



Submission of the Australian Fair Trade and Investment Network (AFTINET) to the Joint Standing Committee on Treaties Review of the Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)

January 2024

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Introduction and Overview

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 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 and democratically accountable framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental standards. In general, AFTINET advocates that non-discriminatory multilateral rules-based trade negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners.

AFTINET welcomes the opportunity to make a submission to the Joint Standing Committee on Treaties Review of the Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), referred to in this submission as *the amended agreement*.

The review of AANZFTA began under the previous government. During the negotiations there was no consultation with civil society groups, and the negotiations were hurriedly concluded without consultation under the current government by November 2022. The text was not made public until after it was signed in August 2023. There has been no independent evaluation of the economic, employment, environmental or gender impacts of the amended agreement.

In general, the amended agreement makes some chapters consistent with the Regional Comprehensive Economic Partnership (RCEP) which Australia and all ASEAN countries ratified in 2020. However, the RCEP did not include Investor-State Dispute Settlement (ISDS) provisions. These are the most controversial provisions in the amended AANZFTA agreement. These provisions have not been amended in AANZFTA and are being used by Clive Palmer to sue the Australian government for over \$400 billion.

This submission will focus on the urgent need to review those ISDS provisions and will also comment on other aspects of the agreement which have been amended and have implications for Australia. These are the Trade and Sustainable Development chapter, the Trade-in-Services chapter and the Movement of Natural Persons chapter.

We also note that there are provisions for further reviews and for amendment of the agreement in chapter 21, which could be brought forward to enable the changes recommended in this submission.

Summary of Conclusions and Recommendations

Investor-State Dispute Settlement (ISDS)

Failure to amend the ISDS provisions in the AANZFTA in November 2022 left the way open for claims against the Australian government, and Clive Palmer has since used these provisions to sue the government in three separate claims for \$410 billion. The proposed review of the ISDS provisions, which is planned to commence 18 months after the amended agreement is in force and take a further 12 months to complete, leaves another gap in which further cases could arise.

The government should take urgent action to expedite this review with a view to removing ISDS or preventing its application to Australia as detailed in the recommendations below.

Recommendations:

The government should

- *Expedite the review of ISDS in the AANZFTA, with a view to amending the agreement to remove ISDS provisions.*
- *Failing that negotiate bilateral side letters with individual ASEAN countries to exclude the application of ISDS to Australia, as Australia has done with New Zealand in the AANZFTA, and with New Zealand and the UK in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).*
- *Urgently implement a specific program with timelines to review ISDS provisions in other trade and investment agreements with ASEAN countries with a view to removing them and/or negotiating side-letters to exclude ISDS provisions from applying to Australia.*

Trade and Sustainable Development

While it is positive that this Chapter has been included in the amended agreement, and that environmental and labour standards have been recognised, the commitments are weak and not enforceable. Unlike other recent agreements, women's empowerment is barely mentioned and there is no reference to Indigenous rights. Commitment should be more specific, stronger and more enforceable, and there should be more definite commitments for resources for capacity-building to meet those commitments.

Recommendations:

- *The Labor government should implement its policy for commitments to specific International Labour Organisation conventions and UN environmental agreements, including on climate change, which are enforceable through a state-to-state disputes process in future reviews of the agreement.*
- *There should be enforceable commitments to the rights of Indigenous Peoples consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).*
- *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 specific funds allocated in the economic cooperation chapter for a program to assist governments to meet international labour and environmental standards, and international standards on gender equality and indigenous rights.*

Myanmar military coup

The military coup in Myanmar on February 1, 2021, against a democratically elected government has caused repression of all human rights and labour rights, including the killing of peaceful protesters and striking workers by the military, but majority resistance to the coup persists.

The Australian government has recognised that thousands have been jailed, tortured and killed and has implemented targeted sanctions against some individuals and companies of the regime. However, continuing a preferential trade agreement with Myanmar could legitimise the brutal military regime. Australia should exert more economic pressure including targeted trade sanctions to support the call of the majority in Myanmar for the return of democracy.

