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**Submission to the Department of Foreign Affairs and Trade on the
application by the United Kingdom (UK) to join the Comprehensive and
Progressive Agreement for Trans Pacific Partnership (CPTPP)**

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Introduction and summary

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, based on the principles of human rights, labour rights and environmental sustainability. We recognise 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 sustainability. In general, AFTINET advocates that non-discriminatory multilateral rules are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. AFTINET welcomes the opportunity to make a submission to this inquiry.

AFTINET believes that the CPTPP has a number of flaws which should be addressed before expansion of its membership. These were outlined in AFTINET's submission to the Joint Standing Committee on Foreign Affairs Defence and Trade Inquiry into the expansion of CPTPP membership¹

However, since the UK has applied for membership, we wish to identify and propose a solution for a risky anomaly regarding Investor-State Disputes Settlement (ISDS) in the CPTPP.

AFTINET has consistently opposed the inclusion of ISDS in trade agreements because it gives additional legal rights to global corporations which already have enormous market power. This submission and Appendix 1 outline the increasing evidence against the use of ISDS in trade agreements, and the fact that many trade agreements now exclude it.

This submission notes that ISDS was not included in the Australia UK Free Trade Agreement (A-UKFTA), as both governments claimed that it was unnecessary because of robust legal systems in each country. On its website, DFAT has described the exclusion of ISDS as one of the benefits of the A-UKFTA².

The application of ISDS between the UK and Australia in the CPTPP would be dangerous because it would expose Australia to the disproportionate risk of many more potential ISDS cases. The UK is the second highest foreign investor in Australia, and UK companies are the third most frequent users of ISDS³.

The submission concludes that it would therefore be inconsistent and dangerous for government to exclude ISDS from the A-UKFTA, but enable ISDS to apply to Australia and the UK in the CPTPP. It recommends that Australia should insist as a condition of support for UK accession that both

¹ See: AFTINET (2021) Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade on the expansion of the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP) membership, April 2021, <http://aftinet.org.au/cms/sites/default/files/210430%20AFTINET%20CPTPP%20Submission%20final.pdf#overlay-context=users/editor>

² DFAT (2021) *Benefits for Australia: Investor Protection*, December 2021, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/ukfta-outcomes-documents/benefits-australia>

³ UNCTAD (2022) *Investment Dispute Settlement Navigator*. Geneva: UNCTAD, <https://investmentpolicy.unctad.org/investment-dispute-settlement>

governments exchange side letters to ensure that ISDS provisions are not applied to each other. Australia has a similar CPTPP side letter with the government of New Zealand.

Recommendation: Australia should impose as a condition for the UK's accession to the CPTPP that the governments of Australia and the UK exchange legally binding side letters confirming that neither government will apply the ISDS provisions in the CPTPP to the other government. These letters could be modelled on the CPTPP side letters on ISDS between Australia and New Zealand.

The case against ISDS

The CPTPP contains ISDS provisions that are the same as in the original the TPP-12. All trade agreements have government-to-government dispute processes. ISDS is controversial because it is an optional, separate dispute process that gives additional legal rights to a single foreign investor (rights not available to local investors) to sue governments for compensation. ISDS gives increased legal rights to global corporations which already have enormous market power, enabling them to bypass national courts and sue governments for millions of dollars in unfair international tribunals over changes in law or policy, even if they are in the public interest.

These tribunals have no independent judiciary, precedents or appeals, and are based on legal concepts not recognised in national systems and not available to domestic investors.

There are some general protections from ISDS cases for health and the environment in the CPTPP, but these have loopholes and do not prevent cases from being launched. Governments can only use them to defend cases, which means they still bear the legal costs.

Under CPTPP rules, governments can only clearly exclude tobacco regulation from ISDS cases. This exclusion resulted from tobacco companies' use of ISDS to undermine public health laws in Australia and elsewhere, described below.

Community campaigning against ISDS meant that the Howard government refused to include ISDS in the Australia-US free trade agreement. The US-based Philip Morris company wanted to claim billions in compensation for Australia's plain packaging law in 2012. The company could not sue under the US-Australia free trade agreement, but it found a Hong Kong-Australia investment agreement which included ISDS, shifted some assets to Hong Kong and used ISDS to claim billions in compensation from the Australian government. The international tribunal took over five years to decide that Philip Morris was not a Hong Kong company, and another two years to decide that the Australian government had to pay half of its \$24 million legal costs⁴.

