

Melbourne Climate Futures



THE UNIVERSITY OF
MELBOURNE

Friday, 22 September 2023

Dr Arj Dibley, Ms Rebekkah Markey-Towler, Professor Jacqueline Peel, Professor Margaret Young

Submission to the Joint Standing Committee on Trade and Investment Growth

This submission brings together expertise of researchers from the University of Melbourne, as part of the Melbourne Climate Futures (MCF) initiative. MCF's interdisciplinary research interests include law and litigation, politics and policy, and oceans and climate, among others. In 2023, MCF launched a Sustainable Finance Hub that aims to align the financial system with the goals of sustainable development and climate action, while also enhancing financial performance and resilience.

The Joint Standing Committee on Trade and Investment Growth is seeking feedback on its inquiry into and report on the Australian Government's approach to negotiating trade and investment agreements with trading partners. A table summarising our recommendations to address the Terms of Reference is as follows:

Terms of Reference	Our recommendations
(a) How the Australian Government develops a negotiating mandate and framework which factors in whole of government priorities	<ul style="list-style-type: none">• Review existing FTAs for their economy-wide integration of climate change ambition in imports and exports, including with respect to energy, agriculture, transport, buildings, and land and ocean use.• Review the activities and policies of investment and trade institutional bodies for alignment with the goals of the Paris Agreement.• Consider reforms to provide these institutions with a net zero mandate and to integrate climate change considerations into their activities.• Mainstream climate change consideration across trade and investment policies and priorities going forward.
(b) How the priorities for States and Territory Governments, businesses, workers and other relevant stakeholders are considered and incorporated into a negotiating mandate;	<ul style="list-style-type: none">• Consider how intergovernmental processes can prioritise discussion between the Commonwealth and States and Territories on climate action and trade before and after specific FTA negotiations.• Identify priority trade and investment sectors, projects and partnerships that are critical to reaching the goals of the Paris Agreement.
(c) The consultation process undertaken with interested parties, including representatives of industry and workers throughout the process;	<ul style="list-style-type: none">• Enhance participation between government and civil society in setting priorities for FTAs and supporting negotiation of FTAs, alongside good governmental practices of ensuring public involvement in environmental decision making. Australia should model its approach on the requirements of the Aarhus Convention.

Postal address:

Melbourne Climate Futures (MCF)
The University of Melbourne VIC 3010
Australia

Email:

melbourne-climate-futures@unimelb.edu.au

(d) The steps taken to ensure transparency and parliamentary oversight	<ul style="list-style-type: none"> • Ensure Parliamentary oversight begins before the final tabling of the negotiated text of a FTA.
(e) How the economic, social and environmental impacts of an agreement are considered and acted upon	<ul style="list-style-type: none"> • Implement 'sustainability impact assessments' for FTAs that build on the current regulation impact statements. • Consider reforms to provide these institutions with a net zero mandate and to integrate climate change considerations into their activities (noted also for (a)) • Identify priority trade and investment sectors, projects and partnerships that are critical to reaching the goals of the Paris Agreement (noted also for (b)) • Identify priority trade and investment sectors, projects and partnerships that are critical to reaching the goals of the Paris Agreement (noted also for (b)). • Mainstream climate change consideration across trade and investment policies and priorities going forward (noted also for (a) and (j)). • Identify options for innovative climate finance, including stocktaking existing approaches and evaluating their strengths and weaknesses. • Monitor climate litigation risks to trade and investment activities, including litigation that is both pro-climate aligned, and non-climate aligned. • Take steps to mitigate the risk of climate litigation to trade and investment activities such as considering the long-term implications of the transition to net zero and a warmer world to these particular activities.
(f) The steps taken to ensure agreements protect and advance Australia's national interests, including the ability to regulate in the public interest;	<ul style="list-style-type: none"> • Consider how climate change priorities can be enhanced within existing FTAs, including through working groups between parties, collaborative and consultative public frameworks, and the use of dispute settlement provisions where appropriate.
(g) The steps taken to ensure agreements protect and advance Australia's cultural interests;	<ul style="list-style-type: none"> • Review best practices from other countries that integrate climate change considerations into FTAs, including with regard to climate friendly labelling, the elimination of fossil fuel subsidies and the promotion of First Nations participation (noted also for (h) and (i)).
(h) Whether agreements appropriately ensure First Nations Australians can participate and benefit in trade;	<ul style="list-style-type: none"> • Review best practices from other countries that integrate climate change considerations into FTAs, including with regard to climate friendly labelling, the elimination of fossil fuel subsidies and the promotion of First Nations participation (noted also for (g) and (i))
(i) How the Australian approach compares with other, similar countries; and	<ul style="list-style-type: none"> • Review best practices from other countries that integrate climate change considerations into FTAs, including with regard to climate friendly labelling, the elimination of fossil fuel subsidies and the promotion of First Nations participation (noted also for (g) and (h)).
(j) How the process could be appropriately legislated to enshrine this approach in law.	<ul style="list-style-type: none"> • Adapt existing legislative processes of integrating public interest considerations in treaty making, including through legislative requirements for sustainability impact assessments. • Mainstream climate change consideration across trade and investment policies and priorities going forward (noted also for (a), (e)).

