AFTINET
Australian Fair Trade & Investment Network

20 YEARS FIGHTING FOR TRADE JUSTICE

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

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Introduction

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

AFTINET welcomes the opportunity to contribute to the 2026 Review of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This updates our previous submission[1] made at the beginning of the review process and addresses the terms of reference for this review .

The Trans-Pacific Partnership (TPP) originally involved 12 countries. The US, the largest economy, withdrew in 2017, and it became the TPP-11. In November 2017, TPP-11 negotiators renamed, amended and signed the agreement as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and suspended some of its most controversial clauses. Original CPTPP members are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. The United Kingdom successfully applied to join the CPTPP from July 2023. Costa Rica's application has been approved and will come into force in 2027. Media reports indicate that applications have also been received from Uruguay, the United Arab Emirates, Indonesia, the Philippines, China, and Taiwan.

Current US America First unilateral tariffs and other coercive policies are undermining cooperative multilateral trade relationships and breaking former commitments to United Nations (UN) agreements on human rights and action to address the climate crisis. Public confidence in such cooperative relationships has been undermined and can only be built if the Australian government implements its policies for an open, transparent trade negotiation process and for agreements that support UN agreements.

The current review of the CPTPP will likely lead to detailed negotiations to change the text of the agreement which may take place behind closed doors with no clear pathways for further community consultation. The 2024 report of the Joint Standing Committee on Trade and Investment Growth entitled *Strengthening Australia's Approach to Trade Negotiations*[2] recommended implementing Labor policy to legislate for a more open and transparent process and to ensure that trade agreements do not prevent governments from regulating in the public interest. Draft texts should be released during negotiations, and the full texts should be released before they are signed. The committee also recommended the exclusion of harmful provisions like Investor-State Dispute Settlement (ISDS) and the inclusion of positive provisions on human rights, labour rights and environmental standards. We call on the government to enact this legislation, and to implement these policies in the CPTPP review.

This submission makes recommendations on transparency, and on other terms of reference of the review relevant to our members. These include removal of ISDS, strengthening labour rights and environmental standards, inclusion of women's rights and Indigenous Peoples' rights and changes to the trade in services and electronic commerce chapters. We also advocate that controversial

[1] AFTINET (2024) Submission to the General Review of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) February, https://aftinet.org.au/sites/default/files/2024-02/240201%20AFTINET%20final%20CPTPP%20submission_formatted.pdf

[2] Joint Standing Committee on Trade and Investment Growth (2024) *Strengthening Australia's Approach to Trade Negotiations,* April https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000220/toc_pdf/StrengtheningAustralia'sapproachtotradenegotiations.pdf

suspended clauses in the intellectual property chapter, which would result in longer medicine monopolies, should be removed, and that temporary workers should be protected from exploitation.

Summary and Recommendations

The government should implement Labor policy for a more open and transparent process and to ensure that trade agreements do not prevent governments from regulating in the public interest. The 2024 report of the Joint Standing Committee on Trade and Investment Growth entitled *Strengthening Australia's Approach to Trade Negotiations* recommended public consultations and access to text during negotiations. AFTINET advocates that draft texts should be released during negotiations, and the full texts should be released before they are signed. The committee also recommends the exclusion of harmful provisions like Investor-State Dispute Settlement (ISDS) and the inclusion of positive provisions on labour rights and environmental standards.

The inclusion of ISDS provisions in the CPTPP gives special legal rights to international corporations to claim billions from governments for enacting democratically decided public interest regulation, including regulation of carbon emissions to address the climate crisis. More evidence has emerged recently to support the Australian government policy for ISDS to be excluded from new agreements and reviewed and removed from existing agreements. Australian billionaire Clive Palmer is still claiming to be a Singaporean investor and is using ISDS in the AANZFTA to claim $120 billion from the Australian government because of the refusal of coal mining and energy permits. Gina Rinehart's Australia-based Hancock Holdings is now using ISDS in the CPTPP to claim over US$2 billion from the Canadian government because of the refusal of a coal mining permit in an environmentally sensitive area. This demonstrates that current CPTPP provisions intended to protect the environment do not prevent such cases. We advocate for the removal of ISDS from the CPTPP. If removal is not agreed, the government should negotiate bilateral side letters with both new and existing CPTPP members to exclude the application of ISDS.

Controversial " TRIPs-pus" clauses on pharmaceuticals have been suspended rather than removed from the CPTPP, despite being unacceptable to CPTPP member countries and the threat they would pose to access to affordable medicines if reinstated. There is now additional evidence that these should be removed. The labour and environment chapters have selective and qualified commitments to international agreements on labour rights and environmental standards, and a lengthy and convoluted disputes process whose outcomes are not enforceable through trade sanctions in the same way as the dispute process outcomes in other chapters in the agreement. Despite women's rights being mentioned in the preamble, the CPTPP has no proactive commitments to women's rights nor to the rights of Indigenous peoples. The trade-in-services chapter should be reviewed to ensure it does not restrict government regulation of essential services needed to address policy challenges like climate change and aged care. Changes to the electronic commerce chapter should ensure that governments retain the right to regulate rapidly changing developments like Artificial Intelligence (AI) in the public interest to protect consumers and workers. The expansion of the number of temporary workers vulnerable to exploitation is not consistent with current government policy aimed at protecting the integrity of Australia's permanent migration system, ensuring that temporary workers meet specific labour shortages and are not vulnerable to exploitation.

The following changes are recommended to address these issues.

Transparency

- **There should be widespread public consultation in the review negotiations process.**

- **Draft texts should be released during negotiations, and the full texts should be released before they are signed.**

ISDS

- **That ISDS provisions (Part B in Investment Chapter 9) be removed.**
- **If there is no agreement to remove ISDS provisions, the Australian government should continue to seek bilateral side letters mutually excluding the application of ISDS to new members of the CPTPP, as it has done with New Zealand, the UK and Costa Rica.**
- **If there is no agreement to remove ISDS provisions, the Australian government should seek bilateral side-letters with all other CPTPP members mutually excluding the application of ISDS.**

Suspended provisions on intellectual property and pharmaceuticals

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

The labour chapter should be revised to

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

The environment chapter should be revised to

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

Women's rights

- **The CPTPP should include enforceable commitments to progressively adopt, develop and implement international standards based on the UN Convention on the Elimination of All Forms of Discrimination Against Women.**

Rights of Indigenous Peoples

- **The CPTPP should include enforceable commitments to progressively adopt, develop and implement international standards based on the UN Declaration on the Rights of Indigenous Peoples.**

Trade-in-services

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

Temporary workers

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

Investor-State Dispute Settlement (ISDS) provisions should be removed

ISDS has a flawed history and does not increase foreign investment

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 to claim billions in compensation in international tribunals over changes in law or policy that may reduce their future profits, even if the changes are in the public interest.

