

**UN-FAIR TRADE AS FRIENDLY FIRE:
THE AUSTRALIA-USA FREE TRADE AGREEMENT**

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Abstract: Trade, economists and trade theorists advise, is a mutually beneficial exercise. Among this group, a particular set of advocates, claim that “Free Trade” is in the interest of all parties. As will be demonstrated, Free Trade is not truly “free” but an exercise of foreign policy and the implementation of policies favouring wealthy corporate interest groups. Free Trade is controlled by wealthy nations who have stacked the rules in favour of themselves, and in particular their corporate interests, and against the poor producers in poor nations. This control is used contrary to fairness, economic and ecological logic. Fair trade, by way of contrast, is an effort to balance the benefits of trade between the trading partners, and ensure that a fairer distribution of the surplus value created by trade ends up in the hands of those who most need it and produced the goods. This paper looks at a trade agreement, the USA-Australia FTA which is well suited to a case study of the various aspects of trade theory, and in particular the fairness, economic and ecological aspects. It deals with the peculiar situation of Australia, a developed, ally of the USA which happens to be located in a tropical climate.

TABLE OF CONTENTS

1) INTRODUCTION	4
2) THE BASICS—TRADE, FAIR TRADE, FREE TRADE.....	8
3) INTERNATIONAL TRADE.....	10
a) Trade theory.....	11
i) Free Trade.....	12
(1) Economic Theory.....	12
(2) Political Reality.....	13
ii) Fair Trade.....	14
(1) Economic Theory.....	15
(2) Political Reality.....	15
4) FAIRNESS.....	17
a) Fairness in International Trade	18
5) POLITICS OF TRADE: USA FOREIGN POLICY.....	21
6) THE AUSTRALIA-USA FTA	28
a) Friends & Interests in International Relations	28
b) Economic Benefits.....	29
c) The Agreement.....	31
7) CASE STUDY: SUGAR	33
a) USA Sugar Programs and Policies	35
b) Australia Sugar Programs and Policies.....	36
8) EVALUATING THE FTA FOR FAIRNESS.....	38
a) Benefits and explanations	38
b) Analysis of Economic Fairness.....	41
9) CONCLUSION.....	43

1) INTRODUCTION

Australian Trade Minister Mark Vaile described the USA-Australia Free Trade Agreement as a “once in a lifetime opportunity to integrate Australia with the world’s largest economy.”¹ Once in a lifetime is a breath-taking description. Does this trade agreement truly meet such standards? Is there reality behind the rhetoric? Similar rhetoric surrounds much of the discussion concerning international trade². The WTO, NAFTA, and various other international trade treaties are presented to the public as monumental achievements to the benefit of the peoples of the various countries involved eliminating poverty and bringing wealth to untold numbers.³

In part, such claims are part of the neo-classical economists’ neo-liberal political revolution in western societies in which governments are supposed to take a lesser role while permitting the efficiencies of private enterprise to deliver equivalent public goods and services at a lower cost. This paper using the USA-Australia Free Trade Agreement (FTA) as a case study will examine the trade aspects of the neo-classical economists’ neo-liberal political agenda, and in particular its economic and political claim that neo-liberal governments in the developed countries are following a free

¹ Quoted in Tim Harcourt, “The Australia United States Free Trade Agreements—what’s it all about: Balancing pros and cons of the trade deal—what’s it all about?” Australian Trade Commission, www.austrade.gov.au/corporatel/layout/00,,_S1-1_CORPORXID29-2_2-3_PWB Many similar quotes can be found in L. Weiss, E. Thurbon, J. Mathews, *How to kill a Country: Australia’s Devastating Trade Deal with the United States* (2004), p. 5.

² Renato Ruggiero, the first director-general of the WTO, claimed that as a result of free trade “the potential for eradicating global poverty in the early part of the next [twenty-first] century—a utopian notion even a few decades ago, but a real possibility today” in “Whither the Trade System Next?,” in J. Bhagwati & M. Hirsch (eds.), *The Uruguay Round and Beyond—Essays in Honour of Arthur Dunkel*. See generally, Jagdish Bhagwati. *Protectionism*. (1985).

³ Id. An opposite view--that international trade generates a significant economic loss--has been ably argued by Herman Daly, former economist at the World Bank and founder of the International Society for Ecological Economics. Daly has argued that the free trade regime is undermining the planet’s ability to sustain life. His work, *Steady-State Economics*, remains a landmark in the area of environment and economics.

trade agenda. Further, it will examine whether the world's dominant economy and dealing neo-liberal government would permit a benefit to those less powerful or less developed countries that would implement the neo-classical economists' agenda.⁴ Finally, it examines the truth of their claim that trade patterns are dictated by rationality and efficiency. Obviously, using a case study significantly restricts the generalizability of any conclusion. It is hoped, therefore, that this study serves as an illustration of an FTA in a peculiarly interesting instance, that of two neo-liberal nations in opposite hemispheres.