We adopt a broad approach in this submission. Rather than focusing exclusively on negotiated agreements, we provide recommendations as to how climate change considerations might be mainstreamed (or are likely to become more mainstream) in four areas relevant to trade and investment: (1) Legal agreements and texts; (2) Institutional mandates; (3) Priorities, policies and outcomes; and (4) Litigation.

Legal agreements and texts

Free trade agreements

Australia is party to 18 free trade agreements (FTAs) that are currently in force, as well as two that are under negotiation and two that are under consideration. These agreements are with some of our most important trading partners including Singapore, the United States, Korea, Japan, China, Indonesia, India, the United Kingdom and the European Union (DFAT 2023).

These agreements represent an important opportunity to collaborate on emissions reduction goals (in line with the Paris Agreement to keep global warming to 1.5-2°C below pre-industrial levels), enhancing resilience to the impacts of climate change and providing finance to achieve both. These are collectively the mitigation, adaptation and financing goals of the Paris Agreement.

More could be done to ensure that FTAs contribute to the mitigation, adaptation and financing goals of the Paris Agreement. For example, legal analysis of the recent UK-Australia FTA found that the opportunity to address climate change mitigation goals in the context of this agreement was not fully realised, despite there being some inclusion of climate change considerations (Young and Clough 2023).

Trade agreements that incentivise climate-friendly goods and services, and trade that reduces the economy's reliance on emissions-intensive goods and services are important to realise climate ambition. For example, agriculture that has low climate impacts in production and consumption can be supported through trade. Negotiating and implementing climate-friendly trade agreements requires an economy-wide understanding across energy, agriculture, transportation, buildings, and the use of land and ocean. 'Sustainability impact assessments' of trade agreements are currently not conducted in Australia, but are done in many countries (Riddell and Lowe 2021). Other FTAs provide good examples of leadership in developments relating to climate friendly labelling (EU-Canada), the elimination of fossil fuel subsidies (UK-NZ) and the inclusion of the interests of indigenous peoples in the negotiation and implementation of FTAs (e.g. the Treaty of Waitangi exception clause in NZ FTAs since 2001).

Public participation in decision-making is recognised as enhancing environmental outcomes, including in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention', adopted 25 June 2008, entered into force 30 October 2001) 2161 UNTS 447. The Joint Standing Committee on Treaties has noted that "the substance and quality of the consultation process around trade agreements has been a consistent theme of the

Committee's work over many years. Consultation should be timely, meaningful and responsive" (JSCOT, 2022; para 8.37).

There is also scope for better engagement with the States and Territories in FTAs, especially given high climate ambitions across multiple Australian jurisdictions. The Treaties Council is an important forum. In addition, former models such as the Council of Australian Governments (COAG) can be enhanced to include ongoing discussion and collaboration on climate and trade integration.

