

## **THE AUSTRALIA-US FREE TRADE AGREEMENT: A CONTEST OF INTERESTS**

**Patricia Ranald**

The first anniversary of the implementation of the Australia-US Free Trade Agreement on January 1, 2006 was marked by two events that encapsulated the clashes of interests expressed in debates about the economic impact of the agreement and its impacts on social policies like access to medicines that had raged during its negotiation.

The first event was the publication of trade figures that revealed that Australia's trade deficit with the US had increased by \$1.3 billion in the twelve months to October 2005. Australia's exports to the US fell by 4.7%, while US exports to Australia rose by 5.7% (Australian Bureau of Statistics, 2005). These figures were accompanied by media stories featuring interviews with Australian agricultural and manufacturing exporters experiencing continued practical difficulties in gaining access to US markets (Metherall and Wade, 2006, Sutherland, 2006a). Opinion pieces in relatively conservative newspapers like the *West Australian* and the *Brisbane Courier Mail* also questioned the benefits of the agreement (O'Connor, 2006, Carney 2006).

The second event was the announcement by the US government that it intended to use the annual review of the agreement due in March 2006 to seek changes to Australian legislation regulating intellectual property rights and medicines. The US was demanding the removal of an amendment to the implementing legislation of the AUSTFTA, moved by the ALP and supported by the minor parties in the Senate in August 2004 when the government had lacked a majority in the Senate. The amendment seeks to prevent pharmaceutical companies from using spurious legal tactics to extend patents and thus continue to charge higher

prices for their products. The US government also indicated that it wanted to raise other issues about the administration of Australia's Pharmaceutical Benefits Scheme (PBS) that it believed were inconsistent with the agreement and disadvantaged the interests of pharmaceutical companies by restricting prices and removing incentives for investment in innovative medicines (Lewis, 2006). The flood of outraged letters to the editor urging the government not to agree to any changes to medicines policy at the lazy height of the summer holidays reflected opinion polls that showed the majority of Australians saw the agreement as a bad deal <sup>1</sup>.

The Australian Minister for Trade, placed on the defensive, gave assurances that there would be no concessions that would affect the PBS. At the same time he responded positively to demands from farmers that the Australian government seek to have access to the US sugar market, which had been excluded from the agreement. Following the review on March 7, which took place behind closed doors, the US government ruled out any change in access to sugar markets, and the Australian Trade Minister denied that there would be any changes to the ALP amendment, although both said there could be continued discussion of these issues (Office of the US Trade Representative, 2006, Borak, 2006).

This article uses a critical theory approach from the classical political economy tradition to analyse the social forces that supported and opposed the AUSFTA, seeks to explore why the agreement was signed despite widespread public opposition in Australia, assesses the impact of oppositional campaigns on the content of the agreement in some key areas and analyses the environment and labour chapters. It concludes with an assessment of the future of the agreement, and its impact on the prospects of other proposed bilateral agreements.

Critical theory, according to Cox

stands apart from the prevailing order of the world and asks how that order came about. Critical theory . . . does not take

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<sup>1</sup> See for example, the letters pages in *The Australian*, January 5, 2006, p.9, *Sydney Morning Herald*, January 5, 2006, p. 10, *The Age*, January 5, 2006, p. 11. A Lowey Institute Poll in February 2005 showed that only 34% of Australians thought that the AUSFTA was a good deal for Australian, (Cook, 2005).

institutions and power relations for granted but calls them into question by concerning itself with their origins and how and why they might be changing (Cox, 1981:129).

This approach enables analysis of the different interests of powerful economic groups, including transnational corporations and business organisations, on the one hand, and social groups that seek to defend the interests of the less powerful and vulnerable, on the other, in modern democracies. Democratic government institutions are influenced, but not simply determined by, dominant economic interests. Institutions also develop their own histories that in turn influence the development of ideas. State policies often reflect the outcomes of struggles between social forces and their interests (Cox, 1981:137).

### **The US Trade strategy and the Washington Consensus**

Over the last two decades a suite of policies known neoliberalism or as the Washington Consensus has dominated economic theory, and been promoted vigorously by US governments and by the International Monetary Fund, the World Bank and the World Trade Organisation (WTO) (Stiglitz, 2005: 2). They include rapid removal of tariff and other trade barriers, lower taxes for business and high income earners, higher taxes for consumers through goods and services taxes, cuts in government spending, privatisation and user charges for essential services, less regulation of corporations and deregulation of labour markets through lower minimum wages and working conditions. The reduction or removal of measures like social welfare programs and labour regulation, intended to protect the interests of lower income groups, and the redistribution of income to investors, is justified by the need to provide incentives for investment in a globalised competitive market. It is argued that free markets will promote investment that will ultimately provide employment and rising living standards for all. However, empirical evidence of growing national and global inequality, and the failure of these policies to engender economic growth or reduce poverty in many developing countries, has led many to contest them. Some leading economists like Joseph Stiglitz, former chief economist at the World Bank, have become sceptical about the effectiveness of

neoliberal policies. Some developing country governments, notably in the WTO, have also resisted these policies. WTO negotiations collapsed in Seattle in 1999 and in Cancun in 2003, and key decisions had to be postponed in Hong Kong in 2005 (Stiglitz, 2005: 22-3, 88-9).

