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**Submission to the Department of Foreign Affairs and Trade (DFAT) on the proposed Australia-United Arab Emirates Comprehensive Economic Partnership Agreement (UAE CEPA) and the potential resumption of negotiations for a free trade agreement with the Gulf Cooperation Council (GCC FTA)**

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## 1. Summary of recommendations:

### Human rights:

- Before embarking upon negotiations, the Australian government must require evidence of improvements in UAE and GCC human rights legislation and record – including accession and adherence to UN human rights conventions – as a precondition for the commencement of negotiations.
- Before embarking upon negotiations, the Australian government must require ratification of the Arms Trade Treaty (ATT) by the UAE and GCC countries. Any future trade agreement must legally bind both parties to upholding and implementing the ATT and provide means of enforcement through a government-to-government dispute mechanism.

### Transparency and accountability:

- Prior to commencing negotiations with the UAE and GCC, the government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the UAE CEPA and GCC FTA, including potential economic, social, environmental and human rights impacts.
- There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. During these consultations, stakeholders must have access to government proposals and discussion papers.
- Draft texts should be released for public discussion.
- The final text should be released for public and parliamentary discussion before it is authorised for signing by Cabinet.
- Comprehensive independent economic, social and environmental impact assessments should be completed before the agreement is signed. Impact assessments should be made public for debate, consultation and review by parliamentary committees.
- Parliament should vote on the whole text of the agreement, not just the implementing legislation.

### ISDS:

- ISDS should not be included in the UAE CEPA or GCC FTA.

### Intellectual property:

- There should be no extension of patents or copyright monopolies in the UAE-CEPA or GCC FTA.

### Trade in services:

- Public services should be clearly and unambiguously excluded from the UAE CEPA and GCC FTA, and there should be no restrictions on the government's right to provide and regulate services in the public interest.
- The UAE CEPA and GCC FTA should use a positive list to identify which services will be included in an agreement.
- The government should retain the right to regulate and re-regulate all services to meet service standards, health, environmental or other public interest objectives. This should include the right to address privatisation failures.

### Procurement:

- The government should not make any commitments on government procurement that undermine its ability, or the ability of state governments, to support local industry development.
- The government should maintain its current government procurement exemptions for SMEs, Indigenous enterprises and local government procurement.

#### **Digital Trade:**

- The UAE CEPA and GCC FTA *should not* include provisions that:
  - Prevent current and future governments from regulating the cross-border flow of data.
  - Prohibit the use of local presence requirements.
  - 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 setting standards for the security of electronic transactions.
  - Apply to financial services.
- The UAE CEPA and GCC FTA *should* include:
  - Full exemptions for tax policy.
  - Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.

#### **Labour rights and rights of temporary migrant workers:**

- Before embarking upon negotiations for a UAE CEPA and GCC FTA, the Australian government must require evidence of improvements in labour rights legislation and implementation – including accession and adherence to ILO Fundamental Conventions and the Migrant Workers Convention – as a precondition for the commencement of negotiations.
- The UAE CEPA and GCC FTA should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement.

#### **Environmental protection:**

- A binding environment chapter should be included in all free trade agreements, and be no less legally enforceable than other chapters in the agreement.
- In determining a breach of the Environment Chapter, trade agreements should not establish impractically high barriers which preclude effective enforcement.
- Environment Chapters should be subject to the same Dispute Resolution processes that are applied to other chapters of trade agreements.
- Trade agreements should bind parties to upholding international environmental law, including the Paris Agreement.
- Trade agreements should preserve the right to regulate for environmental protections, including in developing more stringent regulations and the use of subsidies, local content rules, tariffs and other policy tools to support decarbonisation.
- Agreements must not prevent governments from using tariff and non-tariff measures to limit trade in dirty commodities and to restrict the production, trade and consumption of fossil fuels.
- Intellectual property rules must be adapted to ensure they do not restrict access to green technologies, and should not restrict the right of farmers to store and exchange seeds or prevent governments from using trade policy tools to develop and protect local food markets.

**Women's rights:**

- Before embarking upon negotiations for the UAE CEPA and the GCC FTA, the Australian government must require evidence of improvements in and implementation of women's rights legislation and domestic workers protections – including accession and adherence to ILO Domestic Workers Convention – as a precondition for the commencement of negotiations.

## 2. Introduction

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. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make a submission to this inquiry. This submission will address our key concerns about negotiating a Comprehensive Economic Partnership Agreement (CEPA) with the United Arab Emirates (UAE), and entering into negotiations with the Gulf Cooperation Council (GCC) for a free trade agreement. This submission will also detail our recommendations to protect human rights, labour rights and environmental sustainability.

The UAE includes the following emirates: Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al-Quwain, and Fujairah and Ras Al Khaimah.

The GCC includes the following countries: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE).

## 3. Respect for human rights must be a precondition of preferential trading relationships

The UAE and Australia already engage in \$6.8 billion in two-way trade across a number of industries, including aluminium oxide, meat, vehicle parts, and telecommunications<sup>1</sup>. Given the existing trading relationship, it must be asked why Australia seeks to grant preferential trading rights above and

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<sup>1</sup> Tehan, D (2022) Expanding trade and investment with the United Arab Emirates, 17 March 2022, via: <https://www.trademinister.gov.au/minister/dan-tehan/media-release/expanding-trade-and-investment-united-arab-emirates>

beyond existing WTO rules to a country that is routinely criticised and investigated for gross violations of human rights and labour rights, including war crimes.

Explaining the reasons for commencing negotiations with for a GCC free trade agreement (GCC FTA), the Department of Foreign Affairs and Trade (DFAT) states that two-way trade in goods and services between Australia and the GCC was worth \$13.1 billion in 2020<sup>2</sup>.

The Minister for Trade, the Hon. Dan Tehan, stated that a “UAE CEPA would also be an important building block to a subsequent potential free trade agreement with the wider Gulf Cooperation Council”<sup>3</sup>. The GCC is a trading bloc comprised of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE. All of these states have been criticised or investigated by the United Nations (UN) or human rights organisations for violations of human rights and labour rights. None of the GCC countries are classified by Freedom House as ‘Free’ according to its 2022 report on world political rights and civil liberties, and only Kuwait ranks as ‘Partly Free’<sup>4</sup>.

Any potential future benefits from some expansion of trade must be weighed against the potential cost of damaging the international human rights system. By granting preferential trading rights to the UAE and the GCC, Australia may be seen to be legitimising and incentivising violations of human rights and labour rights in the UAE and GCC, which are subject to consistent criticisms and investigations.

### **Human rights abuses in the UAE and GCC**

Evidence of the violations of human rights and labour rights in the UAE and GCC has been extensively documented over an extended period by both the UN and human rights organisations.

The UAE is not a signatory to key human rights treaties, including: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>5</sup>

Of the other GCC states, only Qatar, Kuwait, and Bahrain have ratified the ICCPR, and none have signed the ICCPR protocol on the abolition of the death penalty. None have signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>6</sup>.

