uber that claimed it was providing its services through unfair competition. Uber argues the decision to ban Uber but not similar companies from Columbia and other countries violates the expropriation, fair and equitable treatment, national treatment and most-favoured nation treatment provisions in the investment chapter of the Colombia-US free trade agreement. It has threatened to sue Columbia if the dispute cannot be resolved via consultation and negotiation.

Australian company sues Sweden for $1.8 billion for phasing out uranium mining
Aura Energy Ltd, an Australian company also listed in the UK, has lodged a claim under the Energy Charter Treaty (ECT) for US 1.8 billion compensation from the Swedish government because in 2018 it decided to phase out uranium mining for environmental reasons.

The company is claiming compensation for 'indirect expropriation' and 'unfair treatment' which it claims violated its 'legitimate expectations' of future profits. Australia has not ratified the ECT and did not opt to provisionally apply the treaty's investment protections, so it appears that the company is relying on its UK listing to claim jurisdiction because the UK has ratified the ECT.

Australian mining company threatens ISDS case against Tanzania
Australian mining company Indiana Resources is one of three mining companies that have served the Tanzanian government with a notice of intent to bring an ISDS case after it revoked the companies' retention licences. Australia does not have a bilateral investment treaty with Tanzania. Indiana Resources is bringing the case through its UK-based parent company Ntaka Nickel Holdings, under the UK-Tanzania bilateral investment treaty.

The cases come after the Tanzanian government made amendments to the county's Mining Act in 2018, which aimed to increase opportunities for the government and local companies to benefit from mining projects. The amended legislation requires a minimum of 16 percent government ownership of mining projects and 5 percent equity participation for local Tanzanian companies. The dispute between the three companies and the Tanzanian government relates to the decision to revoke the companies' retention licences and make a public call for tenders for the joint development of the areas that were previously covered by the licences.

7. New NAFTA deal signed without longer medicine monopolies and with stronger labour rights

Following labour and civil society campaigns over the past two years, the US, Canada and Mexico have signed an amended US Mexico Canada Agreement (USMCA) which eliminates longer medicine monopolies that would have delayed access to cheaper medicines. The amendments also include stronger protection for labour rights.

Previous agreed changes phase out foreign investor rights to sue governments (ISDS) between the US and Canada, and place restrictions on foreign investor rights to sue Mexico. The US Congressional Democrats responded to community pressure and negotiated elimination of a 10-year data exclusivity period for biologic drugs from the agreement, which they feared would lead to higher drug prices in the US, as well as in Mexico and Canada. They also negotiated stronger enforceability for labour rights.

The changes have been welcomed by unions and civil society groups, but some are still critical of President Trump's claims of thousands of jobs resulting from the new agreement. AFL-CIO president Richard Trumka, who was closely involved with the USMCA negotiations, said the amended agreement was a "vast improvement" over NAFTA.

Public Citizen's Global Trade Watch director Lori Wallach said "The best feature of the new NAFTA is the gutting of Investor-State Dispute Settlement (ISDS)…That a U.S. pact largely eliminates extreme

ISDS protections for foreign investors and anti-democratic tribunals sends a signal worldwide about the illegitimacy of the ISDS regime." But Wallach added, "Trump's claim that this new NAFTA will bring back hundreds of thousands of manufacturing jobs is absurd."

Some environment groups were also critical. Dan West, a senior advocate for the Natural Resources Defense Council, said any passable trade agreement must include strong climate protections. "While the details are still secret," West said, "all indications are that the revised NAFTA pact fails this key climate test." The detailed amendments have now been published and are expected to be approved by legislators in all three countries.

8. WTO not dead yet: alternative appeals body set up, but fundamental change needed

For the past two years the US Trump administration has imposed unilateral tariffs outside of the rules of the 164-member World Trade Organisation (WTO). The WTO, although it has many flaws, is the only multilaterally-agreed rules-based trading system. WTO rules are enforceable through government-to-government disputes, heard by disputes panels whose initial decisions can be appealed to ensure they conform with WTO rules.

The US has also blocked appointments to the WTO disputes appeals a body, resulting in a shortage of appeals body members. This means that, while existing cases will continue to be heard, as of last week the appeals body is prevented from hearing future appeals.