Using a critical theory approach, it can be argued that these international institutions are promoting regulatory regimes that create a favourable and predictable environment for the interests of capital investment, but are often contrary to the interests of low-income and other vulnerable groups. The process of decision-making through international institutions and agreements has also created resistance. International trade agreements are negotiated behind closed doors to create predictable global investment regimes that are protected from public scrutiny and democratic pressures. But this secrecy itself can create resistance in modern democracies where the public expectation of transparency and government accountability has become part of the legitimisation process for the exercise of political power (Cox, 1994).

### **US corporate Interests and Bilateral Trade Agreements**

Successive US governments have pursued the neoliberal trade agenda through multilateral negotiations in the WTO. In addition, over the last decade the US has pursued preferential free trade agreements intended to remove all trade barriers at a faster pace than multilateral negotiations. The US has pursued such agreements despite the fact that conventional trade economists are critical of such agreements because they give preferential treatment to the partners but exclude others. Studies show that preferential agreements increase trade between the partners, but reduce trade with other countries (Adams, Dee *et al*, 2003). They also require complex 'rules of origin' to ensure that preferential treatment is only given to the products actually produced by the partners. These can themselves become so complex that they become barriers to trade. The WTO itself has criticised the development of a "spaghetti bowl" of preferential agreements (WTO, 2005:19). Generally, preferential agreements, especially bilateral agreements, favour the larger and more powerful economies in the bargaining process. The poorest developing

countries are excluded from such agreements and disadvantaged by them.

US governments have used their leverage as the world's most powerful economy and the host country for many of the largest transnational corporations to pursue bilateral and regional preferential trade negotiations aggressively. The objective is to achieve neoliberal economic goals of deregulation and privatisation more thoroughly and faster than can be achieved through multilateral negotiations, including through changes in domestic regulation. The template was provided by the Canada-US FTA that was expanded to include Mexico and became the North American Free Trade agreement (NAFTA) from 1994<sup>2</sup>.

These agreements seek to impose US-style legal frameworks that increase the legal rights of corporations and reduce the rights of governments to regulate corporate activity in the interests of more vulnerable groups. They are a very clear assertion of particular US corporate interests, and reflect their influence on US governments. This influence has become far more visible in recent years, leading to allegations of corruption of the political process. For example, under the current US government, the influence of pharmaceutical companies through donations to members of Congress has become a public scandal reported in the mainstream media. Elizabeth Drew, writing in the *New York Review of Books*, has documented how pharmaceutical corporations lobbied successfully to insert a provision in the 2003 Medicare Bill to prevent the federal government from negotiating with corporations to reduce the price of medicines. All of the Congress members who supported this provision received substantial campaign donations from pharmaceutical manufacturers. This and other allegations of corporate corruption have led to the indictment of Washington lobbyist Jack Abramoff and Republican Congressman Tom Delay (Drew, 2005: 3).

The US objectives pursued in bilateral trade agreements include greater protection of corporate intellectual property rights and rights to charge high prices for medicines, and corresponding restrictions on access to cheaper generic medicines, removal of restrictions on levels of foreign investment, and the banning of specific requirements that foreign

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2 For an analysis of NAFTA see Cohen, 1997, and Schneiderman, 2005.

investors should contribute to local development, elimination of industry policies or government purchasing policies that favour local firms, reduction of government rights to regulate essential services, including the reduction or abolition of local content laws in film, television and other audio-visual services, and challenges to food regulation and quarantine law where they are seen to harm US agribusiness interests<sup>3</sup>.

Preferential agreements have another strategic advantage for the US in that they can impose neoliberal agendas for others without disturbing US agricultural export subsidy payments. These subsidies are logically inconsistent with the theory of neoliberalism, but have been retained in the US because of the economic and political influence of the agribusiness lobby on successive US governments. Such subsidies are paid to each farm business and so cannot be reduced for the exports to particular countries in preferential agreements. They can only be reduced through multilateral negotiations in the WTO. However US and European governments' resistance to reduction of export subsidies has slowed progress on this issue in the WTO<sup>4</sup>.

This US preferential trade strategy was intensified after September 2001, when US governments explicitly linked trade agreements and military alliances. US Trade Representative Robert Zoellick's letter to the Senate proposing a free trade agreement with Australia referred to "strengthening the foundation of our security alliance" and "promotion of common values so we can work together more effectively with third countries" (Zoellick, 2002: 1).