Amnesty International’s 2020-2021 Report<sup>7</sup> documented a range of human rights breaches in the UAE, including against migrant rights, women’s rights, and citizenship rights. It also exposed

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<sup>2</sup> Department of Foreign Affairs and Trade (2022) Australia-Gulf Cooperation Council (GCC) FTA - Request for stakeholder submissions, via: <https://www.dfat.gov.au/news/news/australia-gulf-cooperation-council-gcc-fta-request-stakeholder-submissions>

<sup>3</sup> Tehan, D (2022) Expanding trade and investment with the United Arab Emirates, 17 March 2022, via: <https://www.trademinister.gov.au/minister/dan-tehan/media-release/expanding-trade-and-investment-united-arab-emirates>

<sup>4</sup> Freedom House (2022) Freedom in the World, February, via: <https://freedomhouse.org/countries/freedom-world/scores>

<sup>5</sup> OHCHR (2022) UN Treaty Body Database – United Arab Emirates, via: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=184&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=184&Lang=EN)

<sup>6</sup> OHCHR (2022) UN Treaty Body Database, via: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=184&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=184&Lang=EN)

<sup>7</sup> Amnesty International (2022) Amnesty International Report 2021/22, via: <https://www.amnesty.org/en/location/middle-east-and-north-africa/united-arab-emirates/report-united-arab-emirates/>

continuing illicit trade in arms and military equipment with militias in Yemen and Libya, despite its February 2020 withdrawal from direct participation in the Yemeni Civil War.

The UN has made repeated investigations into and reports on the UAE and Saudi Arabia's involvement in the war in Yemen. In each of its annual reports, the United Nations Human Rights Council's Group of Eminent Experts on Yemen (GEE) found "reasonable grounds to believe that the parties to the conflict have committed and continue to commit serious violations of international human rights and international humanitarian law. Some of which may amount to war crimes."<sup>89</sup>

In its reports, the GEE specified that responsibility lies "with all parties to the conflict... Namely the Government of Yemen, de facto authorities, the Southern Transitional Council and members of the Coalition, in particular Saudi Arabia and the United Arab Emirates."<sup>10</sup>

Despite the UAE and Saudi Arabia's participation in wars in Yemen and Libya, the Australia Defence Export Control agency approved 80 permanent export permits to the UAE between 2015 and 2021, and 23 to Saudi Arabia<sup>11</sup>. Only three export permits were denied to Saudi Arabia, and not one export permit was denied to the UAE, despite warnings from the UN that a decade-long arms embargo on the conflict in Libya is "totally ineffective"<sup>12</sup> because of continued supply of arms from countries including the UAE and Saudi Arabia.

Australian civil society organisations have warned that "all states, including Australia, risk complicity in war crimes if they continue to supply the Saudi-led coalition [including the UAE] with arms."<sup>13</sup>

As a signatory of the Arms Trade Treaty (ATT), Australia is obliged to reject export applications if there is a risk of negative consequences for human rights, terrorism, peace, security, and transnational organised crime. As the UAE has signed but not ratified the ATT, Australia must consider the heightened risk of breaches to its international obligations under the ATT should a UAE CEPA go ahead. Of the other GCC countries, only Bahrain has signed (but not ratified) the AAT<sup>14</sup>, with Kuwait, Saudi Arabia, Oman, Qatar abstaining<sup>15</sup>.

All countries of the GCC continue to impose capital punishment to varying degrees of frequency. Saudi Arabia is among the worst in the world for death penalties<sup>16</sup>, and – despite pledges to restrict

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<sup>8</sup> Group of Eminent International and Regional Experts on Yemen (2020) Fresh war crimes fears highlighted in new Yemen report, 9 September, via: <https://news.un.org/en/story/2020/09/1072012>

<sup>9</sup> United Nations Human Rights Office of the High Commissioner (2018) Yemen: United Nations Experts point to possible war crimes by parties to the conflict, 28 August, via: <https://www.ohchr.org/en/press-releases/2018/08/yemen-united-nations-experts-point-possible-war-crimes-parties-conflict?LangID=E&NewsID=23479>

<sup>10</sup> Group of Eminent International and Regional Experts on Yemen (2020) Fresh war crimes fears highlighted in new Yemen report, 9 September, via: <https://news.un.org/en/story/2020/09/1072012>

<sup>11</sup> Fahy, M (2021), Australia defies UN pleas over atrocities in Yemen, escalates weapons exports to Saudis, May 17, via: <https://www.michaelwest.com.au/revealed-australia-defies-un-pleas-over-atrocities-in-yemen-escalates-weapons-exports-to-saudis/>

<sup>12</sup> United Nations Panel of Experts on Libya (2021) Libya arms embargo 'totally ineffective': UN expert panel, 17 March, via: <https://news.un.org/en/story/2021/03/1087562>

<sup>13</sup> Human Rights Watch (2021) Australia: Freeze Arms Sales to Saudi Arabia, UAE, February 3, via: <https://www.hrw.org/news/2021/02/04/australia-freeze-arms-sales-saudi-arabia-uae>

<sup>14</sup> Arms Trade Treaty (2022) ATT Signatories that have not yet ratified, accepted, or approved the Treaty, March 25, via: [https://thearmstradetreaty.org/hyper-images/file/List%20of%20ATT%20Signatory%20States%20\(25%20March%202022\)/List%20of%20ATT%20Signatory%20States%20\(25%20March%202022\).pdf](https://thearmstradetreaty.org/hyper-images/file/List%20of%20ATT%20Signatory%20States%20(25%20March%202022)/List%20of%20ATT%20Signatory%20States%20(25%20March%202022).pdf)

<sup>15</sup> Arms Trade Treaty (2022) UN Member States that have not yet joined the ATT, March 25, via: [https://thearmstradetreaty.org/hyper-images/file/List%20of%20UN%20Member%20States%20that%20have%20not%20yet%20joined%20the%20ATT%20\(25%20March%202022\)/List%20of%20UN%20Member%20States%20that%20have%20not%20yet%20joined%20the%20ATT%20\(25%20March%202022\).pdf](https://thearmstradetreaty.org/hyper-images/file/List%20of%20UN%20Member%20States%20that%20have%20not%20yet%20joined%20the%20ATT%20(25%20March%202022)/List%20of%20UN%20Member%20States%20that%20have%20not%20yet%20joined%20the%20ATT%20(25%20March%202022).pdf)

<sup>16</sup> Amnesty International (2020) Death Penalty, via: <https://www.amnesty.org/en/what-we-do/death-penalty/>

capital punishment – committed mass beheadings of 81 people in a single day of March 2022<sup>17</sup>, a mass execution of 37 people in 2019, and a mass execution of 47 people in 2016<sup>18</sup>. Among the victims of these mass executions were peaceful protestors, leaders of religious minorities and political dissidents<sup>19</sup>, none of whom are likely to have been accorded a fair trial according to Human Rights Watch<sup>20</sup>.

According to Amnesty International, the persecution of human rights defenders, journalists and other peaceful dissenters has escalated in GCC countries in recent years<sup>21</sup>. In addition to the death penalty, GCC countries routinely use torture, harassment, arbitrary detention, unfair trials, and vaguely worded ‘counter-terror’ laws to intimidate critics into silence<sup>22</sup>. The killing of Jamal Khashoggi in October 2018 shone a global spotlight on Saudi Arabia’s human rights abuses, but this represents only one particularly abhorrent instance among many other abuses in GCC countries.

#### **Recommendations:**

- Before embarking upon negotiations, the Australian government must require evidence of improvements in the UAE and GCC human rights legislation and record – including accession and adherence to UN human rights conventions – as a precondition for the commencement of negotiations.
- Before embarking upon negotiations, the Australian government must require ratification of the Arms Trade Treaty (ATT) by the UAE and GCC countries. Any future trade agreement must legally bind both parties to upholding and implementing the ATT and provide means of enforcement through a government-to-government dispute mechanism.