Recommendation

- ***Australia has recognised that thousands have been jailed, tortured and killed by the Myanmar military regime and should implement additional targeted sanctions to support the call of the majority in Myanmar for the return of democracy.***

Trade-in-Services

The amended services chapter uses a negative list structure which means that all services are included except those specifically excluded in Annex 3.

Aged Care has not been specifically excluded, nor is there any clause specifically excluding regulation of staffing numbers or regulation of licensing qualifications and service standards, as was included in the Australia-UK FTA.

This means there is ambiguity about whether the rules of the amended Services chapter would inhibit additional regulation of Aged Care required by the recent Royal Commission into Aged Care Quality and Safety.

Recommendations:

The government should

- ***Ensure that reservations in trade-in-services with a negative list structure are comprehensive and allow changes in government regulation to deal with changes in circumstances like the climate change crisis.***
- ***Ensure that the reservations enable comprehensive regulation of staff numbers, licensing, qualifications and service standards in Aged Care services to meet policy objectives like the recommendations of the Royal Commission into Aged Care Quality and Safety.***

Movement of natural persons

The amended agreement still includes a provision for unlimited entry of temporary contractual service providers and is ambiguous about the requirement for labour market testing to demonstrate genuine labour shortages. The government should clarify that it retains the right to have labour market testing or other means of determining genuine labour market shortages. This clarification is vital in the context of the government's announcement on December 11, 2023, about 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

Recommendation

- ***That the government clarify that the commitments on contractual service providers in Annex 4, p.3, do not preclude labour market testing or other means of determining labour market shortages, consistent with its Migration Strategy policy.***

Chapter 11 Investment rules, including ISDS applying to more sectors

The previous agreement had the option of a positive list for the investment chapter, meaning each country listed the sectors or forms of regulation to be covered by the investment rules in the agreement. All parties have agreed to a negative list for their investment commitments in the amended agreement. This means all investment rules, including foreign investor rights to sue governments (Investor-State Dispute Settlement or ISDS), apply to all sectors and forms of regulation.

Investor-State Dispute Settlement (ISDS) has not been reviewed and retains the provisions that allowed Clive Palmer to sue the Australian government

All trade agreements have state-to-state dispute provisions which enable states to lodge disputes if another state breaks the rules of the agreement. ISDS provisions are not included in all agreements, but were included in the AANZFTA. ISDS gives additional legal rights to single corporate investors enabling them to sue governments for compensation if they can argue that a change in law or policy will harm their future profits.

The AANZFTA ISDS provisions hit the headlines over the last year because Australian mining investor Clive Palmer has registered his mining company Zeph investments in Singapore and used the ISDS provisions in the AANZFTA to sue the Australian government for \$343 billion in two separate cases. He has also launched a third case claiming a further \$69 billion, bringing his total claims against the Australian government to over \$410 billion.

Palmer's first \$300 billion claim¹ was made after he lost a High Court Appeal against Western Australia's decision on his iron ore mining lease. His second claim for \$41.3 billion was for the refusal of coal exploration permits for his Waratah coal mine in Queensland.² The permits were refused for environmental reasons, including the mine's contribution to increased carbon emissions.³ His third claim uses ISDS provisions in the Singapore-Australia Free Trade Agreement to claim a further \$69 billion for the same decision to refuse environmental permits for the Waratah coal mine.⁴ This brings Palmer's total claims to \$410 billion.

Even if these cases are not successful, the Australian government will have to spend years of effort and tens of millions defending them. A previous ISDS case between the Philip Morris tobacco

¹ 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>

² 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>

³ 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

⁴ 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

company and the Australian government over Australia's plain packaging law cost Australia \$12 million in legal fees and took over 5 years to resolve.⁵

The Labor government 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.⁶

The fact that an Australian investor can restructure assets to use ISDS in an existing trade agreement to sue the Australian government over environmental regulation of mining leases underlines the flaws in the ISDS system and the urgency for reviewing ISDS clauses in existing agreements like the AANZFTA to prevent other similar cases.