### **Social forces For and Against the FTA in Australia**

The Australian government decision to pursue preferential agreements was a shift away from its previous commitment to multilateralism, and went against the advice of many trade economists in its own trade bureaucracy and in academia. This decision was made before September

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3 See Ranald, 2004 for more detailed examples of US strategy.

4 There is a vast literature on US agricultural export subsidies. See for example, Capling, 2004.

2001, but was strengthened after September 11 by a substantial shift in Australian foreign policy to give greater weight to the US military alliance in the “War on Terror,” and to join the US military alliance in the invasion of Iraq. In a series of discussion papers culminating in a White Paper, trade policy was linked more explicitly with this new foreign policy than in the past. The government argued that a free trade agreement with the US “would put our economic relationship on a parallel footing with our political relationship” (Department of Foreign Affairs and Trade, 2003a: xvi).

However, the move to support a free trade agreement was initiated by key business interests before 2001. An account by *Australian Financial Review* journalist Mark Davis based on interviews with key government and business players has revealed how the government’s change of policy began in 2000 and was influenced by industry interests and by the change of government in the US. Investors from the wine and other industries were disturbed when the US suddenly raised tariffs on lamb imports in 2000. They lobbied for an FTA in the belief that it would prevent the US from arbitrarily raising tariffs in the future (Davis 2005a: 44).

The Australian Cabinet made the decision to pursue a bilateral agreement soon after the election of George W. Bush in November 2000, but the decision was not publicised. The government then “used 2001 and 2002 to develop an intellectual justification for the shift in Australian trade policy and to create pro-FTA business lobbies in both countries” and “the federal bureaucracy was swung into action to produce the policy advice and economic research to provide intellectual ammunition to support the government’s decision” (Davis, 2005b: 44).

This effort resulted in the creation in 2001 of AUSTA, a business coalition initiated by the Southcorp wine corporation and run by Alan Oxley, director of the APEC Studies Centre, who became the main public Australian business lobbyist for the AUSFTA. Members included the Australian Chamber of Commerce and Industry, the American Chamber of Commerce in Australia, the Australian Industry Group, the Minerals Council of Australia and the Business Council of Australia, all representing major corporations, many of which are US-based transnationals, as well as many individual major US corporations with

subsidiaries in Australia<sup>5</sup>. (AUSTA, 2002) As the negotiations developed, Medicines Australia, with a significant membership of local subsidiaries of US pharmaceutical companies, played a separate role in lobbying for greater rights for pharmaceutical companies in the PBS and intellectual property law<sup>6</sup>. The key missing business player was the National Farmers Federation (NFF). The NFF was reluctant to support an FTA because they were not confident that an FTA would achieve real agricultural market access for Australian farmers and were aware that it would leave US agricultural export subsidies untouched. The NFF leadership were concerned that “the preoccupation with an FTA should not detract from the bigger prize of global agricultural trade liberalisation and that Australia’s farmers would not agree to an FTA that failed to win significant gains in market access.” (Davis, 2005b: 44). The NFF only joined AUSTA after a change in NFF leadership in 2002. These initial concerns of the NFF proved to be accurate when the text of the FTA emerged two years later.

The government commissioned commercial consultants at the Centre for International Economics (CIE) to do econometric modelling<sup>7</sup> of the impact of an FTA. This study found that the immediate removal of all trade barriers would result in an increase in Australia’s GDP of \$US2 billion (\$A4 billion) or 0.3% after 10 years (CIE Consultants, 2001). This somewhat modest result was combined with a more polemical study by Oxley’s APEC Study Centre. This boldly claimed that, since the

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5 These included, Cargill, Caterpillar, EDS Australia, Esso Australia, IBM, Kelloggs, Mobil Oil Australia Pty Ltd and News Limited (AUSTA, 2002).

6 See for example, statements by Kieran Schneemann, Chief Executive of Medicines Australia, defending the AUSTFTA changes to the PBS on ABC Radio and the Sydney Morning Herald, 9-10 February, 2004 (Schubert, 2004, ABC Radio National, 2004).

7 This study and the others discussed below suffered the limitations of most econometric modelling in that it constructed a theoretical model of the national economy based on assumptions of full employment and perfect mobility of labour and capital. For example, these models assume that the middle-aged non-English speaking background process worker from regional or outer-suburban Australia who loses employment as a result of tariff cuts or industry relocation, will glide effortlessly into employment with McDonald’s or Coles in the growing urban services sector. This assumes away the actual unemployment levels experienced in local industries and regions. See Quiggan, 1996, for a critique of these assumptions.



