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**Submission to the Joint Standing Committee on Treaties  
Inquiry on Certain Aspects of the Treaty-Making Process in Australia  
in respect of trade agreements**

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## Summary and Recommendations

### Summary

AFTINET has consistently advocated over the last 20 years for a more transparent and democratically accountable trade agreement process. Community concerns about this process have been demonstrated by three successive parliamentary inquiries which have made recommendations for change.

Trade agreements are legally binding, with dispute processes that can result in trade penalties, and are difficult to revoke. They have increasingly complex commitments not only on tariffs, but on laws and policy that should normally be decided through open democratic parliamentary processes. These include medicines policy, essential services like education, aged care, childcare, water, energy, telecommunications and financial services. They also include digital trade regulation, temporary workers, local industry policy, government procurement, product standards and labelling standards.

This should mean that the process for negotiating, signing and ratifying trade agreements should be subject to the highest levels of public debate, scrutiny and democratic accountability to ensure that the benefits outweigh the costs. But this is not the case. The current trade agreement process is secretive and lacks democratic accountability.

This submission presents case studies of proposals in trade agreements which impact on the ability of future governments to regulate. These include Investor-State Dispute settlement (ISDS), longer monopolies on medicines which delay the availability of cheaper versions of medicines, and regulation of digital trade, including abuse of individual data privacy and restrictive trade practices by global companies.

The World Trade Organisation multilateral negotiations and the EU provide examples of more open and accountable processes, including release of negotiating texts, and the publication of final texts before they are signed.

JSCOT only has access to texts after they are signed, and is hard pressed to analyse trade agreements which are often highly technical documents of thousands of pages. Parliament only votes on the enabling legislation, not the text of the agreement.

The National Interest Analysis and Regulatory Impact Statement are prepared by DFAT, which is the department responsible for negotiating the agreements. This means they inevitably recommend in favour of the agreement. There is no independent assessment of the costs and benefits based on actual outcomes of agreements.

Predictive studies of the economic outcomes of trade agreements conducted before negotiations begin have been based on unrealistic assumptions and have often overestimated the benefits and underestimated the costs of agreements. The final text of agreements should be published before they are signed. Independent studies of their costs and benefits based on actual outcomes and realistic assumptions should be commissioned and published to inform public and parliamentary debate. Studies are also needed to assess health, environment and gender impacts of agreements.

The DFAT consultation process with civil society groups in Australia is limited by the fact that the negotiating texts remain secret and that DFAT negotiators cannot answer detailed questions about the text. Business groups have privileged access to present papers to negotiating rounds of Australian and international negotiators held in different countries, while such access for civil society groups is far more limited.

The recently announced Ministerial Advisory Committee has only two civil society out of eighteen non-government representatives. This excludes organisations representing millions of Australians that have been actively engaged with trade policy and does not enhance transparency for the majority in the community.

The current DFAT Post-Implementation Review process five years after trade agreements come into force, conducted by DFAT under guidelines of the Office of Best Practice Regulations, is not well publicised and does not appear to influence decision-making. This should be replaced by public, transparent and independent evaluation of economic, health, environment and gender impacts of agreements.

### **Recommendations**

- 1. Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, health, gender and environmental impacts which are expected to arise.**
- 2. There should be regular public consultation during negotiations, including submissions from and meetings with all stakeholders, release of negotiating texts, and regular reports to JSCOT and parliament.**
- 3. The Australian government should follow the example of WTO multilateral negotiations and the European Union and should release the final text of agreements for public and parliamentary discussion before they are authorised for signing by Cabinet.**
- 4. The current National Impact Assessment process is inadequate. After the text is completed and released, but before it is signed, comprehensive independent studies of the likely economic, regional, health, gender and environmental impacts of the agreement should be undertaken and made public for debate and review by JSCOT.**
- 5. There should be a separate subcommittee of JSCOT to deal with review of trade agreements. This subcommittee should review the text of a trade agreement which has been released before signing with the independent assessment of its costs and benefits, and make a recommendation to Parliament.**
- 6. The categorisation of trade agreements should not be changed in a way that would reduce scrutiny of trade agreements.**
- 7. Legal experts agree that the Executive power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. There is no constitutional barrier to Parliament playing a greater role in the treaty decision-making process. After release of the text, the JSCOT review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should then decide whether the Executive should approve the agreement for signing.**
- 8. If the agreement is approved by Parliament, and following approval of signing by the Executive, Parliament should then vote on the implementing legislation before ratification.**
- 9. There should be public reviews of trade agreement outcomes five years after entry into force with independent assessments of economic, regional, health, gender and environmental costs and benefits.**

## Introduction

The Australian Fair Trade and Investment Network (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 and recognises 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 protection. In general, AFTINET advocates that non-discriminatory multilateral rules-based trade negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners.

AFTINET has consistently advocated over the last 20 years for a more transparent and democratically accountable trade agreement process. Community concerns about this process have been demonstrated by successive parliamentary inquiries which have made recommendations for change.

AFTINET welcomes the opportunity to make this submission to the JSCOT inquiry on certain aspects of the treaty-making process in respect of trade agreements.

The terms of reference are described below.