Legal experts and legislators have condemned flaws in the ISDS system as the number of cases has increased to 1,104⁵, including cases against health, environment, Indigenous rights, minimum wages and other public interest laws. The two institutions that oversee ISDS arbitration systems are conducting ongoing reviews which have also identified serious flaws in the system.

⁴ Ranald, P (2019) 'When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging' *The Conversation*, 27 March, 2019 <https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279>.

⁵ UNCTAD (2022) *Investment Dispute Settlement Navigator*. Geneva: UNCTAD, <http://investmentpolicyhub.unctad.org/ISDS>.

The EU and the US are now negotiating agreements without ISDS. The recently negotiated Regional Comprehensive Economic Partnership (RCEP) does not have ISDS provisions, nor does the Australia-UK FTA, nor the Australia-EU FTA under negotiation.

For more detailed evidence on all these points see the summary of AFTINET's submission to the 2020 review of ISDS and link to the full submission attached as Appendix 1.

Risks for Australia if CPTPP ISDS provisions apply to the UK and Australia

The inclusion of ISDS in the A-UKFTA was strongly debated in both the UK and Australia⁶. ISDS was not included in the Agreement in Principle or in the final agreement. The summary of benefits for Australia on the DFAT website states

“There is no investor-state dispute mechanism in the A-UKFTA, reflecting the confidence we share in each other's legal systems.”⁷

It would be inconsistent for Australia to claim exclusion of ISDS as a benefit in the A-UK FTA arising from shared confidence in each other's legal systems and then nullify that exclusion by allowing ISDS to apply to the UK and Australia in the CPTPP.

The accession of the UK to the CPTPP would also greatly expand the number of UK-based global corporations which could launch ISDS cases against Australia.

The UK is the second highest source of foreign investment in Australia. UK companies are high users of ISDS with 90 recorded cases in the UNCTAD data base⁸, the third-highest number after the US and the Netherlands. If ISDS in the CPTPP were applied to the UK and Australia, this would expose Australia to the risk of UK company cases for the first time.

For example, Rio Tinto is listed as a UK company. Community and shareholder protest at the destruction of the Juukan Gorge Indigenous sacred sites recently led to a public apology and resignation of its CEO⁹. The Western Australian government is currently considering stricter regulation of Indigenous sacred sites on mining leases. ISDS requires that foreign investors are consulted about changes to regulation. If Rio Tinto objects to such regulation, it would have the option of suing, or threatening to sue the Australian Federal government for compensation. Such threats can have a freezing effect on the development of regulation.

Another example is the UK company BUPA, which is one of the largest owners of nursing homes in Australia. If the government follows the recommendations of the Royal Commission into Aged Care

⁶ Ranald, P (2021) 'A clause in the UK-Australia trade deal could let companies sue governments. We have been here before', *The Guardian*, 1 June, <https://www.theguardian.com/commentisfree/2021/jun/01/a-clause-in-the-uk-australia-trade-deal-could-let-companies-sue-governments-we-have-been-here-before>

⁷ DFAT (2021) *Benefits for Australia: Investor Protection*, December 2021,

<https://www.dfat.gov.au/trade/agreements/not-yet-in-force/ukfta-outcomes-documents/benefits-australia>

⁸ UNCTAD (2022) *Investment Dispute Settlement Navigator: United Kingdom*. Geneva: UNCTAD,

<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/221/united-kingdom/investor>

⁹ The Associated Press (2020) 'Rio Tinto CEO to leave company after destruction of sacred sites', *NBC News*, 11 September, <https://www.nbcnews.com/news/world/rio-tinto-ceo-leave-company-after-destruction-sacred-sites-n1239847>

and regulates for improved staffing levels and quality of care, BUPA could insist on being consulted and could sue for compensation, again with a freezing effect on regulation.

Conclusion and recommendation

ISDS poses risks to all governments because it gives additional legal rights to global corporations which already have enormous market power. There is mounting evidence against ISDS, and it is increasingly being excluded from free trade agreements, including the A-UK FTA, the RCEP, and the EU-Australia FTA.