Australian economy was only 4% of the US economy, (roughly the size of the state of Pennsylvania), a free trade agreement would deliver further dynamic but unmeasurable benefits by integrating Australia into the US economy and by adoption of US models of deregulation and business practice (Australian APEC Study Centre, 2001: 48).

The CIE study's assumptions about removal of all trade barriers were questioned by other trade economists, and its results were contradicted by another study with less heroic assumptions done by ACIL consultants for the Rural Industries Research and Development Corporation. This study, also done in 2002, reflected the original scepticism among farmers about agricultural market access, assumed limited market access, and found that there would be net losses to the Australian economy from an FTA (ACIL Consulting, 2003). The government's strategy to control the public debate was exposed when it exerted pressure on the Rural Industries Research and Development Corporation not to publish the study. The study was only made public after it was leaked to a journalist at the *Sydney Morning Herald* in February 2003, several months after its completion (Garnaut, 2003). The subsequent media debate amongst trade economists about the economic modelling contributed to public scepticism about gains from the agreement (Davis, 2003a and 2003 b).

But the major public scepticism about the FTA arose from the US government identification of Australian health, social and cultural policies as barriers to trade and therefore targets in the negotiations. A letter from the US Trade Representative to the US Congress that identified major Australian trade barriers, and publications of the US pharmaceutical industry, alerted community organizations that price controls on medicines under the Pharmaceutical Benefits Scheme, Australian content laws for film and television, quarantine laws, labelling of genetically engineered food and the Foreign Investment Review Board were all seen by the US as targets (Zoellick, 2002, Pharmaceutical Research and Manufacturers of America, 2003). Community groups feared that the disparity of economic power between the US and Australian governments so graphically documented by the APEC Studies Centre would result in a weak bargaining position and the trading away of these policies. These issues became the focus for campaigns against the AUSFTA by public health groups, churches, unions, pensioner,

environment and other community organisations linked through the Australian Fair Trade and Investment Network (AFTINET) and other community networks (Ranald and Southalan, 2003, 2004) Some of these groups formed links through the internet with similar groups in the US, and used these links to lobby against the agreement in both countries. (ACTU and AFL-CIO, 2003, Defenders of Wildlife, Friends of the Earth, National Environmental Trust, et al, 2003).

The information about US targets was available because the US had public processes for Congress endorsement of specific goals for trade negotiations, and a Congressional vote on the whole treaty before final ratification. There were no equivalent public parliamentary processes in Australia, where all decisions about negotiations were made behind the curtain of Cabinet secrecy. Examination by the Joint Standing Committee on Treaties and a parliamentary vote on the implementing legislation only takes place after the deal is done. The Australian Government only published a very general statement about its aims for the negotiations and denied that policies like access to medicines would be affected (Department of Foreign Affairs and Trade, 2003b). However the community debate pressured the trade negotiators to have some consultations with community organisations as well as with business during the negotiations, although they did so with less frequency and frankness than with business. The debate over the secrecy of trade negotiations prompted a Senate Inquiry on trade agreements in 2003 to recommend that Parliament rather than Cabinet should set the objectives for trade negotiations, should commission studies on their social and economic impacts and should vote on the full text of all trade agreements (Senate Committee on Foreign Affairs, Defence and Trade, 2003).

Negotiations began early in 2003 and were completed in mid-2004, under pressure from electoral timetables in both countries. The Trade Minister admitted that he had doubts about the value of the agreement in the last week of the negotiations. The final US offer totally excluded its sugar market, and delayed full access to US beef and dairy markets for eighteen years. However, the Prime Minister overruled the Trade Minister and made the decision to sign the agreement (Wilkinson, 2004). The initial protests of Australian sugar farmers were quelled with a hasty \$440 million ‘restructuring’ assistance package for the sugar industry.

This additional cost did not feature in the econometric modelling commissioned by the government (Lewis and Walquist, 2004, Dee 2004:24)

The AUSFTA prompted the biggest critical public debate ever held in Australia about a trade agreement. There were hundreds of community meetings held around the country, public rallies in Canberra, Sydney, Melbourne, Perth and other cities, many articles in community, union, local and specialised media, over 700 submissions to parliamentary inquiries in 2004 and thousands of letters, postcards and emails sent to politicians. Two books critical of the agreement were subsequently published (Capling, 2004, Weiss, Thurbon and Matthews, 2004). This assertion of various community interests succeeded in influencing public opinion. Polls conducted by Hawker Britton showed a steady decline in support for the AUSFTA, from 65% when negotiations started to 35% in February 2004 when the deal was concluded. This lack of support was confirmed by a Lowy Institute poll in February 2005 showing only 34% supported the agreement (Hawker Britton, 2004, Cook, 2005: 20).

