Questions on Notice for the Australian Fair Trade and Investment Network submitted by Senator Dorinda Cox following the public hearing on October 20, 2023.

1. **What is your experience with feeding into Government negotiations for trade agreements?**
    a. **What does that look like?**
    b. **Who do you speak to?**
    c. **What access do you have to 1) Government Ministers, 2) Departmental Officials and 3) Lead Negotiators?**
    d. **How often are you having conversations and updates on progress?**

a) The steps of the current trade agreement process are as follows:[1]

- Cabinet makes the decision to initiate trade negotiations and receives reports on the progress of negotiations.
- The text remains secret until after the agreement is completed. There is limited consultation by DFAT with business, trade unions and other community organisations, but there is no direct access to the negotiating text. Consultation with business has usually been far more extensive than consultation with community organisations.
- Cabinet makes the decision to sign the completed agreement. Signing of the text takes place before the text becomes public and without independent evaluation of the costs and benefits of the text.
- Only after the agreement is signed is the text tabled publicly in Parliament and reviewed by the Joint Standing Committee on Treaties (JSCOT).
- There is no independent assessment of the economic costs and benefits of the agreement, nor of health, environmental, gender or regional impacts, before it is signed.
- The National Interest Assessment and Regulatory Impact Statement considered by JSCOT are done by DFAT, the department which negotiated the agreement, and always give a favourable assessment.
- The JSCOT reviews the agreement but it cannot make any changes to the text. It can only make recommendations which are not binding on the government.
- Parliament does not vote on the text of the agreement, only on the enabling legislation, which is mostly confined to changes in tariffs. Parliament does not debate or vote on the thousands of pages of text which can impact on the regulatory capacity of future governments.
- After Parliament has adopted the enabling legislation, the agreement is ratified through the exchange of letters between governments and comes into force at a specified period after ratification.

b)-d) Under the previous government, there were two processes for consultation, which involved briefings from DFAT negotiators.

Firstly, DFAT held two briefings per year by Chief negotiators to peak bodies on all current trade negotiations. These were limited by the short time given to each agreement, limited time for questions and by the fact that there was no access to the negotiating text, which meant that the briefings lacked detail.

[1] Department of Foreign Affairs and Trade (2013) *The Treaty making process,* http://www.dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx

Secondly some briefings were held on particular trade agreement negotiations. For example, with the UK FTA and EUFTA there were some briefings held after negotiating rounds. We could also request specific briefings on particular trade agreements, sometimes with negotiators responsible for specific topics. However these were also limited by the fact that there was no access to the negotiating texts and that negotiators could not answer detailed questions in relation to the text during negotiations.

There was more extensive consultation with business groups than with other community organisations.

Under the current government, which has a policy of wider consultation, we have been invited to more frequent briefings held in addition to the general briefings on all trade agreements.

The briefings conducted by DFAT negotiators under the current government are as follows:

1) Briefings on specific negotiations like the EU FTA and the Indo Pacific Economic Framework (IPEF) are generally held after negotiating rounds. These involve Chief Negotiators and Negotiators on specific topics and are more informative than previous briefings but are still limited by lack of access to the negotiating text.
2) Monthly DFAT "deep dive" briefings on particular trade issues or negotiations, which were previously held for business groups but have now been opened to unions, civil society and First Nations groups. These are still limited by lack of access to the negotiating text.
3) There are ongoing plans for four different consultation groups of business, unions, First Nations and civil society groups. Their role and composition is still being considered, perhaps pending this Inquiry.

In terms of the overall process, there is more consultation with civil society groups during negotiations, but it is still limited by lack of access to the negotiating text. So far there have not been any agreements fully negotiated and completed by this government. We hope that the government's policies of access to negotiating texts and independent evaluation of agreements, as well as our other recommendations below will be implemented as a result of this Inquiry.

2. As a result of these consultations, do you see your concerns reflected in agreements?

This is difficult to say because we don't see the text until after it has been signed so we don't always know the full detail of what has been considered or excluded in trade negotiations. This is why it would be helpful to have a transparent legislated process which makes clear what the government policy is and what will be excluded from or included in trade agreements.

