



# BULLETIN

## June 2018

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### **Introduction**

Dear members,

An exciting opportunity has opened for a trade justice analyst/campaigner at AFTINET – read on for more details. We have continued our campaigning against the TPP-11, while the JSCOT and Senate inquiries progress and we move closer towards a parliamentary vote on the implementing legislation. Our campaigning efforts included organising a protest in Sydney and publishing an op ed in the Fairfax press explaining the dangers of ISDS. In other news, advocates of open source software say the TPP-11 will damage software licensing in Australia, and the newly elected Malaysian government has indicated that they will reconsider the TPP-11. Finally, Trump's destructive tariffs continue as retaliatory tariffs seem inevitable, and the Turnbull government fails the transparency test on the proposed EU FTA negotiations.

Happy reading.

### **Job vacancy: Trade justice analyst/campaigner**

[AFTINET is hiring!](#) We are looking for an experienced graduate who is passionate about global justice, to work with us as a trade justice analyst and campaigner. The position is for 28 hours per week, on a fixed-term contract, with ongoing employment dependent on funding. Total remuneration including superannuation and leave loading is \$42.35 per hour.

The focus of the campaigns is the social impact of trade agreements, including bilateral agreements, regional agreements like the Trans-Pacific Partnership (TPP-11) and the Regional Comprehensive Economic Partnership, and World Trade Organisation agreements.

The trade justice analyst/campaigner reports to the Convener and the management committee (Working Group). Key tasks of the role include to:

For the full job description and selection criteria, please read the full posting on our [website](#).

Please send your applications by email by close of business, July 13, 2018, to Lesley Gruit, Selection Committee Chair <lesley.gruit@gmail.com>.

### **Unions, health, aid, environment and church groups protest TPP-11 in Sydney**

This month over 120 people from 20 union, health, aid, environment and church groups rallied outside the Sydney public hearing of the Joint Standing Committee on Treaties concerning the proposed Trans-Pacific Partnership (TPP-11).

Speakers from AFTINET, AMWU, ActionAid, Greenpeace, NSW Nurses and Midwives' Association and the ETU spoke about ISDS and the negative impacts that the TPP-11 would have on workers, women, health, public services and the environment.

The JSCOT and Senate inquiries will report back to parliament in September. Parliament will then vote on the implementing legislation. AFTINET and community groups are urging MPs and Senators to vote against the implementing legislation.

Photos from the protest have been posted [here](#) and [here](#).

### **Op ed: It's time to stop giving more rights to global corporations**

*The following op ed, written by Dr Patricia Randal from AFTINET, was published in [Fairfax](#) on June 13 2018:*

The UN Conference on Trade and Development has published new research that shows that increased market power of global corporations is [driving global income inequality](#). It notes that “in 2009–2015, the surplus profits of the top 1 per cent of publicly listed firms in a new UNCTAD firm-level database represented 55 per cent of recorded operating profits,” and recommends a review of existing regulation and trade agreements to develop “measures to curb abusive business practices.”

This research supports the case against giving corporations greater legal powers to sue governments over changes to domestic laws in trade deals, (known as investor-state dispute settlement or ISDS) like the Trans-Pacific Partnership (TPP-11). The TPP-11 emerged after the US withdrew from the TPP-12 and is being reviewed by both Joint and Senate parliamentary inquiries, before the parliament votes on the implementing legislation, with a Joint Committee hearing in Sydney on Friday.

The Turnbull government has agreed to ISDS in the TPP-11, despite the Howard government rejection of it in the US-Australia FTA. The previous ALP government also rejected it, as does current ALP policy, together with Greens and Centre Alliance policy. These parties, with other cross-benchers, form a majority in the Senate.

ISDS is hotly debated because it gives increased legal rights to global corporations, 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. This was seen first-hand in Australia when the Philip Morris tobacco company sued the federal government over plain packaging laws. Critics such as former High Court chief justice French have noted these tribunals [have no independent judiciary, precedents or appeals](#). There are now [over 850 known cases](#), with increasing numbers against [health](#), [environment](#) and even [indigenous land rights law and policy](#).

The EU and the US are also withdrawing from ISDS. ISDS cases against EU governments, like the [Swedish energy company Vattenfall suing the German government over its phase-out of nuclear energy](#), led to fierce European public opposition, and two recent court cases.

The European Court of Justice determined in 2017 that ISDS provisions violated national sovereignty and that [EU member states had to vote separately on ISDS provisions in trade agreements](#). In March 2018, the same court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal [also breached EU law](#).

In response, the European Commission has proposed a “fast track” process for agreements without ISDS, that would enable them to be approved by the European Commission alone. This means [there will be no ISDS in the EU-Australia FTA negotiations which will start soon](#).

Meanwhile, bipartisan opposition to ISDS in the US has resulted in a US policy against ISDS in NAFTA. US trade representative Robert Lighthizer has said in recent Congressional hearings, [“I am troubled by the fact that anyone – anyone – can overrule the United States Congress, when it’s passed a law”](#), and has confirmed the US policy to [opt out of ISDS in NAFTA](#).

Leading US international investment law expert and practitioner George Kahale has recently criticized ISDS in an April 2018 lecture titled *The wild, wild west of international arbitration law*. Kahale argues that the ISDS system based on commercial arbitration principles is [not fit to arbitrate cases in which global companies seek compensation from governments for changes in public interest laws](#).

Despite this growing rejection of ISDS, the Australian government claims that ambiguous general “safeguards” in the TPP-11 will protect public interest laws. However, the weakness of these general safeguards is exposed by the fact that there is also a separate exclusion from ISDS cases for tobacco regulation. If the general safeguards were effective, such a specific exclusion would not be needed.