ISDS provisions originally developed in the post-colonial period after World War II to compensate international investors for the direct expropriation or taking of property by governments. However, over the past 60 years, they have expanded to include "indirect expropriation"[3] and "legitimate expectations",[4] which do not exist in national legal systems. Investors can claim that they deserve compensation if they can argue that a change in law or policy reduces the value of their investment and/or expected future profits and/or that they were not consulted fairly about the change and did not expect the change to occur when they made the investment. Most ISDS cases are against developing countries.

ISDS *ad hoc* tribunals are staffed by investment lawyers who continue to practice as advocates, and the tribunals lack the protections of national legal systems. Flaws include the lack of independent judges, arbitrator conflict of interest, lack of transparency, lengthy proceedings, high legal and arbitration costs, forum-shopping by investors, inconsistent decisions caused by the lack of precedents and appeals, third-party funding for claims as speculative investments, and excessively high awards based on dubious and inconsistent calculations of expected future profits.[5]

Supporters of ISDS claim that it increases the level of foreign investment, especially in developing countries. However, there is no conclusive evidence to support this, because studies show that investment decisions are influenced by many other more significant factors, including commercial

[3] Malakotipour, M. (2020). The chilling effect of indirect expropriation clauses on host states public policies: A call for a legislative response. *International Community Law Review*. 29 May. https://brill.com/view/journals/iclr/22/2/article-p235_5.xml?language=en

[4] Levashova, Y. (2022). The role of investors' due diligence in international investment law: legitimate expectations of investors. 22 April. *Kluwer Investment Blog*. https://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/

[5] Langford, M., Potesta, M. and Kaufman, G. (2020). UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions. *Journal of World Investment and Trade.* 22 June. https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en

viability and market conditions. A 2017 review by Bonnitcha *et al* of the impacts of ISDS in BITs on Foreign Direct Investment (FDI) notes the complexity involved in measuring the impact of this single variable on foreign investment flows, which are impacted by many factors. They conclude that

> The studies' results are mixed. A majority find that bilateral investment treaties have a positive and statistically significant impact on inward FDI in at least some circumstances. Amongst these the scale and impact varies remarkably with some reporting strong effects and others finding positive but only small effects. Among the studies reporting a positive effect of BITS on investment flows, some also come to apparently contradictory findings. Finally a sizeable minority of studies find there was no statistically significant effect of BIT adoption on FDI. [6]

The most comprehensive 2022 meta-study on ISDS and investment flows concluded that there was "robust evidence that effect of international investment agreements is so small as to be considered zero." [7]

Brazil's parliament has never endorsed BITs or trade agreements containing ISDS, but it has experienced high levels of FDI.[8]

The number of reported ISDS cases has been increasing rapidly, reaching 1463 as of December 2025.[9] These include claims against tobacco regulation,[10] medicine patents,[11] indigenous land rights,[12] regulation of the minimum wage,[13] environmental protections,[14] and, more recently, government action to reduce carbon emissions, examples of which are discussed in more detail below.

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

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[6] Bonnitcha, J., Lauge, N., Skovgaard, P., Waibel, M. (2017) *The Political Economy of the Investment Treaty Regime*, Oxford University Press, Oxford, p. 159.

[7] Brada, J., Drabek, Z. (2022) Does investor protection increase foreign direct investment? A Meta-Analysis 30 September https://onlinelibrary.wiley.com/doi/full/10.1111/joes.12392

[8] Filho, J. (2008) "The Brazilian Experience with Bilateral Investment Agreements: A Note", *Transnational Dispute Management*, No.1, https://www.transnational-dispute-management.com/article.asp?key=1198.

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

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

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

[12] International Centre for Settlement of Investment Disputes (2017) Decision on Bear Creek Mining Corporation versus the Republic of Peru, November 17, ICSID Case No. ARB/14/21, https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf

[13] UNCTAD (2019) Investment Dispute Settlement Navigator, Veolia v. Egypt 2012, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/458/veolia-v-egypt;
Breville, B and Bulard, M. (2014) The injustice industry and TTIP, *Le Monde diplomatique*, English edition, June, https://www.bresserpereira.org.br/terceiros/2014/agosto/14.08.injustice-industry.pdf

[14] Withers, P. (2019) Canada ordered to pay US 7 million in NAFTA case, February 25, Canadian Broadcasting Company, https://www.cbc.ca/news/canada/nova-scotia/nafta-bilcon-digby-neck-quarry-environmental-sovereignty-1.5032727
Nelson, A. (2022). Oil firm Rockhopper wins £210m payout after being banned from drilling, *The Guardian*, August 25, https://www.theguardian.com/business/2022/aug/24/oil-firm-rockhopper-wins-210m-payout-after-being-banned-from-drilling#:~:text=Oil%20firm%20Rockhopper%20wins%20%C2%A3210m%20payout%20after%20being%20banned%20from%20drilling,-This%20article%20is&text=A%20corporate%20tribunal%20has%20ordered,an%20offshore%20oil%20drilling%20ban.

regulate in the public interest.[15] Since 2022, there have been many additional examples of cases against public interest laws, court decisions and policies, which strengthen the rationale for this policy.

Clive Palmer's forum shopping and claims against regulation of coal mining and energy show the need to remove ISDS from existing agreements

Australian billionaire Clive Palmer has registered his company Zeph Investments in Singapore, claimed to be a Singaporean investor and used ISDS in the ASEAN-Australia-New Zealand Free Trade Agreement to claim a total of $A420 billion from the Australian government. The first claim in 2023 was for $300 billion after he lost a High Court appeal against a Western Australian government decision to refuse an iron ore mining license.[16] The other three claims, which total $120 billion, are for the refusal of permits for a coal mine and coal-fired power station in Queensland.[17] The refusals were for environmental reasons, including contributions to increased carbon emissions.[18]

In September 2025, an ISDS tribunal dismissed Palmer's claim to be a Singaporean investor in the first WA iron ore case and ordered him to pay the Australian government legal costs of $13.6 million[19]. The Attorney-General commented that "Australia should never have had to spend two years and over AU$13 million defending an investor-State claim brought by an Australian national". The Albanese Government remains committed to actively engaging in processes to remove or reform existing investor-State dispute settlement mechanisms."[20]

The government hoped that Palmer would withdraw his remaining cases following the tribunal decision.[21] However, Palmer then announced[22] that his legal team would challenge the tribunal's decision in the Federal Supreme Court of Switzerland as one of the seats of the international tribunal process. The Swiss court is not an appeal mechanism for the tribunal and cannot consider the broad merits of the case, only technical legal issues, so the action may not succeed. In the meantime, his other three coal-related cases can proceed in 2026. ISDS tribunals have no precedents, so there is no guarantee that the other three tribunal decisions will be consistent with the first decision, including on the awarding of costs, which are at the discretion of the tribunal. This means the Australian government could face the time and costs associated with each individual case, amounting to multiples of tens of millions of dollars, even if Palmer loses.