In some cases our concerns have been reflected in agreements. For example, we advocated to the previous government against the inclusion of Investor-State Dispute Settlement (ISDS) in the Australia-UK FTA, and ISDS was not included in that agreement. When the UK applied to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes ISDS, we advocated to both the previous and current government for side-letters between Australia and the UK to exclude the application of ISDS provisions to each country, and such side letters were exchanged in July this year.[2]

[2] DFAT (2023) Letter from Assistant Trade Minister Tim Ayres to the UK trade Minister Kemi Badenoch, July 16. https://www.dfat.gov.au/sites/default/files/cptpp-isds-letter-aus-uk-signed.pdf

Another example is the US proposal and the previous government agreement in the original US-led 12-member Trans-Pacific Partnership (TPP) to expand data protection monopolies on expensive biologic medicines from 5 to 8 years, in addition to the existing 20-year patents on those medicines. This proposal only became public because it was leaked in the US and we advocated against it. Studies by health experts showed that the delay in availability of cheaper versions of these medicines would cost the Pharmaceutical Benefits Scheme hundreds of millions of dollars per year. After much public debate, this provision was suspended by the remaining 11 governments in 2017 after the US Trump administration withdrew from the agreement and it was rebranded as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[3]

We have also advocated for many years for enforceable standards on human rights, labour rights and the environment to be included in trade agreements and these issues are now being included in agreements like the Australia-UK Australia-EU FTA, although their enforceability varies.

These examples show that harmful proposals can be excluded and positive proposals included if the government consults with a wide range of community organisations which can draw attention to the social and environmental impacts of some proposals. This process would be more effective if we had access to negotiating texts.

3. How can the Australian Government make the negotiation process more transparent and accessible to all Australians?

We believe the government should implement its policy and also learn from other more open processes in the EU and the US.

Our recommendations are as follows:

- Prior to commencing trade negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include assessments of how the agreement relates to other whole-of-government priorities, including local industry development and sovereign capability development in strategic industries, the transition to a low carbon economy to meet the government's carbon reduction emissions strategies, and the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, health, gender and environmental impacts, and impacts on First Nations Peoples.
- There should be regular public consultation during negotiations, including submissions from and meetings with business, unions, First Nations groups, women's, environment and other relevant civil society groups, and reports to JSCOT and parliament. Consultation should include access to negotiating texts.
- The final negotiated text should be released before signing together with an independent evaluation of its economic, employment, environmental, gender, and public health impacts.
- After parliamentary review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should decide whether the Cabinet should approve the agreement for signing, by voting on the whole agreement. After signing, Parliament should vote on the implementing legislation.

[3] Gleeson, D., Townsend, B., Ranald, P., Weatherall, K., Robertson, P. (2017) The Trans-Pacific Partnership is back: experts respond, November 17. https://theconversation.com/the-trans-pacific-partnership-is-back-experts-respond-87432

- The government should commission independent reviews of the post-implementation impacts of trade agreements 5 years after the agreement comes into force. These should include economic, employment, environmental, health, gender impacts and impacts on First Nations peoples.

4. **Your submission mentioned human rights, labour rights, environmental standards and climate change. How do you believe these areas could be better considered in negotiations and reflected in agreement outcomes?**

To ensure that the benefits of trade are shared both globally and nationally, and that environmental standards are protected, trade agreements should be underpinned by commitments to agreed international United Nations and International Labour Organisation standards on human rights, labour rights and environmental standards, including agreements on Indigenous Peoples' rights and climate change. These commitments should be enforceable through the state-to-state dispute processes which apply to other chapters in the agreement.

These rights and standards are already being included in some trade agreements, like the Australia-UK FTA and the Australia-EU FTA, although there are variations in their enforceability.

Implementing a whole-of-government approach on human rights, labour rights and environmental standards

Human rights
Australia's trade agreements should be consistent with its commitments to human rights. They should not contain trade rules which impact negatively on human rights, for example by extending medicine monopolies or by restricting governments from regulating in the public interest.