Climate change considerations can be strengthened in FTAs in at least the following ways, as noted by Young and Clough 2023:

- **Provisions to strengthen climate commitments, including net zero goals:** This includes not only affirming the Paris Agreement and its temperature goals, but advancing the mitigation, adaptation and finance goals through trade relations. Some FTAs recognise trade measures that address climate change such as 'border carbon adjustments' – in this regard, principles of international law are relevant (International Legal Expert Group on Trade-Related Climate Measures and Policies, 2023). The authors note the Carbon Leakage Review in Australia that will be considering various issues, including carbon border adjustment mechanisms. Many FTAs recognise the importance of non-derogation, non-regression or progression of environmental laws within federal and State and Territory jurisdictions, and recognise the right to regulate to make decisions on the environment and climate change.
- **Provisions to facilitate trade and investment in climate-related areas:** FTAs can prioritise the liberalisation of green services and goods that have positive impacts on climate change mitigation and adaptation, promote low-carbon investments and discourage high-carbon investments, and eliminate harmful fossil subsidies and production. FTAs can also foster trade and investment into climate change adaptation and resilience. A list of nominated goods and services is sometimes included in FTAs.
- **Dispute resolution and cooperation:** Many FTAs ensure the environmental protection and accountability aspects of the agreements are subject to compulsory dispute settlement. Previous experience demonstrates that caution is needed for investor-state dispute resolution clauses, which may curtail the Government's pursuit of its net zero target. FTAs can usefully institute regular and ongoing cooperative

arrangements such as working groups for trading parties to deepen their engagement and review each other's actions towards climate change mitigation, adaptation and finance goals.

To realise the potential of FTAs to address climate change mitigation, adaptation and finance goals, we provide the following recommendations. We note how these recommendations respond to the Terms of Reference of the Committee by linking to the relevant paragraph (a)-(j) of those Terms of Reference:

Recommendations

Review existing FTAs for their economy-wide integration of climate change ambition in imports and exports, including with respect to energy, agriculture, transport, buildings, and land and ocean use (a).

Consider how intergovernmental processes can prioritise discussion between the Commonwealth and States and Territories on climate action and trade before and after specific FTA negotiations (b).

Enhance participation between government and civil society in setting priorities for FTAs and supporting negotiation of FTAs, alongside good governmental practices of ensuring public involvement in environmental decision making. Australia should model its approach on the requirements of the Aarhus Convention (c).

Ensure Parliamentary oversight begins before the final tabling of the negotiated text of a FTA (d).

Implement 'sustainability impact assessments' for FTAs that build on the current 'regulation impact statements' (e).

Consider how climate change priorities can be enhanced within existing FTAs, including through working groups between parties, collaborative and consultative public frameworks, and the use of dispute settlement provisions where appropriate (f).

Review best practices from other countries that integrate climate change considerations into FTAs, including with regard to climate friendly labelling, the elimination of fossil fuel subsidies and the promotion of First Nations participation (g), (h) and (i).

Adapt existing legislative processes of integrating public interest considerations in treaty making, including through legislative requirements for sustainability impact assessments noted above (j).

Institutional mandates

The Australian Government's approach to negotiating trade and investment agreements with trading partners is also influenced by the institutional arrangements for conducting trade and investment activities. This includes the institutional arrangements governing bodies and

departments such as the Department of Foreign Affairs and Trade, Austrade, Foreign Review Investment Board and Future Fund Australia.

At present, the legal mandates and policies governing these institutions and bodies may not always reflect the goals of the Paris Agreement. For example, [Australia's Foreign Investment Policy](#) provides that foreign direct investments into Australia are screened under a 'national interest test' or 'national security test'. However, climate change priorities are not integrated into this Policy.

As an additional example, Future Fund Australia's Statement of Investment Policies includes a few paragraphs on ESG factors in decision-making. But this is at the very end of the document and, more significantly, is arguably not integrated into the Future Fund's core investment strategy. There is no reference to climate change risks and opportunities in discussing the Fund's investment mandate to maximise returns to the fund over the long-term and to take on an 'acceptable but not excessive' level of risk.

There is therefore an opportunity to provide these institutions with a clear net zero mandate and to ensure climate change considerations inform how trade and investment negotiations are conducted. This could be through, for example, an amendment to the *Climate Change Act 2022* (Cth) with a provision along the lines of s 20 of Victoria's *Climate Change Act 2017* (Vic) that says: "The Government of Victoria will endeavour to ensure that any decision made by the Government and any policy, program or process developed or implemented by the Government appropriately takes account of climate change if it is relevant by having regard to the policy objectives and the guiding principles".