This grass-roots debate was reflected in the mass media. Despite Alan Oxley's corporate-funded AUSTA campaign, the claimed benefits of the agreement were contested fiercely even by mainstream economists, ranging from Professor Ross Garnaut and other prominent academics, to economic writers in *Sydney Morning Herald*, *The Age* and *The Australian*. (Gittens, 2004, Colebatch 2004, Davidson 2004, Wood, 2004). There was widespread media coverage about the impact of the AUSFTA on the price of medicines, including an ABC *Four Corners* television program featuring health experts. (Australia Institute 2003, Drahos and Henry, 2004, ABC 2004). There was also much coverage of the impact on Australian content rules for audio-visual media, with prominent actors and producers challenging the agreement at public events like the Logie television awards (Morello, 2004, Krein and Byrnes 2004).

This public debate prompted the Australian Labor Party (ALP), and the minor parties, (Democrats and Greens) to adopt policies critical of the AUSFTA by the end of 2003. The Leader of the Opposition announced in February 2004 that the ALP would refer the AUSFTA to a Senate Committee and would not support the AUSFTA implementing

legislation if the AUSFTA did not meet specific national interest criteria. This was the first time the ALP had ever conceded that it might oppose a particular trade agreement, and showed the influence of the community campaign (Latham, 2004a). The Senate inquiry provided further opportunities for public submissions, rallies, meetings and media debate.

A second round of econometric studies were conducted in 2004 based on the actual outcomes of the negotiations, as access to both US agricultural and manufacturing markets fell far short of the assumptions of the original studies. The government commissioned CIE consultants to produce a second study that showed gains for Australia resulting from agriculture and merchandise trade liberalisation were marginal. However the study included a chapter that showed huge gains from predicted increased US investment in Australia, and therefore a net economic gain (CIE, 2004). The assumptions about investment were so far outside conventional econometric modelling assumptions that prominent trade economist Professor Ross Garnaut of the Australian National University said that “they did not pass the laugh test” (Garnaut, 2004, p.64). Other studies including one commissioned by the Senate Inquiry Committee, from Philippa Dee, an ANU trade economist formerly employed at the Productivity Commission, estimated that the economic gains from the agreement were marginal or negative for Australia (Dee, 2004, National Institute for Economic and Industry Research, 2004).

The Senate inquiry report, in fact, showed that the AUSFTA did not meet many of the criteria on the national interest set by the ALP policy. (Senate Standing Committee on Foreign Affairs, Defence and Trade 2004). But the ALP divided on factional lines. Key figures in the Right faction, lobbied by business, argued that rejection of the AUSFTA would be seen as anti-business, anti-American and electorally damaging. After a fierce debate, the Left opponents were defeated by the Right majority in the Parliamentary Caucus, which decided to endorse the legislation with some amendments. Community campaigns about the cost of medicines and Australian content rules in audio-visual media were reflected in the amendments, which sought to protect current levels of Australian content in film and television and to prevent pharmaceutical companies from making spurious legal claims to extend patents (Latham, 2004b).

In summary, Australian government support for a bilateral trade agreement was based heavily on specific lobbying from corporate groups, including US-based groups that perceived benefits from an FTA. But the government's own broader political support for the neoliberal economic model also played a role, overcoming traditional "national interest" concerns, including the concerns of farmers disappointed by the exclusion of sugar markets and the long lead times for access to other agricultural markets. Support for neoliberal ideology meant that the government believed that "integration" with the US economy and adoption of US regulatory frameworks was an opportunity to lock in neoliberal policies that would contribute to economic growth, with claimed benefits for all social groups. This ideology was strong enough to motivate suppression of conventional economic studies that showed no benefits to the Australian economy from such an agreement. After September 2001, this neoliberal ideology was reinforced by the perceived need to strengthen the US military alliance. After 14 months of high-profile negotiations, including an Australian visit by President Bush, the Prime Minister was not prepared to walk away from a poor deal, and overruled both the recommendations of the trade negotiators and the doubts of the Trade Minister.

Opponents of the FTA criticised the US economic model, and argued that changes to social policies like access to medicines and reduction of government's ability to regulate in other areas would diminish democratic rights and result in greater social and economic inequality. These opponents succeeded in reducing support for an FTA shown in opinion polls to minority levels, and in persuading opposition parties to adopt policies critical of the FTA. They also influenced the some aspects of the content of the agreement, which does not contain all the extremes of the NAFTA model. However, the ALP in the end supported the FTA implementing legislation, albeit with amendments, as the dominant faction responded to corporate lobbying.

## **Impact Of Oppositional Campaigns on the Content of the Agreement**

The lopsided nature of the agreement in terms of Australian access to US markets is well documented. There is limited access to US agricultural markets, to US manufactured goods markets, and to US government procurement markets. Australia has allowed more market access to the US in all these areas. The Australian government made significant concessions on the regulation of foreign investment, the regulation of services and Australian content rules for film and television. The government adopted aspects of US intellectual property and copyright law that favour the interests of patent and copyright holders over the interests of consumers. The regulation of access to medicines has also been changed to give more rights to pharmaceutical companies. Joint US-Australian committees will discuss future medicines policy, quarantine and food regulation issues (Capling, 2004, Ranald, 2004, Weiss et al, 2004).

