



AFTINET Submission to the General Review of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) February 2024

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AFTINET

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 community organisations and individuals concerned about the social impacts of trade and investment policy. We advocate for fair trade consistent with human rights, labour rights and environmental sustainability.

Introduction

AFTINET welcomes the opportunity to contribute to the General Review of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

The Trans-Pacific Partnership (TPP) originally involved 12 countries including Australia and the US. The US, the largest economy, withdrew in 2017, and it became the TPP-11. In November 2017 TPP-11 negotiators renamed, amended and signed the agreement as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and suspended some of its most controversial clauses. Original CPTPP members are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. The United Kingdom successfully applied to join the CPTPP from July 2023.

The focus of the submission is on those terms of reference of the review ¹ which address labour rights, working conditions and improved cooperation and capacity on labour issues, benefits for consumers, the links between trade and evolving global environmental issues including climate change and biodiversity loss, and the impact of ISDS on members' interests.

The submission begins with a brief discussion of the debate about the relatively low predicted economic benefits of the CPTPP before implementation. It discusses the difficulty of measuring actual economic impact on the Australian economy from the CPTPP because of the economic and trade impacts of the COVID-19 pandemic and the Russian invasion of Ukraine.

The submission then discusses developments since the CPTPP came into force in Investor-State Dispute Settlement (ISDS) cases, and the need for changes to the agreement in the light of these. It also discusses the suspended CPTPP clauses on pharmaceuticals, the enforceability of labour and environmental standards, women's rights and Indigenous rights, the potential impacts on public interest regulation of trade-in-services rules and the temporary worker provisions in the light of recent developments in migration policy. All of these issues impact on the ability to maintain high quality standards on human rights, including government rights to regulate carbon emissions, access to medicines, labour rights and environmental standards, including measures to reduce carbon emissions and address other aspects of climate change. The submission makes recommendations about how the CPTPP could be changed to address these issues.

Summary and Recommendations

This submission deals with those terms of reference of the review which address labour rights, working conditions and improved cooperation and capacity on labour issues, benefits for consumers,

¹ Department of Foreign Affairs and Trade (DFAT) (2023) Terms of Reference for Conducting the General Review of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) endorsed at CPTPP Ministerial meeting on 15 November 2023,

the links between trade and evolving global environmental issues including climate change and biodiversity loss, and the impact of ISDS on members' interests.

The inclusion of ISDS provisions in the CPTPP gives increased legal rights to international corporations to claim compensation from governments for enacting democratically decided public interest regulation, including regulation of carbon emissions. Clive Palmer's use of ISDS in existing agreements reinforces the need for ISDS to be reviewed in the CPTPP. Controversial clauses on pharmaceuticals have been suspended rather than removed from the CPTPP, despite the fact that they are unacceptable to other CPTPP member countries and the threat they would pose to access to affordable medicines if reinstated. The labour and environment chapters have selective and qualified commitments to international agreements on labour rights and environmental standards, and a lengthy and convoluted disputes process whose outcomes are not enforceable through trade sanctions in the same way as the dispute process outcomes in other chapters in the agreement. Despite being mentioned in the preamble, the CPTPP has no proactive commitments to women's rights or Indigenous rights. The trade-in-services chapter could restrict government regulation of essential services needed to address future policy challenges like climate change and aged care. The expansion of numbers of temporary workers vulnerable to exploitation is not consistent with current government policy aimed at protecting the integrity of Australia's permanent migration system, ensuring that temporary workers meet specific labour shortages and are not vulnerable to exploitation.

The following changes are recommended to address these issues.

Recommendations:

ISDS

- **That ISDS provisions (Part B in Investment Chapter 9) be reviewed and removed**
- **Failing the removal of ISDS provisions, that the Australian government negotiate with other CPTPP members bilateral side-letters which agree not to apply the ISDS provisions to each other, as it has done with New Zealand and the UK.**

Suspended clauses on pharmaceuticals

- **That the suspended CPTPP provisions on pharmaceuticals be removed permanently from the agreement.**

The labour chapter should be revised to

- **ensure hard commitments to the ILO conventions, including elimination of forced and child labour**
- **remove the requirements for sustained or recurring course of action or inaction in a manner affecting trade or investment**
- **apply a disputes process which is enforceable through trade sanctions in the same way as disputes processes are applied in other chapters of the agreement.**

The environment chapter should be revised to

- **ensure hard commitments to international environment agreements, including commitments to address climate change through the Paris Agreement and subsequent agreements to reduce carbon emissions**
- **remove the requirements for the dispute processes to require sustained or recurring course of action or inaction in a manner affecting trade or investment**

- **apply a disputes process which is enforceable through trade sanctions in the same way as disputes processes are applied in other chapters of the agreement**

Women's rights and Indigenous rights

- **The CPTPP should be amended to include separate chapters on women's rights and indigenous rights, based on United Nations Conventions**
- **There should be enforceable commitments to gender equality consistent with the UN Convention on the Elimination of All Forms of Discrimination against Women**
- **There should be enforceable commitments to the rights of Indigenous Peoples consistent with the UN Declaration on the Rights of Indigenous Peoples.**

Trade-in-services

- **That the government review the reservations in the CPTPP trade-in-services chapter to ensure that governments retain the right to regulate and reregulate all government-funded and other essential services as circumstances change**
- **That aged care services be listed as a specific reservation in Annex II of the CPTPP.**

Temporary workers

- **That the expansion of numbers of temporary contractual service providers in annex 12 A be removed, consistent with the government's Migration Strategy policy to ensure that numbers of temporary workers address genuine labour shortages and that they are protected from exploitation.**

Economic and Employment Impacts of the CPTPP

There was a lively debate about the impacts of the original TPP-12 on economic growth in Australia, since Australia already had free trade agreements with all but two of the original CPTPP member countries, Canada and Mexico. A 2016 World Bank predictive study found that the likely GDP growth in Australia was just 0.7 per cent by the year 2030, a result described as "hardly any growth" by one prominent economic commentator.²

The US Peterson Institute produced a predictive study of the TPP-12 which estimated a smaller increase in Australia's GDP by 2030, of 0.6 per cent.³