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[15] 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.

[16] Ranald, P. (2023). How Clive Palmer is suing Australia for 300 billion with the help of an obscure legal clause and Christian Porter, 4 April, https://theconversation.com/how-clive-palmer-is-suing-australia-for-300-billion-with-the-help-of-an-obscure-legal-clause-and-christian-porter-203111

[17] Attorney General's Department. Investor-State Dispute Settlement. Zeph Investments Pte Ltd. https://www.ag.gov.au/international-relations/international-law/international-trade-and-investment-law#:~:text=The%20Jericho%20Power%20Station%20Claim%20(PCA%20Case%20No%202024-48,Waratah%20Coal's%20Galilee%20Coal%20Project

[18] 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

[19] Permanent Court of Arbitration (2025) Zeph Investment vs Australia PCA Case No. 2023-40 Award, September 26 https://pcacases.com/web/sendAttach/90853

[20] Attorney-General Michelle Rowland (2025). International tribunal rejects Clive Palmer's claim against Australia, Media Release September 27, https://ministers.ag.gov.au/media-centre/international-tribunal-rejects-clive-palmers-claim-against-australia-27-09-2025

[21] Attorney-General Michelle Rowland (2025).

[22] Palmer, C. (2025) Clive Palmer to challenge tribunal decision, media release September 28, https://x.com/CliveFPalmer/status/1972085296138498546

The Palmer cases demonstrate how the ISDS system can be used to contest coal mining regulation and manipulated to maximise time and costs for governments. Another recent claim by an Australian company using ISDS in the CPTPP to contest coal mining regulation has been lodged against Canada.

Gina Rinehart's use of ISDS in the CPTPP to claim against the environmental regulation of coal mining in Canada

Hancock Prospecting v Canada (Grassy Mountain project)

Australian billionaire Gina Rinehart's Hancock Prospecting and its subsidiary Riverdale Resources, owners of local company Northback Holdings, are using ISDS in the CPTPP to make a claim against Canada[23] over the refusal of permits for coal mining in an environmentally sensitive area.
The case involves the proposed Grassy Mountain open pit coal project and adjacent projects in Alberta, which were blocked in 2021 after a joint federal–provincial review found coal mining would likely cause significant environmental harm, including damage to waterways and a threatened fish species[24]. The companies allege that Canada has interfered with their coal investments through the decision of the environmental assessment by a joint review panel established under Canadian law, the subsequent appeals through judicial proceedings in Canadian courts which the companies lost, and the coal law and policy changes of the Government of Alberta. After losing appeals in Canadian courts, the companies have launched an arbitration claim in the using ISDS in the CPTPP, seeking more than US $2 billion in compensation, alleging that Canada's decisions undermined their investment through unfair and discriminatory treatment[25].

This claim has been made despite clauses in the CPPTPP that claim to protect environmental regulation, and which are discussed further below.

Additional evidence of ISDS claims against government regulation of carbon emissions

The Palmer and Rinehart ISDS claims join a growing global list of claims that threaten the transition away from fossil fuels. A 2022 study published in the journal *Science* showed that the increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to reduce fossil fuel emissions is a growing threat to government action to address climate change.[26]

[23] International Centre for Settlement of Investment Disputes (2024) Riversdale Resources Pty Ltd and Hancock Prospecting Pty Ltd v. Canada (ICSID Case No. ARB/24/50) December 23 https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/24/50

UNCTAD Database (2024). Riversdale and Hancock v. Canada. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1389/riversdale-and-hancock-v-canada

[24] Bankes, N. and Tienhaara, K. (2026). The Next Shoe Drops. The Northback (Grassy Mountains Interests) File an International Investment Law Claim Against Canada. *University of Calgary Faculty of Law ABLawg.ca.* April 14. https://ablawg.ca/2026/04/14/the-next-shoe-drops-the-northback-grassy-mountain-interests-file-an-international-investment-law-claim-against-canada/

[25]Bankes and Tienhaara above, summarise the process of the review panel and judicial appeals, which the company lost.

[26] Tienhaara *et al.* (2022) Investor-State disputes threaten the global green energy transition, *Science,* 5 May 2022Vol 376, Issue 6594 pp. 701-70 https://www.science.org/doi/10.1126/science.abo4637

US company Ruby River Capital filed an ISDS claim against Canada after its liquefied natural gas project was rejected because of concerns about its greenhouse gas emissions. The company sought US$20 billion in compensation despite having spent approximately US$124 million on the project [27].

In Europe, German energy companies RWE and Uniper launched ISDS cases against the Netherlands using ISDS in the Energy Charter Treaty (ECT) over its moves to phase out coal-powered energy by 2030.[28] Although both cases have now been withdrawn, they spurred public debate and a comprehensive review of the EU's membership of the ECT, which led to cancellation of ISDS arrangements between EU members and the EU's withdrawal from the ECT[29].

However, the ECT's sunset clause continues to protect existing investments for 20 years.EU governments have terminated sunset cluses applying to each other. But in 2025, Dutch oil company Shell registered in the UK and US company Exxon-Mobil initiated separate ISDS cases against the Netherlands over the closure of the Groningen gas field, one of Europe's largest gas projects, because a parliamentary inquiry found the drilling caused earthquakes, resulting in widespread structural damage, safety risks, and social harm. These cases appear to be counterclaims to attempt to evade responsibility for the costs of environmental remediation[30], and show why it is essential to terminate ISDS sunset clauses with all parties. There are technical proposals to do so through the use of Article 62 of the Vienna Convention on the Law of Treaties (VCLT), on the basis that there has been a fundamental change in circumstances since the inception of the treaty. This can be justified on the basis that a swift and substantial transition away from fossil fuels is now required to ensure states can meet their obligations under the Paris Agreement[31].

In 2025, the UK faced its first ISDS claim under the bilateral Singapore-UK investment agreement from Singapore-based Woodhouse Investment Pte Ltd against a High Court decision to deny a permit for a coal mine in Cumbria[32]. The claim has provoked widespread public criticism as it is seen as a challenge to government policy to phase out fossil fuels[33].

