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Submission to the Joint Standing Committee on Treaties on the Peru-Australia Free Trade Agreement (PAFTA) April 2018

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 community organisations and many more individuals supporting fair regulation of trade, consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental protection.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make a submission on the Peru-Australia Free Trade Agreement (PAFTA), much of which is modelled on the TPP-11, but which also contains chapters and clauses which differ from the TPP-11.

Peru and Australia have signed both the TPP-11 and PAFTA and both may eventually be ratified. This raises the question of the relationship between the two agreements. The standard answer to this question is that particular companies or governments can choose to apply the terms of the agreement which is more favourable to their interests. This means, for example, that companies wishing to trade or invest can choose to apply provisions in the TPP-11 which are more favourable to their interests but have less safeguards for public regulation than PAFTA. This submission focuses on PAFTA, but also takes into account the relationship between PAFTA and the TPP-11.

Summary

A more transparent democratic and accountable trade agreement process

The current Australian trade agreement process is secretive and undemocratic, with texts not made public until after the decision to sign them. The decision to sign agreements is made by Cabinet before they are tabled in Parliament and examined by the Joint Standing Committee on Treaties. The National Interest Analysis presented to the Committee is not independent but is conducted by the same department which negotiated the agreement. Parliament has no ability to change the agreement and can only vote on the implementing legislation.

AFTINET supports publication of negotiating texts, publication of the final text of agreements and independent evaluation of the economic, health and environmental impacts of agreements before the decision is made to sign them. Parliament should vote on the whole text of the agreement.

Relationship between PAFTA and the TPP-11

Peru and Australia have signed both the TPP-11 and PAFTA and both may eventually be ratified. This raises the question of the relationship between the two agreements. The standard answer to this question is that companies or governments can choose to apply the terms of the agreement which is more favourable to their interests. This means, for example, that companies wishing to trade or invest can choose to apply provisions in the TPP-11 which are more favourable to their interests but have less safeguards for public regulation than PAFTA.

ISDS

It is disappointing that PAFTA includes ISDS provisions, since there is increasing evidence of the flaws in the ISDS system including that the EU and US are moving away from ISDS, and that ISDS institutions have acknowledged its flaws and are reviewing it structures. AFTINET believes that ISDS should not be included in any trade agreements.

Nevertheless, we welcome the fact that PAFTA excludes ISDS cases against public health measures, specifically mentioning cases related to the PBS, Medicare, the Therapeutic Goods Administration and the Office of the Gene Technology Regulator. There is no specific mention of tobacco regulation, so it remains to be seen whether the general exclusion for public health measures will deter tobacco companies from lodging claims.

However, the need for these specific carveouts casts doubt on the effectiveness of the general safeguards for other public interest legislation contained in the text and raises the question of why other public interest regulation like environmental regulation is not specifically excluded.

Also, because both TPP-11 and PAFTA agreements may eventually apply, it may be open to a foreign investor to choose to use the provisions in the TPP-11 which do not have the public health carveouts contained in PAFTA.

Trade in Services

The chapter on trade in treats the regulation of services, including essential services, as if it were a tariff, to be frozen at existing levels or reduced over time, and not to be increased in future, known as the “ratchet” structure. The negative list structure means that all services are included, unless specifically exempted. Exemptions are intended to be reduced over time.

The negative list and ratchet structure are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade.

But this structure ignores the need for democratic governments to respond to changed circumstances, like the reregulation of the financial sector following the Global Financial Crisis, and the need for new regulation of carbon emission levels and energy markets in response to climate change. The structure can also prevent governments from responding failures of privatisation and deregulation, as occurred with the need to re-regulate the provision of Australian vocational education services.

Temporary movement of people

Australia is a nation built on immigration and has a permanent migration scheme which has created our vibrant multicultural society. Permanent migrants have the same rights as other Australians. Their employment is not dependent on the sponsorship of one employer and they cannot be deported if they lose their employment.

Temporary work visas for overseas workers were originally designed to address specific skills shortages and were subject to local labour market testing to establish whether local workers were available. Temporary migrant workers are in a far weaker bargaining position because they are sponsored by a single employer and loss of their employment can lead to deportation. This leaves them vulnerable to exploitation.

Increases in numbers of temporary migrant workers and removal of labour market testing are now frequently included in trade negotiations. AFTINET opposes the inclusion of temporary worker provisions in trade agreements because it treats workers as if they were commodities.

Nevertheless, we welcome the fact that the government has maintained labour market testing for contractual service providers in the PAFTA (DFAT 2018e: 6). However the removal of labour market testing for contractual service providers remains in the TPP-11, despite the fact that they were negotiated over the same period.

This begs the question of why the two agreements are inconsistent.

Labour and environment

Both the labour and environment chapters in PAFTA have been truncated to a few pages compared with the TPP 11. The there are far fewer commitments and the language in the chapters is aspirational and not legally binding or enforceable through the state-to-state dispute mechanism in the agreement.

They do not contain even the relatively weak commitments and convoluted dispute processes in the TPP. This means that governments could choose to use the weaker protections in PAFTA.