The World Bank and Peterson Institute studies used computable general equilibrium (CGE) econometric models. Like all such models they are based on a series of assumptions which do not apply in the real-world economy. The assumptions include that all tariff and non-tariff barriers will be removed, that there will be full employment, perfect labour mobility (i.e. no unemployment outcomes), no income distribution effects and no trade balance effects. By assuming away negative effects, these models almost always produce results that predict future increases in economic

² World Bank (2016) Potential Macroeconomic Implications of the Trans-Pacific Partnership, Global Economic Prospects, January, p227, <https://thedocs.worldbank.org/en/doc/847071452034669879-0050022016/original/GlobalEconomicProspectsJanuary2016ImplicationsTransPacificPartnershipAgreement.pdf>. For Australian commentary see Peter Martin (2016) Trans-Pacific Partnership will barely benefit Australia, says World Bank report, January 16, <https://www.smh.com.au/politics/federal/transpacific-partnership-will-barely-benefit-australia-says-world-bank-report-20160111-gm3g9w.html>.

³ Peterson Institute (2016) Assessing the Trans-Pacific Partnership, Volume 1: Market Access and Sectoral Issues, February, p. 23, <https://www.piie.com/sites/default/files/documents/piieb16-1.pdf>.

growth, usually after 10 to 15 years. There is a substantial economic literature that has criticised GCE models and questioned their results.⁴

The World Bank and Peterson studies did not measure the TPP-12's impact on employment. Studies of the impacts of preferential trade agreements based on more realistic assumptions, including both employment gains and losses, often show minimal change or negative impacts. A separate study of the TPP-12 from academics at Tufts University using a model that does measure employment impacts, found that job losses in Australia would total 39,000 after 10 years.⁵

An updated Peterson Institute study on the TPP-11 (CPTPP) without the US in 2017 used the same GCE model as its previous study. This was also a predictive study, published in October 2017 before the final version of the agreement was reached in November 2017. Like the previous Peterson study, this study did not model employment effects. This study estimated that the TPP-11 would increase Australia's GDP by an even lower figure of 0.5% by 2030.⁶

In summary, the limited econometric studies of the TPP-12 predicted very small increases of 0.6% - 0.7% in Australia's GDP by 2030. After the US, the largest economy, left the agreement, only one study was conducted which predicted even lower GDP growth for Australia of 0.5% by 2030. These studies did not include employment effects. A study of the TPP-12 which did include employment effects found job losses of 39,000 after 10 years.

There appear to be no studies yet conducted of the actual economic or employment outcomes in Australia of the CPTPP since it came into force at the end of 2018. This is unsurprising, given the dramatic fall in global and Australian trade and investment and in economic growth caused by the COVID-19 pandemic from early 2020-22 and the invasion of Ukraine early in 2022.⁷

Although levels of particular Australian products or services exports and imports to particular countries can be measured, the general falls in trade and investment over this period mean it would be difficult to attribute impacts on Australian economic growth and employment to any particular trade agreement.

As indicated in the introduction, this submission will focus on other impacts of the CPTPP.

Investor-State Dispute Settlement (ISDS) Chapter 9

All trade agreements have government-to-government dispute processes. ISDS is controversial because it is an optional, separate dispute process that gives additional legal rights to a single foreign investor (rights not available to local investors) to sue governments for compensation. ISDS gives increased legal rights to international corporations, enabling them to bypass national courts and sue

⁴ L. Taylor and R. von Arnim (2006) *Computable General Equilibrium Models of Trade Liberalization: The Doha Debate*, New School for Social Research, Oxford.

⁵ Capaldo, J., et al (2016) *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement*, January, Global Development and Environment Institute Working Paper 16 – 01, p. 28, Tufts University, <https://ideas.repec.org/p/dae/daepap/16-01.html>

⁶ Petri, P., et al, *Going It Alone in the Asia-Pacific: Regional Trade Agreements Without the United States*, October, Peterson Institute <https://www.piie.com/sites/default/files/documents/wp17-10.pdf>

⁷ World Trade Organisation (2023) *World Trade Statistical Review*, Chapter III, *World Trade and Economic Growth*, pp 30-31, https://www.wto.org/english/res_e/booksp_e/wtsr_2023_ch3_e.pdf. See also WTO predictions of low growth in trade and GDP for 2023, World Trade Organisation (2023) *World Trade Forecasts*, 5 April, https://www.wto.org/english/news_e/news23_e/tfore_05apr23_e.htm.

governments for millions of dollars in international tribunals over changes in law or policy, even if the changes are in the public interest.

The Labor government elected in May 2022 has a policy against ISDS in new trade agreements, and to review it in existing agreements, recognising that ISDS provisions reduce government scope to regulate in the public interest.⁸

ISDS and public interest regulation, including regulation of carbon emissions

Since the original CPTPP text on ISDS was negotiated in 2016, more evidence has emerged that ISDS cases are being used to claim compensation for legitimate public interest regulation.

The number of reported ISDS cases has been increasing rapidly, reaching 1,303 as of July 2023.⁹ These include regulation tobacco regulation,¹⁰ medicine patents,¹¹ environmental protections,¹² indigenous land rights,¹³ regulation of the minimum wage¹⁴ and most recently, government action to reduce carbon emissions, examples of which are discussed in more detail below.

The danger of ISDS clauses in existing agreements like the CPTPP is exemplified by the fact that Australian investor Clive Palmer has moved ownership of assets to Singapore and claimed to be a Singaporean investor in order to use the ISDS mechanisms in the ANZ-ASEAN Free Trade Agreement¹⁵ and the Singapore-Australia Free Trade Agreement amended in 2017.¹⁶ The amended Singapore agreement has “modernised” ISDS provisions almost identical to those in the CPTPP.

The second and third ISDS cases lodged by Clive Palmer’s company, Zeph Investment, against Australia claimed \$41.3 billion and \$69 billion respectively in compensation for the refusal of coal exploration permits for the Waratah coal mine in Queensland. The license was refused for environmental reasons, including its contribution to increased carbon emissions.¹⁷ Palmer previously

⁸ Trade Minister Don Farrell (2022) Trading our Way to Greater Prosperity and Security,

<https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security>.