Other ISDS cases under the CPTPP

To date, there have been two other ISDS claims recorded in the UNCTAD database[34] brought under the CPTPP. The Hancock Holdings case contesting coal mining regulation has been discussed above.

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[27] International Centre for Settlement of Investment Disputes (ICSID) (2023b) Ruby River Capital LLC v. Canada, ICSID Case No. ARB/23/5. Available at 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. Available at https://www.bu.edu/gdp/files/2023/11/KT-RT-KG-OHCHR-ISDS-Submission-FIN.pdf

[28] Kluwer Arbitration (2021) http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/

[29] Schaugg, L. *Why Coordinated Withdrawal From the Energy Charter Treaty Remains Essential for Effective Climate Action* (2025). International Institute for Sustainable Development. June 20. https://www.iisd.org/articles/insight/coordinated-energy-charter-treaty-withdrawal-essential

[30] Bedeschi, B. (2026). Groningen closure debate reignites as Shell brings fresh arbitration. *Gas Outlook.* January 21, https://gasoutlook.com/analysis/groningen-closure-debate-reignites-as-shell-brings-fresh-arbitration/
Hodgson, R. ExxonMobil sues Dutch government over gas field closure (2024*). EuroNews.* October 10. https://www.euronews.com/my-europe/2024/10/10/exxonmobil-sues-dutch-government-over-gas-field-closure

[31] Jackson, E. (2024). The Energy Charter Treaty: Letting the sun set on sunset clauses. Review of European, Comparative & International Environmental Law. Volume 33, Issue 3 pp. 619-63 https://onlinelibrary.wiley.com/doi/10.1111/reel.12583

[32] Investment Treaty News (2026) The United Kingdom faces its First ISDS Arbitration. January 19. https://www.iisd.org/itn/2026/01/19/the-united-kingdom-faces-its-first-isds-arbitration/

[33]ABColombia (2026) ISDS a threat to global security. February 4. Report of a conference sponsored by Christian Aid, CAFOD, SCIAF, Oxfam and Trocaire. https://www.abcolombia.org.uk/isds-a-threat-to-global-security/

[34] UNCTAD Database (2026). https://investmentpolicy.unctad.org/investment-dispute-settlement

The three CPTPP cases demonstrate that even the relatively limited use of ISDS under the CPTPP to date has already engaged sensitive areas of public policy and claimed billions in compensation for regulation of coal mines, requirements for recognition of land rights and consultation with Indigenous peoples and energy market regulation.

Almaden Minerals v Mexico (Ixtaca mining project)

Canadian mining companies Almaden Minerals and Almadex Minerals have lodged a dispute using ISDS in the CPTPP in relation to the cancellation of their Ixtaca gold and silver mining project in Puebla, Mexico[35].

The dispute arises from a series of legal and regulatory developments concerning Indigenous rights. Indigenous communities in the affected region had opposed the project, citing risks to water resources, land rights, and livelihoods[36].In 2022, Mexico's Supreme Court ruled that the company's mining concessions had been granted without the constitutionally required prior consultation with affected Indigenous communities and ordered their suspension[37]. Subsequent administrative decisions led to the cancellation of the concessions entirely[38].

The company alleges that Mexico breached its CPTPP obligations through unlawful expropriation, denial of fair and equitable treatment, and discriminatory conduct and is claiming over US$1 billion in compensation plus interest and legal costs[39].

The claim shows how ISDS mechanisms can be invoked in response to government decisions taken to uphold national legal consultation obligations to Indigenous peoples.

CDPQ and CDP v Mexico

Canadian pension fund Caisse de dépôt et placement du Québec (CDPQ) and CDP Groupe Infrastructures Inc. lodged an ISDS claim against Mexico on December 15, 2023[40].

The claim arose from Mexico's energy policy reforms under former President Andrés Manuel López Obrador, which prioritised investments in state-owned enterprises Petróleos Mexicanos (Pemex) and the Comisión Federal de Electricidad (CFE) moving away from the previous policy of subsidising private investment, with the stated aim of energy sovereignty and security [41]. The Mexican government announced that both parties had agreed to the suspension of the claim pending

[35] UNCTAD Database (2024). Almaden and Almadex v. Mexico. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1349/almaden-and-almadex-v-mexico
[36] Pearson, T. (2024). Land Defenders Shut Down a Toxic Mine. Now Its Corporate Backers Want Damages. *Truthout*. July 20. https://truthout.org/articles/land-defenders-shut-down-a-toxic-mine-now-its-corporate-backers-want-damages/
[37] Radwin, M. (2022). Mexico's top court cancels mining concessions near Indigenous communities. *Mongabay*. February 18. https://news.mongabay.com/2022/02/mexicos-top-court-cancels-mining-concessions-near-indigenous-communities/
[38] Globe Newswire. (2023). Almaden Minerals loses mining concessions permanently. *Financial Post*. April 20. https://financialpost.com/globe-newswire/almaden-minerals-loses-mining-concessions-permanently
[39] Almaden Minerals Ltd and Almadex Minerals Ltd v United States of Mexico (2025) *Clamant Memorial* ICSID Case No. ARB/24/23, March 20, p. 299. https://www.italaw.com/sites/default/files/case-documents/italaw1826944.pdf

[40] UNCTAD Database (2023). CDPQ and CDP v. Mexico. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1316/cdpq-and-cdp-v-mexico
[41] Rousseau, I. (2021). Mexico's Energy Policies During the Presidency of Andrés Manuel López Obrador. *French Institute of International Relations*. July 9. https://www.ifri.org/en/memos/mexicos-energy-policies-during-presidency-andres-manuel-lopez-obrador-sovereignty-and

negotiations on December 19, 2023, four days after the claim was lodged[42]. The claim is still listed as pending, and no further public information is available.

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

There have been attempts in more recent trade agreements, such as the CPTPP, to include more protections for governments. This includes exceptions that are meant to safeguard public interest regulation. However, these "modernised" provisions have not been effective as tribunals have found that general exceptions do not remove the liability to pay compensation for measures that violate an investment protection.[43]

For example, in the *Eco Oro v. Colombia* decision, the tribunal disregarded an exception in the Colombia-Canada FTA included to protect governments' right to enact environmental regulation. The exception reads that nothing in the FTA's investment chapter "shall be construed to prevent a Party from adopting or enforcing measures necessary" to protect the environment, if the measures do not amount to "arbitrary discrimination or disguised restraint on trade or investment". However, the tribunal decided that even if the exception applies to a measure, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation". [44] Similar tribunal decisions were made in *Montauk Metals Inc. v Colombia* and *Bear Creek Mining Corporation v Republic of Peru*[45].