Technical Barriers to Trade (TBT)

The issue with mutual recognition of regulatory standards across countries with different standards is how to preserve the right of future governments to maintain and improve Australia's relatively high standards in areas like food regulation. Pressures from industry to simplify and streamline standards regarded as barriers to trade may suit their cost-reduction interests but may not be in the public interest.

While Australia is already bound by World Trade Organisation TBT rules, the TPP-11 includes the added possibility of ISDS.

In the Korea-Australia Free Trade Agreement, Australia ensured that ISDS disputes could not be applied to the TBT chapter, but there is no such exclusion in the TPP-11. Australia has introduced a form of country of origin labelling after scandals involving imported food. More such regulation might be needed in future.

A foreign investor could allege that changes to country of origin or other labelling requirements which might occur after the TPP is in place could harm their investment. The wine and spirits annex could restrict future options for mandatory alcohol health warnings like those for pregnant women, and such regulation could also be open to ISDS cases.

Conclusion

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of PAFTA despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts.

In the absence of such information, the committee does not have enough information to support the implementing legislation.

The trade agreement process should be transparent, democratic and accountable

The current Australian trade agreement process is secretive and undemocratic, with the text not made public until after the decision to sign it. The decision to sign agreements is made by Cabinet before they are tabled in Parliament and examined by the Joint Standing Committee on Treaties. The National Interest Analysis presented to the Committee is not independent but is conducted by the same department which negotiated the agreement. Parliament has no ability to change the agreement and can only vote on the implementing legislation.

A Senate Inquiry in 2015 entitled *Blind Agreement* criticised this process and made some recommendations for change. The Productivity Commission has made recommendations for the public release of the final text and independent assessments of the costs and benefits of trade agreements before they are authorised for signing by Cabinet. The EU has developed a more open process, including public release of documents and text during negotiations and release of texts before they are signed (Senate Foreign Affairs, Defence and Trade Committee 2015, EU 2015, Productivity Commission 2010).

AFTINET's recommendations that support these and other changes were summarised in our submission to the Senate Inquiry. We support the publication of negotiating texts, publication of the final text of agreements and independent evaluation of the economic, health and environmental impacts of agreements before the decision is made to sign them. Parliament should vote on the whole text of the agreement (AFTINET 2015).

Investor-State Dispute Settlement process (ISDS)

In recent years, numbers of ISDS cases have increased and even more evidence has come to light about the flaws in the ISDS system. The critical debate has affected all sides of politics and had an impact in the EU and the US which are now negotiating agreements without ISDS. The two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID) are conducting ongoing reviews which have identified serious flaws in the system.

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional special rights to foreign investors to sue governments for damages in an international tribunal.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments. But ISDS has developed concepts like "indirect" expropriation, minimum standard of treatment and legitimate expectations which do not exist in national legal systems. These enable foreign investors to sue governments for millions and even billions of dollars of compensation if they can argue that a change in domestic law or policy has reduced the value of their investment.

Many experts including Australia's former High Court Chief Justice French and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen by investors and governments from a pool of investment law experts who can continue to practice as investment law advocates. In

Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest (Kahale 2014, French 2014, Productivity Commission 2015).

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider and appeal mechanisms to ensure consistency of decisions.

Leading international investment law expert and practitioner George Kahale has recently criticized ISDS in an April 2018 lecture at the Brooklyn Law School titled **"**The wild, wild west of international arbitration law**".**

Kahale uses examples from his own experience representing governments in ISDS cases to argue that the ISDS system based on commercial arbitration principles is not fit to arbitrate cases in which international companies seek compensation from governments for changes in health, environment or other public interest laws.

Kahale says "It's one thing to have party-appointed arbitrators negotiate a decision to settle a commercial dispute having no particular significance beyond the case at hand ... it is quite another to decide fundamental issues of international law and policy that affect an entire society" (Kahale 2018: 7).

Adding "there really are no hard and fast rules" in ISDS, he cites examples of claims of billions of dollars based on false documents, methodologies for calculations of future corporate income which are unacceptable in World Bank accounting practice, and similar claims before different tribunals resulting in inconsistent decisions (Kahale 2018: 14).

He notes the growth of third-party funding of ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation, and argues they fuel the growth of "surrealistic" claims and are "more about making money than obtaining justice" (Kahale 2018:17).

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. A 2012 OECD Study found ISDS cases last for 3 to 5 years and the average cost to governments for running cases was US$8 million per case, with some cases costing up to US$30 million (Gaukrodger and Gordon 2012).

The default position in ISDS cases, unlike national court systems, is that each party pays its own costs. Tribunals have discretion about whether they decide to award costs to the winning party and applying for costs to be awarded prolongs the duration and costs of the case. For example, the Philip Morris tobacco case against Australia was decided in 2015, the government won but the costs were not awarded until 2017, and only a proportion of the costs were awarded. More recent studies indicate that costs to governments are increasing (UNCITRAL 2017).