As shall be demonstrated, various theories of trade indicate differing patterns in trade. One may ask, therefore, what rules determine the patterns and how do they do so? Perhaps as the neo-classicists suggest, trade follows natural advantages and economic rationalities. In other words, it may be that where the ecological needs of specific commodities and economic realities dictate, trade flows in a predictable pattern based on that logic. Alternatively, it may be suggested that trade patterns are limited to the relationships between the north and the south as suggested by the Brandt Line. We may ask therefore: is trade between developed countries free trade, or is there yet a role to be played or a problem to be addressed as fair trade advocates claim? Perhaps developed nations treat one another differently than they treat poor nations, or they may indeed continue a pattern of power exploiting the weak even among the developed nations. The USA-Australia Free Trade Agreement offers an excellent opportunity to examine critically the economists' and trade theorists' claims about

⁴ See A. Rands Barros "Challenges of Economic Development" Draft paper prepared for the discussion at the UNRISD meeting on The Need to Rethink Development Economics., 7-8 September 2001, Cape Town, South Africa, but a disturbing trend identified even in the 1970's. See, for example, Gunnar Myrdal, Lecture to the memory of Alfred Nobel, March 17, 1975, <http://nobelprize.org/economics/laureates/1974/myrdal-lecture.html>

free trade agreements: it is an agreement between two developed nations whose main differences are power and climate: tropical versus temperate.

Both countries have a British heritage from which they received the English language, legal systems and basic economic policy.⁵ The USA is a developed country.⁶ It has the world's largest economy, is the world's largest international trading partner.⁷

Australia too is a developed country, but amounts to about one-fourteenth of the USA in terms of population and considerably less in terms of the size of its economy and trade.⁸ It understands its relationship with the USA to be a friendship.⁹ Its support of the USA's, internationally condemned, illegal invasion of Iraq¹⁰ added considerable legitimacy to the "Coalition of the Willing."¹¹

⁵ See Cambridge economist Ha-Joon Chang's review of trade policies of Great Britain and the USA, in Ha-Joon Chang "Kicking Away the Ladder: The 'Real' History of Free Trade," Foreign Policy In Focus, Dec. 2003.

⁶ Both USA and Australia are ranked in the same category as "High Income" countries by the World Bank. http://www.worldbank.org/data/countryclass/classgroups.htm#High_income

⁷ In 2003 it was responsible for 9% (\$724 bn of \$7274 bn worldwide) of the world's exports and 20% (\$1306 bn of \$7557 bn worldwide) of the world's imports. WTO, World Trade Report 2004, "Trade and Trade Policy Developments: Recent Trends in International Trade and Policy Developments," p. 7. http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr04_1a_e.pdf

⁸ In 2003 Australia had \$70 bn exports and \$88 bn imports. World Bank, Australia at a Glance. http://www.worldbank.org/cgi-bin/sendoff.cgi?page=%2Fdata%2Fcountrydata%2Faag%2Faus_aag.pdf

⁹ L. Weiss, E. Thurbon, "Preliminary Submission to the Australian Senate Select Committee," Enquiry of the Australian Senate Select Committee into the Free Trade Agreement Between Australia and the United States of America, 30 April 2004. In the discussion of the countries and identifying various special interest groups, I am taking both Realist and Liberal approaches to International Relations, see. R. Beck, "International Law and International Relations: The Prospects for Interdisciplinary Collaboration" in Beck, Arend and Vander Lugt eds, International Rules: Approaches from International Law and international Relations.

¹⁰ The UN has condemned the invasion. Secretary General Kofi Annan declared that the war was illegal. "War Illegal—says Annan," 16 Sept. 2004 BBC World News http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm For an example of the acrimony see Steven R. Weisman "A Long, Winding Road to a Diplomatic Dead End" March 17, 2003 New York Times See the discussion of the specious nature of the USA's claims and self-contradictions in attempting to put its case forward, see J. Maogoto, Battling Terrorism: Legal Perspectives On The Use Of Force And The War On Terror, Chapter IV (forthcoming) (copy of manuscript on file with Author).