However, the US negotiators did not get all they wanted, and it can be argued that the exposure of the negotiating process to public debate and lobbying by community interest groups in key areas exerted pressure on the government that prevented them from making further concessions that would have made the agreement even more lopsided. The impact of oppositional campaigns on the content of the agreement can be seen in three key areas: the lack of an investor-state complaints process, the limited changes to the PBS, and the regulation of genetically engineered food.

Like other trade agreements, the AUSFTA is enforced through a government-to-government disputes process. This means that one government can lodge a dispute about the laws, regulation or policies of the other government if they are alleged to be inconsistent with the terms of the agreement. The dispute is heard by a panel of trade law specialists. If the dispute is found to be valid, the law or policy must be changed or the winning complainant can ban or tax the products of the other government.

NAFTA and all other US preferential trade agreements also contain an investor-state complaints process that allows individual corporations to challenge laws and sue government for damages if their investments are harmed by a law or policy of the government. This process gives far greater direct rights to corporations. Corporations' use of the process under the NAFTA provisions has been the subject of extensive public debate in the US and Canada. US Corporations have used these provisions to challenge Mexican local government environment law, Canadian federal laws banning the fuel additive MMT, and the Canadian public postal system, on the grounds that they were barriers to trade. In the first two cases, the companies won tens of millions of damages from governments (Public Citizen, 2001, Schrybman, 2002, Schneiderman, 2005).

The investor-state complaints process was a major target of community campaigning in Australia, with many submissions to, and lobbying of, the DFAT negotiators, and media commentators using NAFTA examples to oppose it. Fifty-nine prominent community organisations, including the Australian Catholic Social Justice Council, the Uniting Church, the Australian Council of Trade Unions, the Australian Conservation Foundation, and the Australian Council of Social Service called for the exclusion of an investor-state dispute process, arguing that it would be a dangerous weakening of governments' ability to regulate for social and environmental goals. This call and specific opinion pieces on the same theme received widespread media coverage (ABC Radio National 2003, Henry, 2003, Ranald and Southalan, 2003).

This lobbying and public debate influenced the Australian negotiators to hold out against US demands for an investor-state complaints process. They argued that the Australian legal system could be used for legitimate corporate grievances, and the US government did not insist on it as a condition of the agreement (Capling and Nossel, 2006). This was the most significant effect of community interest campaigning on the content of the agreement.

However, the US government did insist on a clause that leaves the door open for such a process to be requested about particular claims in the future, if conditions change, and that the parties shall consult "with a view to allowing such a claim and establishing such procedures"

(AUSFTA Text, Article 11.16.1). Some commentators argue that such a change in circumstance is unlikely (Capling and Nossell 2006). If it does occur, through a change in policy by a future government, it is likely that the community debate that occurred during the negotiations would form the basis for further contestation.

Pharmaceutical lobby groups and US negotiators clearly identified the price control mechanism of the PBS as a target from the outset of the negotiations. In the US, the wholesale prices of common prescription medicines were three to ten times the prices paid in Australia (The Australia Institute, 2003). Under the PBS, the Australian government buys medicines at low wholesale prices by using a panel of experts on the Pharmaceutical Benefits Advisory Committee to compare the price and effectiveness of new medicines with the prices of comparable but cheaper generic medicines whose patents have expired. This is known as reference pricing. The government then makes the listed medicines available at standard subsidised retail prices. The difference between the wholesale price and the subsidised price is the cost of the PBS to taxpayers.

Pharmaceutical companies argued that Australia's price control system through the PBS prevented them from enjoying the full benefits of their intellectual property rights by comparing the price of new drugs with cheaper generic drugs. US pharmaceutical manufacturers argued in their National Trade Estimate Report of December 2004 that the PBS had adopted a series of "increasingly draconian regulatory and budgetary cost control schemes" including restrictive PBS listing and reference pricing (Pharmaceutical Research and Manufacturers of America, 2004: 6).

Community campaigning ensured that the US pharmaceutical companies did not achieve all of their goals and that the PBS reference pricing system remains in place. However AUSFTA makes three changes that could undermine the effectiveness of the system over time and lead to higher prices.

Firstly, pharmaceutical companies can seek reviews of decisions not to list particular medicines on the PBS. (AUSFTA Text, Side letter on Pharmaceuticals, 2004). The most common reasons for refusal to list are



related to value for money, because of comparisons with equally effective generic drugs. Review of decisions will therefore increase pressure for more highly priced drugs to be listed. Health experts have estimated that this could lead to increased cost to government of \$1.5 billion over 5 years (Drahos, Faunce, *et al*, 2004).