⁹ UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

¹⁰ Ranald, P. (2019) When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging, *The Conversation*, March 27, <https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279>

¹¹ Baker, B. (2017) The Incredible Shrinking Victory: *Eli Lilly v. Canada*, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS cases, *Loyola University Chicago Law Journal*, Vol. 49, 2017, *Northeastern University School of Law Research Paper No. 296-2017* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012538

¹² Withers, P. (2019) Canada ordered to pay US 7 million in NAFTA case, February 25, Canadian Broadcasting Company, <https://www.cbc.ca/news/canada/nova-scotia/nafta-bilcon-digby-neck-quarry-environmental-sovereignty-1.5032727>

Nelson, A. (2022) Oil firm Rockhopper wins £210m payout after being banned from drilling, *The Guardian*, August 25, <https://www.theguardian.com/business/2022/aug/24/oil-firm-rockhopper-wins-210m-payout-after-being-banned-from-drilling>

¹³ International Centre for Settlement of Investment Disputes (2017) Decision on Bear Creek mining Corporation versus the Republic of Peru, November 17, ICSID Case No. ARB/14/21,

https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf

¹⁴ UNCTAD (2019) Investment Dispute Settlement Navigator, *Veolia v. Egypt* 2012,

<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/458/veolia-v-egypt>;

Breville, B and Bulard, M. (2014) The injustice industry and TTIP, *Le Monde Diplomatique*, English edition, June, <http://www.bresserpereira.org.br/terceiros/2014/agosto/14.08.injustice-industry.pdf>

¹⁵ Karp P., (2023) Clive Palmer sues Australia for \$41.3bn over alleged free trade rule breach, *The Guardian* July 11, <https://www.theguardian.com/australia-news/2023/jul/10/clive-palmers-second-case-against-australia-is-413bn-claim-it-broke-trade-deal>

¹⁶ Palmer, C. (2023) Notice of intention to commence arbitration, October, www.ag.gov.au/sites/default/files/2023-10/notice-of-intention-to-commence-arbitration-zeph-20-october-2023.pdf

¹⁷ Queensland Department of Environment and Science (2023) Waratah Galilee Coal Mine EA refused, www.des.qld.gov.au/our-department/news-media/mediareleases/waratah-galilee-coal-mine-ea-refused.

used the ANZ-ASEAN FTA provisions to lodge a \$300 billion claim for a decision of the Western Australian government about an iron ore licence, after losing a High Court Appeal against that decision.¹⁸ His latest case means he is currently suing the Australian government for a total of \$410 billion.

Even if these cases are not successful, the Australian government may have to spend years of effort and tens of millions defending them. A previous ISDS case between the Phillip Morris tobacco company and the Australian government over Australia's plain packaging law cost Australia \$12 million in legal fees and took almost 5 years to resolve.¹⁹

The fact that an Australian investor can restructure assets to use ISDS in an existing trade agreement to sue the Australian government underlines the urgency for reviewing ISDS clauses in existing agreements, including the CPTPP, to prevent further such cases.

In the context of a deepening climate crisis, increasing numbers of cases against regulation of carbon emissions have emerged since the original CPTPP text was negotiated. A 2022 study published in the journal *Science* shows increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to phase out fossil fuels.²⁰

The Westmoreland Coal Company²¹ sought compensation from Canada over the Province of Alberta's decision to phase out coal-fired electricity generation by 2030. This US-based company, an investor in two Alberta coal mines, did so using ISDS provisions in the North American Free Trade Agreement (NAFTA). Its case was unsuccessful²² but only due to technicalities regarding changes in the company's ownership. In 2023 the company filed a new claim under NAFTA legacy provisions.²³

In Europe, German energy companies RWE and Uniper launched ISDS cases²⁴ against the Netherlands (using ISDS in the Energy Charter Treaty) over its moves to phase out coal-powered energy by 2030.²⁵

The Uniper case was withdrawn as a condition of German government support when Uniper sought assistance when it was adversely affected by the energy crisis resulting from Russia's invasion of

¹⁸ Ranald, P., (2023) How Clive Palmer is suing Australia for \$300 billion with the help of an obscure legal clause (and Christian Porter), *The Conversation*, April 4, <https://theconversation.com/how-clive-palmer-is-suing-australia-for-300-billion-with-the-help-of-an-obscure-legal-clause-and-christian-porter-203111>

¹⁹ Ranald, P (2019) When even winning is losing, the surprising cost of defeating Philip Morris over plain packaging. *The Conversation*, <https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279>.

²⁰ Thrasher, R *et al.* (2022) How treaties protecting fossil fuel investors could jeopardize global efforts to save the climate – and cost countries billions, *The Conversation*, <https://theconversation.com/how-treaties-protecting-fossil-fuel-investors-could-jeopardize-global-efforts-to-save-the-climate-and-cost-countries-billions-182135>.

²¹ Investment Arbitration Reporter (2018) Canada hit with investment treaty arbitration from US coalminer, <https://www.iareporter.com/articles/canada-hit-with-investment-treaty-arbitration-from-u-s-coal-miner-relating-to-province-of-albertas-phasing-out-of-coal-fired-energy-generation/>

²² Investment Treaty News (2022) NAFTA tribunal in Westmoreland v. Canada declines jurisdiction, finding that the claimant did not own or control the investment at the time of the alleged breach, <https://www.iisd.org/itn/en/2022/07/04/nafta-tribunal-in-westmoreland-v-canada-declines-jurisdiction-finding-that-the-claimant-did-not-own-or-control-the-investment-at-the-time-of-the-alleged-breach/>

²³ Westmoreland Coal Company v. Canada (ICSID Case No. UNCT/23/2), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/23/2>

²⁴ UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement>

²⁵ Kluwer Arbitration (2021) The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations, <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/>

Ukraine.²⁶ RWE withdrew its case after the German Federal Court ruled in July 2023 that, under EU law, ECT's arbitration clause was not a valid basis for arbitration.²⁷ Although both cases have now been withdrawn, they sparked the public debate which led to the EU decision to withdraw from the ECT described below.