In the CPTPP, another exception includes the additional proviso that nothing should prevent measures to protect the environment "otherwise consistent with this chapter".[46] Trade law experts have said that the circular language of this exception gives no additional protections for environmental regulation.[47]

Only tobacco regulation has been clearly excluded from ISDS cases in the CPTPP.[48] While other language in the CPTPP allows regulation for other legitimate public welfare objectives, it qualifies this by stating except in "rare circumstances".[49] This contains allows for a very broad interpretation by tribunals.

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[42] Mexican Economics Secretary (2023) Economics secretary and (CDPQ) and CDP Groupe Infrastructures agree to temporarily suspend arbitration proceedings, December 19, https://www.italaw.com/sites/default/files/case-documents/italaw181022.pdf

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

[44] *Eco Oro v Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), paras 826–37
Benton Heath, J (2021) Eco Oro and the Twilight of Policy Exceptionalism, *Investment Treaty News*, https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/.

[45] *Montauk Metals Inc. v Colombia*, ICSID Case No. ARB/18/13, Award (7 June 2024), paras 971–984
Bear Creek Mining Corporation v Republic of Peru, ICSID Case No. ARB/14/21, Award (30 November 2017), para 477

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

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

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

[49] DFAT, Ibid, Chapter 9, Annex 9-B, p. 9-35.

None of these clauses prevent claims from being brought against governments. They only provide some possible arguments governments can use in defending cases. Governments still have to spend time and millions in legal costs defending cases.

Joint interpretive Declarations and UNCITRAL Model Provisions on Mediation

In the current review, it appears that CPTPP Ministers have made proposals for negotiation of joint interpretive declarations by governments, although no details are provided. These declarations, if accepted as binding by tribunals, are presumably intended to provide some improved protections for governments. They are:

- a joint interpretative declaration on the dominant and effective nationality principle;
- a joint interpretative declaration that may apply to the National Treatment, Most-Favoured-Nation Treatment, and Minimum Standard of Treatment articles, and the right to regulate[50]

Although negotiation of such proposals may intend to provide some improved protections for governments, there is a dispute amongst legal experts about whether such declarations can, in fact, be binding on tribunals[51]. This means that such declarations could be contested, and governments would have to spend time and legal fees presenting the case for them to be binding on tribunals.

There is also a proposal to recognise the UNCITRAL Model Provisions on Mediation for International Investment Disputes (2023) as a non-binding reference for Parties to consider using for the consultation phase of the Investor-State Dispute Settlement mechanism in the Investment Chapter. This proposal could allow for mediation before proceeding to disputes, but it is non-binding.

In summary, since the CPTPP was negotiated, more evidence has emerged that ISDS clauses are being used against public interest regulation, including the regulation of carbon emissions. CPTPP ISDS provisions have been used against environmental regulation of coal mining, against regulation designed to protect the rights of Indigenous peoples and against regulation of the energy market.

Clauses similar to those in the CPTPP, intended to provide protections or exemptions for public policy areas like the environment, have been disregarded by ISDS tribunals. These exemptions do not prevent cases from being launched, and governments still have to spend years and tens of millions defending them. There is also legal uncertainty that joint interpretive declarations by governments intended to protect government rights to regulate in the public interest would be binding on tribunals. Given the evidence, the strongest safeguard for CPTPP governments' right to regulate in the public interest would be to remove ISDS from the agreement.

We note that several CPTPP member countries already have exclusions or modifications to the ISDS clauses in the agreement. Australia and New Zealand have a side-letter in which they agree not to apply the CPTPP ISDS provisions to each other.[52] Australia, the United Kingdom and Costa Rica have

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[50] DFAT (2025) Joint Ministerial Statement on the occasion of the inaugural Trade and Investment Dialogue between the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the Association of Southeast Asian Nations, November 21, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/joint-ministerial-statement-occasion-ninth-commission-meeting-cptpp#final

[51] See Gaukrodger, D. (2016). OECD Working Papers on International Investment 2016/01. The legal framework applicable to joint interpretive agreements of investment treaties. p.14. https://www.oecd.org/en/publications/the-legal-framework-applicable-to-joint-interpretive-agreements-of-investment-treaties_5jm3xgt6f29w-en.html and Alcolea, L. States as Masters of Investment Treaties: the rise of joint interpretive statements, Chinese Journal of International Law volume 22 Issue 3, September 2023, pp 479-527. https://academic.oup.com/chinesejil/article/22/3/479/7261461

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

similar side-letters.[53] New Zealand also has similar side letters with Brunei Darussalam, Malaysia, Peru and Viet Nam.[54] We welcome the Australian government policy of negotiating side-letters to exclude the application of ISDS provisions to new members of the CPTPP. If there is no agreement to remove ISDS from the CPTPP, similar bilateral side letters excluding the application of ISDS should be sought from the original 11 CPTPP members.

Recommendations:

- **That ISDS provisions (Part B in Investment Chapter 9) be removed**
- **If there is no agreement to remove ISDS provisions, the Australian government should continue to seek bilateral side letters mutually excluding the application of ISDS to new members of the CPTPP, as it has done with New Zealand, the UK and Costa Rica.**
- **If there is no agreement to remove ISDS provisions, the Australian government should seek bilateral side-letters with all other CPTPP members mutually excluding the application of ISDS.**

CPTPP suspended intellectual property clauses would delay access to affordable medicines if reinstated and should be removed

Twenty-two of the original TPP-12 provisions, mostly in the intellectual property chapter, have been suspended but not removed. Many of the most controversial suspended provisions on pharmaceuticals in the intellectual property chapter were originally included at the insistence of the US on behalf of their pharmaceutical companies but were suspended when they withdrew from the agreement. These are provisions which weakened requirements for patentability and/or extend medicine monopolies beyond the 20 years included then the WTO Trade-Related Intellectual Property Rights (TRIPS) agreement, known as "TRIPS-plus" provisions. A 2022 comprehensive review of the evidence where such provisions have been implemented showed that "stronger pharmaceutical monopolies created by TRIPS-plus intellectual property rules are generally associated with increased drug prices, delayed availability and increased costs to consumers and governments"[55].