#### **4. The trade agreement process should be transparent, democratic and accountable**

AFTINET has consistently raised concerns about the lack of transparency and democratic accountability in trade negotiations. Given the significant human rights and Environmental Social and Governance (ESG) risks stemming from trade with the UAE and the GCC, transparency and consultations are all the more important in negotiations.

Australia’s current procedure for negotiating and ratifying trade agreements is highly secretive, and is not compliant with the basic democratic principles that underpin our domestic policy-making processes. Trade negotiations are conducted in secret, and neither the Parliament nor the wider public has input into the development of Australia’s negotiation mandate.

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<sup>17</sup> United Nations High Commissioner for Human Rights (2022) UN rights chief decries mass execution of 81 people in Saudi Arabia, 14 March, via: <https://news.un.org/en/story/2022/03/1113922>

<sup>18</sup> United Nations High Commissioner for Human Rights (2022) UN rights chief decries mass execution of 81 people in Saudi Arabia, 14 March, via: <https://news.un.org/en/story/2022/03/1113922>

<sup>19</sup> Amnesty International (2022) Saudi Arabia: Mass execution of 81 men shows urgent need to abolish the death penalty, March 15, via: <https://www.amnesty.org/en/latest/news/2022/03/saudi-arabia-mass-execution-of-81-men-shows-urgent-need-to-abolish-the-death-penalty>

<sup>20</sup> Human Rights Watch (2022) Saudi Arabia: Mass Execution of 81 Men, March 15, via: <https://www.hrw.org/news/2022/03/15/saudi-arabia-mass-execution-81-men>

<sup>21</sup> Amnesty International (2022) Saudi Arabia: Mass execution of 81 men shows urgent need to abolish the death penalty, March 15, via: <https://www.amnesty.org/en/latest/news/2022/03/saudi-arabia-mass-execution-of-81-men-shows-urgent-need-to-abolish-the-death-penalty>

<sup>22</sup> Ibid.



Negotiation texts are kept confidential, and the final text of a trade agreement is not made public until after Cabinet has made the decision to sign it. It is only after they have been tabled in Parliament that they are examined by the Joint Standing Committee on Treaties (JSCOT).

The National Interest Analysis (NIA) presented to JSCOT is not independent, but rather it is conducted by the same department that negotiates the agreement. There are no independent human rights, labour rights or environmental impact assessments. Parliament has no ability to change the agreement and can only vote on the implementing legislation.

A Senate Inquiry in 2015 entitled *Blind Agreement*<sup>23</sup> criticised this process and made some recommendations for change. The Productivity Commission has also made recommendations for improvements, including the public release of the final text and independent assessments of the costs and benefits of trade agreements before they are authorised for signing by Cabinet.

In 2021, the Joint Standing Committee on Treaties majority report recommended independent cost-benefit assessments of agreements, while the minority reports recommended wider changes<sup>24</sup>. The direction of change at the international level is towards increased transparency and accountability. For example, the EU has developed a more open process, including public release of documents and texts during negotiations and release of texts before they are signed<sup>25</sup>.

#### **Recommendations:**

- Prior to commencing negotiations with the UAE and GCC, the government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the UAE CEPA and GCC free trade agreement, including potential economic, social, environmental and human rights impacts.
- There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. During these consultations, stakeholders must have access to government proposals and discussion papers.
- Draft texts should be released for public discussion.
- The final text should be released for public and parliamentary discussion before it is authorised for signing by Cabinet.
- Comprehensive independent economic, social and environmental impact assessments should be completed before the agreement is signed. Impact assessments should be made public for debate, consultation and review by parliamentary committees.
- Parliament should vote on the whole text of the agreement, not just the implementing legislation.

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<sup>23</sup> Senate Standing Committee on Foreign Affairs Defence and Trade (2015) *Blind agreement: reforming Australia's treaty-making process*, May. Available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Treaty-making\\_process/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report).

<sup>24</sup> Joint Standing Committee on Treaties *Inquiry into Certain Aspects of the Treaty-making Process in Australia* (2021) Report 193, August, via: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Treaty-makingProcess/Report\\_193](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Report_193)

<sup>25</sup> European Union (2015) EU negotiating texts in TTIP, February, Brussels. Available <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

## 5. Trade agreements should not contain Investor-State Dispute Settlement (ISDS) processes

All trade agreements have government-to-government dispute processes. However, Investor-State Dispute Settlement (ISDS) is controversial because it is an optional, separate dispute process that gives additional legal rights to foreign investors (rights which are 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, reaching 1,104 as of March 2022<sup>26</sup>. Companies registered in the GCC have launched 36 ISDS cases across a wide range of industries, including oil, gas, mining, infrastructure, logistics, telecommunications, construction, metallurgy, and real estate<sup>27</sup>. Of those 36 cases, 13 involve UAE claimants<sup>28</sup>. Including ISDS in the UAE-CEPA or GCC FTA would expose the Australian government to risk of being sued in international arbitration tribunals by companies domiciled in the UAE and GCC.

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

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

There have been increasing numbers of claims for compensation for public interest regulation. These include regulation of public health measures like tobacco regulation, medicine patents, environmental protections, reductions 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 a 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 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.

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<sup>26</sup> UNCTAD (2022) Investment Dispute Settlement Navigator, via: <https://investmentpolicy.unctad.org/investment-dispute-settlement>

<sup>27</sup> Ibid.

<sup>28</sup> UNCTAD (2022) Investment Dispute Settlement Navigator, United Arab Emirates, via: <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/220/united-arab-emirates/investor>

Huge awards against developing countries, and the use of Australian free trade agreements 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.

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 Regional Comprehensive Economic Partnership (RCEP), the Australia-UK Free Trade Agreement (A-UKFTA) and the Australia-EU Free Trade Agreement (A-EUFTA) currently under negotiation.

Legal experts and the United Nations Conference on Trade and Development (UNCTAD) – the body responsible for monitoring ISDS – have recognised the danger of ISDS claims against a wide range of government actions taken during the COVID19 pandemic, recommending 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 and omit important public policy areas like the environment, workers’ rights and Indigenous land rights.

For more details on the evidence against ISDS, see AFTINET’s full submission<sup>29</sup> on ISDS to the DFAT Review of Australia’s Bilateral investment Treaties.

**Recommendations:**

- ISDS should not be included in the UAE CEPA or GCC free trade agreement.

## 6. Trade agreements should not extend intellectual property rights

Intellectual property rights as expressed in patent and copyright law are monopolies granted by states to patent and copyright holders to reward innovation and creativity. However, intellectual property law should maintain a balance between the rights of patent and copyright holders and the rights of consumers to have access to products and created works at reasonable cost. This can be a matter of life or death in the case of affordable access to essential medicines. Trade agreements should not be the vehicle for extension of monopolies which contradict basic principles of competition and free trade<sup>30</sup>.