US company Ruby River Capital filed an ISDS claim against Canada after its liquefied natural gas project was rejected because of concerns about greenhouse gas emissions. It is seeking US\$20 billion in compensation, despite having spent only US\$124 million on the project.²⁸

After public debate and a comprehensive review and debate, the EU Commission in July 2023 proposed a coordinated withdrawal of all EU states from the Energy Charter Treaty because its ISDS provisions are being used by fossil fuel companies to claim compensation for government laws and policies to reduce carbon emissions. The EU Executive Vice-President for the European Green Deal Frans Timmermans said:

“With the European Green Deal, we are reshaping our energy and investment policies for a sustainable future. The outdated Energy Charter Treaty is not aligned with our EU Climate Law and our commitments under the Paris Agreement.”²⁹

A 2023 report of the UN Special Rapporteur on human rights and the environment found “overwhelming evidence that ISDS is a major barrier to addressing climate change and is incompatible with the urgent action needed to transform the global energy system.”³⁰

The Clive Palmer cases, increasing numbers of ISDS cases against government policies to reduce carbon emissions and the increasing numbers of governments withdrawing from ISDS arrangements all support the urgency of reviewing ISDS in existing agreements.

ISDS legitimacy crisis

Scholars have identified that ISDS has suffered a legitimacy crisis that has grown since the CPTPP came into force, with lack of confidence in the system shared by both civil society organisations and by a growing number of governments. Structural and process issues have been acknowledged by reviews conducted by the two institutions which oversee ISDS arbitration systems.³¹

²⁶ Hodgson C., and Miller J., (2022) Uniper drops coal case as tensions rise over treaty on fossil fuel projects, *Financial Times*, August 15, <https://www.ft.com/content/0a1406f7-4338-478c-ab11-b0c2c12faac8>

²⁷ Verbeek, B. (2023) Energy giant RWE withdraws billion-euro claim against the Netherlands, November 1, <https://www.somo.nl/energy-giant-rwe-withdraws-billion-euro-claim-against-the-netherlands/#:~:text=The%20German%20energy%20company%20Uniper,against%20the%20Dutch%20coal%20law.>

²⁸ Ruby River Capital LLC v. Canada (ICSID Case No. ARB/23/5) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/23/5>; Boston University (2023) Submission to the Special Rapporteur on human rights and the environment call for inputs, <https://www.bu.edu/gdp/files/2023/11/KT-RT-KG-OHCHR-ISDS-Submission-FIN.pdf>

²⁹ European Commission (2023) European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty, News Announcement, 7 July, https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

³⁰ Boyd, D. (2023) Paying polluters: the catastrophic consequences of Investor-State Dispute Settlement for climate and environment action and human rights. UN Commission on Human Rights, July 13 <https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute?s=03>

³¹ Langford, M., Potesta, M., Kaufman, G., (2020) UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions, *Journal of World Investment & Trade*. Retrieved from https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en.

Criticisms of the ISDS *structure* include: the power imbalance which gives additional legal rights to international corporations that already exercise enormous market power; the lack of obligations on investors; and the use of claims for compensation for public interest regulation.

Criticisms of the ISDS *process* include: a lack of transparency; lengthy proceedings; high legal and arbitration costs; inconsistent decisions caused by a lack of precedent and appeals; third-party funding for cases as speculative investments; and excessively high awards based on dubious calculations of expected future profits. Furthermore, arbitrators are not independent judges, but instead remain practising advocates with potential or actual conflicts of interest.³²

Many governments are withdrawing from ISDS arrangements, and the EU and the US are now negotiating trade agreements without ISDS. ISDS has been excluded from the Regional Comprehensive Economic Partnership (RCEP), the Australia-UK Free Trade Agreement (A-UKFTA), the proposed Australia-EU Free Trade Agreement (A-EUFTA), and the India-Australia Comprehensive Economic Cooperation Agreement currently under negotiation.

In 2022, 15 countries terminated investment agreements, meaning that for the third consecutive year, more investment agreements were terminated than were created.³³

‘Modern’ ISDS provisions in the CPTPP do not create effective protections against ISDS cases

There have been attempts in more recent trade agreements such as the CPTPP to include more protections for governments. This includes exemptions that are meant to safeguard public interest regulation. However, the effect of the “modernised” provisions has been limited as ISDS tribunals have continued to draw on the text of old treaties when interpreting “modernised” treaties.³⁴

For example, in the *Eco Oro v. Colombia* decision, the tribunal disregarded an exception in the Colombia-Canada FTA included to protect governments’ right to enact environmental regulation, instead relying on decisions relating to older agreements. The exception reads that nothing in the FTA’s investment chapter “shall be construed to prevent a Party from adopting or enforcing measures necessary” to protect the environment, if the measures do not amount to “arbitrary discrimination or disguised restraint on trade or investment” However, the tribunal decided that even if the exception applies to a measure, “this does not prevent an investor claiming ... that such a measure entitles it to the payment of compensation”.³⁵

In the CPTPP, a similar exception includes the additional proviso that nothing should prevent measures to protect the environment “otherwise consistent with this chapter”.³⁶ Trade law experts have said that the circular language of this exception gives no additional protections for environmental regulation.³⁷

³² Ibid, p.1.

³³ UN Committee on Trade and Development (2023) World Investment Report, p. 10, <https://unctad.org/publication/world-investment-report-2023>.

³⁴ Wolfgang, A (2022) *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes*, OUP. <https://global.oup.com/academic/product/investment-arbitration-and-state-driven-reform-9780197644386?cc=ch&lang=en&>.

³⁵ Benton Heath, J (2021) *Eco Oro and the Twilight of Policy Exceptionalism*, *Investment Treaty News*, <https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/>.

³⁶ DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Chapter 9, Article 9.16, p. 9-18. <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents>.

³⁷ Kawharu, A (2015) TPPA Chapter 9 on Investment, Expert Paper no. 2 on the TPPA, p.9, *The Law Foundation*, <https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf>, and Gleeson, D, and Labonte, R (2020) *Trade Agreements and Public Health*, pp.28-9. Palgrave studies in public health policy research, Palgrave Macmillon, Singapore.