¹¹ Denominated as such by G.W. Bush. An indication of the skepticism of even this claim of willing cooperation can be seen in the mockery of the denomination as the "Coalition of the Bought", or "Coalition of the Billing." Australian negotiators sold the FTA to the public claiming this was part of the reason they were able to get the deal on the table, L. Weiss, E. Thurbon, J. Mathews, How to kill a Country: Australia's Devastating Trade Deal with the United States (2004), pp 140-143

The USA-Australia Free Trade Agreement is important because it sharpens the focus on issues and complaints raised by weaker, poor southern countries against wealthy, powerful northern countries. Wealthy northern countries, instead of addressing southern countries' issues and complaints, often simply obfuscate the matter by reference to some aspect of the IMF's Structural Adjustment Policy, such as conditionality, and so avoid addressing the issue.¹² Australia, however, is not such a nation, and accordingly the resulting FTA cannot be dismissed as a problematic consequence of international debtors complying with creditor imposed conditions or creditors' other rights. Further, this particular case makes it clear that powerful northern countries like the USA,¹³ are concerned only about the economic benefit of their own wealthy corporations, remain unconcerned with the broader negative economic and environmental impact of their trade policies, and will use their power to impose manifestly unfair trade agreements on weaker parties.¹⁴ Perhaps most striking, the USA will impose its will regardless of and even contrary to both economic and ecological rationality, which form the very basis for neo-classical economists' drive for "Free Trade." I wish to declare from the outset that this piece is not "anti-USA" as the USA's actions are no different from other empires of the past: however, whether it is done in the last century by the UK, two thousand years ago by Rome, or today by the USA, unfair trade is unfair.¹⁵

¹² Rigged Rules and Double Standards: trade, globalization, and the fight against poverty, 126-128.

<http://www.maketradefair.com/en/index.php?file=26032002105641.htm>

¹³ The USA's policies concerning trade and the use of violence to implement its policies are not unique, and indeed may be said to form part of imperial policies traditionally. See for example, Lord Shelburne's comment: "England prefers trade without domination where possible, but accepts trade with domination when necessary." Quoted in R. Robinson and J. Gallagher, "The Imperialism of Free Trade," 6 *Economic History Review*, (2nd series) (1953) 1-15.

¹⁴ The use of USA power is a central tenet of the Bush II Administration and has been a part of its policy since its inception. In the words of Condoleezza Rice "Great powers do not mind their own business" in an article in which she advocates USA military adventures to spread America's "universal values". C. Rice, *Promoting the national interest*, 79 *Foreign Affairs*, (2000), p. 49.

¹⁵ See comment of Lord Shelburne above n. 13.

2) THE BASICS—TRADE, FAIR TRADE, FREE TRADE

Trade is a contentious issue at the best of times as parties attempt to maximize their share of the surplus value created in any given transaction. Parties doubt each other's intentions and the truthfulness of the other party's information¹⁶—and even after a deal is negotiated, parties suffer from buyer's remorse, wondering whether in fact they received the best deal.¹⁷ All trade depends on the perception of value: parties will trade where one party values its goods less than it values the goods of the other party, and the other party values in the reverse. In other words, each party perceives the value of the other's goods as being greater than the value it places on its own goods.¹⁸ The attractiveness of alternative distributions cause us to engage in the process of trade continually, never reaching the ultimate equilibrium economists posit as the point of General Equilibrium Theory.¹⁹

For trade to occur, in other words, it must be mutually beneficial to induce the parties to engage in it and hence, in some way “fair.” If trade is by definition fair, and free trade is simply forcing the government to extricate itself from introducing distortions into the marketplace, what can be the objection to free trade? How could it be anything other than “fair”? If these two questions are based on correct premises, then there can be no cause for complaint and there can be no basis for fair trade advocates.

¹⁶ R. Lewicki, *Negotiations*, (2003)

¹⁷ *Ibid.*

¹⁸ R. Malloy, *Law and Market Economy* (2002)

¹⁹ See, for example, John R. Hicks – Prize Lecture, The Mainspring of Economic Growth Lecture to the memory of Alfred Nobel, April 27, 1973, <http://nobelprize.org/economics/laureates/1972/hicks-lecture.html>

The argument presented in the previous paragraph is platitudinous at best. Oxfam, arguably one of the world's most famous NGO's, has recently released a study on trade. Its authors observe:

The international trading system is not a force of nature. It is a system of exchange, managed by rules and institutions that reflect political choices. Those choices can prioritise the interests of the weak and vulnerable, or they can prioritise the interests of the wealthy and powerful... Trade is reinforcing global poverty and inequality because the international trading system is managed to produce these outcomes. The rules of the game reflect the power of vested interests.²⁰

In other words, it is abundantly clear outside of the sheltered offices of trade ministers, trade negotiators and big business executives, and particularly those of the wealthy nations that the current system of rules is an unmitigated disaster for the vast majority of the world's population.²¹

As indicated within, neo-liberal politicians "free trade" has little to do with actually reducing barriers to trade where the barriers benefit the rich countries, but much to do with marketing the products of wealthy countries in the markets of poorer countries while maintaining protections for their own producers at home. Knowledge of this fact is so wide spread that the WTO talks at Cancun, Mexico in 2003 halted for this very reason,²² and indeed had been written about in advance.²³ The poor countries simply refused any further participation until their concerns were addressed. In particular, they insisted that the wealthy nations honour their commitments to

²⁰ Ibid.