The Australian experience of ISDS

The June 2015 Productivity Commission study of ISDS confirmed its 2010 study that ISDS gives additional legal rights to foreign investors not available to domestic investors and lacks evidence of economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses "considerable policy and financial risks" to governments (Productivity Commission 2015). This is why the previous ALP government had a policy against ISDS from 2011, and why many other governments, including Germany, France, Brazil, India, South

Africa and Indonesia are reviewing ISDS (Filho 2007, Biron 2013, Uribe 2013, Mehdudia 2013, Bland and Donnan 2014).

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Coalition Howard government did not include ISDS in the US-Australia Free Trade Agreement in 2004.

Claimed ISDS "safeguards" for health, environment and other public welfare measures have not prevented ISDS cases. Tribunals have enormous discretion in interpreting the meaning of "safeguards" (Tienhaara 2015b).

Once a case is under way, defending it can take years and cost tens of millions of dollars. The US Philip Morris tobacco company lost its claim for compensation for the 2011 plain packaging legislation in the Australian High Court. The company could not sue under the Australia-US Free Trade Agreement because the Howard government had not agreed to include ISDS in that agreement. The company moved some assets to Hong Kong and used the Hong Kong-Australia investment agreement to sue the Australian government. It took over four years and reportedly cost tens of millions in legal fees for the tribunal to decide the threshold issue that Philip Morris was not a Hong Kong company (Tienhaara 2015b).

The Australian government was awarded a proportion of the costs by the tribunal, but the proportion and total costs were blacked out of the tribunal decision, and the Australian government has refused to reveal them. The government is also appealing an FOI decision by the Australian Information Commissioner that the costs should be made public (Patrick 2018).

The Australian government won on the issue of jurisdiction, so the substantive issue of whether the company deserved billions of dollars of compensation because of the legislation was not tested.

Even so, the case had a freezing effect on other governments' introduction of plain packaging legislation. The New Zealand government delayed introducing its own legislation pending the tribunal decision (Johnstone 2015).

International corporations are well aware of this freezing effect and use ISDS to attempt to prevent public interest regulation. The Canadian Chevron Company has lobbied for ISDS to be included in EU trade agreements as a deterrent against environmental protection laws (Nelson 2016).

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors.

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning Report which argued strongly that trade agreements should **not** include ISDS.

The Report says ISDS is incompatible with human rights principles because it "encroaches on the regulatory space of States and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability" (de Zayas 2015).

Recent ISDS cases on medicines, environment, Indigenous land rights

Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the United Nations Conference on Trade and Development show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and over 850 in 2017 (UNCTAD 2018). Most cases are won by investors or settled with concessions from governments (Mann 2015, UNCTAD 2018).

There are growing numbers of cases against health, environment, Indigenous land rights and other public interest laws. Recent cases include the following:

> Swiss Pharmaceutical company Novartis filed an ISDS dispute against the Colombian government under the Switzerland-Columbia bilateral investment treaty over plans to reduce prices on a patented treatment for leukemia (Williams 2016).
>
> The Canadian Bear Creek mining company recently won $26 million from the government of Peru because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous land owners about the mine, leading to mass protests (International Centre for Settlement of Investment Disputes 2017). The tribunal essentially rewarded the company despite the fact that it had violated its obligations in the ILO Convention on Indigenous Peoples to which Peru is a party.
>
> The US Bilcon Company won millions in compensation because its application for a quarry development was refused for environmental reasons. The exact amount is still being determined (Global Affairs Canada 2018).
>
> The French Veolia Company is suing the Egyptian Government over a contract dispute in which they are claiming compensation for a rise in the minimum wage (Breville and Bulard 2014).

Ongoing reviews conducted by ISDS institutions reflect community concerns about ISDS

Growing community concern about ISDS has also had an impact on the two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), both of which are conducting ongoing reviews of the system.

The November 2017 discussion paper for the UNCITRAL review involving member states identified the following issues to be addressed:

> “(i)inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties (“party-appointment”), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns…have been said to undermine the legitimacy of the ISDS regime and its democratic accountability” (UNCITRAL 2017:6).

In October 2016, the Secretariat of ICSID initiated a consultation with its member States to identify areas of concern. The consultation was extended to the public in January 2017 and is ongoing.

The preliminary outcome of the consultations indicated 16 potential areas of concern, many of which were similar to the UNCITRAL list. They include arbitrator-related issues (appointment, code of conduct, challenge procedure), third-party funding, consolidation of cases, means of communication, preliminary objections proceedings, rules on witnesses, experts and other evidence, provisional measures, time frames and allocation of costs (UNCITRAL 2017:5)

EU and US governments retreating from ISDS

Both the EU and the US have been major proponents of ISDS. However, recently there have been increasing numbers of cases taken against changes to EU and US government laws and policy decisions, and there has been an enormous growth in public opposition to ISDS. Opposition has been expressed by legal experts, state and provincial governments, court decisions and the general public**.** Both the EU and the US are now retreating from ISDS in trade negotiations.

The EU

The inclusion of ISDS in negotiations for the Trans-Atlantic Trade and Investment Partnership Agreement between the US and the EU prompted fierce public debate, resulting in a European Commission decision to pause the negotiations to allow for further public consultation about ISDS. In 2014, the European Commission launched an online public consultation on ISDS. The consultation received over 150,000 submissions, the majority of which were critical of ISDS (European Commission 2016, Donnan and Wagstyl 2014, European Parliamentary Research Service 2014).