Unfortunately, ISDS was excluded from review in the current amended AANZFTA, which was initiated under the previous government and concluded in November 2022 by the current government. There are only very marginal changes to ISDS provisions which will not prevent future cases from either Australian or foreign investors. There is a more thorough review of ISDS scheduled to take place 18 months after the new agreement comes into force in 2024, which will not be completed for a further 12 months, meaning a delay of at least two years.⁷ In the meantime more cases are possible.

This section on ISDS explains its background, its flawed processes which enable the Palmer cases and how it is being used to undermine public interest regulation including measures to reduce carbon emissions, and makes recommendations for a more speedy review and removal of the AANZFTA ISDS provisions.

Background on ISDS

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 normally available to local investors) to sue governments for compensation. ISDS gives additional rights to international corporations, enabling them to bypass national courts and sue governments for millions and even billions of dollars in international tribunals over changes in law or policy, even if the changes are in the public interest.

Australia has 15 bilateral investment treaties and 10 out of a total of 17 broader trade agreements which include ISDS. However, governments have been moving against the inclusion of ISDS in trade agreements. More recent Australian agreements negotiated by the previous government with the UK, India, and the Regional Comprehensive Economic Partnership (RCEP) with 14 Asia-Pacific

⁵ 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>

⁶ 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>

⁷ Department of Foreign Affairs and Trade (2023) National interest Analysis, Second Protocol to Amend the AANZFTA, -para 56, https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2023/Second_Protocol_ASEAN_NZ_FTA/1_AANZFTANational_Interest_Analysis.pdf?la=en&hash=1E86AAAAED02C3FC11B8A6B6F1630FAE4DAA0197

countries have excluded ISDS. Previous agreements with New Zealand, the US, Malaysia, Japan, the Pacific Islands and a previous agreement with India have also excluded ISDS.⁸

ISDS has already been excluded from the proposed Australia-EU Free Trade Agreement (A-EUFTA), and the India-Australia Comprehensive Economic Cooperation Agreement (AICECA) currently under negotiation. While this is welcome, ISDS provisions in existing agreements remain a serious threat to the ability of Australia to regulate in the public interest.

The claimed benefits of ISDS are not proven. For example, there is no conclusive evidence that ISDS increases levels of foreign investment.⁹

Scholars have identified that ISDS has suffered a legitimacy crisis, 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 the reviews conducted by the two institutions which oversee ISDS arbitration systems.¹⁰

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.¹¹

The decreasing confidence in the legitimacy of ISDS is evidenced by the declining number of agreements with ISDS provisions. In 2022, 15 countries terminated investment agreements, meaning that for the third consecutive year, more investment agreements were terminated than were created.¹²

ISDS and public interest regulation, including regulation of carbon emissions

There is increasing evidence 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 2023.¹³ In addition to previous claims for compensation for public interest regulation including public health measures like tobacco regulation, medicine patents, environmental protections and regulation of the

⁸ Department of Foreign Affairs and Trade, Australia's Bilateral Investment Treaties, <https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties> and

DFAT Australia's Free Trade Agreements, <https://www.dfat.gov.au/trade/agreements/trade-agreements>

⁹ Bonnitca, J. et al. (2017) *The Political Economy of the Investment Treaty Regime*, Oxford University Press, Oxford, p. 159.

¹⁰ Langford, M., Potesta, M., Kaufman, G. (2020) UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions, *Journal of World Investment & Trade*, https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en

¹¹ Ibid, p.1.

¹² UN Committee on Trade and Development (2023) *World Investment Report*, p. 10. <https://unctad.org/publication/world-investment-report-2023>

¹³ UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement>

minimum wage, there has been an increase in claims against government action to reduce dependence on fossil fuels and regulate carbon emissions.

