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Indigenous Australia and the Australia-United States Free Trade Agreement

by Megan Davis

From the outset the potential for a free trade agreement with the United States resulted in intense media speculation and political lobbying by predominantly business and industry groups as well as community groups and Opposition parties to ensure that the Australian Government negotiated a fair deal that reflects their interests. On 8 February 2004, Australia announced it had finalised negotiations with the United States (US FTA)[1] In the wake of the text's belated release, public commentary is divided between those who argue the agreement can only be beneficial for Australia's economy and those who argue that it weakens Australian citizens' rights, diminishes Australian sovereignty or that the gains will be insignificant.[2] Yet a notable absence from the media coverage has been an Indigenous voice. In particular the absence of any ATSI/ATSIC voice should be of concern to all Aboriginal and Torres Strait Islander peoples. This article explores what constitutes a free trade agreement and what relevance the US FTA is to Indigenous Australia.

Indigenous peoples and international trade

Exploration of new territories for the expansion of trading markets and discovery of new sources of wealth such as natural resource deposits or slave labour have informed successive waves of imperialism and colonisation for centuries. Indigenous peoples have experienced the brunt of these trade motivated waves, suffering from dispossession of traditional lands, genocide, forced assimilation policies, disintegration of culture, theft of traditional knowledge and sexual and labour exploitation. It is an inescapable proposition that Indigenous peoples have contributed enormously to the development of global industries and the global economy. For example, Indigenous contribution to the development of infant industry such as sugar and dairy is often unrecognised when exploited labour including imported Kanak labour undeniably advanced the growth of these industries.[3]

Another unrecognised aspect of Indigenous Australia is that trading and international trade has been inextricably linked to our lives and histories. Prior to colonisation, Indigenous Australia involved a complex web of trading patterns and traditions between Aboriginal and Torres Strait Island groups as well as international trading such as the relationships formed in Western Australia and Northern Territory with Indonesian Macassan fishermen.[4] Today, trade in Aboriginal and Torres Strait Islander culture results in billions of dollars for the Australian economy. A contemporary manifestation of international trade also involves Aboriginal partnerships with mining corporations such as Henry Walker Eltin[5] or relationships many Aboriginal communities have with corporations such as Rio Tinto and their funding programs.[6] Equally the Indigenous experience with recognition of land title, through the decision in *Mabo* and the *Native Title Act* and the portrayal of Indigenous peoples as a vested interest group against the economic interests of more deserving major international trading corporations such as mining companies and farming interests illustrate how Indigenous peoples continue to have their rights and culture sacrificed for the development of trade and wealth.

The linkage of Indigenous sacrifice for Australian wealth is not a successfully established notion. Internationally there has been much work done concerning Indigenous peoples and their relationship with transnational corporations.[7] Equally the correlation between the wealth of transnational corporations and first world affluence is clearer.[8] There was a strong indigenous presence at the 5th World Trade Organisation (WTO) Ministerial Conference in Cancun in 2003. The indigenous caucus released an 'International Cancun Declaration of Indigenous Peoples' that argued: 'Corporations are given more rights and privileges at the expense of our rights.[9] This is a proposition Indigenous Australia knows well. And this is why it is imperative that those advocating Indigenous rights in Australia carefully analyse and monitor the agreement for its impact on Indigenous communities.[10] The reality of trade liberalisation and indeed capitalism is that its impacts are felt acutely by the most vulnerable in the community and in the case of Australia, this includes many Aboriginal and Torres Strait Islander communities.

What are free trade agreements?

The engine room of contemporary international trade law is the WTO and the rules negotiated by member states during the Uruguay Round of Multilateral Trade Negotiations. Those rules are known as the General Agreement on Tariffs and Trade 1994 (GATT 1994). GATT 1994 builds upon the original 1947 text of the GATT (known as GATT 1947)[11]. The notion of non-discrimination frames the entire GATT. Non-discrimination is encompassed in two key principles known as the 'Most Favoured Nation' (MFN) principle and the principle of 'National Treatment'.