The 2010 Productivity Commission Report on Bilateral and Regional Trade Agreements concluded that, since Australia is a net importer of patented and copyrighted products, the extension of patents and copyright imposes net costs on the Australian economy. The Commission also concluded that extension of patent and copyright can also impose net costs on most of Australia's trading

<sup>29</sup> AFTINET (2020) Submission to the Department of Foreign Affairs and Trade Review of Australia’s Bilateral investment Treaties, September, via: [http://aftinet.org.au/cms/sites/default/files/200929%20AFTINET%20DFAT%20ISDS%20%20submission%20final\\_0.pdf#overlay-context=node/1929](http://aftinet.org.au/cms/sites/default/files/200929%20AFTINET%20DFAT%20ISDS%20%20submission%20final_0.pdf#overlay-context=node/1929)

<sup>30</sup> Stiglitz J., (2015) “Don’t trade away our health,” News York Times, January 15. Available at [http://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html?\\_r=0](http://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html?_r=0)

partners, especially for developing countries in areas like access to medicines<sup>31</sup>. Based on this evidence, the Productivity Commission Report recommended that the Australian government should avoid the inclusion of intellectual property matters in trade agreements. This conclusion was reinforced by a second report in 2015<sup>32</sup>. A study of costs of biologic medicines in Australia found that longer data protection monopolies proposed in the Trans-Pacific Partnership (TPP) would cost the Pharmaceutical Benefits Scheme (PBS) hundreds of millions of dollars per year.<sup>33</sup>

Other studies indicate additional costs resulting from longer monopolies in other bilateral agreements<sup>34</sup>. Public health experts and humanitarian medical organisations like Médecins Sans Frontières/Doctors Without Borders (MSF) have also demonstrated how successive trade agreements have strengthened patent rights on medicines to the benefit of global pharmaceutical companies and to the detriment of access to affordable medicines<sup>35</sup>.

#### **Recommendations:**

- There should be no extension of patents or copyright monopolies in the UAE-CEPA or GCC FTA.

## **7. Trade agreements should not restrict the regulation of public and essential services**

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

Trade in services chapters often use a negative list structure, which means that *all* services, including those which may be developed in future, are included, except those which governments list as specific exclusions.

To the extent that services are included in any trade agreement, a positive list rather than a negative list system should be used. A positive list allows governments and the community to know clearly what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It also avoids the problem of inadvertently including in the agreement future service areas which are yet to be developed. This means that governments retain their right to develop new forms of regulation needed when circumstances change, as has occurred with the need for financial regulation following the Global Financial Crisis, the Royal Commission into the Banking and Financial Services Industry, the Royal Commission on Aged Care, and governments' responses to climate change<sup>36</sup>.

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<sup>31</sup> Productivity Commission (2010) Bilateral and Regional Trade Agreements Final Report, Productivity Commission, Canberra, December, via: <https://www.pc.gov.au/inquiries/completed/trade-agreements/report>

<sup>32</sup> Productivity Commission (2015) Trade and Assistance Review 2013-14, June. Available at <http://www.pc.gov.au/research/recurring/trade-assistance/2013-14>

<sup>33</sup> Gleeson D et al (2017) Financial Costs Associated with Monopolies on Biologic Medicines in Australia, *Australian Health Review* 43, no.1: 36-42

<sup>34</sup> Gleeson, D. and Labonté, R. (2020) Trade Agreements and Public Health. London: Palgrave Studies in Public Health Policy Research, pp 47-52.

<sup>35</sup> Lopert, R, and Gleeson, D (2013) The high price of "free" trade: US trade agreements and access to medicines. *Journal of Law, Medicine and Ethics*, 41(1): 199-223, via: <http://onlinelibrary.wiley.com/doi/10.1111/ilme.12014/abstract>

<sup>36</sup> 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 (the Stiglitz Commission) New York, via: [https://www.un.org/en/ga/econcrisissummit/docs/FinalReport\\_CoE.pdf](https://www.un.org/en/ga/econcrisissummit/docs/FinalReport_CoE.pdf)

Services chapters 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 exempted from this structure. 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 government had to reregulate to address these failures in 2016<sup>37</sup>.

The inclusion of essential services, like health, water and education in trade agreements 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. Governments should maintain the right to regulate to ensure equitable access to essential services, service standards and staffing levels, and to meet social and environmental goals.

Public services should be clearly excluded from trade agreements. This requires that public services are defined clearly. AFTINET is critical of the definition of public services in many trade agreements which defines a public service as “a service supplied in the exercise of governmental authority ... which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.” This definition results in ambiguity about which services are covered by the exemption. In Australia, as in many other countries, some public and private services are provided side-by-side.

Even when essential services are not publicly provided, governments need clear rights to regulate them to ensure equitable access to them, and to meet other social and environmental goals.

#### **Recommendations:**

- Public services should be clearly and unambiguously excluded from the UAE CEPA and GCC FTA, and there should be no restrictions on the government’s right to provide and regulate services in the public interest.
- The UAE CEPA and GCC FTA should use a positive list to identify which services will be included in an agreement.
- The government should retain the right to regulate and re-regulate all services to meet service standards, health, environmental or other public interest objectives. This should include the right to address privatisation failures.

### **8. Trade agreements should not restrict government procurement from local businesses as part of industry development programmes**

There has been much debate in Australia about both Commonwealth and State government procurement policies. AFTINET believes that Australian procurement policy should follow the example of trading partners like South Korea and the US in that it should have policies with more

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<sup>37</sup> Conifer, D (2016) Parliament passes bill to scrap troubled VET loans, overhaul vocational education sector, ABC News online, December 2, via: <https://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860>

flexibility to consider broader definitions of value for money, which recognise the value of supporting local firms in government contracting decisions<sup>38</sup>.

Several Australian states have developed such policies, and the Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017 recommended in its report, *Buying into Our Future*, that the government should not enter into any commitments in trade agreements that undermine its ability to support Australian businesses<sup>39</sup>.

Australia has also maintained exemptions for Small and Medium-Sized Enterprises (SMEs) to procurement rules, including exemptions for Indigenous enterprises.

Until the recently signed Australia-United Kingdom Free Trade Agreement (A-UKFTA), Australia had excluded local government procurement in trade agreements, recognising of the importance of local firms in contributing to local employment, especially in regional areas. The proposed future inclusion of local government procurement in the A-UKFTA must not be used as a precedent for future trade negotiations, particularly considering the need to encourage local employment and community development following recent catastrophic floods and bushfires in regional areas.

#### **Recommendations:**

- The government should not make any commitments on government procurement that undermine its ability, or the ability of state governments, to support local Australian businesses.
- The government should maintain its current government procurement exemptions for SMEs, Indigenous enterprises and for local government procurement.

### **9. Trade agreements should not place Big Tech interests above users' rights**

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 tech industry lobby, which seeks to codify rules that suit the dominant tech industry companies. These rules were the basis of the USA's negotiating position during the Trans-Pacific Partnership negotiations<sup>40</sup>, and are known as the Digital2Dozen principles<sup>41</sup>.

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

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<sup>38</sup> AFTINET (2015) Submission to the Department of Foreign Affairs and Trade on Australia's proposed accession to the World Trade Organisation Government Procurement Agreement January 30, via: <http://aftinet.org.au/cms/sites/default/files/DFAT%20submission%20Jan%202015%20edited.pdf#overlay-context=world-trade-organisation>

<sup>39</sup> Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/Government\\_Procurement/CommProcurementFramework/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework/Report)

<sup>40</sup> Kelsey, J (2017a) E-commerce - The development implications of future proofing global trade rules for GAFA, Paper to the MC11 Think Track, 'Thinking about a Global Governance of International Trade for the 21st Century; Challenges and Opportunities on the eve of the 11th WTO Ministerial Conference', Buenos Aires, Argentina, 13 December 2017. Via: <https://bestbits.net/wp-uploads/2017/12/Kelsey-paper-for-MC11-Think-Track.pdf>

<sup>41</sup> Office of the United States Trade Representative (2016) The Digital2Dozen, via: <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen>.

companies including:

- Facebook and Google's data abuse scandals<sup>42</sup>
- Uber classifying itself as a technological platform to avoid regulation and enable its exploitation of workers<sup>43</sup>
- Apple's tax avoidance<sup>44</sup>
- Anti-competitive practices by Facebook, Google and Amazon<sup>45</sup>

The Australian Competition and Consumer Commission's (ACCC) ground-breaking digital platforms report, released in July 2019, 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<sup>46</sup>. In its response to the ACCC report in December 2019, the government "accepted the overriding conclusion that there was a need for reform" and has outlined a plan for immediate and long-term action.