In the context of the deepening climate crisis, 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.¹⁴ There have also been cases threatened against other forms of regulation of fossil fuels. For example, the previous Australian government was warned of possible ISDS cases from international energy companies when it was considering gas price regulation in 2022.¹⁵

The Westmoreland Coal Company¹⁶ 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 unsuccessful¹⁷ but only due to technicalities regarding changes in the company's ownership. In 2023 the company filed a new claim under NAFTA legacy provisions.¹⁸

In Europe, German energy companies RWE and Uniper launched ISDS cases¹⁹ against the Netherlands (using ISDS in the Energy Charter Treaty) over its moves to phase out coal-powered energy by 2030.²⁰

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 Ukraine.²¹ 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.²² Although both cases have now

¹⁴ 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>

¹⁵ Ghori, U. (2022) Hey minister, leave that gas trigger alone – it may fire up a fight with foreign investors, *The Conversation*, August 1, <https://theconversation.com/hey-minister-leave-that-gas-trigger-alone-it-may-fire-up-a-fight-with-foreign-investors-185710>

¹⁶ 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/>

¹⁷ 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/>

¹⁸ Westmoreland Coal Company v. Canada (ICSID Case No. UNCT/23/2), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/23/2>

¹⁹ UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement>

²⁰ 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/>

²¹ Camilla Hodgson and Joe Miller (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>

²² 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.>

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.²³

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.”²⁴

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.”²⁵

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.

The DFAT National Interest Analysis claims that some provisions in the amended agreement²⁶ have been updated to reduce the ISDS risks to government. These include exempting decisions relating to foreign investment screening from ISDS (Chapter 18, Article 6), expanding the list of general exceptions to ISDS to include specific sites of historical or archaeological value, and measures necessary to support creative arts (Chapter 18, Article 1), and clarifying who is entitled to benefit from the Investment Chapter (Chapter 11, Articles 12.3-12.4). The latter is supposed to discourage the use of ISDS by investors like Palmer without substantial business in the country from which they are making a claim.²⁷ However, these clauses are similar to the clauses in the Singapore-Australia FTA,²⁸ which did not prevent Palmer from lodging his third case under that agreement. In summary,

²³ 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>

²⁴ 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

²⁵ 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>

²⁶ DFAT (2023b) Text of the *Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)*, para 56, <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/agreement-establishing-asean-australia-new-zealand-free-trade-area-aanzfta/chapter-11-investment>

²⁷ DFAT (2023a) National Interest Analysis, op. cit. para 57.

²⁸ DFAT (2017) Text of the amended Singapore-Australia Free Trade Agreement, Chapter 8, Article 18.1, <https://www.dfat.gov.au/sites/default/files/safta-chapter-8-171201.pdf>

none of these clauses prevent investors from lodging cases. At best they might provide government with some arguments about whether the case was in the public interest or whether the tribunal has jurisdiction.

Chapter 21 Article 6 provides for the amendment of the agreement by agreement between the parties. As explained above, a future review of ISDS is scheduled to take place 18 months after the agreement comes into force and could take 12 months or more to complete. We urge the government to expedite the review of ISDS with a view to amending the agreement to remove ISDS (Section B of the Investment Chapter) from the agreement.

Failing that, the government could seek side letters with particular countries to exempt Australia from ISDS provisions. The government already has a side letter with New Zealand which exempts both countries from the AANZFTA ISDS provisions,²⁹ and has negotiated similar side letters with New Zealand and the UK to exclude both governments from the ISDS provisions in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).³⁰ If the proposed review of ISDS cannot be expedited, the government should negotiate with individual ASEAN countries to obtain similar side letters.

Conclusion and recommendations

Failure to amend the ISDS provisions in the AANZFTA in November 2022 left the way open for claims against the Australian government, which Clive Palmer has used to sue the government for \$410 billion. The proposed revision of the ISDS provisions to commence 18 months after the amended agreement is in force and take 12 months, leaves another gap in which further cases could arise.

The government should take urgent action to expedite this review with a view to removing ISDS or preventing its application to Australia, as detailed in the recommendations below.