Some of these suspended provisions would have inserted or extended data exclusivity on clinical drug trial data submitted to drug regulatory authorities, specifically for the newest, most effective and expensive biologic medicines. Data exclusivity is a separate monopoly in addition to the existing 20-year patent monopoly, meaning manufacturers of lower cost versions of the medicines cannot use existing drug trial data to obtain market approval for additional periods after patents have expired. For Australia, which already has 5 years of data exclusivity, this period would be up to an

[53] DFAT (2023) Side letter between Australia and the UK on ISDS, https://www.dfat.gov.au/sites/default/files/cptpp-isds-letter-aus-uk-signed.pdf.
[54] NZ Ministry of Foreign Affairs and Trade (2016), CPTPP Investment and ISDS, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/investment-and-isds/.
[55] Tenni, B, Moir, HVJ, Townsend, B, Kilic, B, Farrell, A-M, Keegel, T and Gleeson, D (2022) What is the impact of intellectual property rules on access to medicines? A systematic review. *Globalization and Health* 18(1), 40. https://doi.org/10.1186/s12992-022-00826-4

additional three years. For developing countries without data exclusivity, this could be up to eight years.[56]

These provisions would delay the introduction of low-cost versions of expensive biologic medicines. For Australia, it could cost the Pharmaceutical Benefits Scheme several hundred million dollars per year for each year of delay[57]. These provisions would be even more costly for developing countries that are party to the agreement, like Viet Nam, Peru, Malaysia and Mexico.[58] A 2025 article by International public health experts in the *Health Economics, Policy and Law*, has summarised and updated the evidence for removing these and other "TRIPS-plus" provisions from the CPTPP and concluded:

> Based on our review of the evidence of the effects of TRIPS-Plus obligations on access to medicines, the suspended provisions relevant to pharmaceuticals from Chapter 18 of the CPTPP should be completely removed during the review of the CPTPP[59].

The rationale for suspending, but not removing the provisions, was that these provisions could be reinstated if the US were to re-join the agreement. However, the US' Trump administration remains firmly opposed to rejoining the agreement. Moreover, the US administration is using coercive tariff threats to pressure Australia and other countries to increase the wholesale price of medicines, which would also reduce affordable access to medicines[60].

There is no rationale for retaining the suspended clauses. In order to ensure that provisions that would reduce affordable access to medicines cannot be reinstated, the suspended clauses should be removed.

Recommendation:

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

Labour and Environmental Standards

The CPTPP contains chapters on labour and environment,[61] which are considered a step up from older agreements, that did not include such chapters or had chapters that were completely

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

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

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

[59] Gleeson, D., Lexchin, J., Tenni, B., & Labonté, R. (2025). An opportunity to remove harmful intellectual property provisions from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. *Health Economics, Policy and Law*, 1–8. doi:10.1017/S1744133125100261

[60] Trump, D. (2026). Adjusting imports of pharmaceuticals and pharmaceutical ingredients into the United States, April 2. Presidential declaration. https://www.whitehouse.gov/presidential-actions/2026/04/adjusting-imports-of-pharmaceuticals-and-pharmaceutical-ingredients-into-the-united-states/

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

aspirational with no disputes processes or enforceability. The CPTPP chapters have disputes processes that are separate from the dispute processes in other chapters in the agreement. The chapters do commit governments to enforce their own laws and not to reduce labour rights or environmental standards to gain a trade advantage. However, other commitments to labour rights are soft commitments to which the dispute processes do not apply. The dispute processes themselves have not proven effective in other agreements because they are qualified, lengthy and convoluted, compared with the general state-to-state dispute process enforced through trade sanctions, which applies to other chapters.[62]

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

Labour Rights Chapter 19

Many of the countries that are party to the CPTPP, including Australia, have ratified the International Labour Organisation (ILO) conventions, which protect labour rights. This includes freedom of association, the right to collective bargaining, no forced labour, no child labour, no discrimination in the workplace and the right to a safe and healthy workplace.[63] The convention obligations are stronger and more detailed than the ILO *Declaration on Fundamental Principles and Rights at Work* (1998). The CPTPP text refers to "rights as stated in the ILO Declaration" and, crucially, not the ILO conventions (which are explicitly excluded from consideration in footnote 3 of Article 19.3). Given that there are no rights included in the ILO declaration, only principles informed by rights, this creates ambiguity, undermining consistent application of the labour chapter and respect for labour rights.[64]

Nine CPTPP countries, including Australia, have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which further protects labour rights.[65] For example, ICESCR states that child labour "should be prohibited and punishable by law", while the CPTPP Chapter only commits governments to "recognise the goal" of eliminating forced and child labour.

In addition to the soft obligations on labour rights, there are notable areas in which the CPTPP has omitted to lay down standards, such as for migrant workers, or has included heavily qualified obligations. Complaints about labour rights violations require evidence that there is a "sustained or recurring course of action or inaction in a manner affecting trade or investment" between TPP governments (Article 19.5.1). These are more onerous requirements than for enforcement provisions in other TPP chapters. The second requirement, that the violation be in "a manner affecting trade or investment", means that public sector workers and others in non-traded sectors cannot use the disputes process. Under similar qualified provisions in the Dominican Republic-Central American Free Trade Agreement, the US complaint against Guatemala for failing to enforce labour laws was dismissed because the tribunal found that the failure did not affect trade,[66] meaning that these

[62] International Trade Union Confederation (2011) Trans-Pacific Partnership Labour Chapter scorecard: fundamental issues remain unaddressed, https://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf.
[63] International Labour Organization (2022) https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm
[64] Tham, J C, and Ewing, K D (2020) Labour provisions in trade agreements: neoliberal regulation at work? *Research Gate*. pp. 6-14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610727.
[65] UNHR Treaty Bodies. Ratification Status by Country or Treaty,https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=35&Lang=EN.
[66] Dominican Republic-Central America-United States Free Trade Agreement Arbitral Panel (2017) In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR (Final Report of the Panel) para 594,

qualifications exclude large sections of the workforce. Given all these qualifications, some experts have questioned whether the CPTPP labour chapter establishes meaningful labour rights.[67]

Recommendations

The labour chapter should be revised to

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

Environmental Standards Chapter 20

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

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

1. "The Parties acknowledge that transition to a low emissions economy requires collective action.
2. The Parties recognise that each Party's actions to transition to a low emissions economy should reflect domestic circumstances and capabilities and, consistent with Article 20.12 (Cooperation Frameworks), Parties shall cooperate to address matters of joint or common interest".[68]

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

The CPTPP has been criticised for requiring the UK to remove or lower environmental standards before its accession to the CPTPP. This includes the reduction of tariffs on the import of

p.201, https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf.

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

[68] CPTPP Chapter 20. See also Sierra Club (2015). TPP Text Analysis: Environment Chapter Fails to Protect the Environment, https://www.sierraclub.org/sites/default/files/uploads-wysiwig/tpp-analysis-updated.pdf

unsustainable palm oil associated with deforestation and the lowering of agricultural and animal welfare standards.[69] Australia has not been required to lower its environmental standards, but the requirements imposed on the UK set a bad precedent for other countries that may want to join the CPTPP in future.