Only tobacco regulation has been clearly excluded from ISDS cases in the CPTPP.³⁸ While language in the CPTPP allows regulation for other legitimate public welfare objectives, it qualifies this by stating except in “rare circumstances”, so creating large loopholes.³⁹

These clauses do not prevent claims from being brought against governments. They only provide some possible arguments governments can use in defending cases. Governments still have to spend time and legal costs defending cases.

In summary, since the CPTPP was negotiated, more evidence has emerged that ISDS clauses are being used against public interest regulation, including regulation of carbon emissions. The increasing numbers of these cases have prompted EU governments to see ISDS as a barrier to government action to address the intensifying climate crisis. The cases taken by Clive Palmer’s company against Australia using the ANZ-ASEAN FTA underline the need for review of ISDS provisions in existing agreements like the CPTPP to prevent further cases.

Attempts in the CPTPP to provide protections or exemptions for public policy areas like the environment are qualified and can be disregarded by ISDS tribunals, as exemplified by the *Eco Oro v. Colombia* case cited above. These exemptions do not prevent cases from being launched, governments still have to spend years and tens of millions defending them.

We note that several CPTPP member countries already have exclusions or modifications to the ISDS clauses in the agreement. Australia and New Zealand have a side-letter in which they agree not to apply the CPTPP ISDS provisions to each other.⁴⁰ Australia and the United Kingdom have a similar side-letter.⁴¹ New Zealand also has similar side letters with Brunei Darussalam, Malaysia, Peru and Viet Nam.⁴²

Recommendations:

- **That ISDS provisions (Part B in Investment Chapter 9) be reviewed and removed.**
- **Failing the removal of ISDS provisions, that the Australian government negotiate with other CPTPP members bilateral side-letters which agree not to apply the ISDS provisions to each other, as it has done with New Zealand and the UK.**

CPTPP suspended clauses would delay access to affordable medicines if reinstated

Twenty-two of the original TPP-12 provisions have been suspended, but not removed. Many of the most controversial suspended provisions on pharmaceuticals were originally included at the insistence of the US but were suspended when they withdrew from the agreement.

These suspended provisions would have inserted or extended data exclusivity on clinical drug trial data submitted to drug regulatory authorities, specifically for the newest, most effective and

³⁸ DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Chapter 29, Article 29.5, p.29, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents>.

³⁹ DFAT, Ibid, Chapter 9, Annex 9-B, p. 9-35.

⁴⁰ DFAT (2018) Side Letter between Australia and New Zealand on ISDS, <https://www.dfat.gov.au/sites/default/files/sl15-australia-new-zealand-isds.pdf>.

⁴¹ DFAT (2023) Side letter between Australia and the UK on ISDS, <https://www.dfat.gov.au/sites/default/files/cptpp-isds-letter-aus-uk-signed.pdf>.

⁴² NZ Ministry of Foreign Affairs and Trade (2016), CPTPP Investment and ISDS, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/investment-and-isds/>.

expensive biologic medicines. Data exclusivity is a separate monopoly in addition to the existing 20-year patent monopoly, meaning manufacturers of lower cost versions of the medicines cannot use existing drug trial data to obtain market approval for additional periods after patents have expired. For Australia, which already has 5 years of data exclusivity, this period would be up to an additional three years. For developing countries without data exclusivity, this could be up to eight years.⁴³

These provisions would delay the introduction of low-cost versions of expensive biologic medicines. For Australia, it could cost the Pharmaceutical Benefits Scheme several hundred million dollars per year for each year of delay.⁴⁴

These provisions would be even more costly for developing countries that are party to the agreement (Viet Nam, Peru, Malaysia, Mexico). This is despite the negotiation of transition arrangements before the provisions would come into force.⁴⁵

The rationale for suspending, but not removing the provisions was that these provisions could be reinstated if the US were to re-join the agreement. That these provisions are not currently in effect is positive, and the fact that these suspended provisions were removed by the remaining parties suggests that the impact on access to medicines was considered unacceptable. In order to ensure that provisions that are detrimental to affordable medicines access cannot be reinstated, the suspended clauses should be removed.

Recommendation:

- **That the suspended CPTPP provisions on pharmaceuticals be removed permanently from the agreement.**

Labour and Environmental standards

The CPTPP contains chapters on labour and environment,⁴⁶ which are considered a step up from older agreements which did not include such chapters or had chapters which were completely aspirational with no disputes processes or enforceability. The CPTPP chapters have disputes processes which are separate from the dispute processes in other chapters in the agreement. The chapters do commit governments to enforce their own laws and not to reduce labour rights or environmental standards to gain a trade advantage. However, many other commitments are soft commitments to which the dispute processes do not apply. The dispute processes themselves have not proven effective in other agreements because they are qualified, lengthy and convoluted, compared with the general state-to-state dispute process enforced through trade sanctions which applies to other chapters.⁴⁷

⁴³ Gleeson, D, et al (2017) The Trans-Pacific Partnership Agreement, intellectual property and medicines: Differential outcomes for developed and developing countries. *Global Social Policy*, 18 (1), 7–27. Retrieved from <https://journals.sagepub.com/doi/full/10.1177/1468018117734153>.

⁴⁴ Gleeson, D et al (2017) Financial Costs associated with monopolies on biologic medicines in Australia, *CSIRO Publishing*, <https://www.publish.csiro.au/AH/AH17031>.

⁴⁵ Gleeson, D, et al (2017) The Trans-Pacific Partnership Agreement, intellectual property and medicines: Differential outcomes for developed and developing countries. *Global Social Policy*, 18 (1), 7–27. Retrieved from <https://journals.sagepub.com/doi/full/10.1177/1468018117734153>.

⁴⁶ DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Chapters 19 and 20 <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents>.

⁴⁷ International Trade Union Confederation (2011) Trans-Pacific Partnership Labour Chapter scorecard: fundamental issues remain unaddressed, https://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf.

Labour regulation and environmental regulation are not clearly excluded from ISDS cases, meaning that changes to labour laws or environmental policy can still be subject to ISDS disputes, as discussed above.