Recommendations:

The government should

- ***Expedite the review of ISDS in the AANZFTA, with a view to amending the agreement to remove ISDS provisions.***
- ***Failing that negotiate bilateral side letters with individual ASEAN countries to exclude the application of ISDS to Australia, as Australia has done with New Zealand in the AANZFTA, and with the UK in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).***
- ***Urgently implement a specific program with timelines to review ISDS provisions in other trade and investment agreements with ASEAN countries with a view to removing them and/or negotiating side letters excluding ISDS provisions from applying to Australia.***

²⁹ DFAT (2009) Letter from Australian Trade Minister Simon Crean to the New Zealand Trade Minister, https://www.dfat.gov.au/sites/default/files/minlet_aust.pdf

³⁰ DFAT (2023) Letter from Australian Assistant Trade Minister Tim Ayres to the UK Trade Minister, <https://www.dfat.gov.au/sites/default/files/cptpp-isds-letter-aus-uk-signed.pdf>

Trade and Sustainable Development Chapter 13

Labour rights, environmental standards, gender and indigenous rights

This chapter marks a step forward compared to the original agreement which did not include any reference to labour rights and environmental standards. However, women's empowerment is only briefly mentioned, and there is no reference to Indigenous rights. While environmental and labour standards have been recognised, the commitments are weak and not enforceable. These commitments should be more specific, stronger and more enforceable, and there should be more definite commitments for resources for capacity building to meet those commitments.

The commitments to labour and environmental standards use the weak language of "may" rather than "shall".³¹ There is no enforceability through the state-to-state disputes. This means the updated agreement still falls short of other recent trade agreements involving ASEAN countries and the Labor government's own policy of including enforceable labour rights and environmental standards.

Weak commitments and lack of enforceability compared with other agreements

The Trade and Sustainable Development Chapter reaffirms that the Parties share a "common aspiration" to promote high environmental and labour protection standards.³² It recalls the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs) in addition to the multilateral environmental and labour agreements that Parties to the agreement have endorsed. However, unlike other more recent agreements, including some with ASEAN countries, there are no references to specific ILO Conventions or UN agreements and the commitments are not enforceable. Nor are there any references to Indigenous Peoples' rights, despite Australia's ratification of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

While it is positive that the chapter makes general reference to international environmental and labour standards, the weak language of "recall" and "recognise" does not commit parties to implement them. Commitments are further qualified by the language, as they are "commensurate with each Party's needs, capabilities and national circumstances, and according to each Party's laws and regulations."³³

This contrasts with stronger commitments to specific UN and ILO labour and environmental agreements in the CPTPP which includes four ASEAN members (Brunei, Malaysia, Singapore and Vietnam) to specific international agreements such as the ILO Declaration of Fundamental Rights at Work. The CPTPP also has a chapter-specific disputes process, although it is weaker than the disputes process applying to other chapters in the agreement.³⁴

Australia is also involved with six ASEAN countries, the US and six other Indo-Pacific countries in negotiations for the Indo-Pacific Economic Framework (IPEF). These 14 countries recently concluded an agreement on Pillar 2 Supply Chains, which makes reference to specific rights in the ILO

³¹ DFAT 2023b Text, Ch 13. Articles 13.2.1, 13.2.2, 13.2.3

³² DFAT 2023b Text, Ch 13. Article 13.1.6

³³ DFAT 2023b Text, Ch 13 Article 13.1.6

³⁴ DFAT (2016) Trans-Pacific Partnership Text, Ch 19. <https://www.dfat.gov.au/sites/default/files/19-labour.pdf>

Declaration of Fundamental Rights at Work and sets up mechanisms for reviewing the implementation of those rights.³⁵

Australia has also been negotiating with the EU, which has a trade agreement negotiation policy³⁶ that requires trade partners to make stronger commitments to specific international labour conventions and environmental agreements and which applies the same disputes process to those commitments as to commitments in other chapters of the agreement. IPEF and Australia's recent agreement with the UK also have specific reference to gender equality and the rights of Indigenous Peoples.³⁷ It is therefore disappointing that the revised AANZFTA agreement has weaker commitments with no enforceability compared with these other agreements.

Parties to AANZFTA, including ASEAN members Brunei, Cambodia, and the Philippines, have been criticised by human rights organisations for their violation of labour rights, and would require capacity building to meet international standards (Myanmar is discussed separately below).³⁸ While Article 2 of this chapter allows for economic cooperation, including capacity building, on issues such as labour rights, climate and the environment, the language is weak, stating countries "may" cooperate "subject to the availability of funding and human and other resources, and to each Party's laws and regulations".³⁹ These provisions are in contrast to other recent trade agreements, such as IPEF which have recognised the differing levels of economic development of its members and committed specific funds to support IPEF developing economy members to meet their environmental and labour commitments.⁴⁰ The AANZFTA agreement also contains members with differing levels of economic development and the lack of definitive economic cooperation commitments on labour and environment standards indicates that capacity-building resources may not be available, undermining the feasibility of realising the collective aspiration of high standards.