Concerns have already been raised that the government's response to the ACCC inquiry does not go far enough to address existing and emerging gaps in Australia's regulatory framework and that additional reform may be required<sup>47</sup>. In this context, it is vital that the UAE CEPA and GCC FTA do not include digital trade provisions that restrict policy flexibility for the Australian governments.

### **Digital trade rules and privacy rights and consumer protections**

The risk of digital trade rules to privacy rights and consumer protections has been widely documented and contradicts government assurances that digital trade rules are compatible with privacy and consumer protections<sup>48</sup>. Privacy rights and data security are undermined by rules that restrict the regulation of electronic transmissions, preventing governments from requiring encryption of personal data and other security measures.

Rules that lock-in the free cross-border flow of data also enable companies to move data, including personal data, to jurisdictions where privacy laws are more limited, effectively evading privacy legislation. The assertion that the inclusion of privacy and consumer protections in digital trade chapters, which require parties to have/enact privacy and consumer laws, is enough to ensure privacy is upheld, is misleading. Unless these provisions outline a minimum standard for this legislation there is no guarantee that once data is moved and stored offshore it will be subject to the

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<sup>42</sup> Waterson, J (2018) UK fines Facebook £500,000 for failing to protect user data, The Guardian, October 25, via:

<https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>

<sup>43</sup> Bowcott, O, (2017) Uber to face stricter EU regulation after ECJ rules it is transport firm, The Guardian, December 21, via: <https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu>

<sup>44</sup> Drucker, J and Bowers, S., (2017) After a Tax Crackdown, Apple Found a New Shelter for Its Profits, The New York Times, November 7, via: <https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html>

<sup>45</sup> 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>

<sup>46</sup> Australian Competition and Consumer Commission (2019) Digital Platforms Inquiry final report, June 2019, via: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

<sup>47</sup> Kemp, K and Nicholls, R (2019) The federal government's response to the ACCC's Digital Platforms Inquiry is a let down, 2019, via: <http://theconversation.com/the-federal-governments-response-to-the-acccs-digital-platforms-inquiry-is-a-let-down-128775>

<sup>48</sup> Greenleaf, G (2018) Free Trade Agreements and data privacy: Future perils of Faustian bargains, in Svantesson, D and Kloza D (eds.) Transatlantic Data Privacy Relationships as a Challenge for Democracy, 2018, Intersentia, via: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2732386](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732386)

same privacy standards as in Australia<sup>49</sup>.

### **Digital trade rules and government responses to anti-competitive and discriminatory practices**

The use of algorithmic systems to collect and analyse data is a fundamental aspect of the digital economy. However, there is growing evidence that demonstrates that algorithms can be used by companies to reduce competition<sup>50</sup> and that algorithmic bias can result in race, gender, class or other discrimination<sup>51</sup>.

For governments and regulators that are responsible for identifying and responding to concerns in relation to competition law and algorithmic bias, source code is an important tool in this process. Regulators may require access to source code in a range of situations, including for example, to determine whether practices contravene competition law or to detect if algorithms are discriminatory<sup>52</sup>. Digital trade rules that prevent governments from requiring that companies transfer or give access to their source code can undermine government efforts to identify and respond to anti-competitive practices and algorithmic bias.

### **Digital trade rules, cybersecurity and security standards for electronic transmissions**

Trade agreements are increasingly including provisions that impact on the regulations of electronic transactions, which could increase cybersecurity risks. For example, the TPP-11 includes provisions that restrict governments from setting security standards for electronic transactions<sup>53</sup>. This could reduce security across a range of sectors, including impacting credit card data, online banking, and healthcare data amongst others<sup>54</sup>. The impact of electronic transactions rules is worsened when combined with digital trade rules that enable the free flow of cross-border data, as governments are restricted in their ability to ensure that this data is encrypted when it is transferred or stored securely<sup>55</sup>.

It is important that governments retain the ability to regulate security standards in order to reduce cybersecurity issues. This is particularly the case given the rapid emergence of new technologies in this space, which could adapt or create new cybersecurity risks requiring new regulatory frameworks.

### **Digital trade rules and financial services**

Digital trade rules relating to financial services are an emerging trade issue that raises additional privacy concerns and poses new financial oversight and management risks. These provisions undermine the government's ability to protect privacy by enabling companies to move financial data

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<sup>49</sup> Ibid.

<sup>50</sup> European Commission (2017) Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, June 2017, via: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1784](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784)

<sup>51</sup> Mittelstadt, B et al. (2016) The ethics of algorithms: Mapping the debate, *Big Data & Society*, July–December 2016, via: <https://journals.sagepub.com/doi/pdf/10.1177/2053951716679679>

<sup>52</sup> Ried-Smith, S (2017) Some preliminary implications of WTO source code proposal – MC11 briefing paper, via: [https://ourworldisnotforsale.net/2017/TWN\\_Source\\_code.pdf](https://ourworldisnotforsale.net/2017/TWN_Source_code.pdf)

<sup>53</sup> Department of Foreign Affairs and Trade (2018) Comprehensive and Progressive Agreement for Trans-Pacific Partnership text, Article 14.6, via: <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/14-electronic-commerce.pdf>

<sup>54</sup> Reid Smith, S (2018) Preliminary note: Electronic authentication: some implications, via: <http://ourworldisnotforsale.net/2018/esignatures2018-9.pdf>

<sup>55</sup> Ibid.



to jurisdictions where privacy laws are more limited. Once financial data has moved offshore, it is extremely difficult for states to control or have oversight over this data<sup>56</sup>.

As an example of the risk of foreclosing governments' control over financial data, one may observe the Global Financial Crisis, during which the US Treasury Secretary, Jack Lew, told Congress there were times when his office was cut off from timely and appropriate information<sup>57</sup>. Because of that experience, the US insisted in negotiations on the TPP that financial data were treated more restrictively than other data, and was exempted from the data transfer rules that prevent requirements that data is stored and processed locally. This provision remained in the TPP-11 text after the US left the agreement<sup>58</sup>.

Given the size of the UAE's financial services sector, it is likely that digital trade provisions that impact financial services will be on the negotiating table. The government must ensure that provisions do not reduce privacy in relation to financial data or restrict the government's ability to respond to a financial crisis.

It is well documented that the UAE's liberal financial regulations and its high level of trade in commodities and international business have embroiled UAE financial institutions in controversies concerning terrorism financing, money laundering, 'dirty' gold that is illegally mined and traded, criminal proceeds, and other illicit activity<sup>59</sup>.

In a 2020 report, the global financial crime watchdog the Financial Action Task Force (FATF) called for "fundamental and major improvements" in UAE financial regulation and risk management, concluding that: "The UAE is a major international and regional financial centre and trading hub which attracts both legitimate financial and business activities as well as financial flows with links to crime and terrorism. The country must urgently deepen its understanding of the risks it faces...and take action to strengthen the effectiveness of its measures to stop money laundering, terrorist financing and proliferation financing."<sup>60</sup>

Despite commitments by the UAE to implement the 2020 FATF recommendations, in March 2022 the FATF placed the UAE on the 'grey list' of jurisdictions under increased monitoring of "strategic deficiencies in their regimes to counter money laundering, terrorist financing, and proliferation financing." The FATF says that "the UAE must now demonstrate progress on facilitating international anti-money laundering investigations, on managing risks in certain industries including real estate agents and precious stones and metal dealers, and on identifying suspicious transactions in the economy."<sup>61</sup>

Given the UAE's ongoing failure to adequately address various financial risks and crimes, the UAE CEPA and GCC FTA should not expose Australian financial institutions, companies and consumers to

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<sup>56</sup> Ibid.