Labour Rights Chapter 19

Many of the countries that are party to the CPTPP, including Australia, have ratified the International Labour Organisation (ILO) conventions which protect labour rights. This includes freedom of association, the right to collective bargaining, no forced labour, no child labour, no discrimination in the workplace and the right to a safe and healthy workplace.⁴⁸ The convention obligations are stronger and more detailed than the ILO *Declaration on Fundamental Principles and Rights at Work* (1998). The CPTPP text refers to “rights as stated in the ILO Declaration” and, crucially, not the ILO conventions (which are explicitly excluded from consideration in footnote 3 of Article 19.3). Given that there are no rights included in the ILO declaration, only principles informed by rights, this creates ambiguity, undermining consistent application of the labour chapter and respect for labour rights.⁴⁹

Nine CPTPP countries, including Australia, have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) which further protect labour rights.⁵⁰ For example, ICESCR states that child labour “should be prohibited and punishable by law” while the CPTPP Chapter only commits governments to “recognise the goal” of eliminating forced and child labour.

In addition to the soft obligations on labour rights, there are notable areas in which the CPTPP has omitted to lay down standards, such as for migrant workers, or has included heavily qualified obligations. Complaints about labour rights violations require evidence that there is a “sustained or recurring course of action or inaction in a manner affecting trade or investment” between TPP governments (Article 19.5.1). These are more onerous requirements than for enforcement provisions in other TPP chapters. The second requirement, that the violation be in “a manner affecting trade or investment”, means that public sector workers and others in non-traded sectors cannot use the disputes process. Under similar qualified provisions in the Dominican Republic-Central American Free Trade Agreement, the US complaint against Guatemala for failing to enforce labour laws was dismissed because the tribunal found that the failure did not affect trade,⁵¹ meaning that these qualifications exclude large sections of the workforce. Given all these qualifications some experts have questioned whether the CPTPP labour chapter establishes meaningful labour rights.⁵²

⁴⁸ International Labour Organization (2022) <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

⁴⁹ Tham, J C, And Ewing, K D (2020) Labour provisions in trade agreements: neoliberal regulation at work? *Research Gate*. pp. 6-14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610727.

⁵⁰ UNHR Treaty Bodies. Ratification Status by Country or Treaty, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=35&Lang=EN.

⁵¹ Dominican Republic-Central America-United States Free Trade Agreement Arbitral Panel (2017) In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR (Final Report of the Panel) para 594, p.201, https://www.trade.gov/sites/default/files/2020-09/Guatemala%E2%80%9320Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf.

⁵² Tham, J C and Ewing, K D (2020) Labour provisions in trade agreements: neoliberal regulation at work? *Research Gate*, pp. 18-19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610727.

Recommendations

The labour chapter should be revised to

- ensure hard commitments to the ILO conventions, including elimination of forced and child labour
- remove the requirements for sustained or recurring course of action or inaction in a manner affecting trade or investment
- apply a disputes process which is enforceable through trade sanctions in the same way as disputes processes are applied in other chapters of the agreement.

Environmental Standards Chapter 20

Environmental law experts have also criticised the environment chapter for its soft commitments on environmental standards, which are not fully enforceable. Violations in the environment chapter must also affect environmental regulation “through a sustained or recurring course of action or inaction in a manner affecting trade or investment” (article 20.3.4). Many of the commitments to international environment agreements use soft aspirational language. The only hard commitment applies to the international agreement on trade in endangered species (Article 20.17). As in the labour chapter, the dispute process is lengthy and convoluted, and is not enforced by trade sanctions in the same way as the dispute process applying to other chapters in the agreement.

The CPTPP commitments are very weak on measures to address climate change. The text does not refer to climate change, but only to acknowledgement and cooperation for voluntary measures for lower emissions. Articles 20.15.1 and 20.15.2 state:

1. “The Parties acknowledge that transition to a low emissions economy requires collective action.
2. The Parties recognise that each Party’s actions to transition to a low emissions economy should reflect domestic circumstances and capabilities and, consistent with Article 20.12 (Cooperation Frameworks), Parties shall cooperate to address matters of joint or common interest”.⁵³

More recent agreements like the Australia-UK FTA include stronger commitments to reduce carbon emissions. The EU-New Zealand FTA, which is reportedly a model for the agreement that Australia is currently negotiating with the EU, has hard commitments to reduce carbon emissions which are enforceable through trade sanctions in the same way as other chapters in the agreement.⁵⁴

Australia passed the Climate Change Act in 2022, setting the goal of reaching net-zero emissions by 2050. Considering the increasing recognition of the urgency of climate action by the international community and Australia’s own increased climate ambition since the CPTPP came into force, the text of the CPTPP should be reviewed and updated.

The CPTPP has been criticised for requiring the UK to remove or lower environmental standards before its accession to the CPTPP. This includes the reduction of tariffs on the import of unsustainable palm oil associated with deforestation and lowering of agricultural and animal welfare

⁵³ CPTPP Chapter 20. See also Sierra Club (2015) TPP Text Analysis: Environment Chapter Fails to Protect the Environment, <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysisupdated.pdf>.

⁵⁴ New Zealand Ministry of Foreign Affairs and Trade, Text of the NZ-EU FTA, Chapter 26, Articles 26.3.6 and 26.16.2 <https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/Consolidated-Text-of-all-Chapters.pdf>.

standards.⁵⁵ Australia has not been required to lower its environmental standards, but the requirements imposed on the UK set a bad precedent for other countries which may want to join the CPTPP in future.

In summary, the non-binding nature of commitments and weak enforceability in the labour and environment chapters mean the CPTPP does not meet current high-quality standards in these areas. The lack of enforceability of these chapters contrasts sharply with the legal rights of corporations to sue governments over domestic laws, including environmental laws, under the provisions for ISDS described above.