The ongoing debate about ISDS has led to several EU court cases in which national governments have challenged the ability of the EU to make collective commitments on ISDS on behalf of national governments without such commitments being subject to democratic processes in each country.

On 16 May 2017, the Court of Justice of the European Union issued a landmark opinion on the investment and ISDS clauses in the EU-Singapore free trade agreement. It found that most of the agreement fell under the EU's powers, and that the EU could ratify it on behalf of member countries, except for some investment provisions, including ISDS. The court found that EU Member States' national and regional parliaments and the European Parliament must ratify provisions regarding investors, particularly ISDS (Court of Justice of the European Union 2017).

In March 2018, in a separate case brought by the government of Slovakia, the Court of Justice found that ISDS has an adverse effect on the autonomy of EU law and is therefore incompatible with EU law. The Court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal breached EU law (Court of Justice of the European Union 2018).

The Slovakian case involved two EU member states, but the Belgian government has also requested the court to consider whether the EU proposal for an ISDS investment court in the Canada-EU free trade agreement is compatible with EU law (Kingdom of Belgium 2017).

The European Union now faces a situation resulting from the 2017 decision in which any proposal for ISDS in a trade agreement must be subjected to parliamentary decision-making processes in each EU member country. The 2018 decision and the pending Belgian case also cast doubt on the legal competence of the EU to include

ISDS in any agreement. These two decisions have contributed to the delay in the European mandate for negotiations for the EU-Australia free trade agreement and other agreements.

Because of the unpopularity of ISDS, European Commissioner Jean Claude Juncker has proposed a "fast track" process for agreements without ISDS, which would enable them to be approved by the European Commission alone, without seeking approval from national parliaments. Such agreements could not include ISDS (Von der Burchard 2017). This means that the EU is not likely to include ISDS in the EU-Australia free trade agreement and other future agreements.

The US

Over the last two years, there has also been strong public opposition expressed in the US to the inclusion of ISDS in trade agreements from state governments and legal experts, which has influenced state and national governments.

In February 2016 the National Conference of State Legislatures declared that it "will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations" (National Conference of State Legislatures 2016).

In October 2017, more than 200 prominent law professors and economists signed an open letter arguing that ISDS undermines the rule of law and urging the US government to oppose ISDS in its renegotiation of the North American Free Trade Agreement (NAFTA). Signatories included Nobel laureate Joseph Stiglitz, former Labor Secretary Robert Reich, former California Supreme Court Justice Cruz Reynoso and Columbia University professor and UN Senior Adviser Jeffrey Sachs (Public Citizen (2017).

The United States has since put forward a proposal to withdraw from the ISDS provisions in NAFTA because of the risk and costs of US governments being sued by foreign corporations.

The US Trade Representative Robert Lighthizer said in his testimony to the US House of Representatives Ways and Means Committee Hearing on June 22, 2017:

> "There is a legitimate interest in people who go overseas and invest, and the United States has an obligation to do what it can to make sure that those people are treated fairly. On the other hand, as you suggest, Congressman, I am troubled by the sovereignty issue. I am troubled by the fact that anyone – anyone – can overrule the United States Congress, or the President of the United States, when it's passed a law. That is troubling to me." (US House Ways and Means Committee 2017).

Lighthizer also said in a media conference in October 2017:

> "I've had people come in and say, literally, to me: 'Oh, but you can't do this: you can't change ISDS. … You can't do that because we wouldn't have made the investment otherwise.' … The bottom line is, business says: 'We want to make decisions and have markets decide. But! We would like to have political risk

> insurance paid for by the United States' government. And to me that's absurd. You either are in the market, or you're not in the market."
>
> "It's always odd to me when the business people come around and say, 'Oh, we just want our investments protected.' … I mean, don't we all? I would love to have my investments guaranteed. But unfortunately, it doesn't work that way in the market," (quoted in Ikenson 2017).

On March 21, 2018 Lighthizer confirmed in evidence to the US House Ways and Means Committee that the US was seeking in the NAFTA negotiations an opt-out provision to exempt the US from ISDS. He repeated the arguments quoted above about US sovereignty and that it was not the job of the US government to provide a political risk insurance policy for investors. He argued that investors were protected by state-to-state disputes processes and could also include risk insurance in their individual investment contracts, and did not require ISDS (US House Ways and Means Committee 2018).

ISDS provisions in the PAFTA: some more specific carveouts but general safeguards still not effective

We welcome the fact that PAFTA excludes ISDS cases against public health measures, specifically mentioning cases related to the Pharmaceutical Benefits Scheme, Medicare, the Therapeutic Goods Administration and the Office of the Gene Technology Regulator (PAFTA Section B, Footnote 17). There is no specific mention of tobacco regulation, and it remains to be seen whether the general exclusion for public health measures will deter tobacco companies from taking cases if a future government should decide on changes to regulation.

However, the need for these specific carveouts casts doubt on the effectiveness of the general safeguards for other public interest legislation contained in the text and raises the question of why other public interest laws like environmental regulation are not specifically excluded.