<sup>57</sup> Lew, J., (2016) Evidence given to the House Financial Services Committee hearing on the international financial system, March 22, 2016, via: <https://www.c-span.org/video/?407079-1/treasury-secretary-jack-lew-testimony-international-financial-system&start=2490>

<sup>58</sup> Department of Foreign Affairs and Trade (2018) Comprehensive and Progressive Agreement for Trans-Pacific Partnership text, via: <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/14-electronic-commerce.pdf>

<sup>59</sup> FATF (2020) United Arab Emirates' measures to combat money laundering and terrorist financing, 30 April, via: <http://www.fatf-gafi.org/countries/u-z/unitedarabemirates/documents/mer-uae-2020.html>

<sup>60</sup> FATF (2020) United Arab Emirates' measures to combat money laundering and terrorist financing, 30 April, via: <http://www.fatf-gafi.org/countries/u-z/unitedarabemirates/documents/mer-uae-2020.html>

<sup>61</sup> FATF (2022) Jurisdictions under Increased Monitoring, March, via: <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-march-2022.html>

significant ESG, privacy, regulatory, and reputational risks through digital trade clauses that apply to financial services.

### **Digital trade rules and workers' rights**

Trade rules that enable global corporations, including those operating in the gig-economy, to access Australian markets without a local presence, could worsen the situation for workers and undermine Australian employment law.

The International Trade Union Confederation (ITUC) argues that “without a local presence of companies, there is no entity to sue and the ability of domestic courts to enforce labour standards, as well as other rights, is fundamentally challenged”<sup>62</sup>. Concerns have also been raised about the impact that new technologies and artificial Intelligence can have in recruitment practices and on work conditions<sup>63</sup>.

It is essential that digital trade rules do not restrict the government's ability to implement policy reform and new innovative regulation to respond to emerging issues in relation to labour rights and conditions.

#### **Recommendations:**

The UAE CEPA and GCC FTA *should not* include provisions that:

- Prevent current and future governments from regulating the cross-border flow of data.
- Prohibit the use of local presence requirements.
- 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 setting standards for the security of electronic transactions.
- Apply to financial services.

The UAE CEPA and GCC FTA *should* include:

- Full exemptions for tax policy.
- Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.

### **10. Trade agreements must not undermine workers' rights and should not enable the exploitation of temporary migrant workers**

The Australian government should ensure that all trade agreements include commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work and the eight

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<sup>62</sup> International Trades Union Confederation (2019) E-commerce push at WTO threatens to undermine labour standards, via: <https://www.ituc-csi.org/e-commerce-push-at-wto-undermines-workers>

<sup>63</sup> The Centre for Future Work (2019) Turning 'Gigs' Into Decent Jobs – Submission to: Inquiry into the Victorian On-Demand Workforce. Available at [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8815/5669/1362/The\\_Australia\\_Institute.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8815/5669/1362/The_Australia_Institute.pdf)

Fundamental Conventions. These include:

- The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)
- The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)
- The effective abolition of child labour (ILO Conventions 138 and 182), and
- The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111).

The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the trade agreement.

### **Exploitation, discrimination and modern slavery in the UAE and GCC workforce**

Repeated investigations and reports have documented systemic exploitation, discrimination and modern slavery in the UAE and GCC workforce. In particular, temporary migrant workers are subject to abuse of their labour rights. As these workers cannot stay permanently in the UAE or GCC countries, nor become citizens, they are dependent on their employers for visas and can be deported if they lose their employment.

With more than 90% of the private sector workforce being composed of temporary migrant workers<sup>64</sup>, the UAE is host to the fifth largest temporary migrant population in the world<sup>65</sup>. The majority of migrant workers in the UAE are nationals of India, Bangladesh, Nepal, Sri Lanka, and Pakistan, working across all sectors and skill levels.

The UAE is not a signatory to key International Labour Organisation (ILO) Fundamental Conventions, including the Freedom of Association and Protection of the Right to Organise Convention (1948), and the Right to Organise and Collective Bargaining Convention (1949).<sup>66</sup> Furthermore, the UAE has not signed the ILO Migrant Workers Convention (1975)<sup>67</sup>.

The International Trade Union Confederation (ITUC) has classified the UAE, Bahrain, and Kuwait in its 2021 Global Rights Index as 'Rating 5' countries, meaning that there is "no guarantee of rights"<sup>68</sup>. The UAE's status has not changed since 2014<sup>69</sup>. Oman and Qatar are ranked as 'Rating 4' countries, meaning there are "systematic violations of rights". Saudi Arabia has not been rated in the 2021 Global Rights Index while its new Labour Reform Initiative is assessed and implemented. The Middle East and North Africa region is singled out by the ITUC as "the world's worst region for working people" because of systematic violations of the right to strike, form unions, and collectively bargain<sup>70</sup>.

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<sup>64</sup> Migration Policy Institute (2013) Labor Migration in the United Arab Emirates: Challenges and Responses, via: <https://www.migrationpolicy.org/article/labor-migration-united-arab-emirates-challenges-and-responses>

<sup>65</sup> Ibid.

<sup>66</sup> International Labour Organisation (2022) Conventions and Recommendations, via: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>

<sup>67</sup> International Labour Organisation (2022) Up-to-date Conventions and Protocols not ratified by United Arab Emirates: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210\\_COUNTRY\\_ID:103495](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:103495)

<sup>68</sup> International Trade Union Confederation (2021) Global Rights Index, via: <https://www.globalrightsindex.org/en/2021/countries/are>

<sup>69</sup> International Trade Union Confederation (2021) UAE labour law reforms fail to address abuses of workers' rights, 22 November, via: <https://www.ituc-csi.org/uae-labour-law-reforms-fail>

<sup>70</sup> International Trade Union Confederation (2021) Global Rights Index, Middle East and North Africa, via: <https://www.globalrightsindex.org/en/2021/regions/middle-east>

Despite new laws touted to be a major reform of the UAE's labour relations coming into force this year, the ITUC has determined that these laws "fail to meet international standards for workers' rights" and bring "no change to the *kafala* system of modern slavery."<sup>71</sup>

According to Human Rights Watch<sup>72</sup>, the *kafala* system – which is used in Bahrain, Kuwait, Oman, Saudi Arabia and the UAE – ties migrant workers to individual employers who act as their visa sponsors, and restricts their freedom to change employers. The system punishes workers for 'absconding', and gives employers the power to revoke sponsorship at will. This automatically removes the right of a worker to remain in the country and triggers repatriation procedures. The ITUC classifies *kafala* as a system of modern slavery.

Of the GCC countries, only Qatar has sought to end the *kafala* system, inaugurating in 2021 a modern system of industrial relations which includes a minimum wage and gives workers the freedom to change their job without their employer's consent<sup>73</sup>. The ITUC has welcomed the reforms, but has warned that the test of the new laws will be their proper implementation, enforcement and scrutiny ahead of the FIFA World Cup scheduled for November-December this year<sup>74</sup>, while Human Rights Watch has said that the laws are "woefully inadequate and poorly enforced"<sup>75</sup>.