Trade agreements should include enforceable commitments to the UN human rights conventions and declarations, including:

- The International Covenant on Civil and Political rights
- The International Covenant on Economic, Social and Cultural Rights
- The UN Convention on the Elimination of All Forms of Racial Discrimination
- The UN Convention on the Elimination of All Forms of Discrimination Against Women
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities
- the UN Declaration on the Rights of Indigenous Peoples.

Australia should work with developing country trading partners and provide resources through its ODA programs to progressively adopt, develop and implement these international standards.

Labour rights
Trade agreements should include enforceable commitments to the International Labour Organisation (ILO) conventions and declarations, including:

- 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)

- The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111)
- A safe and healthy working environment (ILO Conventions 185 and 187).

Each country should also develop appropriate local minimum standards for working hours, wages and health and safety, based on ILO principles.

The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement in the same way as other chapters and provisions of the agreement, and through enforceable enterprise-specific dispute processes.

- Australia should work with developing country trading partners and provide resources through its ODA programs to progressively adopt, develop and implement international standards on labour rights, including the ILO Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions.

Environmental standards and climate change
Trade agreements should include enforceable commitments to the UN multilateral environmental agreements, including:

- The Montréal Protocol on Hydrofluorocarbons
- The International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978
- The UN Convention on Biological Diversity
- The UN Convention on International Trade in Endangered Species
- The UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001)
- The UN Framework Convention on Climate Change 1992, the Paris Agreement 2015, and subsequent Climate Change Agreements at COP 26 2021 and COP 27 2022.

Australia should work with developing country trading partners and provide resources through its ODA programs to adopt, develop and implement these international standards.

5. **Can you please go into more detail about how ISDS clauses impacted First Nations people specifically?**

As outlined above, there should be comprehensive consultations with First Nations Australians during negotiation of trade agreements. Moreover, trade agreements should ensure that the rights of First Nations Australians are protected and not undermined by trade rules. First Nations Australians' basic rights are enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which Australia endorsed in 2009.[4] The Declaration includes the right to non-discrimination, cultural recognition, protection of land rights through free, prior and informed consent and affirms the minimum standards for the survival, dignity and well-being of Indigenous peoples. These are fundamental rights that should not be compromised by trade agreements.[5]

[4] Australian Human Rights Commission (2007) UN Declaration on the Rights of Indigenous Peoples, https://humanrights.gov.au/our-work/un-declaration-rights-indigenous-peoples-1
[5] Australian Human Rights Commission (2023) Human Rights and Aboriginal and Torres Strait Islander Peoples, https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_ATSI.pdf

The right to free, prior and informed consent to projects on Indigenous land

Australia is a party to some trade and investment agreements that include ISDS provisions. A 2016 report of the UN Special Rapporteur on the Rights of Indigenous Peoples noted the significant impacts on indigenous peoples' rights as a result of the international investment regime, notably ISDS.[6] This includes negative impacts on Indigenous peoples' right rights to free, prior and informed consent about investment projects on traditional lands.

One example is the ISDS case Bear Creek Mining Corporation v. Peru (2017).[7] The ISDS tribunal ordered the government of Peru to pay Bear Creek Canadian mining company $18.2 million in compensation and $6 million in legal costs because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous landowners about the mine, leading to mass protests. A dissenting judgement about the costs noted that Bear Creek had failed to implement provisions of the ILO Convention on Indigenous Peoples to which Peru is a party, and which it had implemented through national laws.[8]

More generally, Bear Creek's ISDS case is part of a pattern of cases[9] that seek to bypass international human rights and environmental commitments by using a flawed forum that favours transnational investors. In the ISDS case Von Pezold and Border Timbers v. Zimbabwe (2015),[10] arbitrators refused to consider an amicus submission on Indigenous peoples' rights related to the case, citing a number of grounds including that the tribunal lacked the competence to interpret Indigenous peoples' rights.[11] The failure of ISDS arbitrators to consider international human rights commitments means that investor rights are routinely privileged over all other obligations.

Recommendation

- The government should ensure that trade agreements are consistent with protecting the rights of First Nations Peoples. This requires exclusion of ISDS and guarantees of the right to free prior and informed consent for investment projects on their land.