The Joint Standing Committee on Treaties will inquire into *Certain Aspects of the Treaty-Making Process in Australia* including:

- considering the role of JSCOT in respect of trade-related agreements, including during the negotiation phase;
- considering the consultation process undertaken by the Department of Foreign Affairs and Trade (DFAT) before and during the negotiation of trade agreements;
- considering the effectiveness of independent analysis to inform negotiation or consideration of trade agreements; and
- reviewing the process around the categorisation of treaty actions (JSCOT 2020).

## Trade agreements are legally binding, difficult to revoke, and deal with domestic laws and policies that require greater transparency and accountability

Trade agreements are legally binding and have stronger enforcement mechanisms and penalties than United Nations human rights and environment treaties, which rely on naming and shaming. All trade agreements contain a government-to-government dispute process which can ultimately result in trade sanctions. This means that one government can lodge a dispute with a tribunal if it can claim that another government breaches the terms of the agreement. If the complaint is found to be valid, the tribunal can allow the successful complaining government to ban or tax the products of the other government.

Public pressure for the trade agreement process to become more open and democratically accountable has developed over the last 20 years because trade agreements now deal not only with

reductions in tariffs and quotas on goods and agriculture, but with a wide range of issues that affect communities and should normally be decided by parliament.

These include stronger medicine monopolies than the standard 20-year monopoly on new medicines, foreign investor rights to sue governments over changes to domestic laws and policy including health and environmental laws, and regulation of essential services, including health, education, aged care, child care, water, energy, telecommunications and financial services. They also include digital trade regulation, temporary workers, regulation of local industry policy and government procurement, product standards and labelling standards.

Since Australia now has very low tariffs, concessions on such issues are often traded off against increased access to other countries' markets through lower tariffs or quotas for Australian exported goods, services or agricultural products.

Decisions about such issues as medicines policy and other forms of public interest regulation should be debated publicly and decided by parliament, not traded off behind closed doors. The secrecy of the trade agreement negotiating process means that these issues are effectively removed from democratic debate and parliamentary scrutiny before the agreement is signed. Parliament does not vote on these concessions, only the enabling legislation for the agreement. Such legislation mostly involves tariff changes.

However, the length and complexity of trade agreements have expanded so that they now often include up to 30 chapters and thousands of pages of text. This text, covering all the topics listed above, can constrain the regulatory ability of future governments and the capacity to respond to change like economic crises, climate change and the current COVID-19 pandemic. Under the current process parliament does not debate or vote on the many regulatory issues in the text of trade agreements.

Trade agreements are also difficult to withdraw from, especially if they involve more than one party. The terms of most trade agreements require that any government wishing to withdraw from them must compensate the other parties for loss of market access. This economic penalty can be an effective deterrent for governments considering withdrawing from trade agreements.

In short, trade agreements are legally binding with heavy penalties, and are difficult to revoke. They have increasingly complex commitments on laws and policy that should normally be decided through open democratic parliamentary processes. This should mean that the process for negotiating, signing and ratifying trade agreements should be subject to the highest levels of public debate, scrutiny and democratic accountability to ensure that the benefits outweigh the costs. But this is not the case. The current trade agreement process is secretive and lacks democratic accountability.

The current process is as follows:

- 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.
- Cabinet makes the decision to sign the completed agreement (which is then done by the Federal Executive Council, comprising the Governor-General and all serving Ministers and Parliamentary Secretaries (DFAT 2013). Signing of the text usually takes place before the text becomes public and without independent evaluation.
- Only after the agreement is signed is the text tabled publicly in Parliament and reviewed by the 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 is done by DFAT, the department that negotiated the agreement, and it always gives 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 ratified the enabling legislation, the agreement is ratified through the exchange of letters between governments and comes into force at a specified date.

Since the *Trick or Treaty Report* in 1996, which resulted in the establishment of the current process, the trade agreement process has been the subject of continuous debate and three parliamentary inquiries, in 2003, 2012 and 2015, all of which recommended increased transparency and accountability. The 2015 report was aptly called *Blind Agreement*.<sup>1</sup>

The need for a more open and accountable trade agreement process has been highlighted by the COVID-19 pandemic. The pandemic has exposed the inflexibilities and flaws in current trade agreements and policies. These include overdependence on global production chains, limits on policies to develop local manufacturing capacity and procurement policies, the entrenchment of medicine monopolies in trade agreements, and rights for foreign investors to sue governments over actions taken to save lives.

The AFTINET submission and many other submissions to the Joint Standing Committee on Foreign Affairs Defence and Trade inquiry on the impact of the pandemic on trade policy have recommended reviews of current trade agreements and policies to address these flaws. A more open, accountable and democratic process with more comprehensive inputs from a broader range of stakeholders would assist in developing trade agreements that could avoid such flaws (AFTINET 2020b).

## Case studies of trade agreement restraints on domestic law and policy

As explained above trade agreements increasingly deal not only with traditional trade issues like reduction of tariffs and quotas on goods and agriculture, but with a wide range of regulatory issues which would normally be debated and legislated through the democratic parliamentary process.

There are many proposals in trade agreements which impact on the ability of future governments to regulate, but which are not debated or voted on by Parliament. Below are some case studies.