As such, we provide the below recommendations and link these to the relevant paragraph (a)-(j) of the Terms of Reference:

Recommendations

Review the activities and policies of investment and trade institutional bodies for alignment with the goals of the Paris Agreement (a).

Consider reforms to provide these institutions with a net zero mandate and to integrate climate change considerations into their activities (a), (e).

Priorities, policies and outcomes

The Australian Government's approach to negotiating trade and investment agreements with trading partners could also encompass the types of investments that are allowed into Australia and the types of investments that are made out of Australia. In this regard, there is scope for the Australian Government to identify priority sectors, projects and partnerships that are critical in reaching the goals of the Paris Agreement. This might build on the work

to develop the Australian Sustainable Finance Taxonomy by identifying which trade and investment sectors, projects and partnerships ought to be pursued now and into the future.

This 'climate mainstreaming' in Australian Government trade and investment policies and priorities is already underway and can be expanded further. For example, the Government's South-East Asia Economic Strategy includes a number of recommendations that could be used to pursue investments that are aligned with mitigation and adaptation goals of the Paris Agreement including:

- *...reduce regulatory burden under the Foreign Investment Review Board... (Recommendation 8):* Australia is already a favoured destination for SE Asia investors, including for renewable energy and clean energy supply chains. However, 'streamlining' should not come at the expense of positive environmental, social and governance outcomes.
- *...review the scope of existing FTAs to determine priorities for agreement upgrade negotiations (Recommendation 10):* One of the initial focuses for this review will be on clean energy thereby opening the door for future collaboration on this front. However, there is also scope to prioritise investments in adaptation and resilience measures.
- *Expand collaboration on trade rules and standards harmonisation with Southeast Asian partners (Recommendation 11):* Harmonising these standards will be important for shaping the development of clean energy technologies in the region. This could also include harmonisation in other types of investments e.g. green bonds, offsets.
- *...new government instruments for reducing risk in investments offshore, including examining political risk insurance (Recommendation 23):* These public-private collaborative arrangements may help to reduce risks for Australian investors entering SE Asian markets and encourage further green investments. This could also include innovative finance instruments to foster investment in adaptation projects, where the business case is less clear.
- *...establish a strategic investment facility for Southeast Asian infrastructure projects, utilising Export Finance Australia and other government-supported funding sources (Recommendation 44):* This strategic investment facility might prioritise investments in projects critical to the transition to net zero, as well as investments in projects aimed at enhancing resilience in the region.
- *Establish new investment 'deal teams' for Southeast Asia, blending private sector and Australian Government capabilities to provide outward investment (including financing) services (Recommendation 45):* These deal teams could prioritise investments that are aligned with the

adaptation and mitigation goals of the Paris Agreement.

There are a range of innovative climate financing mechanisms that could be used by the Australian Government in its approach to trade and investment with trading partners and beyond. These include, for example, green bonds to pay for low-carbon development projects, sustainability-linked bonds to tie a company's debt interest payments to climate promises, funding guarantee mechanisms for climate finance, blended finance arrangements between public and private sector participants or sovereign green bonds.

To integrate climate change in Australia's trade and investment priorities, policies and outcomes, consideration could be given to the following recommendations. We also link these to the relevant paragraph (a)-(j) of the Terms of Reference:

Recommendations

Identify priority trade and investment sectors, projects and partnerships that are critical to reaching the goals of the Paris Agreement (b), (e).

Mainstream climate change consideration across trade and investment policies and priorities going forward (a), (e), (j).

Identify options for innovative climate finance, including stocktaking existing approaches and evaluating their strengths and weaknesses (e).

Litigation

Australia is the jurisdiction with the second highest number of climate change cases worldwide. While historically the majority of climate change cases have been filed against governments, a growing number of cases are also being filed against corporate and financial sector actors (Setzer and Higham 2023). Already there have been climate disputes that relate to trade and investment activities. These cases can be either 'non-climate aligned' (cases that impeded the achievement of the goals of the Paris Agreement), or pro-climate aligned (cases that aim to further the goals of the Paris Agreement).