ISDS was excluded from the A-UK FTA because the two governments expressed confidence in each other's legal systems. The exclusion of ISDS from the UKFTA is described as a benefit on the DFAT website. It would be inconsistent for the Australian government to claim a benefit from excluding ISDS from the Australia-UK FTA and then enable ISDS to apply to the UK and Australia in the CPTPP. Such a course of action would also expose Australia to disproportionate risk as the UK is the second highest foreign investor in Australia and UK companies are the third highest users of ISDS cases.

Recommendation: Australia should impose as a condition for the UK's accession to the CPTPP that the governments of Australia and the UK exchange legally binding side letters confirming that neither government will apply the ISDS provisions in the CPTPP to the other government. These letters could be modelled on the CPTPP side letters on ISDS between Australia and New Zealand.

Appendix 1: Summary of the AFTINET submission to the DFAT review of ISDS and Bilateral Investment Treaties, July 2020

All trade agreements have government-to-government dispute processes. ISDS is controversial because it is an optional, separate dispute process that gives additional legal rights to a single foreign investor (rights not available to local investors) to sue governments for compensation in an international tribunal if they can claim that a change in law or policy will harm their investment. Because ISDS cases are very costly, they are mostly used by large global companies that already have enormous market power, including tobacco, pharmaceutical, agribusiness, mining and energy companies.

The number of reported ISDS cases has been increasing rapidly and is 1,023 as of December 2019.

Scholars have identified that ISDS has suffered a legitimacy crisis that has grown in the last decade, with lack of confidence in the system shared by both civil society organisations and by a growing number of governments.

Criticisms of the structure of the system 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.

ISDS arbitrators are not independent judges but remain practising advocates with potential or actual conflicts of interest. Criticisms of the process include lack of transparency of proceedings, length of proceedings, high legal and arbitration costs and lack of precedents and appeals leading to inconsistent decisions, third party funding for cases as speculative investments, and excessively high awards based on dubious calculations of expected future profits.

There have been increasing numbers of claims for compensation for public interest regulation. These include regulation of public health measures like tobacco regulation, patents on medicines, environmental protection, reduction of carbon emissions and regulation of the minimum wage.

Developing countries have been burdened with legal costs and compensation payments amounting to billions of dollars, which can be equivalent to a large proportion of the government's budget. A recent example is the award of US\$5.5 billion to Australian company Tethyan against Pakistan, when Pakistan was experiencing a severe economic crisis and had just received an emergency loan of about US\$5 billion from the IMF. This was also a forum shopping exercise, as the majority owner of the mine was a Canadian company that used its Australian subsidiary to sue because Australia, unlike Canada, has a bilateral investment agreement with Pakistan. The same Canadian mining company has used another Australian subsidiary to launch a case against Papua New Guinea.

Huge awards against developing countries and the use of Australian BITS in forum shopping contradict Australia's commitments to human rights, undermine its aid and development programs, and harm Australia's reputation and relationships with developing countries.

The Clive Palmer threat to use the Singapore-Australia FTA to sue the Australian government shows that current changes in ISDS provisions to prevent forum shopping are not adequate in preventing it.

Some governments are withdrawing from ISDS arrangements, the EU and the US are now negotiating trade agreements without ISDS, and the system is being reviewed by the two institutions which oversee ISDS arbitration systems. ISDS has been excluded from the RCEP, the Australia-UK FTA and the Australia-EU FTA.

Legal experts and UNCTAD, the body responsible for monitoring ISDS, have recognised the danger of ISDS cases against a wide range of governments' actions taken during the COVID-19 pandemic, and have recommended means of preventing such cases.

Current revised clauses in ISDS provisions in the CPTPP and other agreements are not effective in protecting the rights of governments to regulate since the exclusions only prevent cases in a narrow range of areas, omitting important public policy areas like the environment, workers' rights and Indigenous land rights.

The full submission with references is at:

<http://aftinet.org.au/cms/sites/default/files/200929%20AFTINET%20DFAT%20ISDS%20%20submission%20final.pdf#overlay-context=node/1929>.