MFN is defined by Article 1 of the GATT and provides that with respect to customs duties and charges of any kind imposed on any member state, any advantage, favour, privilege or immunity shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[12] In summary, under the rule of MFN all state members must give other members the same treatment they would any other country or member. Seemingly, this rule on the face of it would preclude the negotiation of free trade agreements or regional trade agreements. However GATT provides an exemption of these types of agreements even though they conflict with the MFN principle[13] including a number of grounds that guide the establishment of such agreements. For example the MFN rule is exempted if generally duties are not higher after the formation of the agreement than they were prior to the agreement. Furthermore duties and other restrictions should be significantly abolished between those members of the regional trading bloc or those parties to the free trade agreement. The European Union (EU), the Association of South East Asian Nations (ASEAN) and the North America Free Trade Agreement (NAFTA) are other examples of free trade agreements that have been successfully negotiated and exempted under the GATT rules.

This would be of concern to Indigenous peoples given the perennial request to the Commonwealth for better protection of Indigenous peoples' unique intellectual property interests.

Regarding health, of enormous importance to Indigenous peoples' lives, the Pharmaceutical Benefits Scheme has been maintained. However there is some concern that the agreement provides the capacity for US corporations to challenge the determination of drug prices and potentially raise higher the price of medicine. The text is quite vague and therefore the actual implementation of new reforms will be closely monitored given the health problems of Aboriginal and Torres Strait Communities. This will be an important area to monitor given that pharmaceuticals were identified in the Cancun Indigenous Declaration as a specific area of detrimental impact upon Indigenous communities. Pinpointed as a primary source of hardship are the:

Soaring prices of pharmaceutical products and inaccessibility of cheaper drugs for diseases like tuberculosis, malaria, AIDS which are diseases in Indigenous Peoples communities and decreasing public health services in these communities.[1]

Culture is one area in which Indigenous peoples' issues are concerned in relation to audio-visual services and local content in Australian media. The concerns here are that US access to the Australian media and audio-visual market may have significant implications for the Australian local content quota. It is likely that Indigenous media and audio-visual content will be disproportionately impacted if Australian audiences have less access to Australian content.

Clearly there are a number of wide-ranging issues the agreement covers. The Australian government has negotiated a number of exemptions in the agreement. As noted above preferences for Indigenous people in the nature of government procurement will remain where it concerns the health and welfare of Indigenous people and measures for their economic and social advancement. The other exemption allows for "the right to adopt or maintain any measure with respect to investment that accords preferences to any indigenous person or organisation or provides for the favourable treatment of any indigenous person or organisation" in relation to goods and services. However no exemptions were provided in the way of cultural rights, intellectual property or any other rights.

Future trade concerns for Indigenous Australia

One of the emerging areas of concern are agreements relating to the provision of crucial government services and the privatisation of government services. For Indigenous peoples, many health and education services, particularly in rural areas, are essential. It is therefore interesting to note that there was only one submission from an Aboriginal organisation to the Senate Inquiry into the General Agreement on Trade in Services (GATS) in 2003 and an absence of submission from ATSIIS.[17]

The WTO Agreement on TRIPS is one of the most concerning areas given the inimical nature of Indigenous traditional knowledge and the exclusive right to profit from such knowledge. According to the Cancun Indigenous Declaration the TRIPS agreement conflicts with indigenous interests by allowing:

The patenting of medicinal plants and seeds nurtured and used by Indigenous Peoples, like the quinoa, ayahuasca, Mexican yellow bean, maca, sangre de drago, hoodia, yew plant, etc. Such biopiracy and patenting of life-forms is facilitated by the TRIPS Agreement.[18]

ATSIC also produced a report on TRIPS in 1999 and in establishing a link between intellectual property protection and Indigenous participation in the economy called upon the Australian government:

to recognise and protect Indigenous peoples' intellectual property and communal traditional knowledge as a means of promoting public interest and contributing to socio-economic and technological development. [19]

Indigenous peoples have been working internationally for years to articulate their objection to the TRIPS and the Western intellectual property system in general. As the Cancun Declaration argued:

These concerns of indigenous peoples have been taken up by organisations like WIPO and the WTO. The Doha Ministerial Declaration, for example, expressly highlights the relationship between TRIPS and the CBD and the protection of traditional knowledge and folklore as an area that requires greater research and investigation. [20]

As argued above, Indigenous culture contributes billions to the Australian economy yet because of intellectual property laws much of this money does not go to Indigenous communities. Given the amount of work done internationally on TRIPS it is surprising there has been so little attention paid to the potentially disastrous impact of stricter and tighter intellectual property laws as inherited through the US FTA for Indigenous Australia.