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

Recommendations:

The environment chapter should be revised to

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

Women's Rights and Indigenous Rights

The terms of reference for the review include women's rights and indigenous rights. Although the CPTPP preamble[70] mentions "promotion" of women's rights and indigenous rights very briefly, there are no commitments in the text of the agreement to proactively protect these rights. This renders the preamble meaningless in these areas and is a serious omission compared with other recent trade agreements.

Women's Rights

Women form half the population, and the economy relies on their paid and unpaid work caring for children and elders. However, because of historic discrimination, this work is often unrecognised and under-rewarded, resulting in higher rates of poverty. Changes in trade policy can have disproportionate impacts on women's economic participation. Gender analysis is required to assess and mitigate those impacts. For example, tariff changes can disproportionately impact female dominated industries like the garment industry. In developing countries, many small farmers are women and changes to agricultural trade policies can disproportionately impact them. We note that Article 7 of the International Covenant on Economic, Social and Cultural Rights, of which Australia is a signatory, speaks of ensuring equal pay for work of equal value, free of assumptions of gender.

The UN Convention on the Elimination of All Forms of Discrimination Against Women, which many countries have ratified, shows how discrimination can be removed to increase women's social and

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

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

economic participation. This is essential for women's full participation in both policy and in economic and trade activities, and sharing the benefits of those activities.

In recent years, some trade agreements have included gender equality provisions that recognise the importance of women's economic empowerment and typically include commitments to cooperation, capacity building and gender-responsive policy. However, these provisions are often not legally enforceable and lack effective monitoring mechanisms.

Recommendation:

The CPTPP should include enforceable commitments to progressively adopt, develop and implement international standards based on the UN Convention on the Elimination of All Forms of Discrimination Against Women.

Rights of Indigenous Peoples

Australian Indigenous peoples live with the legacy of colonial dispossession and discrimination, with basic civil rights and land rights only recognised by Australian governments and courts over the last 60 years.

Indigenous peoples are rights-holders with jurisdictional authority over Country, not merely stakeholders to be consulted. In particular, free prior and informed consent is required for activities on Indigenous Country. Trade agreements that constrain environmental regulation, land governance, or climate action on Indigenous Country also undermine indigenous rights, even if those rights are referenced formally.

In addition, trade agreements can affect the protection of Indigenous knowledge and cultural heritage, particularly through intellectual property provisions. Strong safeguards are needed to prevent misappropriation and to ensure that Indigenous communities retain control over the use of their knowledge and cultural expressions.

The government should implement its commitments to the inclusion of Indigenous peoples and sharing the benefits of trade through supporting the following recommendation:

The CPTPP should include enforceable commitments to progressively adopt, develop and implement international standards based on the UN Declaration on the Rights of Indigenous Peoples.

Electronic Commerce rules must ensure that governments retain the right to regulate the digital domain

Electronic commerce or digital trade is a complex area of trade law that is directly tied to provisions relating to financial services and broader trade in services. The digital trade agenda is highly influenced by the US digital industry lobby, which seeks to codify rules that suit the dominant digital industry companies, which are among the largest and most powerful global companies.

The aim of this digital trade agenda is to secure the cross-border free flow of data and to establish an international regulatory framework that prevents governments from regulating the digital domain and the operations of digital companies. This is particularly concerning given the recent issues arising from the lack of regulation of digital platforms and the business practices of digital companies including:

- Facebook and Google's data privacy abuse scandals[71]
- Uber classifying itself as a technological platform, not an employer, to avoid labour regulation and enable the exploitation of workers[72]
- tax avoidance[73]
- abuse of market power and anti-competitive practices by Facebook, Google and Amazon[74]
- use of algorithms which enable anti-competitive conduct or result in discrimination based on class, gender or race
- The abuse of facial recognition technology and Artificial Intelligence.

The 2019 Australian Competition and Consumer Commission's (ACCC) digital platforms report identified the need for regulatory reform in Australia to address concerns about the market power of big tech companies, the inadequacy of consumer protections and laws governing data collection, and the lack of regulation of digital platforms.[75] Successive governments, including the current government, have developed regulation to address these concerns.

One example is the News Media Bargaining Code, a mandatory code of conduct that governs commercial relationships between Australian news businesses and digital platforms that benefit from a significant bargaining power imbalance. The code enables news media companies to reach agreements for payment from digital platforms for their use of Australian news media information[76]. Addressing this imbalance was seen as necessary to support the sustainability of the Australian news media sector, which is essential to a well-functioning democracy. The code was reviewed in 2022[77] and is still in place, but technology companies have been resisting it[78]. Another example is the development of Online Safety Codes and Standards and age-related restrictions on the use of social media.[79] There has also been legislation to improve the rights of digital platform workers. There is ongoing consideration of the public interest in the regulation of the expansion of cybercrime and some aspects of Artificial Intelligence.

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[71] Waterson, J. (2018) UK fines Facebook £500,000 for failing to protect user data, The Guardian, October 25, https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica.
[72] Bowcott, O. (2017) Uber to face stricter EU regulation after ECJ rules it is transport firm, The Guardian, December 21, https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu.
[73] Drucker, J. and Bowers, S. (2017) After a Tax Crackdown, Apple Found a New Shelter for Its Profits, The New York Times, November 7, https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html.
[74] Ho, V. (2019) Tech monopoly? Facebook, Google and Amazon face increased scrutiny, *The Guardian*, June 4, via: https://www.theguardian.com/technology/2019/jun/03/tech-monopoly-congress-increases-antitrust-scrutiny-on-facebook-google-amazon.
[75] Australian Competition and Consumer Commission (2019) Digital Platforms Inquiry final report, June 2019, https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report.
[76] Australian Competition and Consumer Commission (2021) News Media Bargaining Code, https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/news-media-bargaining-code.
[77] Australian Competition and Consumer Commission (2022) Review of the News Media Bargaining Code https://www.accc.gov.au/by-industry/digital-platforms-and-services/news-media-bargaining-code/news-media-bargaining-code
[78] McIlroy, T. (2025). Meta could face millions in fines for not signing content deals in Australia. *The Guardian.* November 13. https://www.theguardian.com/technology/2025/nov/12/meta-could-face-millions-in-fines-for-not-signing-content-deals-in-australia
[79] Australian e- safety Commissioner (2025) Online safety codes and standards https://www.esafety.gov.au/industry/codes#about-the-phase-2-industry-codes

Some of these forms of regulation have been identified by the US digital trade lobby as barriers to trade in the US' America First trade policy agenda. The US government is pressuring governments to remove them under the threat of increased tariffs.[80] Australia should cooperate with other governments to resist such pressure.