The claimed "safeguards" which apply to the ISDS section of the investment chapter cannot be described as clear carveouts or exclusions.

The general "safeguard" articles in the investment chapter which do apply to key ISDS definitions have the same pitfalls as in previous FTAs, which have not prevented foreign investors from bringing cases against governments in areas like environmental regulation.

One claimed safeguard in Chapter 9 refers to laws or policies which can be seen by investors as "indirect expropriation". This has the same wording as the equivalent article in the Korea-Australia Free Trade Agreement (KAFTA) and other recent agreements (DFAT 2014: Annex 2B).

The article in PAFTA reads:

> "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances" (Annex 8-B.5).

This has large legal loopholes, as it does not prevent companies from launching cases in which they can argue that the measures are not legitimate, and that the circumstances are rare.

Another claimed safeguard reads:

> "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent with this chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental health or other regulatory objectives" (Article 8.16).

Associate Professor Amokura Kawharu of Auckland University has commented that this is circular language which "appears to provide no additional protection, and only affirms the right to regulate in a manner consistent with the other terms of the investment chapter" (Kawharu 2015:9). Internationally recognised investment law practitioner George Kahale shares this view (quoted in Hill 2015).

A third claimed safeguard relates to the fact that governments are required to treat international investments in accordance with customary international law, which includes "fair and equitable treatment" and "full protection and security" (Article 9.6.1).

There have been controversial cases dealing with fair and equitable treatment where tribunals have found in favour of corporations on the basis that government action has interfered with the company's own expectations of the treatment they should receive. A recent example is *Bilcon vs Canada*, in which a tribunal found in March 2015 in favour of a company claiming damages because its application for a quarry development was refused for environmental reasons. The reasons for the decision included that the decision was contrary to the company's expectations of treatment (Dundas 2015).

Choice of ISDS arbitrators and other procedural issues in PAFTA

The PAFTA reflects provisions in previous agreements on selection of arbitrators, whereby each of the disputing Parties selects one arbitrator and the third is appointed by agreement. The arbitrators are appointed from panels overseen by two different international institutions, the United Nations Commission on International Trade Law (UNCITRAL) or the World Bank International Centre for Settlement of Investment Disputes (ICSID).

If Parties cannot agree about the third appointment, that person is appointed by a neutral third party. It has been claimed that this process is a protection against arbitrator bias.

This system of appointing arbitrators is not new, provides no additional protection, and misses the point as a defence against arbitrator conflict of interest. The point is not about individual arbitrator bias, but about a systemic failure. The pool from which arbitrators can be selected consists of investment law experts who can continue to be practising advocates, representing disputing parties one month, and sitting on an arbitration panel the next month. This is not an independent judiciary. The only way to ensure an independent judiciary is to ensure that arbitrators or judges cannot continue to be practising advocates.

The PAFTA does not include an appeals mechanism. There is only a reference to a future appeals mechanism, which may be developed outside the framework of the PAFTA. There is no commitment to use such a mechanism, but only to consider whether it should be applied to the PAFTA. The relevant article reads:

> "In the event that an appellate mechanism for reviewing rewards rendered by Investor-State Dispute Settlement tribunals is developed in the future under other institutional arrangements, the parties shall consider whether awards

rendered under article 8.28 should be subject to that appellate mechanism" (Article 8.24.11).

The PAFTA ISDS model compared with other recent models

PAFTA ISDS provisions are not informed by two recent models developed by India and the EU, both of which were publicly available before the conclusion of the PAFTA negotiations. Australia has been engaged with India in both bilateral negotiations and through the Regional Comprehensive Economic Partnership negotiations between the 10 ASEAN countries plus India, China, Japan, South Korea, Australia and New Zealand. Australia has also been engaged in discussions for a bilateral agreement with the EU.

The India draft model Bilateral Investment Treaty was released publicly in March 2015, with a second draft in December. The EU draft model investment chapter for its trade negotiations was released publicly on September 15, 2015, and has since been tabled in the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the US (Government of India 2015, European Commission 2016).

The Indian model has more robust assertions of the right of government to regulate for public policy reasons with fewer qualifications than the TPP. For example, the definition of expropriation in the draft India BIT does not contain the loophole "except in rare circumstances" discussed above (Government of India 2015: Article 5.5). The draft also avoids the pitfalls discussed above in the definition of fair and equitable treatment and legitimate expectations by omitting these concepts altogether.

The EU model attempts to address the structural flaws of the lack of an independent judiciary and appeals system by establishing a panel of qualified judges to serve on tribunals (EU Commission 2015: Section 3 article 9 p.17). It also establishes an appeals tribunal consisting of more senior qualified judges (European Union 2015: section 3 Article 10).

However, the judges would not be full-time, could accept other work and would be paid a retainer. This would initially be a bilateral arrangement under the rules of the TTIP. While the use of more qualified arbitrators and the addition of an appeals tribunal is a step forward, Van Harten has argued that this is not an independent judiciary because part-time judges paid a retainer and able to accept other work would not have the same independence as full-time judges in national court systems (Van Harten 2016).