### The Australia-US Free Trade Agreement (AUSFTA)

At the beginning of the AUSFTA negotiations, the US government made it clear that it was pursuing changes to Australian domestic regulation on behalf of its largest export industries, including the

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<sup>1</sup> Senate Foreign Affairs, Defence and Trade References Committee (2003) *Report: Voting on Trade*, Canberra; Joint Standing Committee on Treaties (2012b) *Report on the Inquiry into the Treaties Ratification Bill 2012*, Canberra; and Senate Foreign Affairs, Defence and Trade References Committee (2015) *Blind Agreement: Report on the Commonwealth's treaty-making process, particularly in light of the growing number of bilateral and multilateral trade agreements*, Canberra.

pharmaceutical, media, information technology and other industries (Zoellick 2002). These goals were pursued in the interests of these US industries, regardless of the rights and interests of Australians.

Although the US negotiators did not achieve all their goals, the AUSFTA resulted in changes to Australian law and regulation in the following areas:

- Strengthening of monopoly patent rights on medicines, through changes to the Therapeutic Goods Act, which contribute to delaying the availability of cheaper generic medicines (Lopert and Gleeson 2013).
- Extensions of Copyright terms and conditions, which meant longer payment periods for royalties on creative works, from life of the author +50 years to life of the author +70 years, and stronger penalties for breaches of Copyright. This has meant extra costs for consumers, libraries and educational institutions. Australia is a net importer of copyrighted goods. The Productivity Commission quoted a 2004 study which showed that these changes increased net royalty payments to overseas copyright holders by 25% or \$88 million per year (Productivity Commission 2010:166).
- Reductions and restrictions on Australian content for digital media (DFAT, AUSFTA text 2004 Annex II).
- Reductions in the ability to have local content provisions in government procurement (DFAT, AUSFTA text 2004 Chapter 15).

It can be argued that some governments see trade agreements as an opportunity to lock in changes to domestic law and policy which would not survive democratic parliamentary scrutiny. For example, a Review of Pharmaceutical Patents criticised the strengthening of patent monopolies on medicines at the expense of consumers and government revenue, and reviews of copyright law have consistently criticised the strengthening of copyright law at the expense of consumers (IP Australia 2013, Burrell and Weatherall 2008).

The 2016 Productivity Report on Intellectual Property Arrangements found that Australia's intellectual property policy had been "constrained" by trade agreements. The report criticises a 'more is better mind set' on strengthening intellectual property rights and states:

International agreements that commit Australia to implement specific IP provisions — such as the duration of patent or copyright protection — have worked against Australia's interests. These agreements typically involve trade-offs, and keen to cut a deal, Australia has capitulated too readily.

The report concludes:

greater use of independent and public reviews, and more effective consultation, would improve treaty-making processes (Productivity Commission 2016: 26).

### Investor-State Dispute Settlement (ISDS)

ISDS allows a single foreign investor to sue a government for damages in an international tribunal if a change in law or policy can be claimed to harm their investment. ISDS provisions have been included in the text of some trade agreements but do not require changes to Australian law and have not been debated or voted on by parliament.

ISDS is a separate process from the government-to-government dispute process found in all trade agreements. It is highly controversial and is only included in some agreements. ISDS was so controversial that the Howard Coalition government did not agree to include it in the AUSFTA in 2004,



and the Productivity Commission recommended against its inclusion in trade agreements in 2010 (DFAT AUSFTA text 2004, Productivity Commission 2010:274).

ISDS has been rejected by the low-income majority of countries in the 164-member WTO, but has been included in some preferential regional trade agreements like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership between 11 countries, and some bilateral trade and investment agreements. But ISDS has been excluded from the current negotiations for the Australia-EU Free Trade Agreement and from negotiations for the 15-member Regional Comprehensive Economic Partnership between Australia, New Zealand, Japan, China, South Korea and the 10 ASEAN countries (DFAT 2020, Ranald 2019b).

ISDS tribunals are staffed by practising advocates, not independent judges, and there are no precedents or appeals, leading to inconsistent decisions (French 2014, Kahale 2014).

There are now over 1,000 ISDS cases, many against low income countries (UNCTAD 2020a), with costs awarded against governments amounting to hundreds of millions or even billions of dollars (Transnational Institute 2017, Tienhaara 2019).

The US Philip Morris tobacco company could not use ISDS in the US Australia FTA because community opposition had kept it out of that agreement. The company shifted some assets to Hong Kong and used ISDS in a Hong Kong investment agreement to claim billions in compensation from the Australian government for Australia's plain packaging legislation. Defeating this case took a total of seven years, cost the Australian government \$12 million in legal costs, and other countries delayed similar regulation pending the result (Ranald 2014, Ranald 2019a).

There are now ISDS cases against government regulation to reduce carbon emissions and combat climate change. For example, the US Westmoreland Coal Company is suing Canada over a decision by the Alberta province to phase out all coal powered energy (Tienhaara 2018).

ISDS rules could result in cases from global companies claiming compensation for government actions during the pandemic that reduced their profits but were essential to save lives.

Peru cancelled road tolls to facilitate internal transport of essential goods during the pandemic, and has been threatened with an ISDS case by private road toll operators (Sanderson 2020).