Recommendations:

The environment chapter should be revised to

- **ensure hard commitments to international environment agreements, including hard commitments to address climate change through the Paris Agreement and subsequent agreements to reduce carbon emissions**
- **remove the requirements for dispute processes to require a sustained or recurring course of action or inaction in a manner affecting trade or investment**
- **apply a disputes process which is enforceable through trade sanctions in the same way as disputes processes are applied in other chapters of the agreement.**

Women's Rights and Indigenous rights

The terms of reference for the review include women's rights and indigenous rights. Although the CPTPP preamble⁵⁶ mentions "promotion" of women's rights and indigenous rights very briefly, there are no commitments in the text of the agreement to proactively protect these rights. This renders the preamble meaningless in these areas and is a serious omission compared with other recent trade agreements.

Since the negotiation of the CPTPP, increasing numbers of governments have included such commitments in trade agreements. The Australia-United Kingdom Free Trade Agreement has commitments to gender equality based on UN conventions.⁵⁷ The Australia-EU Free Trade Agreement still being negotiated is modelled on the New Zealand-EU FTA which has fully enforceable commitments to women's rights and indigenous rights.⁵⁸ Commitments to women's rights and Indigenous rights are also being discussed in the negotiations for the Indo-Pacific Economic Forum, which includes seven members of the CPTPP.⁵⁹

⁵⁵ WWF (2023) New UK trade deal 'rewards environmental destruction', warns WWF, <https://www.wwf.org.uk/press-release/new-uk-trade-deal-encourages-nature-destruction>.

⁵⁶ DFAT (2015) Text of the Comprehensive and Progressive Trans-Pacific Partnership, Preamble, p. 1, <https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf>

⁵⁷ DFAT (2023) Australia-UK FTA Text, Ch 24, <https://www.dfat.gov.au/trade/agreements/in-force/aukfta/official-text/australia-uk-fta-chapter-24-trade-and-gender-equality>

⁵⁸ European Commission (2022) Text of the New Zealand-EU Free Trade Agreement, chapter 19, article 19.4, page 390 to 392, and Chapter 26, article 25.6 p. 464.

<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/41b9778a-c4b6-4189-83b1-98d7cccdec9d/details?download=true>

⁵⁹ DFAT (2023) Indo-Pacific Economic Framework, Ministerial text for Trade Pillar of the Indo-Pacific Economic Framework, p. 2. [https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20\(Trade%20Pillar\)_FOR%20PUBLIC%20RELEASE%20\(1\).pdf](https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf)

Recommendations

- **The CPTPP should be amended to include separate chapters on women's rights and indigenous rights, based on United Nations Conventions**
- **There should be enforceable commitments to gender equality consistent with the UN Convention on the Elimination of All Forms of Discrimination against Women**
- **There should be enforceable commitments to the rights of Indigenous Peoples consistent with the UN Declaration on the Rights of Indigenous Peoples.**

Trade in Services Chapter 10

The objectives of trade-in-services rules in the CPTPP, as in other agreements, are to open services to international investment, and to reduce regulation of them. These rules treat regulation of services as a tariff, to be frozen at current levels and to be reduced, not increased, in future.

The CPTPP uses a negative list structure, which means that *all* services, including those which may be developed in future, are included in the rules of the agreement, except those which governments list as specific exclusions or reservations. The reservations are listed in two annexes. Annex I lists current regulation which can be retained, but not increased in future. Annex II lists reservations for which the government can both retain existing regulation and increase regulation in future.

This means that governments have to be very careful to list all reservations, including for emerging new services, in agreements. Public services are intended to be excluded, but a public service is defined as “a service supplied in the exercise of governmental authority which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”⁶⁰ This definition can result in ambiguity about which services are covered by the reservations. In Australia, as in many other countries, some public and private services are provided side-by-side.

Without very specific reservations, trade-in-services rules can restrict new forms of regulation needed when circumstances change, as has occurred with the need for increased financial regulation following the Global Financial Crisis and the Royal Commission into the Banking and Financial Services Industry,⁶¹ the Royal Commission into Aged Care Quality and Safety discussed below, and governments' responses to climate change through regulation of energy services' carbon emissions discussed above.

Trade-in-services rules also use a 'ratchet' structure which treats the regulation of services as if it were a tariff, to be frozen at current levels and not raised in future, unless particular services are specifically reserved from this structure in Annex II. This can prevent governments from addressing the failures of privatisation or deregulation. For example, the deregulation and privatisation of vocational education services in Australia resulted in failures in service delivery for students and fraudulent use of public funds, and the Turnbull government had to reregulate to address these failures in 2016.⁶² The increased regulation of vocational education could have been contrary to trade-in-services rules in the Trans-Pacific Partnership which was then still under negotiation.

⁶⁰ Department of Foreign Affairs and Trade (2020) *Text of the CPTPP*, Chapter 10, Article 10.1. p. 10.2.

⁶¹ United Nations (2009) Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, https://www.un.org/en/ga/econcrisissummit/docs/FinalReport_CoE.pdf.

⁶² Conifer, D., (2016) “Parliament Passes Bill to Overhaul Vocational Education Sector”, *ABC News*, December 1, 2016, <https://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860>.

The government responded to this unintended consequence and the need for re-regulation in the CPTPP and subsequent agreements like the RCEP and the Australia-UK FTA, by including a new reservation in Annex II which retained the right to regulate the funding and standards of education services.⁶³

The inclusion of essential services, like health, education, energy, water and aged care in trade agreements also limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to transnational service providers of those services. This means that governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, numbers of staff or relationships with local services. This can reduce the right to regulate to ensure equitable access to essential services, to regulate service standards and staffing levels, and to meet social and environmental goals.⁶⁴

Another example of possible unintended consequence occurred in aged care services in 2021, when a debate emerged about whether aged care services were specifically excluded from trade-in-services rules in the Regional Comprehensive Economic Partnership (RCEP) and other trade agreements, including the CPTPP. Aged care is funded by the federal government but managed largely by private providers. The 2021 Report of the Royal Commission into Aged Care Quality and Safety⁶⁵ exposed multiple scandals caused by a lack of qualified staff and poor-quality care, and recommended increases in staffing levels, increases in qualifications of staff and changes to licensing arrangements. Many of these recommendations have now been implemented, including measures to increase staffing levels through legislation requiring a registered nurse to be on site in residential aged care at all times and mandated minimum care minutes. Reform of the aged care sector is ongoing.