Secondly the agreement sets up a joint Medicines Working Group based on the commercial principles that contribute to the high cost of medicines in the US. These principles give priority to the 'need to recognise the value of innovative pharmaceutical products' through strict intellectual property rights protection (AUSTFTA Annex 2c). The principles effectively reduce the importance of the Australian public health goal of affordable access to medicines for all (Drahos and Henry, 2004).

The inclusion of this working group in the AUSFTA ensures that the US government can attempt to influence future policy and challenge policy decisions on trade grounds. US Senator Jon Kyl, a strong supporter of the US pharmaceutical industry, has said that the AUSFTA is 'only the beginning of negotiations over Australia's pharmaceutical system' and that 'there is much more work that needs to be done in further discussions with the Australians in relation to pharmaceuticals' (Garnaut, 2004). This comment reinforces the view that the US pharmaceutical companies did not get all that they wanted from the agreement, and that the Australian government was constrained from making further concessions by both the popular support for the scheme and the potential for cost increases.

Thirdly, the AUSFTA requires changes to intellectual property law that could delay access to cheaper generic medicines (Article 17.10). These changes require generic producers to inform patent holders of their intention to produce cheaper drugs and to certify that such production would not infringe a patent. The changes make it easier for drug companies to raise legal objections and delay the production of generic drugs. In the US, drug companies have used such legal tactics aggressively, as even a year's delay can result in billions of dollars of revenue. This is the problem that the ALP amendment to the implementing legislation sought to address, by imposing penalties for spurious legal claims. The amendment was the outcome of intense community debate and lobbying of the ALP. The US government

signalled its strong objection to this amendment and reserved its right to challenge it under the government-to-government dispute provisions of the Agreement (Zoellick, 2004). As discussed above, the US government also sought to revisit this amendment in the first annual review of the agreement in March 2006. The strong public reaction against this, described above, constrained the Australian government from doing so, despite the fact that it then had a majority in the Senate and so had the technical ability to repeal the amendment.

In the area of food labelling, the US government clearly targeted Australia's requirements for the labeling of genetically engineered food. In the letter to the US Senate setting out the US negotiating objectives, US negotiators sought to remove restrictions "relating to labeling requirements on US food and agricultural products produced through biotechnology" (Zoellick, 2002:3). The US is the world's largest producer of genetically engineered food, does not have such regulation, and has challenged EU regulations as a barrier to trade through the WTO disputes process. Polls consistently show that over 90% of Australians support this regulation. The lobbying on this issue by environment and other community groups clearly had an impact, as there were no changes to Australia's food labeling laws as a result of the USFTA (Greenpeace, 2003a and 2003b, Ranald and Southalan, 2003). However, the US may continue to pursue this issue through clauses in the agreement that require consultation with US representatives about technical regulation, including food regulation (AUSFTA article 8.5).

## **Labour and Environment Chapters**

The AUSFTA contains chapters on labour and environment issues. These were required as conditions for trade negotiations set by the then Democrat-controlled US Senate in 2002. These issues were not generally supported by the Bush administration but are a legislated requirement for all US bilateral trade agreements. The Australian government agreed to them only reluctantly, as it also had a general policy to oppose the inclusion of labour and environment issues in trade agreements. Australian community interest groups supported the

inclusion of these chapters, but they were not a major focus of public debate compared with issues like medicines and media content rules.

The environment chapter recognises the right of each country to develop laws to ensure high levels of environmental protection, and that it is inappropriate to encourage trade or investment by weakening or reducing protections in environmental laws (AUSFTA text, Article 19.1 and 19.2.2). The only aspect of the environment chapter that is subject to the government- to-government dispute process is the failure of a government to enforce its own environmental law. This means that US government can only lodge a dispute on the grounds that Australian environmental laws are not being enforced, not on the grounds that such laws are a barrier to trade. In the NAFTA experience, the main attacks on environmental laws have come through the investor-state disputes process. The lack of such a dispute process makes it less likely that environmental laws will come under challenge.

The labour chapter begins with a statement of principle that refers to internationally recognised labour principles and rights, as defined by the International Labour Organisation. However it is carefully worded to say that that each party has the right to establish its own labour standards and that each party is only obliged to “strive to ensure” that international principles are recognised and protected by domestic law (AUSFTA, Article 18.1). The binding commitment is that each party “shall not fail to effectively enforce its own labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties” (AUSFTA, Article 18.2). As in the environment chapter, this article is the only basis on which a dispute may be lodged under the dispute process of the agreement. Both Australian and US Unions pressed for stronger and more binding clauses relating to international labour standards (ACTU and AFL-CIO, 2003).