Conclusion and recommendations

While it is positive that this Chapter has been included in the amended agreement, and that environmental and labour standards have been recognised, the commitments are weak and not enforceable. Women's empowerment is barely mentioned and there is no reference to Indigenous

³⁵ DFAT (2023) text of the Indo-Pacific Economic Framework for Prosperity Agreement relating to supply chain resilience, Article 1, <https://www.dfat.gov.au/sites/default/files/indo-pacific-economic-framework-prosperity-agreement-relating-supply-chain-resilience.pdf>

³⁶ European Commission, Sustainable Development in EU Trade Agreements https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en

³⁷ 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>
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)

³⁸ Brunei: Freedom in the World 2023 country report (2023) Freedom House <https://freedomhouse.org/country/brunei/freedom-world/2023>, Myanmar: Freedom in the World 2023 country report (2023) Freedom House <https://freedomhouse.org/country/myanmar/freedom-world/2023>, Cambodia: Freedom in the World 2023 country report (2023) Freedom House <https://freedomhouse.org/country/cambodia/freedom-world/2023>, Philippines: Freedom in the World 2023 country report (2023) Freedom House <https://freedomhouse.org/country/philippines/freedom-world/2023>

³⁹ DFAT (2023b) Text, Ch 13. 13.2.1 and 13.2.4.

⁴⁰ IPEF Supply Chains Agreement, Minister for Trade and Tourism Special Minister of State, <https://www.trademinister.gov.au/minister/don-farrell/media-release/ipef-supply-chains-agreement-more-resilient-supply-chains-uncertain-times>

rights. Commitment should be more specific, stronger and more enforceable, and there should be more definite commitments for resources for capacity-building to meet those commitments.

Recommendations:

- ***The Labor government should implement its policy for commitments to specific International Labour Organisation conventions and UN environmental agreements, including on climate change, which are enforceable through a state-to-state disputes process in future reviews of the agreement.***
- ***There should be enforceable commitments to the rights of Indigenous Peoples consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).***
- ***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 specific funds allocated in the economic cooperation chapter for a program to assist governments to meet international labour and environmental standards, and international standards on gender equality and indigenous rights.***

Myanmar military coup

The military coup in Myanmar on February 1, 2021, against a democratically elected government has caused repression of all human rights and labour rights, including the killing of peaceful protesters and striking workers by the military. However, majority resistance to the coup persists, led by the exiled National Unity Government. A June 2023 report by the Peace Research Centre Oslo found that at least 6,337 civilians were reported as killed and 2,614 as wounded for political reasons in Myanmar in the twenty months between the military coup of February 1, 2021, and September 30, 2022.⁴¹

The Australian government has recognised that “thousands have been jailed, tortured and killed” and has implemented targeted sanctions against individuals and companies of the regime.⁴² However, continuing a preferential trade agreement with Myanmar legitimises the brutal military regime. Australia should implement increased sanctions as called for by the National Unity Government to support the return of democracy.⁴³

Recommendation

- ***Australia has recognised that thousands have been jailed tortured and killed by the Myanmar military regime and should implement additional targeted trade sanctions to support the call of the majority in Myanmar for the return of democracy.***

⁴¹ Peace Research Institute Oslo (2023) Counting Myanmar’s Dead: Reported Civilian Casualties since the 2021 Military Coup, June 2023, <https://reliefweb.int/report/myanmar/counting-myanmars-dead-reported-civilian-casualties-2021-military-coup>

⁴² Wong, P. (2023) Targeted sanctions in response to human rights violations in Myanmar and Iran, February 1, <https://www.foreignminister.gov.au/minister/penny-wong/media-release/targeted-sanctions-response-human-rights-violations-myanmar-and-iran>