The EU has foreshadowed that it wishes to establish an International Investment Court similar to the International Court of Justice, which could be used multilaterally. Presumably these judges would be full-time and barred from accepting other work, and thus more independent and similar to national judicial appointments (European Union 2015: Article 12).

These proposals attempt to address the issues of independence of arbitrators and an appeals system. However, they do not address the basic issue that ISDS gives unfair additional legal rights to international corporations that already have enormous market power, and the definitions of indirect expropriation, minimum standard of treatment and investor expectations.

Moreover, as discussed above, recent EU court decisions have since cast doubt on whether any of these models would be compatible with EU law.

These attempts to adjust the ISDS system are responses to widespread recognition of its flaws. But regardless of future changes to ISDS systems**,** the basic question remains as to why any government would agree to ISDS at all. As the Productivity

Commission has noted, there is no legitimate rationale for giving special legal rights to global corporations to bypass national courts and sue governments over changes in domestic legislation, resulting in financial and policy risks to governments.

Trade in services chapter: negative list and ratchet structure restrict future government regulation

Trade agreements should not undermine the ability of governments to regulate in the public interest, particularly in regard to essential services like health, education, social services, water and energy.

The PAFTA Trade in Services Chapter text is essentially the same as the TPP-11. Its aim is to increase trade in services and treat them on a commercial basis, open them to international investment, and to minimise barriers to such trade. Considerations about the ability of governments to regulate access to essential services in the public interest are secondary to this aim.

Regulation of services is treated as if it were a tariff, frozen at existing levels or reduced over time, but not to be increased in future, known as the “ratchet” structure.

Public services are claimed to be excluded, but the exclusion is ambiguous because it defines a public service as “a service supplied in the exercise of governmental authority … which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers,” (DFAT PAFTA text 2018e: Article 9.1). In Australia, as in many other countries, many public and private services are provided side-by-side, meaning few public services are covered by the definition.

The services and investment chapters are both structured on a negative list basis, which means that all services are included unless specifically excluded in two Annexes, which are described in more detail below.

The negative list and ratchet structure are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade.

But this structure ignores the need for democratic governments to respond to changed circumstances. For example, most governments including the Australian government had to introduce new financial regulation following the Global Financial Crisis, which a United Nations study has shown would have been difficult if TPP-like services rules had been in place (United Nations 2009).

Governments are also responding to the need for new forms of regulation of energy markets and carbon emission levels to respond to climate change. The current debate about the National Energy Guarantee is just one example, and future governments will need to have the flexibility to adjust such policies. This flexibility should not be reduced by restrictions on new regulation.

The negative list and ratchet structure can also prevent governments from responding to failures of deregulation and privatisation. The recent failure of deregulation and privatisation of Australian vocational education services resulted in government reregulation of those services late in 2016 (Conifer 2016). If the TPP or PAFTA had already been implemented without very specific exclusions for private vocational education services, the ratchet structure could have prevented such reregulation.

The negative list also means that governments may not be aware of the implications of the inclusion of all services, and have to specify very detailed exclusions if they want to maintain policy flexibility for particular services or respond to new developments.

New services which may be developed in future will be automatically covered, reducing government's ability to regulate them. The exclusions to the rules are listed in the two Annexes described below.

Annex I lists current non-conforming laws and policies that can be maintained, but they cannot be changed in ways which would make them more "trade restrictive" in future, and new restrictions cannot be introduced. Annex II lists non-conforming laws and policies that can be both maintained and changed in future. However, the aim is to reduce over time the measures listed in both Annexes.

ISDS cases not excluded by Annex 1 and annex 2 exemptions

The exclusions for public interest legislation in the Annexes of non-conforming measures do **not** prevent foreign corporations from suing governments over these forms of regulation under the separate ISDS provisions in the Investment Chapter for measures introduced at national, state or local government level.

What this means in practice is a potential double whammy of state-to-state and ISDS disputes. This is demonstrated by the example of the need to re-regulate Australian vocational education services after the failure of deregulation and privatisation described above. If the TPP or PAFTA had already been in place, and private vocational education services were not fully covered by an Annex ll exception, another TPP member government could have invoked the state-to-state dispute mechanism to prevent reregulation.

At the same time, if there were a private vocational education service provider from a country that was a party to the agreement, such a company could argue that the value of its investment had been reduced by the change in regulation. The company could launch an ISDS case arguing indirect expropriation and/or lack of fair and equitable treatment.

Examples of specific impacts of trade in services provision provisions on particular services

State and Local government

All existing nonconforming measures in state and local government are exempted in Annex l, which means that they can be retained, but not increased in future, and that state and local governments are restricted from introducing new regulation in the future that could be regarded as barriers to trade. This could include many areas of state government regulation. For local government, it could include regulation for local purchasing policies, local land use, environmental or health regulation.

Community services like child care and aged care

Market access provisions to provide national treatment and non-discrimination to international investors in services (PAFTA Article 9.5a), mean governments cannot regulate on numbers of service suppliers, numbers of operations and numbers employed in particular services or operations. This may limit planning for the distribution of services and staffing levels in services like child care and aged care.