Despite some legislative improvements in Qatar, systematic abuse of labour rights in the UAE and the GCC countries continues to draw international condemnation. Recent scandals have included, but are not limited to:

- A Guardian investigation revealing the deaths of 6,500 migrant workers in Qatar since the FIFA World Cup was awarded in 2010<sup>76</sup>
- The arbitrary detention and deportation from the UAE of 700 migrant African workers in June 2021
- Documentation of widespread discrimination and forced labour practices at Expo 2020 Dubai<sup>77</sup>

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<sup>71</sup> International Trade Union Confederation (2021) UAE labour law reforms fail to address abuses of workers' rights, 22 November, via: <https://www.ituc-csi.org/uae-labour-law-reforms-fail>

<sup>72</sup> Human Rights Watch (2014) "I Already Bought You": Abuse and Exploitation of Female Migrant Domestic Workers in the United Arab Emirates, October 22, via: <https://www.hrw.org/report/2014/10/22/i-already-bought-you/abuse-and-exploitation-female-migrant-domestic-workers>

<sup>73</sup> International Trade Union Confederation (2021) New era of transparency for the ILO and Qatar in support of workers' rights, 22 November, via: <https://www.ituc-csi.org/new-era-of-transparency-for-the>

<sup>74</sup> Ibid.

<sup>75</sup> Human Rights Watch (2021) Q&A: Migrant Worker Abuses in Qatar and FIFA World Cup 2022, December 18, via: <https://www.hrw.org/news/2021/12/18/qa-migrant-worker-abuses-qatar-and-fifa-world-cup-2022#Q2>

<sup>76</sup> The Guardian (2021) Revealed: 6,500 migrant workers have died in Qatar since World Cup awarded, February 23, via: <https://www.theguardian.com/global-development/2021/feb/23/revealed-migrant-worker-deaths-qatar-fifa-world-cup-2022>

<sup>77</sup> Equidem (2022) EXPOsed: Discrimination and forced labour practices at Expo 2020 Dubai, via: [https://www.equidem.org/assets/downloads/Equidem\\_EXPOsed\\_Report.pdf](https://www.equidem.org/assets/downloads/Equidem_EXPOsed_Report.pdf)

- Reports of violations of migrant workers' rights during the COVID19 pandemic in the UAE and GCC countries<sup>787980</sup>

#### **Recommendations:**

- Before embarking upon negotiations for a UAE CEPA and GCC FTA, the Australian government must require evidence of improvements in labour rights legislation and implementation – including accession and adherence to ILO Fundamental Conventions and the Migrant Workers Convention – as a precondition for the commencement of negotiations.
- The UAE CEPA and GCC FTA should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement.

### **11. Trade agreements must not undermine environmental protections**

Without binding and enforceable environmental protections, and without an integrated approach to trade and environmental sustainability, free trade agreements can detrimentally impact environmental protections.

This may occur through such means as: locking in deregulation; overlooking or overriding international environmental agreements; incentivising environmentally damaging forms of agriculture; incentivising carbon-intensive production; granting fossil-fuel corporations the right to sue governments for actions taken to protect the environment; restricting subsidies for renewable energy industries; restricting the transfer and sharing of green technologies; banning requirements to utilise local inputs; and obliging corporate consultation on environmental regulations through regulatory cooperation councils.<sup>81</sup>

#### **Inaction on climate change in the UAE and GCC**

With 30%<sup>82</sup> and 50%<sup>83</sup> (respectively) of Gross Domestic Product (GDP) based directly in oil and gas exports, the UAE and Saudi Arabia have been widely criticised by environmental defenders and sustainability experts as laggards on climate action and environmental sustainability.

According to the Climate Action Tracker (CAT) – an independent scientific analysis that tracks government climate action and measures it against the Paris Agreement – the climate targets and policies of the UAE and Saudi Arabia are “Highly insufficient”<sup>84</sup> (other GCC countries, also major fossil fuel producers, are not yet rated by the tracker).

<sup>78</sup> Migrant Rights (2021) COVID Relief Report, via: <https://www.migrant-rights.org/wp-content/uploads/2021/11/Covid-Relief-Report-Migrant-Rights.pdf>

<sup>79</sup> McQue, K (2020) 'I'm trapped': the UAE migrant workers left stranded by Covid-19 job losses, The Guardian, April 20, via: <https://www.theguardian.com/global-development/2020/apr/20/im-trapped-the-uae-migrant-workers-left-stranded-by-covid-19-job-losses>

<sup>80</sup> Human Rights Watch (2020) Joint Letter to H.E. Nasser bin Thani Al Hamli, Minister of Human Resources and Emiratization, April 10, via: [https://www.hrw.org/sites/default/files/supporting\\_resources/jointletter\\_emiratigov\\_migrantworkers\\_covidprotections\\_eng.pdf](https://www.hrw.org/sites/default/files/supporting_resources/jointletter_emiratigov_migrantworkers_covidprotections_eng.pdf)

<sup>81</sup> Trade Justice Movement (2020) Alternative Trade for the Planet: aligning trade policy with climate and environmental goals, December, via: <https://www.tjm.org.uk/documents/briefings/Alternative-Trade-for-the-PlanetFINAL.pdf>

<sup>82</sup> OPEC (2021) UAE facts and figures, via: [https://www.opec.org/opec\\_web/en/about\\_us/170.htm](https://www.opec.org/opec_web/en/about_us/170.htm)

<sup>83</sup> OPEC (2021) Saudi Arabia facts and figures, via: [https://www.opec.org/opec\\_web/en/about\\_us/169.htm](https://www.opec.org/opec_web/en/about_us/169.htm)

<sup>84</sup> Climate Action Tracker (2021) Country summary: UAE, November 9, via: <https://climateactiontracker.org/countries/uae/>

The CAT's "Highly insufficient" rating indicates that the UAE's and Saudi Arabia's climate policies and commitments are not consistent with the Paris Agreement's 1.5°C temperature limit, and lead to *rising* rather than *decreasing* emissions, even taking into account the recently announced net-zero ambitions of both the UAE and Saudi Arabia.<sup>8586</sup>

While GCC exports such as oil and gas already enjoy tariff-free trade to Australia, negotiations for a UAE CEPA and GCC FTA must take care to not incentivise further growth in the fossil fuel industry or disincentivise the growth of renewable energies.

Instead of continuing the historical practice of negotiating Bilateral Investment Treaties (BITs) which, at best, take symbolic and piecemeal approaches to trade and environmental sustainability, and at worst, further entrench the power of fossil fuel companies and restrict climate action and environmental protections, the Australian government must forge a new approach to trade and investment that is environmentally sustainable and supports the transition to a low-carbon economy in Australia and globally.

#### **Recommendations:**

- A binding environment chapter should be included in all free trade agreements, and be no less legally enforceable than other chapters in the agreement.
- In determining a breach of the Environment Chapter, trade agreements should not establish impractically high barriers which preclude effective enforcement.
- Environment Chapters should be subject to the same Dispute Resolution processes that are applied to other chapters of trade agreements .
- Trade agreements should bind parties to upholding international environmental law, including the Paris Agreement.
- Trade agreements should preserve the right to regulate for environmental protections, including in developing more stringent regulations and the use of subsidies, local content rules, tariffs and other policy tools to support decarbonisation.
- Agreements must not prevent governments from using tariff and non-tariff measures to limit trade in dirty commodities and to restrict the production, trade and consumption of fossil fuels.
- Intellectual property rules must be adapted to ensure they do not restrict access to green technologies, and should not restrict the right of farmers to store and exchange seeds or prevent governments from using trade policy tools to develop and protect local food markets.