These increases in regulation could have been prevented by the market access and national treatment rules listed above, unless aged care was specifically reserved from the agreement in Annex II. Aged care is not listed in the specific reservation with other specific services like childcare in the RCEP and the CPTPP.⁶⁶ The government argued that aged care was excluded under the more general category of social services, but the Joint Standing Committee on Treaties noted the ambiguity and recommended that 'such inconsistencies give rise to public concern, and it would be better if they were avoided'.⁶⁷ To ensure that there is no potential threat to ongoing reform of the aged care sector in line with the Royal Commission recommendations, aged care should be listed as a specific reservation in Annex II of the CPTPP.

Recommendations

- **That the government review the reservations in the CPTPP trade-in-services chapter to ensure that governments retain the right to regulate and reregulate all government-funded and other essential services as circumstances change.**

⁶³ DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Annex II, p. 1.
<https://www.dfat.gov.au/sites/default/files/annex-ii-australia.pdf>.

⁶⁴ Ranald, P (2021) How a New Trade Deal Could Make It Harder to Improve Life for Australians in Aged Care, *The Conversation*. <https://theconversation.com/how-a-new-trade-deal-could-make-it-harder-to-improve-life-for-australians-in-aged-care-164947>.

⁶⁵ Royal Commission into Aged Care Quality and Safety (2021) Summary of the Final Report, <https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>.

⁶⁶ DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) chapter 10, Annex II, p. 8, <https://www.dfat.gov.au/sites/default/files/annex-ii-australia.pdf>.

⁶⁷ Joint Standing Committee on Treaties (2022) Report 196 on the Regional Comprehensive Economic Partnership, p.27, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Report_196/section?id=committees%2FReport%2F024720%2F76916.

- **That aged care services be listed as a specific reservation in Annex II of the CPTPP.**

Temporary Workers Chapter 12

AFTINET supports Australia's permanent migration system which has contributed to our vibrant multicultural society. Permanent migrants have the same rights as other workers in Australia because they have permanent residency and cannot be deported if they lose their employment.

The government's recent report on Migration Strategy⁶⁸ acknowledged that temporary migrant workers are more vulnerable to exploitation than permanent migrant workers. The fact that they are tied to one employer and face deportation if they lose their job means that these workers have no effective rights in the workplace.

A survey of temporary overseas workers in Australia published in 2017 by University of New South Wales academics found temporary overseas workers experienced widespread wage theft.⁶⁹ Similar evidence was provided in 2017 to the Joint Parliamentary Committee Inquiry into the Modern Slavery Act and by a 2019 study of the horticultural industry.⁷⁰ The evidence from these studies shows gross violations of Australian minimum work standards including failure to pay even minimum wages, long hours of work, and lack of health and safety training leading to workplace injuries, as well as lack of effective freedom of association and collective bargaining rights.

For these reasons AFTINET does not support expansion of the numbers of vulnerable temporary workers through commitments in trade agreements. However, Annex 12A of the CPTPP commits Australia to accepting unlimited numbers of temporary contractual service providers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam in a wide range of occupations, and does not require labour market testing to establish whether there are local workers available.⁷¹

On December 11, 2023 the government announced changes to Australia's migration strategy following a comprehensive review. The changes are aimed at protecting the integrity of Australia's permanent migration system, ensuring that temporary workers meet specific labour shortages, and are not vulnerable to exploitation, and ensuring that temporary workers have a pathway to becoming permanent residents and citizens.⁷²

Recommendation

- **That the expansion of numbers of temporary contractual service providers in annex 12A be removed, consistent with the government's Migration Strategy policy to ensure that numbers of temporary workers address genuine labour shortages and that they are protected from exploitation.**

⁶⁸ Commonwealth of Australia (2023) Migration Strategy December 11, <https://immi.homeaffairs.gov.au/programs-subsite/migration-strategy/Documents/migration-strategy.pdf>

⁶⁹ Berg et al. (2017) Wage Theft in Australia, <https://apo.org.au/sites/default/files/resource-files/2017-11/apo-nid120406.pdf>

⁷⁰ Howe et al. (2019) Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry, www.sydney.edu.au/Content/Dam/Corporate/Documents/Business-School/Research/Work-And-Organisational-Studies/Towards-a-Durable-Future-Report.pdf

⁷¹ Department of Foreign Affairs and Trade (2016) Trans-Pacific Partnership Agreement (incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership), Chapter 12, annex 12A, p.6 <https://www.dfat.gov.au/sites/default/files/12-a-australia-temporary-entry-for-business-persons.pdf>

⁷² Commonwealth of Australia (2023) Migration Strategy, December 11, p.13, <https://immi.homeaffairs.gov.au/programs-subsite/migration-strategy/Documents/migration-strategy.pdf>

Conclusion

This submission has focussed on the review terms of reference dealing with human rights, labour rights and environmental standards. These include the expansion of international investor rights at the expense of governments' right to regulate, equitable access to medicines, labour rights and environmental standards.

The inclusion of ISDS provisions in the CPTPP gives increased legal rights to international corporations to claim compensation from governments for enacting democratically decided public interest regulation, including regulation of carbon emissions. Clive Palmer's use of ISDS in existing agreements reinforces the need for ISDS to be reviewed in the CPTPP. Controversial clauses on pharmaceuticals have been suspended rather than removed from the CPTPP, despite the fact that they are unacceptable to other CPTPP member countries and the threat they would pose to access to affordable medicines if reinstated. The labour and environment chapters have selective and qualified commitments to international agreements on labour rights and environmental standards, and a lengthy and convoluted disputes process whose outcomes are not enforceable through trade sanctions in the same way as the dispute process outcomes in other chapters in the agreement. The trade-in-services chapter could restrict government regulation of essential services needed to address future policy challenges like climate change and aged care. The expansion of numbers of temporary workers vulnerable to exploitation is not consistent with current government policy aimed at protecting the integrity of Australia's permanent migration system, ensuring that temporary workers meet specific labour shortages and are not vulnerable to exploitation.

The agreement should be revised according to the recommendations listed above.