The US stated reasons for its actions are that it wants changes to the WTO appeals process to address flaws, including lengthy and complex processes and allegations that appeals bodies have over-reached the boundaries of WTO rules. However, the US has not responded to proposals for change that would address these issues, showing that its objections are to the enforceable rules-based trade system itself, a conclusion reinforced by its unilateral tariff wars.

But despite claims of its demise, the WTO is not dead yet. The EU and Canada have initiated a temporary voluntary appeals system allowable under WTO rules. Australia and China have joined a total of 17 other governments that have agreed to use this system, and others are expected to join. This will enable WTO member governments to continue to lodge government-to-government disputes under WTO rules and to have access to an appeals body if there are grounds for appeals. But this is a temporary fix that does not address longer term issues.

AFTINET has criticised the power dynamics in the WTO which is dominated by the largest players and neoliberal economic principles. But we support the concept of a multilateral rules-based system that includes all governments, as it potentially gives more voice to the needs of poorer and smaller countries, and can have rules which recognise the needs of developing countries. This is preferable to bilateral trade wars based on might-is-right principles.

The WTO needs fundamental change to a fairer multilateral system that would give developing countries more negotiating power and be based on commitments to human rights, labour rights and environmental sustainability. Nearly all governments agreed to these principles through the Sustainable Development Goals (SDGs) in 2015, but they have not been integrated into WTO goals or practice. A blueprint for achieving these goals can be found in "A New Multilateralism for Shared Prosperity: Geneva Principles for a Green New Deal" published by the UN Conference on Trade and Development (UNCTAD).

9. Trade rules could impact on regulation of facial recognition technology

A *New York Times* investigation reprinted in the *Sydney Morning Herald* has reported that an American software company, established by Australian developer Hoan Ton-That, has developed ground-breaking facial recognition software that is being used without any regulation or public scrutiny by both public agencies and private companies in the US.

The software uses an algorithm that can scrape images from social media to identify individuals. It has been strongly criticised as an invasion of individual privacy open to abuse. Similar software has been used in China for mass surveillance. The Sydney Morning Herald reported separately that different but similar software is being used by Victoria Police and some Australian schools.

The article quotes Dr Monique Mann, a senior lecturer in criminology at Deakin University and board member of the Australian Privacy Foundation, who called for a ban or moratorium on use of facial recognition technology, saying its application can be "very dangerous". Dr Mann said the international experience was facial recognition technology was being outlawed given the human rights concerns. A significant difference existed between authorities using technology to verify identity such as at airports and searching databases to identify people.

The article also reports that Human Rights Commissioner Edward Santow has also called for a "moratorium on the potentially harmful use of facial recognition technology in Australia" until there is a legal framework to safeguard human rights."

Meanwhile, the Australian government is playing a leading role in negotiations for an e-commerce agreement among 76 WTO member countries. They are being conducted behind closed doors and heavily influenced by Big Tech companies. who want less, rather than more regulation. The government has supported proposals in other trade agreements that would prevent governments from gaining access to source code and algorithms which may be needed to regulate facial recognition technology.

AFTINET and 314 other civil society organisations have argued in an open letter to governments that these trade rules could make it more difficult for governments to regulate to protect privacy and other human rights. AFTINET will be making more detailed submission to government about how the e-commerce negotiations could limit a range of regulatory recommendations made by the Australian Competition and Consumer Commission in its *Digital Platforms Report* which recommended stronger regulation to protect privacy and other human rights.

10. 278 community organisations release open letter on the Energy Charter Treaty

278 community organisations and trade unions, including AFTINET, have released an open letter demanding reform of the Energy Charter Treaty (ECT) so that it does not undermine action to address climate change.

The ECT includes Investor-state dispute resolution (ISDS) provisions that give foreign investors in the energy sector sweeping rights to directly sue states in international tribunals for policy decisions that impact on their investments. Out of all the international agreements that include ISDS, the ECT has brought the most ISDS cases.

These cases could undermine action on climate change, as governments risk facing huge lawsuits if they strengthen environmental protections or implement policies to transition away from fossil fuels. For example, the German coal company Uniper is threatening to use the ECT to bring an ISDS case against a law to burn the burning of coal in the Netherlands. See short video here. Australia has signed but not ratified the ECT. However, there have been at least three ISDS cases brought by Australian companies.