[Surveys show most Australians oppose ISDS](#). Its inclusion in the TPP-11 would expose our laws to cases from global companies based in Japan, Canada, Malaysia, Singapore and other TPP countries. This could be a significant obstacle to Senate majority approval of the TPP-11 implementing legislation.

### **TPP-11 could harm free software licensing, says Open Source Industry Australia**

Open Source Industry Australia (OSIA) has [warned](#) that the TPP-11 chapter on e-commerce may damage or destroy the free software licensing sector. OSIA is concerned about Article 14.17 of the agreement, which provides that *‘no party shall require the transfer of, or access to, source code of software owned by a person or another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.’*

OSIA notes that the TPP-11 provides exceptions for ‘terms and conditions related to the provision of source code in commercially negotiated contracts’. If Australian courts rule that open source licenses are not ‘commercially negotiated contracts’, those licenses will no longer be enforceable in Australia, and free software as we know it will no longer be enforceable in Australia.

Even if open source licenses are determined to be commercially negotiated contracts, OSIA notes that ‘the wording of Art. 14.17 makes it unclear whether authors could still seek injunctions to enforce compliance with license terms requiring transfer of source code in cases where their copyright has been infringed’.

The impacts of these TPP-11 clauses on open source in Australia and internationally would be significant.

### **New Malaysian government to reconsider TPP-11**

Malaysia’s new Prime Minister, Dr Mahathir, has [indicated](#) that he will review Malaysia’s support of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, or TPP-11.

Prime Minister Mahathir believes weaker economies like Malaysia are at a disadvantage under the current terms, saying "it is important to take into consideration the level of development of a country", and that “weaker economies must be given a chance to protect their products”.

There has been [strong community opposition](#) against the TPP-11 in Malaysia. Martin Khor from the Third World Network (TWN) and the Consumer Association of Penang has [urged](#) the new government to reconsider the TPP-11. The deal would restrict the Malaysian government’s ability to regulate in the public interest and make it more difficult for state-owned enterprises to secure government loans and equity.

It would lock in monopoly rights for pharmaceutical companies, delaying access to affordable medicines such as the [generic medicine for Hepatitis C](#), a disease affecting half a million Malaysians.

According to Khor, the TPP-11 would require Malaysia to sign on to the UPOV 1991 international treaty, meaning Malaysian farmers would have to pay for the seeds they use instead of being able to save their own seeds to plant in the next season.

The TPP-11 will take effect once ratified by at least six member countries, which requires passage of the implementing legislation by parliaments. So far, only Mexico has ratified the agreement. AFTINET is [campaigning](#) for the majority of ALP, Greens, Centre Alliance and others to block the implementing legislation.

### **Trump’s trade war continues**

US President Donald Trump has now imposed tariffs on steel and aluminium imports from China, Japan, [Canada, Mexico and the EU](#). The tariffs against Canada, Mexico and the EU were confirmed at the [G7 in Canada](#) earlier this month. The pretext for these actions is that the aluminium and steel industries in the US are essential to national security.

The US now faces retaliation from all of these countries, as well as legal action through the World Trade Organisation (WTO). Despite Trump's claims of the US as a victim of 'unfair' trade, these tariffs are about asserting the right of US corporations to make the global trading system more unfair to everyone. This is all happening in the context of drawn out economic stagnation since the 2008 Global Financial Crisis, with its political impacts in the United States, and in Europe. Trump is turning on longstanding US allies, as well as China, because he wants US corporations to make even greater gains in global markets than the current US-imposed rules have given.

Under Trump, the [Washington Consensus](#) on global trade, forged under the Reagan administration in the 1980s which gave US corporations leadership of the global trade system through the World Bank, the International Monetary Fund and the World Trade Organisation, has been superseded by the "America First" slogan.

Underlying the profound shocks being administered by Trump is the drawn out economic stagnation since the 2008 Global Financial Crisis, with its political impacts in the United States, and in Europe. Trump is turning on longstanding US allies, as well as China, because he wants US corporations to make even greater gains in global markets than the current rules have given.

Australia has escaped direct rises in US tariffs on its exports because it has a trade deficit with the US, and is not seen as a threat. But trade wars between the largest economies will slow global trade and growth, with negative effects on all. AFTINET does not support Trump's unilateralism, and we do not support unfair deals like the TPP which restrain governments from regulating in the public interest. We support fair trade rules which apply to all countries, and potentially restrain the market domination of economies like the US. The WTO in its current form is not playing this role.

Until we have fairer trade rules, the rest of us will suffer the collateral damage of a war between the giants.

### **Turnbull government fails transparency test on proposed EU FTA negotiations**

The European Union has published its "[Negotiating Directives](#)" for its proposed free trade agreement with Australia, but the Australian government hasn't matched this level of transparency by publishing its own objectives.

Following European Court of Justice decisions that ISDS is incompatible with national sovereignty and EU law, the EU Negotiating Directives [do not include ISDS](#). But the EU Trade Commissioner has also said that the EU may seek stronger monopolies for data protection on biologic medicines of up to 10 years, compared with five years under Australia's current law. Pharmaceutical companies already have 20 years monopoly on these costly new medicines, plus five years data protection in Australia. Extending data protection to 10 years would delay the availability of cheaper forms of these medicines, costing the Pharmaceutical Benefits Scheme hundreds of millions of dollars per year.

The EU also wants other forms of stronger intellectual property rights, broader access to government procurement, and broader access to services.

We need a clear statement from the Australian government about its negotiating objectives, and whether it will resist such demands. The AFTINET will continue to [call on](#) the Turnbull government to do so.