There are detailed obligations for governments on domestic regulation of services to ensure that regulations for licensing, qualifications and technical standards are "reasonable" and predictable (Articles 9.8-9). This could have an impact on future

governments that regulate to lift staff qualifications in areas like childcare and aged care.

Air Transport Services

The PAFTA services chapter will apply to certain services related to air transport, that were previously excluded from both the WTO General Agreement on Trade in Services (GATS), and bilateral trade agreements. These include airport operations services, ground handling services, aircraft repair and maintenance services, selling and marketing of air transport services, travel and tour operator services, advertising and distribution services.

Australia has also made a series of additional commitments on the same air transport services under the GATS which were not previously included (Annex II, Appendix A, p. 21). This means that that Australia has made a series of additional commitments on national treatment, market access and cross-border supply of these services.

Note that the inclusion of these services in both the TPP-11, with 11 member countries, and Australia's WTO GATS commitments which will eventually extend to 164 member countries, mean that there can be no policies which require these services to be supplied by local service providers. Such policies in the past have contributed to local employment and maintenance of Australian safety and security standards.

Temporary movement of people

Australia is a nation built on immigration and has a permanent migration scheme which has created our vibrant multicultural society. Permanent migrants have the same rights as other Australians. Their employment is not dependent on the sponsorship of one employer and they cannot be deported if they lose their employment.

Temporary work visas for overseas workers were originally designed to address specific skills shortages and were subject to local labour market testing to establish whether local workers were available. However, the use of temporary overseas workers without labour market testing has increased over recent years (Berg and Farbenblum 2017).

Temporary migrant workers are in a far weaker bargaining position because they are sponsored by a single employer and loss of their employment can lead to deportation. This leaves them vulnerable to exploitation.

Increases in numbers of temporary migrant workers and removal of labour market testing are now frequently included in trade negotiations.

AFTINET opposes the inclusion of temporary worker provisions in trade agreements because it treats workers as if they were commodities. Governments should always retain their ability to regulate labour market policies, which need constant adjustment to ensure workers are not exploited. This can only be ensured by not including temporary labour arrangements in trade agreements.

Academic studies comparing various recent trade agreements have demonstrated that a range of governments are using temporary work visas without local labour market testing as a means of deregulating labour markets. Such arrangements create groups of workers with less bargaining power who are more vulnerable to exploitation because loss of their employment can lead to deportation (Rosewarne 2015, Howe 2015).

Recent Australian studies have provided more evidence of the exploitation of temporary workers. A Fair Work Ombudsman investigation revealed that that up to 20 per cent of 457 visa workers were being underpaid or incorrectly employed. The Fair Work Ombudsman reported that temporary visa holders accounted for one in 10 complaints to the agency in 2015. In the three years from 2012, the agency dealt with 6000 complaints and recovered more than $4 million in outstanding wages (Toscano 2015).

A study by Monash University which interviewed workers on 457 and other temporary visa programs had similar findings (Schneiders and Millar 2015). The Senate inquiry into temporary work visas also provided similar evidence (Senate Standing Committee on Education and Employment 2016). More recent evidence was provided to the Joint Parliamentary Committee Inquiry into a Modern Slavery Act (Joint Committee on Foreign Affairs, Defence and Trade 2017). A survey by UNSW academics found temporary migrant workers experienced widespread wage theft (Berg and Farbenblum 2017).

The evidence of violations of Australian minimum work standards included failure to pay even minimum wages, long hours of work, and a lack of health and safety training leading to workplace injuries.

The current Australian government recognised some of these issues in 2017 in its announcement of the abolition of the Visa 457 scheme and its replacement by the Temporary Skill Shortage (TSS) Visa, which it claimed will restore labour market testing (Department of Home Affairs 2017).

We welcome the fact that the government has maintained labour market testing for contractual service providers in the PAFTA (DFAT 2018e: 6). However the removal of labour market testing for contractual service providers remains in the TPP-11, despite the fact that they were negotiated over the same period.

This begs the question of why the two agreements are inconsistent.

Labour Chapter truncated and weakened

The PAFTA labour chapter is only 3 pages, compared with 13 pages in the TPP 11.

The chapter does not contain even the relatively weak commitments and convoluted dispute processes in the TPP.

The language in the chapter is aspirational and not legally binding or enforceable. For example the parties simply “affirm” their obligations as members of the International Labour Organisation (article 18.2) and “shall endeavour to adopt and maintain in the labour laws” the principles of International Labour Organisation declarations (Article 18.3).

Parties commit only to enforce their own labour laws (Article 18.4) and not to reduce them “in a manner substantially affecting trade or investment between the parties.”

They also commit to provide information about national labour laws and national dispute processes, and to national parties having access to existing remedies under those laws (Article 18.5).

Parties also commit to providing a provide contact point for cooperative discussion (Articles 18.6 to 18.7). But there is no reference in the chapter to enforcement through the dispute mechanisms of the agreement.

Environment Chapter truncated and weakened

The PAFTA environment chapter is only 4 pages, compared with 19 pages in the TPP 11.