Conclusion

It is noteworthy that the Executive arm of our government system negotiates treaties and that media and public scrutiny of executive decisions is an integral aspect of our democracy. As the Department of Foreign Affairs and Trade website acknowledges:

The Government has consulted business, state and territory governments, non-government organisations and the public right through the negotiations. [21]

It is therefore essential that Indigenous Australia monitor closely this agreement and its impact over the years upon our communities. It is also important that Indigenous Australians call upon their democratic Indigenous representation to be more vocal in articulating the disproportionate impact of international trade upon Indigenous lives. Australia's democratic weaknesses manifest in its utilitarian tendency to marginalise Indigenous issues and racism has been exploited for electoral gain. Nevertheless lobby groups facilitate an important presence in the negotiations of agreements such as these.

International trade is important to the Australian economy. Many Indigenous communities benefit from a robust Australian economy and the ability to participate in international trade. Yet a wholesale community devotion to the acquisition of wealth and the metaphorical 'sink or swim' notion of capitalism is inimical to human rights and to improving Indigenous interests not matter how much capitalism is popularly triumphed as the band-aid solution to a more complicated and historical problem of social dislocation. This point is no better argued than in the only Indigenous submission to the potential impact of GATS upon Indigenous peoples:

Poverty is more than simply the lack of money; it is also a condition, which involves the experience of shame, powerlessness and social and political exclusion. Whilst being a necessary pre-requisite, genuine human development requires more than the improvement in the material and economic aspects of life. [22]

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Regional trading blocs or free trade agreements are controversial. Some argue that the type of trade liberalisation arrangement such as the US-Australia bilateral agreement can only be beneficial for trade liberalisation worldwide. Given the recent stalling of debate at the WTO Ministerial in Cancun, some commentators argue that the continuance of liberalisation in whatever form is a positive development. [14]

The opposing argument is that regional trading blocs fragment global trade liberalisation creating trade distortions. The intention of Bretton Woods 1944 conference [15] that established a multilateral and cooperative trading effort and concerted monetary regulation was to eliminate the trade blocs that were inhibiting worldwide economic growth in the aftermath of two world wars. This view intimates that these types of agreements divert resources away from the global WTO trading system that will deliver greater benefits to a currently commodities-dominant economy like Australia's.

Nevertheless there is a WTO Committee on Regional Trade Agreements that monitors regional trade agreements like the US FTA. Its mandate is to examine individual regional agreements and analyse the implications of these agreements on the multilateral trading system. [16]

Australia currently has a free trade agreement with Singapore, recently concluded negotiations for a Thailand-Australia free trade agreement and recently began consultations with Japan. Australia also has an agreement with New Zealand that entered into force in 1983 known as the Australia and New Zealand Closer Economic Relations Trade Agreement (CER) and has begun work with China on a future Trade and Economic Framework relating to trade and investment.

The Agreement and Indigenous exemptions

In general, analysis of the US FTA has been varied. It is difficult to garner the outcome given that the text was not released to the Australian community until 26 days after its announcement. Much analysis has been based on the information provided by the Australian government and US negotiators.

The agreement includes significant gains for Australia's agriculture industry however the exclusion of sugar from the agreement has been widely regarded as a failure. If anything this agreement highlights the reality that industries in major developed countries remain significantly protected. This reality informs the resentment within developing countries of the persistent call for tariff reductions and zero protection given that most developed countries' economies benefited significantly from protection during industrialising periods and continue to do so. While it is true that the US FTA provides improved access to the US beef and dairy markets, the beef industry for example will have to wait 18 years for access to kick in. Importantly, Australia's quarantine and food safety regimes appear to remain intact including the requirements for labelling on GM foods. [1]

Apparent gains in the area of services include a mutual recognition system for professional services. Government procurement restrictions mean that Australians can now access the \$200 billion market in provision of goods and services to the federal Government. In this context Australia has maintained preferences for small business and Indigenous peoples.