⁴³ Abuza, Z. (2023) The national unity government's revenue denial strategy, September 20, statement by the National Unity Government Ministry of Planning Finance and Investment. <https://www.stimson.org/2023/the-national-unity-governments-revenue-denial-strategy/>

Chapter 8 Trade in Services

Moving from a positive to a negative list in applying trade-in-services rules

The objective of trade-in-services rules in trade agreements is to open services to international investment, and to reduce regulation of them. This can reduce Australia's ability to regulate in the public interest. It is preferable for trade-in-services chapters to have a positive list structure, which lists those services covered by the chapters. This means that governments know exactly which services are covered by the rules.

The previous AANZFTA agreement had a positive list approach to trade-in-services, meaning that the rules of the agreement only apply to those services which were listed in an annex.

The amended agreement gives the option for a negative list approach, meaning all services, including services which may develop in future, are included unless they are specifically reserved or exempted in Annex 3. Australia, Brunei, Indonesia, Malaysia New Zealand and Singapore have all made negative list commitments on services. There is also a commitment for the other five parties to transition to a negative list within two years of the date of entry into force of the new agreement.

The negative list structure means that governments have to be very careful to list all reservations, including for emerging new services. 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."⁴⁴ 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 careful 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,⁴⁵ 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.

The DFAT National Interest Analysis acknowledges that the amended agreement on trade-in-services rules uses a 'ratchet' mechanism⁴⁶ 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. Annex 3 List A lists existing sectors and forms of regulation that are exempted from the agreement but cannot be increased in future.⁴⁷ Annex 3 List B lists those sectors and forms of regulation for which the government reserves the right to retain existing regulation and to

⁴⁴ DFAT (2023b) *op cit*, Chapter 8 Article 8. 1 (s).

⁴⁵ 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, www.un.org/en/ga/econcrisissummit/docs/FinalReport_CoE.pdf

⁴⁶ DFAT (2023a) *op. cit.* para 22.

⁴⁷ DFAT (2023b) Text, Annex 3, List A, pp. 1-23 <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/second-protocol-to-amend-the-agreement-establishing-asean-australia-new-zealand-free-trade-area-aanzfta/replace-annex-3-schedules-specific-services-commitments>

increase regulation in future. These lists are almost identical to the reservation lists in the RCEP and CPTPP.⁴⁸

The ratchet mechanism 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 2016.⁴⁹ The increased regulation of vocational education could have been contrary to trade-in-services rules in the Trans-Pacific Partnership (TPP) which was then still under negotiation.

The government responded to this unintended consequence in the CPTPP, the RCEP and the amended AANZFTA agreement, by including a new reservation retaining the right to regulate the funding and standards of education services.⁵⁰

However, there is no such reservation for Aged Care in the AANZFTA agreement. The trade-in-services chapter 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, unless these services are specifically reserved in Annex 3 List B, the agreement restricts regulation of numbers of services, location of services and numbers of staff. 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.⁵¹ The committee should note that Aged Care has not been included in the list of services specifically reserved from these rules in the amended AANZFTA.

In 2021 a debate emerged about whether Aged Care services were specifically excluded from trade-in-services rules in the RCEP and other trade agreements. Aged Care is funded by the federal government but managed largely by private providers. The Royal Commission into Aged Care Quality and Safety⁵² 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 are now being 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 per resident. 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 Australian trade agreements. Aged Care was not listed in the specific reservations with other specific services like childcare in the RCEP,⁵³ and has not been listed in the amended ANNEX 3B of AANZFTA.⁵⁴ The government argued that Aged Care was excluded under the more general category of social services,

⁴⁸ DFAT (2023b) op. cit. Annexe 3, List B, p.24.

⁴⁹ Conifer, D. (2016) Parliament Passes Bill to Overhaul Vocational Education Sector. *ABC News*, December 1, <https://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860>

⁵⁰ Department of Foreign Affairs and Trade (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> ..