Legal firms specialising in ISDS are already advising corporations on possible cases. An international arbitration law firm has told its clients:

While the future remains uncertain, the response to the COVID-19 pandemic is likely to violate various protections provided in bilateral investment treaties and may bring rise to claims in the future by foreign investors...While States may invoke *force majeure* and a state of necessity to justify their actions, as observed in previous crises that were economic in nature, these defences may not always succeed (Aceris Law 2020).

Legal scholars critical of ISDS have confirmed that after the pandemic governments could face claims for compensation from global corporations. They have called for all governments to withdraw consent from ISDS rules to avoid an avalanche of cases relating to the pandemic (International Institute for Sustainable Development 2020).

UNCTAD, the UN body which monitors ISDS cases, has also acknowledged this danger (UNCTAD 2020b: 11-12). Prominent global economists and lawyers led by Jeffrey Sachs have called for a moratorium on ISDS claims relating to government actions during the pandemic (Columbia Centre on Sustainable

Investment 2020). Six hundred and thirty civil society groups have written to governments about the dangers of such cases, asking them to withdraw from ISDS arrangements (Civil Society Organisations 2020).

In short, ISDS is an example of a provision in trade agreements which can expose governments to risks of costly litigation over health, environment and other public interest regulation which should not be included in trade agreements.

### The Australia-EU Free Trade Agreement: demands for 3-5 years additional monopolies on biologic medicines

We only know about this proposal because the EU has published this proposed chapter for intellectual property rights as part of publication of its proposals for the current negotiations of the EU-Australia FTA. The EU has been publishing its negotiating proposals in trade agreements since 2015 (EU 2015).

Representing the interests of its powerful pharmaceutical manufacturing industry, the EU is seeking stronger monopolies on medicines, including the most expensive biologic medicines used to treat cancer and other life-threatening diseases. This would delay the availability of cheaper versions of those medicines.

Pharmaceutical companies already have 20-year monopoly on new medicines. As the monopoly period comes to an end competitor companies prepare to produce cheaper versions of medicines under patent. However there is a separate monopoly arrangement which covers access to the data needed to produce cheaper versions, known as data protection. In Australia the period of data protection is currently 5 years.

The EU text is seeking an additional 3 to 5 years of data protection for biologic medicines, which could delay the production of cheaper medicines for a further 3 to 5 years (EU 2020: article X46, p. 28).

Under Australia's Pharmaceutical Benefit Scheme (PBS), the government subsidises the cost of medicines to make them affordable. If Australia agreed to the EU proposal, taxpayers' funds will be used to continue paying higher prices for biologic medicines for longer through the PBS. The cost would be hundreds of millions of dollars per year.

A study published by public health experts in the *Australian Health Review* in 2017 showed that the cost of biologic medicines was more than \$2 billion in 2015-16 alone. This could be reduced by 24%, or \$480 million per year, if cheaper forms of these medicines had been available sooner (Gleeson *et al* 2017).

It would clearly not be in the public interest for the government to agree to EU demands for longer medicine monopolies, which would result in higher costs to the PBS of hundreds of millions of dollars per year and fewer resources for other key health needs. This is even more relevant since the COVID-19 pandemic and the need for affordable access to both treatments and vaccines for the virus.

Yet the Australian government has not made this information public. We only know about this proposal because the EU has published its own negotiating proposals.

## The Singapore Digital Economy Agreement: regulation of cross-border data flows and source code

According to the summary published on the DFAT website, Australia has made extremely deregulatory commitments in the Singapore-Australia Digital Economy Agreement concluded in March 2020 (DFAT 2020). The summary is consistent with the demands of global technology companies including Google, Facebook and Amazon, for trade rules which do not restrict the free flow of data across borders, that prevent governments from requiring that data be stored locally, and prevent governments from requiring that source code be shared.

The agreement was negotiated behind closed doors between October 2019 and March 2020. The text of the agreement will not be made public until after it is signed.

This deregulatory approach which allows global companies to transfer data overseas and to forbid scrutiny of their source code has been enshrined in a trade agreement despite the recommendations of the Australian Competition and Consumer Commission (ACCC) Digital Platforms Report. The report recommended more, not less, regulation of such companies to protect consumer privacy and prevent discriminatory use of source code and algorithms and restrictive trade practices (ACCC 2019).

The ACCC recommendations for more regulation arise from a series of scandals about the behaviour of global technology companies including Facebook and Google data abuse scandals; anti-competitive practices by Facebook, Google and Amazon; Apple's tax avoidance; Uber classifying itself as a technological platform to avoid regulation and enable exploitation of workers; and the human rights risks of facial recognition software. These examples are detailed with references in the ACCC Report and AFTINET's submission (ACCC 2019, AFTINET 2020a).

The government has taken the same deregulatory approach in the WTO plurilateral negotiations for an e-commerce agreement which are being conducted behind closed doors in Geneva.

AFTINET has criticised this approach in a detailed submission to DFAT because it pre-empts regulatory recommendations made by the ACCC and by a review of the human rights aspects of digital trade conducted by the Australian Human Rights Commission (AFTINET 2020, Australian Human Rights Commission 2019).