Digital trade provisions should not prevent governments from regulating all aspects of the digital domain that require regulation in the public interest.

Recommendations:

The CPTPP should not include provisions that:

- ***Prevent governments from regulating the cross-border flow of data***
- ***Prevent regulation to address market power imbalances***
- ***Prevent governments from accessing source code and algorithms and from regulating to prevent the misuse of algorithms to reduce competition and to prevent class, gender, race and other forms of discrimination***
- ***Prevent governments from regulating the abuse of Artificial Intelligence***
- ***Prevent governments from setting standards for the security of electronic transactions and preventing cybercrime***
- ***Prevent governments from regulating to ensure that digital platform workers have access to the same minimum standards for wages and working conditions as other workers***
- ***Prevent governments from regulating to protect workers' privacy, prevent intrusive surveillance and ensure that workers have access to data collected about them.***

The CPTPP should include:

- ***Full exemptions for tax policy to ensure that digital companies do not evade tax.***
- ***Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.***

Trade in Services Chapter 10

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

Public services are notionally excluded from the CPTPP services chapter. However, the exclusion of public services is ambiguous because a public service is defined 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"[81]. In Australia, as in many other

[80] Tommaso Giardini (2025) Is US Pressure Against Foreign Digital Policy Working? An Investigation of US Tariff Deal Priorities and Government Responses, including an Annex with Annotated Tariff Deal Texts, December 2, https://digitalpolicyalert.org/report/reactions-to-tensions

[81] DFAT (2025). Text of the Trans-Pacific Partnership Chapter 10, Article 10. 1.3 c) and d). https://www.dfat.gov.au/sites/default/files/10-cross-border-trade-in-services.pdf

countries, many public and private services are provided side-by-side, meaning few public services are covered by this definition.

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

This means that governments have to be very careful to list all reservations, including for emerging new services, in agreements.

Without very specific reservations, trade-in-services rules can restrict new forms of regulation needed when circumstances change, as has occurred with the need for increased financial regulation following the Global Financial Crisis and the Royal Commission into the Banking and Financial Services Industry,[82] the Royal Commission into Aged Care Quality and Safety discussed below, and governments' responses to climate change through regulation of energy services' carbon emissions discussed above.

Trade-in-services rules also use a 'ratchet' structure which treats the regulation of services as if it were a tariff, to be frozen at current levels and not raised in future, unless particular services are specifically reserved from this structure in Annex II. This can prevent governments from addressing the failures of privatisation or deregulation. For example, the deregulation and privatisation of vocational education services in Australia resulted in failures in service delivery for students and fraudulent use of public funds, and the Turnbull government had to reregulate to address these failures in 2016.[83] The increased regulation of vocational education could have been contrary to trade-in-services rules in the Trans-Pacific Partnership, which was then still under negotiation.

The government responded to this unintended consequence and the need for re-regulation in the CPTPP and subsequent agreements like the RCEP and the Australia-UK FTA by including a new reservation in Annex II, which retained the right to regulate the funding and standards of education services.[84]

The inclusion of essential services, like health, education, energy, water and aged care in trade agreements also limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to transnational service providers of those services. This means that governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, numbers of staff or relationships with local services. This can reduce the right to regulate to ensure equitable access to essential services, to regulate service standards and staffing levels, and to meet social and environmental goals.[85]

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

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

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

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

Another example of a possible unintended consequence occurred in aged care services in 2021, when a debate emerged about whether aged care services were specifically excluded from trade-in-services rules in the Regional Comprehensive Economic Partnership (RCEP) and other trade agreements, including the CPTPP. Aged care is funded by the federal government but managed largely by private providers. The 2021 Report of the Royal Commission into Aged Care Quality and Safety[86] exposed multiple scandals caused by a lack of qualified staff and poor-quality care, and recommended increases in staffing levels, increases in qualifications of staff and changes to licensing arrangements. Many of these recommendations have now been implemented, including measures to increase staffing levels through legislation requiring a registered nurse to be on site in residential aged care at all times and mandated minimum care minutes. Reform of the aged care sector is ongoing.

These increases in regulation could have been prevented by the market access and national treatment rules listed above, unless aged care was specifically reserved from the agreement in Annex II. Aged care is not listed in the specific reservation with other specific services like childcare in the RCEP and the CPTPP.[87] The government argued that aged care was excluded under the more general category of social services, but the Joint Standing Committee on Treaties noted the ambiguity and recommended that 'such inconsistencies give rise to public concern, and it would be better if they were avoided'.[88] To ensure that there is no potential threat to ongoing reform of the aged care sector in line with the Royal Commission recommendations, aged care should be listed as a specific reservation in Annex II of the CPTPP.

Recommendations

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

Temporary Workers Chapter 12

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

The government's 2023 report on Migration Strategy[89] 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.

[86] Royal Commission into Aged Care Quality and Safety (2021). Summary of the Final Report, https://www.royalcommission.gov.au/system/files/2021-03/final-report-executive-summary.pdf
[87] DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) chapter 10, Annex II, p. 8, https://www.dfat.gov.au/sites/default/files/annex-ii-australia.pdf.
[88] Joint Standing Committee on Treaties (2022) Report 196 on the Regional Comprehensive Economic Partnership, p.27, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Report_196/section?id=committees%2Freportjnt%2F024720%2F76916.
[89] Commonwealth of Australia (2023) Migration Strategy December 11, https://immi.homeaffairs.gov.au/programs-subsite/migration-strategy/Documents/migration-strategy.pdf

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.[90] 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.[91] The evidence from these studies shows gross violations of Australian minimum work standards, including failure to pay even minimum wages, long hours of work, and lack of health and safety training leading to workplace injuries, as well as lack of effective freedom of association and collective bargaining rights.

For these reasons, AFTINET does not support expansion of the numbers of vulnerable temporary workers through commitments in trade agreements. However, Annex 12A of the CPTPP commits Australia to accepting unlimited numbers of temporary contractual service providers from Canada, Mexico, Chile, Japan, Malaysia and Viet Nam in a wide range of occupations, and does not require labour market testing to establish whether there are local workers available.[92]

On December 11, 2023, the government announced changes to Australia's migration strategy following a comprehensive review. The changes are aimed at protecting the integrity of Australia's permanent migration system, ensuring that temporary workers meet specific labour shortages, and are not vulnerable to exploitation, and ensuring that temporary workers have a pathway to becoming permanent residents and citizens.[93]

Recommendation

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

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

[91] Howe et al. (2019) Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry, https://www.researchgate.net/publication/331586106_Towards_a_Durable_Future_Tackling_Labour_Challenges_in_the_Australian_Horticulture_Industry_-_REPORT

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

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