### **The Future of AUSFTA and other Bilateral Agreements.**

The labour and environment chapters are relatively weak and were agreed only reluctantly by the Australian government. However, they provide a precedent and present some dilemmas for the government for

the negotiation of other bilateral agreements. For example, the Australian and Chinese Governments have refused to consider such issues in the proposed China-Australia Free Trade Agreement. Despite many submissions from unions and human rights groups to the feasibility study for the agreement, the study failed to mention these issues (Department of foreign affairs and Trade, 2005). However, a different approach was taken by Government Senators when the Senate Foreign Affairs and Trade Committee conducted an Inquiry into Australia's relationship with China in 2005. Following the 2004 election the government had a majority in the Senate and on this committee. The Inquiry also received many submissions from unions and human rights organizations about violations of human rights and labour rights in China. The Inquiry Report, supported by both Government and Opposition members of the committee, used these submissions to document widespread human rights and labour rights abuses in China, and stated that "the Australian government should take every opportunity, including negotiations for a Free Trade Agreement, to raise Australia's concerns about violations of human rights and labour standards in China" (Senate Committee on Foreign affairs, Defence and Trade, 2005: xxx). This reveals that community interest pressures are creating some differences of opinion about the policy on trade agreements, human rights and labour standards between government back benchers and official government trade policy. In the face of continuing community interest pressure, it may become increasingly difficult for the government to insist on excluding these issues from future trade agreements.

The experience of the AUSTFTA is also having a broader influence on public debate about the wisdom of other proposed bilateral agreements, with some influential commentators arguing strongly that bilateral agreements with large economies are inherently unequal and should be rejected. For example, Professor Peter Drysdale of the Asia-Pacific School of Government at Australian National University was quoted as follows in an article entitled "Trade: Warning on FTA duds" in the *Business Review Weekly*:

'The nature of these free trade agreements makes it very unlikely, except in a few commodities, that they will have any significant impact on Australia's trade performance. But more than that, if we squib

negotiations with China like we did with the US, Australia will be in the worst of worlds” (Le Mesurier, 2006).

Michael Costello, a former advisor to the Labor Party, in an article in *The Australian* entitled “Done like a dinner on the Free Trade Deal,” argued that the failure of the USFTA to deliver benefits for Australia has wider lessons for Australian trade policy than a failure of negotiating tactics. Citing Gormory and Baumol’s study *Global Trade and Conflicting National Interests*, he concludes that “when a big economy negotiates deals of this kind with smaller economies, the smaller economy always loses” He added “Even if the government has learned nothing from this episode, let’s hope that Labor will reject out of hand any future free trade agreements with large economies such as Japan and China. Labor should be able to argue convincingly that, having been done over by the Americans, we have no desire to let it be done to us again, ” (Costello, 2006).

The ongoing public debate about the impact of the agreement and the wisdom of bilateral agreements provides space for ongoing contests of interests over the AUSFTA itself, especially if economic benefits continue to be elusive and the US government continues to press for further changes to the PBS, or uses the disputes process to challenge aspects of the PBS or other social policies. The AUSFTA has a provision for either government to give six months’ notice to end the agreement (AUSFTA Text Article 23.4). This is a relatively simple process without penalties, which could be triggered by popular pressure if the disputes process were used to further challenge social policies like the PBS. This would be strongly resisted by corporate interests that see benefits in the agreement, and is not likely to occur under the Howard government, which has a major political investment in the agreement. However, the range of critical commentary indicates that it might conceivably find its way into Opposition policy, especially if there are ongoing threats to the PBS, including threats of the removal of the ALP amendments to the implementing legislation.

## Conclusion

In terms of critical theory, the AUSFTA clearly demonstrates the contest of social forces and interest that opposed and supported the AUSTFTA. The corporate interests included a range of US transnational corporations with interests in the US and Australia, organized through AUSTA, and US pharmaceutical companies and their Australian subsidiaries. However, Government and corporate advocacy for the agreement was publicly contested by a wide range of community-based interests, who debated both the secrecy of the process and the content of the agreement, and influenced public opinion against it. These community interests also influenced some aspects of the content of the agreement, most notably the lack of an investor-state disputes process. The inclusion of environment and labour chapters in the agreement create an embarrassing problem for the government, and provide the basis for unions and other community interests to argue for their inclusion in other trade agreements.

The continued community interest opposition to the AUSTFTA was demonstrated by the public reaction to the anniversary of the agreement, and widespread criticism by influential commentators about the outcomes of the AUSFTA and the dangers of bilateral agreements more generally. These assertions of community interests keep open the possibility that the AUSFTA will continue to be a site of contesting interests and a reference point that will influence future trade policy.

*Patricia Ranauld is Principal Policy officer at the Public Interest Advocacy Centre*

*pranauld@piac.asn.au*

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