Intellectual property, which is a significant area of interest for Indigenous peoples will be, according to the Australian government, 'substantially harmonised with the largest intellectual property market, and a global leader in innovation and creative products'. [17]

According to the government, 'standards of intellectual property protection will be beyond those provided by multilateral agreements such as the WTO TRIPS agreement and WIPO Treaties'. [1]

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[1] The Hon Mark Vaile MP, 'Free Trade Agreement with the United States' (Press Release, 8 February 2004) http://www.trademinister.gov.au/releases/2004/mvt008_04.html at 17 February 2004.

[2] Hewson, J, 'Trade deal wont be free' *The Australian Financial Review* (Sydney); 'Farmers: we were outgunned' *The Australian Financial Review* (Sydney) 10 February 2004; Michael Costello, 'FTA: We should've walked' *The Australian* (Sydney) Feb 13 2004; 'FTA critics don't see the bottom line', *The Australian Financial Review* (Sydney) February 14-15 2004; Paul Kelly, 'Trade deal the New Cash Flow' *The Australian* (Sydney) 14-15 February 2004.

[3] See for example Bunbury, B, *It's not the Money it's the Land: Aboriginal Stockmen and the Equal Wages Case*, Freemantle Arts Centre Press, 2002.

[4] See for example 'A Brief Historical Overview' in *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] 771 FCA (6 July 1998).

[5] See HW Eltin, *Community and Indigenous Relations*, http://www.hwe.com.au/content.asp?page_id=16.

[6] See Rio Tinto indigenous programs: <http://www.riotinto.com/community/communities.aspx>.

[7] See for example, 2003 United Nations Working Group on Indigenous Populations 'Indigenous Peoples and Globalisation' [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.22.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.22.En?Opendocument).

[8] See for example, OHCHR website 'Human rights, trade and investment' <http://www.unhchr.ch/html/menu2/trade/index.htm>.

[9] Cancun Declaration.

[10] Professor Larissa Behrendt and Megan Davis 'Adverse effects of free-trade deal will hit indigenous groups hard' *Sydney Morning Herald* March 8 2004 <http://www.smh.com.au/articles/2004/03/07/1078594233872.html>.

[11] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS -- RESULTS OF THE URUGUAY ROUND, vol. 1 (1994), 33 I.L.M. 1125 (1994).

[12] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS -- RESULTS OF THE URUGUAY ROUND, vol. 1 (1994), 33 I.L.M. 1125 (1994). See Annex 1A, Article 1, General Agreement on Tariffs and Trade.

[13] For rationale behind regional trading agreements see: *ibid*, Article XXIV of the General Agreement on Tariffs and Trade (GATT) of 1947.

[14] Gallagher, P, Will, G, 'A chance to rebalance WTO' *The Australian Financial Review* 71 Thursday

12 February 2004.

[15] See www.wto.org

[16] See Committee on Regional Trade Agreements:
www.wto.org/english/tratop_e/region_e/regcom_e.htm

[16] See www.dfat.gov.au for Government analysis.

[17] *ibid*

[18] Above, note 12; see also annexed as parts of the WTO Agreement: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[19] Above, note 9.

[17] Submission to Senate Foreign Affairs, Defence and Trade References Committee Central Australian Aboriginal Congress Inc, see
http://www.aph.gov.au/Senate/committee/fadt_ctte/gats/submissions/sub158.doc.

[18] The International Cancun Declaration of Indigenous Peoples 5th WTO Ministerial Conference , Cancun , Mexico, 12 September 2003

[http://www.eireview.org/eir/eirhome.nsf/\(DocLibrary\)/EC2E0481ADA1BCD485256DAA006A4410/\\$FILE/Cancun%20declaration.doc](http://www.eireview.org/eir/eirhome.nsf/(DocLibrary)/EC2E0481ADA1BCD485256DAA006A4410/$FILE/Cancun%20declaration.doc).

[19] Recommendation Two; ATSIC GATT TRIPS Review
http://www.atsic.gov.au/issues/indigenous_rights/intellectual_property/GATT_TRIPS_Review.doc.

[20] WT/MIN(01)/DEC/1 dated 20 November 2001 Paragraph 19: We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension. See also Daniel Gervais, 'TRIPS, Doha and Traditional Knowledge' (2003) *The Journal of World Intellectual Property* 6.

[21] See www.dfat.gov.au for Government analysis.

[22] Above, note 20.

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