⁵¹ Ranald, P. (2021) How a New Trade Deal Could Make It Harder to Improve Life for Australians in Aged Care. *The Conversation*. July 27, <https://theconversation.com/how-a-new-trade-deal-could-make-it-harder-to-improve-life-for-australians-in-aged-care-164947>

⁵² Royal Commission into Aged Care Quality and Safety (2021) A Summary of the Final Report, <https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>

⁵³ Ranald (2021) op. cit.

⁵⁴ DFAT 2023b, op. cit. Annex 3, List B, p.33.

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.”⁵⁵

In contrast, the Australia-UKFTA, negotiated after the controversy about regulation of Aged Care in the RCEP, had clauses in the Annex to the trade-in-services chapter which clarified that governments have the right to regulate in relation to service standards and qualifications. These clauses state that governments can have requirements relating to qualification requirements and procedures, technical standards, authorisation requirements and licensing requirements and procedures.⁵⁶

A similar clause has not been included in the amended AANZFTA Services chapter.

ISDS not excluded from trade-in-services exemptions

It should also be noted that these reservations or exclusions only exempt governments from government-to-government disputes about these services. These reservations do not apply to the separate ISDS dispute processes. This provides yet another argument for excluding ISDS from trade agreements.

Conclusion and recommendations

The amended Services chapter uses a negative list structure which means that all services are included except those specifically excluded in Annex 3. It should be noted that the reservation or exemption of specifically listed services only applies to specific clauses in the investment chapter Part 1 and do not apply to the ISDS provisions in Part 2.

Aged Care has not been specifically excluded, nor is there any clause specifically excluding regulation of staffing numbers or regulation of licensing qualifications and service standards, as was included in the Australia-UK FTA. This means there is ambiguity about whether the rules of the amended services chapter would inhibit additional regulation of Aged Care recommended by the Royal Commission.

Recommendations:

The government should

- ***Ensure that reservations in trade-in-services with a negative list structure are comprehensive and allow changes in government regulation to deal with changes in circumstances like the climate change crisis.***
- ***Ensure that the reservations enable comprehensive regulation of staff numbers, licensing, qualifications and service standards in Aged Care services to meet policy objectives like the recommendations of the Royal Commission into Aged Care Quality and Safety.***

⁵⁵ 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

⁵⁶ DFAT (2022) Text of the Australia-UK Free Trade Agreement, Annex I p2, and Annex II p2,

<https://www.dfat.gov.au/trade/agreements/in-force/aukfta/official-text/australia-uk-fta-annex-i-schedule-australia>

Chapter 9 Movement of Natural Persons

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 Strategy⁵⁷ 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.⁵⁸ 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.⁵⁹ 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. For example, the CPTPP commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of occupations, and removes labour market testing to establish whether there are local workers available.⁶⁰

The amended AANZFTA chapter on Temporary Movement of People includes arrangements for unlimited numbers of temporary contractual service suppliers, while stating that "labour market testing may be required for some occupations to the extent that this is not inconsistent with Australia's commitments under the WTO".⁶¹ This is ambiguous, since previous governments have in the past argued that WTO commitments remove the requirement for labour market testing.

Conclusion and recommendations

The government should clarify that it retains the requirement for labour market testing. This clarification is vital in the context of the government's announcement on December 11, 2023, about 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

⁵⁷ Commonwealth of Australia (2023) Migration Strategy December 11,

<https://immi.homeaffairs.gov.au/programs-subsite/migration-strategy/Documents/migration-strategy.pdf>

⁵⁸ Berg et al. (2017) Wage Theft in Australia, <https://apo.org.au/sites/default/files/resource-files/2017-11/apo-nid120406.pdf>

⁵⁹ 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

⁶⁰ 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, <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>

⁶¹ DFAT (2023b) Text of the amended AANZFTA, Chapter 9, Annex 4, p.3, para C (i).

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.⁶²

Recommendation

- ***That the government clarify that the commitments on contractual service providers in Annex 4, p.3, do not preclude labour market testing or other means of determining labour market shortages, consistent with its Migration Strategy policy.***

⁶²Commonwealth of Australia (2023) op. cit., p.13, <https://immi.homeaffairs.gov.au/programs-subsite/migration-strategy/Documents/migration-strategy.pdf>