However, when Australia's COVID-19 tracing app was launched amid some controversy about privacy protections in April 2020 the government hastened to reassure potential users that their privacy would be protected, and their data would not be abused.

The government claimed that the Biosecurity (Human Biosecurity Emergency) Determination 2020, Section 7 states that the data for the app must be stored in Australia (Commonwealth of Australia 2020). The government also promised to reveal the source code for the tracing app, so that it could be examined by IT privacy experts (Crozier 2020).

This appears to be a major inconsistency.

On the one hand, the government is promising that data from the COVID-19 tracing app must be stored in Australia and source code must be made public to protect privacy.

On the other hand, the government has just concluded a legally-binding trade agreement which enables global companies to store data overseas and keep source code secret. The difference appears to be based on the fact that the COVID-19 app was exposed to public debate and the government had

to commit to local storage of data and publication of source code in order to gain public confidence in use of the app.

The Singapore and WTO plurilateral negotiations have been conducted in secret, amid intense lobbying from global technology companies with an interest in cross-border data flows and secrecy of source code.

The same privacy protections the government is promising for the COVID-19 tracing app should apply to all future digital technology applications. This should mean that the text of the Singapore agreement should be changed if needed and that similar contradictory commitments should be excluded from other digital trade negotiations, including the WTO plurilateral e-commerce negotiations in which Australia is playing a leading role. The text of both of these agreements should be released for public and parliamentary debate before signing.

All of these examples support the argument that the full text of trade agreements should be released for public and Parliamentary scrutiny before they are signed, and should be voted on by Parliament.

***Recommendations:***

1. Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, health, gender and environmental impacts which are expected to arise.
2. There should be regular public consultation during negotiations, including submissions from and meetings with all stakeholders, release of negotiating texts, and regular reports to JSCOT and parliament.
3. The Australian government should follow the example of WTO multilateral negotiations and the European Union and should release the final text of agreements for public and parliamentary discussion before they are authorised for signing by Cabinet.

## The role of JSCOT in respect of trade-related agreements, including during the negotiation phase and the categorisation of treaties

We are not aware of the details of consultation processes between DFAT and JSCOT during the negotiation phase of trade agreements. However we believe it would be in the public interest for JSCOT members and other parliamentarians to be informed about the progress of negotiations and to have access to negotiating texts as recommended above.

The current process is that the text becomes public only after it is signed. It is then tabled in Parliament for up to 20 sitting days (depending on the status of the agreement) together with a National Interest Analysis and a Regulatory Impact Statement and then reviewed by JSCOT (DFAT 2013b).

There are three categories of treaties:

- **Category 1** - major treaties which the Committee is required to report on within 20 joint sitting days;
- **Category 2** - treaties which the Committee is required to report on within 15 joint sitting days; and

- **Category 3** - treaties considered to be 'Minor treaty actions' which the Committee generally approves without a full inquiry.

Most trade agreements are Category 1 treaties. We believe this is appropriate because they are major legally enforceable documents which cannot be easily revoked, and as such should be subjected to as much public and parliamentary scrutiny as possible.

Because the JSCOT has the task of reviewing all treaties, it has a heavy work schedule and has to review several treaties at the same time. This means that in many cases it receives few submissions and holds only one hearing in Canberra. It can only justify holding hearings outside Canberra if it receives many submissions and there is evident public interest in the agreement.

The Committee is therefore hard pressed to thoroughly analyse trade agreements, which are often highly technical documents of thousands of pages.

The National Interest Analysis and Regulatory Impact Statement are prepared by DFAT, which is the Department responsible for negotiating the agreement. This means they inevitably recommend in favour of the agreement. There is no independent assessment of the costs and benefits of the agreement.

The government of the day has a majority of members of this Joint Committee, which means the Committee report almost always recommends that the implementing legislation should be passed. The fact that the agreement has been signed before release of the text to the Committee gives momentum to the process. JSCOT has only once recommended against an agreement, after the EU rejected the Anti-Counterfeiting Agreement (JSCOT 2012a).

JSCOT itself has also made recommendations for greater transparency in trade agreement negotiations including that the costs and benefits of agreements should be assessed independently (JSCOT 2012b: 15, JSCOT 2019: xvii).

Given the complexity and the differences between trade agreements and other treaties summarised above, AFTINET recommends that the joint committee have two sub-committees, one dealing with trade agreements and the other dealing with all other treaties.

If there were a sub-committee dealing specifically with trade agreements, it would have more time and capacity to play a greater role in the parliamentary process.

### ***Recommendations***

4. The current National Impact Assessment process is inadequate. After the text is completed and released, but before it is signed, comprehensive independent studies of the likely economic, regional, health, gender and environmental impacts of the agreement should be undertaken and made public for debate and consultation and review by parliamentary committees.
5. There should be a separate sub-committee of JSCOT to deal with review of trade agreements. This sub-committee should review the text of a trade agreement which has been released before signing with the independent assessment of its costs and benefits, and make a recommendation to Parliament.
6. The categorisation of trade agreements should not be changed in a way that would reduce scrutiny of trade agreements.

## The effectiveness of independent analysis to inform negotiation or consideration of trade agreements

In the past, preferential trade negotiations were often accompanied by predictive feasibility studies based on computable general equilibrium (CGE) econometric modelling. These studies build mathematical models of the economy based on assumptions that bear limited relation to real world economies.

