



Review Article

ANALYSING THE BONDS OF THE AUSTRALIA-US FREE TRADE AGREEMENT

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How to kill a country: Australia's devastating trade deal with the United States by academics Linda Weiss, Elizabeth Thurbon and John Matthews (Allen and Unwin, Sydney, 2004, 190 pages) is a devastating critique of the content of the Australia-US Free Trade Agreement (USFTA). The critique is so devastating that the reader is left wondering why, after widespread public debate, the implementing legislation was finally adopted with the support of the ALP.

The authors document the government's false claims about the content of the agreement, but not the 18 months of community debate, its impact on public opinion and why the political process failed to reflect the community debate. This gap is surprising given that the authors are political scientists. It is perhaps partly explained by the fact that, by their own admission, they were overseas during much of the debate, returning only for the last few months before the implementing legislation was debated in August 2004.

The USFTA did prompt the biggest critical community debate ever held in Australia about a trade agreement over 18 months during 2003-4. As the national convenor of the Australian Fair Trade and Investment Network of 90 unions and community organisations, (www.aftinet.org.au) I am aware of hundreds of community meetings that took place around the country, public rallies in Canberra, Sydney,

Melbourne Perth and other cities, many articles in community, union and mainstream media, over 700 submissions made to two parliamentary inquiries and thousands of letters and emails sent to politicians. Public opinion polls conducted by Hawker Britton showed a steady decline in support for the USFTA, from 65% when negotiations started to 35% in February 2004 when the deal was concluded. Support remained at minority levels despite the government publicity campaign about benefits.

This grass roots debate was reflected in the media to a greater extent than debate about any previous trade agreement, including the notorious Multilateral Agreement on Investment. A well funded business lobby, including US-based firms (AUSTA) headed by Alan Oxley, campaigned for the agreement, especially in the Murdoch-owned media. But the claimed benefits of the agreement were contested fiercely even by mainstream economists, ranging from Professor Ross Garnaut and other prominent economists, to Ross Gittins of the *Sydney Morning Herald*, Tim Colebatch and Ken Davidson of *The Age* and Allan Wood of *The Australian*. There was widespread media coverage about the impact of the USFTA on the price of medicines under the Pharmaceutical Benefits Scheme, including an ABC *Four Corners* television program featuring health experts. There was also much coverage of the impact on Australian content rules for audio-visual media, with prominent actors and producers challenging the agreement.

The debate prompted the ALP, Democrats and Greens to adopt policies critical of the USFTA by the end of 2003. The ALP announced in February 2004 that it would refer the USFTA to a Senate Committee and would not support the USFTA implementing legislation if the USFTA did not meet Labor's Australia's 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. The criteria included that the USFTA should deliver significant benefits for Australian agriculture, including sugar, and for manufacturing and service industries. The USFTA should not undermine the sovereignty of Australian government laws and regulations, or the capacity of governments to provide and regulate essential services. The PBS should not be undermined, nor should the ability to regulate Australian content

for future audio-visual products. The Senate inquiry provided further opportunities for public submissions; rallies, meetings and media debate.

The Senate inquiry report in fact showed that the USFTA did not meet most of these criteria. Why then did the ALP finally approve the USFTA implementing legislation? The ALP divided on factional lines. Key figures in the Right, lobbied by those sections of business who would benefit, argued that rejection of the USFTA would be seen as anti-business, anti-American and electorally damaging. Most Labor State Premiers supported the deal even before it was finalised. After the details became public, state and territory government submissions to the Joint standing Committee on Treaties made many criticisms, but all but the ACT still supported it.

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 concerns about the cost of medicines and Australian content rules in audio-visual media were reflected in the amendments, but they only addressed very specific issues, discussed further below.

While it does not analyse this political debate, *How to Kill a Country* reflects many of the issues raised in the campaign. The authors were shocked at the lopsided nature of the deal, symbolised most blatantly by the exclusion of sugar and the low level of Australian access to other US agricultural markets. They analyse some of the impacts of the USFTA least debated in the media, including on quarantine, government procurement and on intellectual property law. They point out that the USFTA disputes process enables the US government to challenge Australian law and policy that is not consistent with the agreement, backed up by trade penalties. They argue that the impacts in these key areas, plus the impact on the PBS, undermine key institutions and will damage Australia's capacity for future economic development, subordinating Australian interests to those of the US.

The book deals briefly with the debate about whether the USFTA delivers gains to the Australian economy as a whole, noting that the government refused to allow the Productivity Commission to scrutinise the deal because of its well-known scepticism about the benefits of

bilateral trade agreements. Instead it commissioned studies from a private consulting firm. The second of these, done after the deal, found few gains for Australia resulting from merchandise trade precisely because of the limited access to US agricultural and manufacturing markets. The study therefore made exaggerated claims about economic gains from increased US investment in Australia. These claims were so far outside the framework of conventional econometric analysis that Professor Ross Garnaut remarked that they "did not pass the laugh test." The authors note that the North American Free Trade Agreement, now 10 years old, did not deliver the promised economic benefits to Canada, where unemployment has increased. Over 96% US investment in Canada in this period has been for takeovers of existing assets rather than new investment.