## **12. Trade agreements must not undermine women's rights**

Because of existing social and economic disadvantage, trade agreements can have greater negative impact on women and exacerbate gender inequality. To ensure trade does not deepen gender inequality, free trade agreements should include hard and enforceable commitments to upholding women's rights.

Fundamentally, trade agreements should not undermine the public services, fair wages, land rights, medicines, food security, and civic participation that women across the globe depend upon for their livelihoods and wellbeing.

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<sup>85</sup> Ibid.

<sup>86</sup> Climate Action Tracker (2021) Country summary: Saudi Arabia, November 4, via: <https://climateactiontracker.org/countries/saudi-arabia/>

AFTINET welcomed the inclusion of Australia’s first ever gender equality chapter in the Australia-UK Free Trade Agreement<sup>87</sup>, but notes that the commitments are not enforceable. We look forward to the inclusion of enforceable provisions on gender equality in all future trade deals.

### **Violation of women’s rights in the UAE and GCC**

Repeated investigations and reports have documented systemic discrimination against women in the UAE and GCC countries. Despite some reforms in the UAE over the past decade, significant discrimination against women and girls remains.

These UAE reforms have included the prohibition of discrimination on the basis of sex and gender, and the revocation of family laws that obliged wives to “obey” their husbands, allowed husbands to discipline their wives, and punished consensual extramarital sex.

However, according to a Human Rights Watch 2021 submission to the UN Committee on the Elimination of Discrimination Against Women (CEDAW)<sup>88</sup>, UAE laws still provide for male guardianship authority over women, and loopholes allow reduced sentences for men who kill a female relative. Judges may deem a woman in breach of her spousal obligations if she leaves the house or takes a job deemed outside “the law, custom, or necessity,” or if the judge considers it against the family’s interests.

According to the World Economic Forum’s 2021 Global Gender Gap Report<sup>89</sup> – which rates a country’s economic, educational, health and political gender gaps – Saudi Arabia has the greatest gender gap of the GCC countries, ranking 147<sup>th</sup> of the 156 countries assessed. Oman ranks 145<sup>th</sup>, Kuwait 143<sup>rd</sup>, Qatar 142<sup>nd</sup>, and Bahrain 137<sup>th</sup>. The UAE is the only GCC country showing improvement, ranking 72<sup>nd</sup>.

According to the Human Rights Watch 2021 World Report, all GCC countries directly discriminate against women in laws relating to marriage, divorce, inheritance, nationality, and child custody<sup>90</sup>, and some GCC countries have other discriminatory laws. Oman’s revised 2018 penal code, for example, increases penalties for consensual intercourse outside marriage, and explicitly criminalizes non-normative gender expression and consensual sexual intercourse between men<sup>91</sup>.

### **Exploitation of women domestic workers in the UAE and GCC**

Multiple human rights organisations have documented the exploitation of women domestic workers in the UAE and GCC countries. Despite improvements in UAE labour laws, domestic workers still do not enjoy the same protections as other workers and are at risk of labor abuses, forced labor, and human trafficking because of the *kafala* system of modern slavery.

According to the ITUC, there are approximately 236,545 domestic workers in the UAE, comprising more than 12% of the total workforce and 42% of the female workforce<sup>92</sup>. Despite the scale of the

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<sup>87</sup> See: AFTINET submission on A-UKFTA

<sup>88</sup> Human Rights Watch (2021) Submission to the Committee on the Elimination of Discrimination against Women on the United Arab Emirates, March 4, via: <https://www.hrw.org/news/2021/03/04/human-rights-watch-submission-committee-elimination-discrimination-against-women>

<sup>89</sup> World Economic Forum (2021) Global Gender Gap Report, March, via: [https://www3.weforum.org/docs/WEF\\_GGGR\\_2021.pdf](https://www3.weforum.org/docs/WEF_GGGR_2021.pdf)

<sup>90</sup> Human Rights Watch (2021) World Report, via: <https://www.hrw.org/world-report/2021>

<sup>91</sup> Human Rights Watch (2021) World Report: Oman, via: <https://www.hrw.org/world-report/2021/country-chapters/oman>

<sup>92</sup> International Trade Union Confederation (2017) Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries, via: [https://www.ituc-csi.org/IMG/pdf/migrant\\_domestic\\_workers\\_in\\_gulf\\_final-2.pdf](https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf)

domestic workforce, the primary legislation governing UAE labour rights (UAE Labour Law No. 8 of 1980, or UAELL), specifically excludes domestic workers from its scope, depriving them of protections guaranteed to other workers<sup>93</sup>. Furthermore, the UAE has not signed the ILO Domestic Workers Convention (2011)<sup>94</sup>, nor has any other GCC country.

In 2017, a separate piece of labour law – the UAE Domestic Labour Law<sup>95</sup> – was introduced, extending protections like a weekly day of rest and paid leave. However, Human Rights Watch criticises the new laws for containing fewer and weaker protections than the main labor law and falls short of international standards<sup>96</sup>. According to Human Rights Watch, women domestic workers remain at acute risk of labor abuses, forced labor, and human trafficking because of the *kafala* system.

This mirrors the experience in Kuwait, which introduced domestic workers laws in 2015 but has failed to adequately implement the new protections, as documented by Human Rights Watch in a 2019 country visit which revealed continued exploitation, forced confinement, and physical and sexual abuse<sup>97</sup>. In Bahrain, a new standardised contract for domestic workers was introduced in 2017 with some limited protections, but there is no law setting out extended rights and decent working conditions for domestic workers<sup>98</sup>. In Oman, there are 287,000 migrant domestic workers<sup>99</sup>, and 100,000 work in Qatar<sup>100</sup>.

**Recommendations:**

- Before embarking upon negotiations for the UAE CEPA and the GCC FTA, the Australian government must require evidence of improvements in and implementation of women’s rights legislation and domestic workers protections – including accession and adherence to ILO Domestic Workers Convention – as a precondition for the commencement of negotiations.

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<sup>93</sup> Ibid.

<sup>94</sup> International Labour Organisation (2022) Up-to-date Conventions and Protocols not ratified by United Arab Emirates, via: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210\\_COUNTRY\\_ID:103495](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:103495)

<sup>95</sup> The United Arab Emirates Government Portal (2022) The UAE’s policy on domestic helpers, 30 March, via: <https://u.ae/en/information-and-services/jobs/domestic-workers/uae-policy-on-domestic-helpers>

<sup>96</sup> Human Rights Watch (2021) UAE: Greater Progress Needed on Women’s Rights, March 4, via: <https://www.hrw.org/news/2021/03/04/uae-greater-progress-needed-womens-rights>

<sup>97</sup> Human Rights Watch (2021) World Report – Kuwait, via: <https://www.hrw.org/world-report/2021/country-chapters/kuwait>

<sup>98</sup> Human Rights Watch (2021) World Report – Bahrain, via: <https://www.hrw.org/world-report/2021/country-chapters/bahrain>

<sup>99</sup> Human Rights Watch (2021) World Report – Oman, via: <https://www.hrw.org/world-report/2021/country-chapters/oman>

<sup>100</sup> Human Rights Watch (2021) World Report – Qatar, via: <https://www.hrw.org/world-report/2021/country-chapters/qatar>



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