The assumptions include that all tariff and non-tariff barriers will be removed, that there will be full employment, perfect labour mobility, no income distribution effects and no trade balance effects. By assuming away negative effects, these models almost always produce results that predict future increases in economic growth, usually after 10 to 15 years. There is a substantial economic literature that has criticised predictive GCE models and questioned their results (Taylor and von Anim 2006).

The reality is that there are winners and losers from most trade agreements. Studies of the impacts of preferential trade agreements based on actual outcomes and more realistic assumptions, often show minimal change or negative impacts.

The AUSFTA, negotiated by the Howard and Bush governments and implemented in 2005, provides the best example to compare predictive studies with post-implementation studies. It included chapters on trade in goods, services, investment, government procurement and an intellectual property chapter which applied US standards and resulted in expansion of both copyright and medicine monopolies. However, after a fierce public debate, it did not include ISDS.

There was a battle between different predictive feasibility studies while the agreement was being negotiated, which demonstrated the extent to which CGE modelling results depended on the assumptions of particular models.

The Howard government commissioned the Centre for International Economics (CIE) to do econometric modelling of the AUSFTA in 2001. This predictive study found that the immediate removal of all trade barriers would result in an increase in Australia's GDP of 0.3% after 10 years (CIE 2001).

Another study by ACIL consultants for the Rural Industries Research and Development Corporation in 2002 assumed only limited removal of US agricultural trade barriers. This study found that there would be net losses to the Australian economy (ACIL 2003).

The final text of the AUSFTA, published in 2004, showed that the US gained more access to Australian markets than vice versa. The National Farmers Federation (NFF) said it was 'not a free trade agreement' because there was no additional Australian access to the sugar market, and increased access for other farm products was very limited with long lead times (NFF 2004). There was limited access to the US market for Australian manufactured products, and for government procurement.

More econometric studies were conducted in 2004, based on these actual outcomes. A second CIE study showed gains for Australia resulting from agricultural and merchandise trade were marginal but claimed huge gains from reduced equity risk for US investors, resulting in increased US investment in Australia, and therefore a net economic gain (CIE 2004). The assumptions about reduced equity risk were so far outside conventional econometric modelling assumptions that ANU Professor Ross Garnaut said that 'they did not pass the laugh test' (Garnaut, quoted in Armstrong 2015:4). Other

studies based on actual outcomes estimated the economic gains were marginal or negative for Australia (Dee 2004, National Institute for Economic and Industry Research 2004).

The AUSFTA's limited market access was criticised by the Australian Industry Group, the peak body for manufacturing industry, which surveyed its members in 2010. The survey found that eighty per cent said that the AUSFTA was not very effective in improving export opportunities, and eighty-five per cent said it had failed to help in setting up operations in the US (Australian Industry Group 2010).

A 2010 Productivity Commission report concluded that predictive studies for bilateral and regional trade agreements had produced 'overly optimistic expectations of their likely economic effects'. The report used its own model based on actual outcomes and more realistic assumptions to conclude that the economic effects of bilateral and regional trade agreements, were 'modest' for the Australian economy as a whole and that there was 'little evidence to indicate that preferential agreements have provided significant commercial benefits' (Productivity Commission 2010: xxxvi, xxv and xxxv).

The report also noted that AUSFTA increased the rights of patent holders, including medicine patents, and payments to copyright holders. It concluded that, since Australia is a net importer of patented and copyright products, AUSFTA imposed net costs on the Australian economy, but that these costs had not been included in the econometric modelling (Productivity Commission 2010: 259, 260, 263).

In 2015 ANU economist Shiro Armstrong applied an updated dataset to the Productivity Commission's model to measure the economic impact of the agreement (Armstrong 2015). This study measured the trade diversion effects of the actual outcomes of the AUSFTA. Trade diversion can occur because preferential treatment for one trading partner may result in trade being diverted from more efficient and competitive suppliers in other countries.

The study concluded that the agreement diverted trade away from other lower cost sources. Australia and the United States had by 2012 reduced their trade by US\$53 billion with the rest of the world and were worse off than they would have been without the agreement. Although there was an increase in Australia's trade with East Asian economies over this period, this trade would have grown more without the trade diversionary effects of the AUSFTA. The study also concluded that there was no increase in the share of US investment relative to other foreign investment (Armstrong 2015: 10-13).

In the case of the Japan, China and Korea FTAs, concluded in 2014-15, only one post-agreement study was conducted on the combined impacts of all three agreements. Even with the usual favourable assumptions, this predicted very small economic gains after 20 years of 0.05% of GDP, and net employment gains of only 5,434, described by *The Age* economics editor as "hardly any jobs" (CIE 2015: 29, Martin 2015).

The debate about the assumptions of such studies, and their variable results, may have contributed to the fact that they have fallen out of favour with government. The Coalition government refused to fund a study of the post-agreement economic outcomes of the TPP-12 (Hutchens 2016), and has not funded studies of the CPTPP (TPP-11) or bilateral agreements with Peru, Indonesia and Hong Kong.