The book also documents the systematic deception permitted by the secretive nature of trade negotiations and the lack of parliamentary accountability for them in Australia. The US went into negotiations with a clear set of bottom lines debated and endorsed by their Congress, from which they could not depart. Australian negotiators had only a vague set of objectives set by Cabinet, which were not debated or endorsed by Parliament. The government denied there would be any impact on the PBS, or other social policies. There were media reports from Washington that the Australian negotiators recommended against the agreement after sugar was excluded, but were over-ruled by Vaile and Howard, who wanted a deal at any price. The deception was only fully revealed when the thousand-page text of the agreement became public in March 2004, a month after the deal was agreed.

The chapter on the PBS shows how the USFTA is part of a wider agenda by the US government, acting on behalf of drug companies, to protect their rights to huge profits from exclusive patent rights to produce new medicines. Drug companies targeted the PBS because it forces them to accept lower prices by comparing the price of new drugs with the price of cheaper generic drugs that can deliver the same health benefits. These medicines are then listed for prescription by doctors and made available to the public at subsidised prices. The USFTA gives US drug companies rights to seek reviews of decisions by the Pharmaceutical Benefits Advisory Committee, increasing the pressure for listing of higher priced

drugs. A joint US-Australian committee on medicines policy will be based on principles that give priority to protecting the intellectual property rights of drug companies over the principle of access to affordable medicines. Finally, Australian patent laws will be changed so that patents can be extended and to make it easier for drug companies to take legal action to delay the availability of cheaper generic medicines. The ALP amendment sought to address one aspect of these changes by imposing penalties to discourage drug companies from lodging bogus patent claims to delay access to generic drugs, as they have done in the US.

The chapter on intellectual property shows how the US is using bilateral agreements to impose its copyright laws that give far more rights to corporations holding patents than to consumers. These laws enshrine monopoly rights, which restrict both competition and innovation in the knowledge economy. This will mean higher copyright costs for schools and libraries, less access to cheaper imports of products like CDs, and less access to cheaper and innovative Open Source software.

The chapters on manufacturing and government procurement provide useful details about the lopsided nature of the deal. While 99% of the Australian manufacturing market will be open to the US, the US retains bans in key areas like fast ferries, which were supposed to be opened up. The US insisted on complex rules of origin that will exclude Australian products from US markets. For example, yarn for textile and clothing products must come from either the US or Australia. The US with its huge cotton and other yarn industries is able to meet this requirement, but Australia imports most of its yarn, thus most Australian textile products are excluded from the deal. In government procurement, all Australian state governments are included and Australia has agreed to abolish all preference to local products, except for small local firms employing up to 200 people. Just over half of US states are included, and the US definition of small local firms extends to firms of 1500 employees, thus effectively preserving preference to US products.

The chapter on quarantine shows how the US has identified Australian quarantine standards as barriers to trade. Australian standards are meant to be based on scientific risk assessment, not influenced by trade considerations. The USFTA sets up joint US-Australian committees on

quarantine policy, providing ongoing US pressure to reduce standards. The authors argue that Biosecurity Australia's conduct of risk assessments in 2004 of apples, bananas and pig meat has already been influenced by US pressure, which will increase when the deal comes into force.

The book does not discuss several important aspects of the agreement. The USFTA restricts Australian voices in new media by limiting Australian content rules for new forms of media, and allows the US government to challenge these rules as a barrier to trade. The ALP amendment on the media seeks to place Australian content rules for existing media in legislation, but does not affect the restrictions on rules for new forms of media, which will become dominant over the next few years.

Nor does the book discuss the impact of the USFTA on government regulation of essential services. This, together with the attack on the PBS, are at the heart of the hidden agenda for social change of the USFTA, strongly opposed by community organisations. The Agreement provides a means for further advancing the Howard agenda of deregulation and privatisation of essential services, despite overwhelming community opposition shown in opinion polls. The inclusion of these social policies in a trade agreement removes them from democratic accountability and subjects them to trade rules which push towards inequitable US models of private service provision. The most blatant example of this is the side letter on Telstra privatization, which commits the government to full privatization despite the fact that full privatization has not yet been approved by parliament.

The agreement applies a "negative list" to services and investment, which means that all regulation in these areas is covered by the terms of the agreement unless specifically listed as exceptions. Even the exceptions are hedged with qualifications. The regulation of health and education, childcare and social welfare services are listed as exceptions only in so far as they are "established or maintained for a public purpose."

The negative list treats government regulation as if it were a tariff, "bound" or frozen at existing levels, unless listed as exceptions. There is

also a “ratchet effect” which means that, once lowered, regulation cannot be increased in ways that would restrict US investment or service provision. For example, Howard government plans to further deregulate and privatize public education and public health services may be implemented after the USFTA comes into force. If a future Labor government legislated to wind back such changes, the legislation might be challenged by the US government on the grounds that it could restrict US investment in health or education.