6. Does AFTINET have a position about inclusion chapters and ensuring the Government has to ensure First Nations people and other minority groups are supported to reap the benefits of agreements?

As explained above, AFTINET supports the inclusion in trade agreements of enforceable commitments to the rights of First Nations peoples based on the UN Declaration on the Rights of

[6] UN Human Rights Special Rapporteur (2016) Report to the UN Human Rights Council on the rights of Indigenous Peoples and International Investment Agreements, August 11, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/178/84/PDF/G1617884.pdf?OpenElement
[7] International Centre for Settlement of Investment Disputes (2017) Bear Creek Mining Corporation v. Republic of Peru. Case No. ARB/14/2, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf
[8] International Labour Organisation (1989) Indigenous and Tribal Peoples Convention (No. 169), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
[9] Terra Justa, *et al* (2022) Summary of Amicus Curiaw to the Constitutional Court of Colombia, https://ips-dc.org/wp-content/uploads/2022/09/Summary-of-Amicus-Curiae-to-the-Constitutional-Court-of-Colombia.docx.pdf
[10] Von Pezold and Border Timbers v. Zimbabwe (2015) International Centre for Settlement of Investment Disputes, Von Pezold v. Zimbabwe Case ARB/10/15. https://www.italaw.com/cases/1472
[11] Human Rights Council (2016) Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/33/42, https://digitallibrary.un.org/record/847079?ln=en

Indigenous Peoples (UNDRIP) which Australia endorsed in 2009. We also support specific consultation with First Nations peoples during the negotiation process.

We also advocate that there should be specific exclusions and amendments to other aspects of trade agreements like Intellectual Property Rights to ensure that traditional art, culture and knowledge are protected as explained below.

Recognition of indigenous art and culture and use of traditional plants in intellectual property rules

Intellectual property rules in the WTO TRIPS agreement have been used to the detriment of Indigenous Peoples' rights because they do not account for collective ownership or development of traditional culture and knowledge of indigenous peoples.[12]

There are numerous examples of companies trying to patent products that have long had traditional uses. For example, in the 1990s, international companies attempted to patent various Indian products including basmati rice, turmeric and products of the neem tree.[13] The neem tree had long been used for medicinal purposes in India, and the attempts to patent it were met with mass protests in Bangalore in 1994 over perceived bio-piracy. The European Patent Office did eventually revoke the patent in 2000, recognising the traditional knowledge of the neem tree's properties.[14]

There have been numerous examples of exploitative practices regarding traditional knowledge, art and culture which fail to adequately compensate indigenous peoples. Megan Davis states in her article on FTAs and Indigenous issues: "indigenous culture contributes millions of Australian dollars to the Australian economy annually but because of intellectual property laws and inertia in law reform much of this income does not return to Indigenous communities."[15] Experts have commented that international agreements like the Convention on Biological Diversity (1992) do not function as intended in protecting indigenous intellectual property.[16]

Recommendation

- There should be specific protections in intellectual property rules for indigenous art, culture and use of traditional plants.

[12] Davis, M. (2007) Parliamentary Inquiries into Free Trade Agreements and Indigenous Issues, *Journal of Indigenous Policy*, 7. http://www5.austlii.edu.au/au/journals/JlIndigP/2007/10.pdf
[13] Ismail, Z., and Fakir, T. (2004) Trademarks or Trade Barriers?, *International Journal of Social Economics* 31 (1/2), 173–94, https://doi.org/10.1108/03068290410515493
[14] The Times of India (2005) India Wins Neem Patent, *The Times of India*, April 1, https://timesofindia.indiatimes.com/business/international-business/india-wins-neem-patent/articleshow/1067104.cms
[15] Davis, M. (2007) Parliamentary Inquiries into Free Trade Agreements and Indigenous Issues, *Journal of Indigenous Policy*, 7, http://www5.austlii.edu.au/au/journals/JlIndigP/2007/10.pdf
[16] MacGonigle, I.V. (2016) Patenting nature or protecting culture? Ethnopharmacology and indigenous intellectual property rights, *Journal of Law and the Biosciences,* 3, https://doi.org/10.1093/jlb/lsw003