However, the Productivity Commission recommended in 2010 that the text of trade agreements should be published before they were signed and that independent studies of the costs and benefits of actual outcomes with realistic assumptions should be carried out:

"The government should commission and publish an independent and transparent assessment of the final text of the agreement, at the conclusion of negotiations, but before an agreement is signed" (p.312).

Such studies could then inform the decision about whether the agreement should be signed.

JSCOT itself has also recommended that such studies should be conducted (JSCOT 2019: xvii).

Given the impact of trade agreements on public health, including the cost of medicines, on public health, labelling of tobacco and alcohol products and increased trade and availability of processed food, public health academics and advocacy groups also recommend that public health impact studies be done of the completed text of trade agreements before they are signed. Environment and women's advocacy groups have also supported environmental and gender impact studies being done of the completed texts before they are signed.

All of these studies could inform the decision about whether an agreement should be signed.

The EU conducts sustainability impact studies of the likely economic, health, environment and gender impacts of trade agreements before they are signed (EU 2019).

## The consultation process undertaken by the Department of Foreign Affairs and Trade (DFAT) before and during the negotiation of trade agreements

The current consultation process is very one-sided. Stakeholders can make their views known to the Department of Foreign Affairs and Trade (DFAT), but, since negotiations are confidential, they are given very little information about the detail of negotiations or whether their views have had any impact.

After Cabinet has made the decision to commence trade negotiations, invitations for submissions are placed on the DFAT website. For some but not all trade agreements, meetings are held on request with stakeholders on particular topics of interest, but discussion is limited by lack of access to the text.

For some trade negotiations, DFAT also holds more general briefing meetings with a range of stakeholders, where questions can be asked. However departmental officers are not permitted to reveal details of any text being negotiated, so the answers to questions are often limited.

DFAT also now holds two meetings per year in Canberra, at which there are very brief summaries of the state of all current negotiations. Such meetings deal with up to 20 or more negotiations and topics in two-three hours, which gives very little time for questions and discussion.

### **The Trans-Pacific Partnership (TPP-12)**

In the case of the TPP-12 involving Australia, the US and 10 other Pacific Rim governments, general briefings for Australian stakeholders were held twice a year in several cities, with briefings on particular issues held more often when requested by stakeholders.

Negotiations themselves were held in different locations hosted by the TPP governments. Until 2015, stakeholders were permitted to attend negotiations and present papers to negotiators on particular issues. However there was little feedback about the impact of these presentations and no official access to the negotiating texts. Leaked texts provided the only detailed information. The negotiations for the TPP-12 were completed in November 2015.

After the US withdrew in January 2017, there was no stakeholder presence or consultations at negotiations between the 11 remaining countries for the renamed Comprehensive and Progressive Agreement for Trans-Pacific Partnership in 2017 before the final text was signed in March 2018.



## **The Regional Comprehensive Economic Partnership (RCEP)**

The RCEP was negotiated from 2012, originally involving 16 countries. These were Australia, New Zealand, India, China, Japan, South Korea and the 10 ASEAN countries. India withdrew in November 2019.

There was less consultation with civil society groups about the RCEP than with the TPP-12.

We do know there was strong representation of business at RCEP negotiating rounds, because there were reports of seminars hosted by corporate consultancies and business organisations which gave presentations to RCEP negotiators. For example, the Asian Trade Centre (ATC), a corporate consultancy funded by international companies and trade associations and some governments<sup>2</sup>, stated on its website:

The ATC has been active on RCEP work since 2014. We have been directly involved in 15 RCEP negotiation rounds as of October 2018 through different types of activities such as stakeholder engagement sessions, workshops, panels, round-table discussions and meetings. In addition to that, the ATC has also been involved in indirect and informal activities to contribute to the RCEP negotiations such as drafting materials on RCEP-related topics and providing input from the business community (Asian Trade Centre 2018).

In contrast, there were no formal consultations with civil society representatives at RCEP negotiating rounds until 2016.

Requests for consultation about the negotiations from 2013 resulted in some contact with individual Australian negotiators about specific issues and the general DFAT briefings about all trade agreements in which the RCEP negotiations were mentioned.

It was not until March 2015, when negotiating text on the intellectual property and investment chapters were leaked and became public, that DFAT agreed to have briefings in Australia involving both civil society and business.

In April 2016 RCEP negotiations were held in Perth and for the first time both civil society groups and business groups were given half a day to give short presentations to negotiators from RCEP countries on specific topics. Business groups also had separate meetings with negotiators as they had been doing from the beginning of the negotiations.

After the Perth consultations, formal business presentations continued as described above. Depending on the attitude of the host governments there were also some opportunities given to civil society groups to make brief presentations to negotiators meeting in different countries from 2016 to July 2019.

After July 2019 there were no more formal meetings with civil society groups at negotiations, which were announced as completed in November 2019, at which point India left the negotiations. The text is still secret and is undergoing final legal scrub and translation (DFAT 2019).

Despite numerous representations and letters to RCEP governments signed by 94 civil society organisations from RCEP countries (Civil Society Organisations 2019), the text will not be released until after the planned signing by the remaining 15 countries in November 2020.