On the non-climate aligned side, Zeph Investment (Clive Palmer's Singapore-based company) is suing the Commonwealth of Australia for \$296 billion for breaches of the ASEAN-Australia-New Zealand Free Trade Area agreement (an investor-state dispute). The applicant is arguing that the West Australian government breached the agreement by introducing legislation in 2020 to retrospectively remove Mr Palmer's ability to seek compensation from the state regarding the Balmoral South Iron Ore Project in the Pilbara ([*Zeph Investments v Commonwealth of Australia*](#)).

On the pro-climate aligned side, Jubilee Australia have brought a claim against Export Finance Australia (EFA) and the Northern Australia Infrastructure Facility (NAIF). Both entities provide financial support to (possible) fossil fuel projects. The applicants argue that the EFA and NAIF have breached s 516A(6) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) by failing to disclose in their annual reporting the impact of their financing activities on the environment (*Jubilee Australia Research Centre Ltd v Export Finance and Insurance Corporation & Ors*).

It might be expected that trade and investment disputes are likely to involve climate change questions and issues going forward. This includes disputes directly aimed at achieving the goals of the Paris Agreement, as well as disputes that arise in the course of business activities. Examples of the latter include disputes relating to contracts for the supply of goods and services that may be affected by transition risks (e.g. the phase out of coal) or physical risks (e.g. weather events that frustrated the performance of contracts). These disputes might also involve claims of greenwashing (misleading and deceptive conduct) or breaching disclosure obligations to the marketplace.

Climate litigation risks are likely to affect trade and investment activities going forward. As such, we recommend that the Australian Government's approach to trade and investment ought to be cognisant of these risks. We also identify the relevant paragraph (a)-(j) of the Terms of Reference to these recommendations:

Recommendations

Monitor climate litigation risks to trade and investment activities, including litigation that is both pro-climate aligned, and non-climate aligned, (e).

Take steps to mitigate the risk of climate litigation to trade and investment activities such as considering the long-term implications of the transition to net zero and a warmer world to these particular activities, (e).

References

DFAT. 2023. 'Australia's Free Trade Agreements (FTAs)'. *Australian Government Department of Foreign Affairs and Trade*.
<https://www.dfat.gov.au/trade/agreements/trade-agreements> (September 20, 2023).

International Legal Expert Group on Trade-Related Climate Measures and Policies. 2023. [Principles of International Law Relevant for Consideration in the Design and Implementation of Trade-](#)

[Related Climate Measures and Policies](#) [\(tessforum.org\)](#)

Jakob, Michael, and Jan C. Steckel. 2022. *The Political Economy of Coal: Obstacles to Clean Energy Transitions*. Routledge.

JSCOT, Joint Standing Committee on Treaties, 'Report 201: Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland' (Parliament of Australia, November 2022)
<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/AUKFTA/Report>

Kansal, Rachit, Dhroovaa Khannan, and Juan Vial. 2023. *Unlocking Coal Contracts: Pathways to Decarbonizing Long-Term Coal Power Purchase Agreements*. RMI.
<https://rmi.org/insight/unlocking-coal-contracts/> (September 20, 2023).

Riddell, G and S Lowe. 2021. 'UK Trade Policy Observatory: Special Report – Towards a Comprehensive UK Green Trade Strategy' (12 October 2021) 3
<<https://blogs.sussex.ac.uk/uktpo/files/2021/10/SR-UK-Green-Trade-Strategy.pdf>>.

Setzer, Joana, and Catherine Higham. 2023. *Global Trends in Climate Change Litigation: 2023 Snapshot*. Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.
<https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2023-snapshot/> (September 20, 2023).

Young, Margaret A., and Georgina Clough. 2023. 'Net Zero Emissions and Free Trade Agreements: Efforts at Integrating Climate Goals by the United Kingdom and Australia'. *International & Comparative Law Quarterly* 72(2): 393–436.
www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/net-zero-emissions-and-free-trade-agreements-efforts-at-integrating-climate-goals-by-the-united-kingdom-and-australia/52C6936B90441584486FFEFEE4DBF13