Australia must give “national treatment” and full market access to US firms to invest in services, which means governments cannot restrict levels of US investment, cannot limit the number of service providers, cannot be prescriptive about staffing levels, and cannot impose licensing requirements that are “too burdensome” on business. Although health, education, childcare and welfare services are listed as qualified exceptions, water, electricity, public transport and aged care are not. These services will be exposed to the full pressures of US private investment, and government attempts to regulate them will be limited by the agreement.

The failures to exempt water services in both the services and investment chapters of the USFTA are particularly dangerous, given ongoing water shortages and the need for government regulation to ensure equitable and affordable access to water. The USFTA means that there can be no limits placed on US investment in water services or water rights once the agreement comes into force. This could affect the rules for the market in water rights for the Murray-Darling Basin. A future government may judge it to be in the national interest to give some preference in water rights to local landowners, or to limit foreign investment in water rights. Such regulation could be challenged by the US under the USFTA.

Ann Capling’s *All the Way with the USA, Australia, the US and Free Trade* (UNSW Press, Sydney, 2004, 96 pages) is one of UNSW Press’s short briefings series, and covers different ground. Capling uses her extensive background in the history of trade policy to place the USFTA in its historical context, and in the context of multilateral trade negotiations. Whereas Weiss *et al* are trade policy “outsiders” shocked by the impact of the USFTA on specific policies, Capling is an “insider.” Her critique explains why many conventional trade economists opposed the USFTA,

and sheds some light on differences about the agreement within the Department of Foreign Affairs and Trade (DFAT). As a supporter of Australia's historical approach to trade liberalization through multilateral negotiations, Capling argues that the USFTA departs from this approach in four ways.

Firstly, Capling argues that bilateral agreements favour the powerful and are discriminatory, at odds with the multilateral approach of non-discrimination between trading partners. They create a patchwork of different rules that can be practical barriers to trade.

Secondly, the USFTA is an explicit departure from Australia's tradition of relative separation between trade and defence policies, with both parties linking the agreement to Australia's support for the Iraq war. This is dangerous because it increases Australian dependence on the US in both policy areas, leaving less room for negotiation with other important trading partners. Capling argues that trade concerns within DFAT have been eclipsed by obsession with the US defence alliance, and that Australia's capacity to develop technically competent and independent trade policy has been diminished.

Thirdly, the USFTA has a far greater impact than previous trade agreements in the areas of domestic social policy, discussed above.

Fourthly, the secrecy and lack of public participation in the process helped to fuel the public backlash against the agreement when the text was finally revealed. Capling's book shows why bilateralism may not be sustainable even within the framework of conventional trade policy.

What of the future of the USFTA? Both governments had until October 30 2004 to sign off on the implementing legislation for the USFTA to be implemented as planned by January 1, 2005. This deadline was extended because of US objections to the ALP medicines amendment, and to some aspects of Australia's copyright law. The US also criticized the Howard government's own election promise to save funds by cutting prices paid to drug companies when cheaper generic drugs become available. After weeks of negotiations the US finally signed off on November 18 when the Australian government agreed to make changes to Australian copyright law. However, the US explicitly reserved its right to challenge the ALP medicines amendment after the agreement comes into force.

This confirms community fears that the USFTA will give the US government an effective veto over Australian medicines policy. The US government can complain to a dispute panel of trade law experts who will decide the issue only on the basis of trade law, without regard to the right to affordable medicines. The tribunal can order changes to Australian law, backed up by trade sanctions.

The only remaining remedy is for a future Australian government to use the termination clause to give six months notice to end the agreement. This is rarely done, and would not be easy, as the agreement would be strongly supported by those sections of business that will achieve some gains from it. But if the US government does use the USFTA dispute process to further challenge Australian law, this could provide fuel for a community campaign to end the agreement.

The experience of the USFTA should be used by community movements to challenge the strategy of bilateral agreements that are inherently unequal in their impacts and exclude many developing countries. This should be accompanied by changes to multilateral trade rules to restrain the most powerful corporations and governments and give more voice to developing countries.

The USFTA experience also highlights the need for full public and parliamentary accountability for all trade negotiations. This would include publication of independent research into the impact of proposed trade agreements before negotiations, parliamentary debate and endorsement of negotiating objectives, meaningful public consultation during negotiations, clear exclusion of health, education, water, cultural and other essential services from trade agreements and voting on the full trade agreement by parliament, not just the implementing legislation as at present.

References

Ann Capling, *All the Way with the USA, Australia, the US and Free Trade*, UNSW Press, Sydney, 2004.

Linda Weiss, Elizabeth Thurbon and John Matthews *How to kill a country: Australia's devastating trade deal with the United States*, Allen and Unwin, Sydney, 2004.