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<sup>2</sup> Asian Trade Centre (2018) Funding Sources, Singapore <http://asiantradecentre.org/funding-sources>

In summary, consultations between civil society groups and both Australian and international negotiators were held for the TPP-12 negotiations but ceased for the TPP-11 negotiations which became the CPTPP. Consultations for civil society groups with Australian and international negotiators for the RCEP did not take place at all from 2012 to 2015, were variable from 2016-19, and ceased after July 2019.

All of these consultations for both agreements were limited by the fact that the text remained secret and that negotiators could not answer detailed questions about the text.

## New Ministerial Advisory Committee not representative of community stakeholders

On June 17, 2020 the Trade Minister announced a new Ministerial Advisory Committee to “enhance transparency” and “help inform the government’s ongoing free trade agreement agenda”. Of eighteen non-government members, only two are from community organisations, the Australian Workers’ Union and the Consumers’ Federation of Australia (Birmingham 2020).

Most of the community organisations that have been most engaged and made submissions to government and parliament on trade policy over the last two decades have been excluded. Amongst these are the ACTU, AFTINET, public health, environment, church, aid and development and digital rights organisations. These organisations represent millions of Australians.

We understand that DFAT will continue its limited consultations described above with both industry and the broader range of community groups. However the Ministerial Advisory Committee does not enhance transparency for the majority in the community.

## Changing international practice and examples of greater transparency in trade negotiations

Over the last two decades the growing public opposition to secrecy in trade negotiations has resulted in increasing numbers of examples of greater transparency.

Since 2003, when the World Trade Organisation engages in multilateral trade negotiations, proposed texts, offers and background papers have been placed on the WTO public website (WTO 2003).

In the case of the plurilateral Anti-Counterfeiting Trade Agreement (ACTA), which dealt with the extension of intellectual property rights, there was so much controversy that governments agreed to release the text in 2011 before it was signed (ACTA 2011).

WTO practice and the ACTA are precedents for both the release of negotiating documents and the release of final text before it has been signed by governments.

The EU Commission announced in January 2015 that it would release its own negotiating proposals, and would release the full text of the trade agreements at the end of the negotiations for public and parliamentary debate before they are signed (EU 2015).

The EU is currently releasing its negotiating texts in the Australia-EU free trade negotiations now being conducted, and will release the completed text before it is signed (EU 2020).

## Constitutional issues: experts say that greater Parliamentary role is compatible with the Constitution

It has been argued that Parliament cannot play a greater role in the trade agreement process because the Australian Constitution, based on the Westminster system, gives treaty-making powers to the Executive.

However constitutional experts Prof George Williams, University of New South Wales, and Prof Anne Twomey, University of Sydney, have argued in submissions to a previous Parliamentary Inquiry that a greater role for Parliament could be consistent with the Australian Constitution.

Based on the historical development of treaty-making in Australia, Professor Twomey argues that it would be constitutional for the treaty-making power of the Executive to be limited by a provision for the approval of both Houses of Parliament. She quotes Professors Winterton and Campbell's opinions that the power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. This would be the case if the Parliament did not purport to exercise the power to ratify treaties, but instead made the approval of its two Houses a condition precedent to the exercise by the Government of its executive power (Twomey 2012: 2).

Professor Twomey notes that there are several examples in the Westminster system in which the decisions of the Executive on international agreements are subject to Parliamentary approval in the way outlined above. These include the United Kingdom and Ireland. In both cases the treaty is tabled in Parliament before signing and Parliament has the ability to accept or reject it (Twomey 2012:2).

Professor George Williams has described the democratic deficit in the process of treaty-making, particularly in relation to trade agreements like the AUSFTA. He says JSCOT should have a clearly mandated role early in the process of inquiring into treaty actions, before such instruments are signed by the executive (Williams 2012: 5).

He also stated in evidence to the JSCOT:

"I have also looked at the submission of Professor Twomey and I agree with her conclusions and the statements made. I think it is possible for parliament to legislate to not take over the ratification function but to make it subject to a decision of parliament" (JSCOT 2012b:18).

Based on these expert opinions, the JSCOT 2012 inquiry concluded that making the Executive decisions on treaties subject to a decision of Parliament would not be unconstitutional (JSCOT 2012b:19).

### **Recommendations:**

7. Legal experts agree that the Executive power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. There is no constitutional barrier to Parliament playing a greater role in the treaty decision-making process. After release of the text, the JSCOT review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should then decide whether the Executive should approve the agreement.
8. If the agreement is approved by Parliament, and following approval of signing by the Executive, Parliament should then vote on the implementing legislation before ratification.

## Independent and public reviews of outcomes of trade agreements 5 years after implementation

Currently there is an internal DFAT Post-Implementation Review process five years after trade agreements come into force, conducted by DFAT under guidelines of the Office of Best Practice Regulations (Office of Best Practice Regulations 2020).

These reviews are not well-publicised and are not independent, since they are conducted by the department that negotiated the agreements. This means many stakeholders are not aware of them, their results are not publicised to parliament or the public, and they do not appear to inform future decisions. This process lacks transparency and public accountability.

### ***Recommendation***

9. There should be independent public reviews of trade agreement outcomes five years after entry into force, with independent public assessments of economic, regional, health, gender and environmental costs and benefits.

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