Again the language in this chapter is aspirational and not legally binding or enforceable. Parties "recognise the importance" of improving environmental protection in the furtherance of sustainable development (Article 19.3.1) and shall "strive to ensure" that its environmental laws and policies encourage high levels of environmental protection (Article 19.3.4).

Parties merely "recognise that it is inappropriate" to encourage trade and investment by weakening or reducing the protection in their environmental law (Article 19.3.3).

The section on Multilateral Environmental Agreements (Article 19.4) is weak and unenforceable, with the parties merely "recognising" some agreements.

Unlike the TPP, there is a mention of climate change, but the provisions are not enforceable. Parties merely "recognise" the importance of implementation of their respective commitments under the multilateral agreements to which they are a party. However this is qualified by the sentence that "each party's actions should reflect domestic circumstances and capabilities and the parties shall as appropriate cooperate to address matters of joint and common interest" (Article 19.4.7).

There is a commitment to adopt, maintain and implement laws, regulations and any other measures to fulfil obligations under the Convention on International Trade in Endangered species (Article 19.4.8).

The parties also nominate contact points and may request consultations. However neither party can use the State-to-state dispute settlement for any matter arising under the chapter, so the chapter is essentially unenforceable (Article 19.6).

Technical Barriers to Trade and food labelling standards not exempted from ISDS

The Technical Barriers to Trade (TBT) chapter in PAFTA is based on the framework of the WTO TBT agreement (Article 7.5.2). However it goes further than this agreement in encouraging conformity assessment bodies and mutual recognition of standards and qualifications (Articles 7.6, 7.9). The chapter is enforceable through the state to state dispute process of the agreement (Article 7.10.6).

The issue with mutual recognition of standards across countries with different standards is how to preserve the right of future governments to maintain and improve Australia's relatively high standards. Pressures from industry for simplification or streamlining of standards may suit their interests in cost reduction, but may not be in the public interest.

In 2015, the WTO ruled against the US' mandatory country-of-origin meat labelling, finding that such labelling discriminated against imported meat products (Locke 2015).

This has strong implications for the Australian Government, which introduced a new system of country-of-origin labelling for imported food products in the wake of the hepatitis outbreak caused by imported frozen berries. Consumer organisation dedicated that there might be a need for further regulation in future (Clarke 2015).

While Australia is already bound by WTO rules, the TPP includes the added possibility of ISDS disputes.

TBT Chapter not exempted from ISDS disputes

In the Korea-Australia Free Trade Agreement, Australia ensured that ISDS disputes could not be applied to the TBT chapter (DFAT 2014: Articles 5.11, 5.18). However, there is no such exclusion in the PAFTA.

A foreign investor could allege that future changes to country of origin regulation requirements, which might occur after the PAFTA is in place, could harm their investment.

In addition, corporations could argue that country-of-origin food labelling laws were about consumer choice rather than about public health, thus avoiding the ISDS public health exception.

It is possible that, based on new evidence, future governments may decide to introduce clearer country of origin labelling, mandatory provisions for other forms of labelling such as additional nutritional information, or more stringent labelling of GE products. If the TPP-11 were implemented, a foreign investor could lodge an ISDS dispute to claim compensation.

Wine and spirits labelling

There is a specific Annex which sets out rules for wine and spirits labelling (Annex 7-A). This provides for a standard labelling regime allowing a manufacturer to use the same main label in all TPP countries. Any additional mandatory labelling requirements by individual governments must be on a supplementary label, not on the main label. These rules reduce the flexibility of governments in the future to design labelling requirements based on new public health research.

For example, the requirement to use supplementary labelling could restrict options for future warnings on the health effects of alcohol for pregnant women. Such labelling is currently voluntary in Australia, and not widely in use. Where it is used, the warnings are often small and difficult to see. Although governments are not prohibited from introducing health warnings, the use of a supplementary label, which would typically be smaller and less noticeable than the main label, could restrict the options for future governments to introduce more prominent health warnings (O'Brien and Gleeson 2015).

Again, since the PAFTA also includes ISDS provisions, there is an option for foreign alcohol companies to dispute new labelling requirements if they can allege they have harmed their investment.

Weighing the costs and benefits of PAFTA: no analysis provided

The NIA places emphasises the gains from PAFTA to particular sectors in services and agriculture, but does have any information on the impact of PAFTA on the economy as a whole.

There has been no economic modelling of the specific impacts of PAFTA on the Australian economy measured by GDP.

THE NIA does not even provide an estimate of the actual costs of loss of revenue from tariff elimination by Australia under PAFTA, describing those costs only and as "negligible" (DFAT 2018e: 9).

In the absence of such information, it is impossible to say whether the risks and costs of PAFTA outweigh the benefits.

These possible risks and costs include:

- employment losses
- losses to government revenue from reductions on remaining tariffs
- losses resulting from possible regulatory risks and costs to government arising from ISDS
- costs of other possible environmental, health and other impacts arising from future restrictions on government regulation.

Conclusion

The Government has refused to undertake independent studies of the economic, health, environmental and other impacts of PAFTA despite advice from key bodies like the Productivity Commission, the Australian Competition and Consumer Commission, environment and public health experts.

In the absence of such information, the committee does not have enough information to support the implementing legislation.

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