²¹ "unmitigated disaster" is Stiglitz' term. See Stiglitz, *Globalization, and its Discontents*, p. 20. Numerous studies have attempted to demonstrate to the contrary that trade has helped reduce poverty. The problem with these studies is that they fail to consider the distribution of wealth in the poor countries, nor the ecological damage, nor damage to democratic institutions, nor the increased populations, including pundits like David Brooks of the NY Times "The Good News about poverty," NY Times 24 Nov. 2004,

²² WTO website

²³ R. H. Steinberg and T. Josling, "When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge," 6(2) *J. of Intl Econ. Law*, (2003).

reducing agricultural subsidies minimal though they may be and make further commitments.

In response to this united action by the third world, instead of fulfilling promises, the developed nations of the G-7 scrambled to bring to the fore an idea first raised by Paul Martin, the then Minister of Trade for Canada—the notion of a G-20.²⁴ The notion is to expand the G-7 to include some of the larger developing countries. To many it is a transparent effort to implement a divide and conquer strategy among members of the third world.²⁵

3) INTERNATIONAL TRADE

International trade has been a part of human history for thousands of years. Evidence of trade between nations exists in the pre-Hispanic civilizations in meso-America, where nations traded for precious green stones, in Polynesia where goods and cultural artefacts were traded between islanders as signs of friendship, in the spread of Buddhism from its home in northern India throughout China and South East Asia, to the ancient Phoenician mariners who traded throughout the eastern Mediterranean, even to Sumer's connections with India, perhaps some 1,000 years prior to the rise of Egypt's pyramids in Giza. Arguably the oldest known international trade was

²⁴ ???

²⁵ Walden Bello and Aileen Kwa "G 20 Leaders Succumb to Divide-and-Rule Tactics: The Story behind Washington's Triumph in Geneva" <http://www.ourworldisnotforsale.org/wto/Updates/44.htm> See also, Yuill Herbert, "Divide and Conquer: Bilateral Trade Agreements," Dominion April 2, 2004. As noted by The Economist magazine in "Progress at last, but still a long way to go" Aug 2nd 2004, The Economist Global Agenda concerning the Doha Round "The details of the framework agreement suggest that the rich countries are now prepared to pay a price to ensure access to the markets of the bigger, more attractive developing nations, and that price is the freeing-up of their own agricultural markets. Meanwhile, the poorest countries, in being relieved of many tariff-cutting obligations, have opted out of the process. So, though the Doha round is back on track, the WTO has, in effect, split into two tiers: one for those countries that are fully engaged in the round, and one for those that are little more than bystanders."

conducted by the Australian Aboriginals with the Macassans in the northern parts of Australia. Various explanations for international trade have been given.

a) Trade theory

Modern trade theory, explaining the motivations, directions and goods traded, is usually traced back to Adam Smith. Smith held that nations traded on the basis of “absolute advantage.”²⁶ That is, nations that have pastures produce sheep for wool, whereas nations with good vineyards and appropriate climate easily produce wine. These nations trade wool for wine. David Ricardo is credited with refining Smith’s theory with a theory known as “comparative advantage.”²⁷ Ricardo pointed out that where fewer labour inputs were required to produce the same goods in two countries, trade can be beneficial, even where one country had an absolute advantage in both goods to be traded. Further advances in trade theory were made by Heckscher-Ohlin who took factor proportions into consideration,²⁸ by Samuelson and Jones whose Specific Factors model took into account the immobility of certain factors,²⁹ and more recently, as advocated by Krugman, The Standard Model, a much more sophisticated model which considers multiple factors including immobility, the “relationship between production possibility frontier and the relative supply curve, the relationship between relative prices and relative demand, determination of world equilibrium, and the effect of terms of trade.”³⁰ Current international trade indicates that a critical component of understanding trade is market access.³¹

²⁶ P. Krugman, M. Obstfeld, *International Economics: Theory and Policy*, 6th ed. (2003), 20-24.

²⁷ *On the Principles of Political Economy and Taxation* (1819)

²⁸ B. Ohlin, *Interregional and International Trade* (1933) modified and expanded by Heckscher

²⁹ Krugman, above n. 16, 38-66.

³⁰ *Ibid.*, 94. For criticism, See D. R. Davis, D. E. Weinstein, “Market Access, Economic Geography and Comparative Advantage: An Empirical Assessment” National Bureau of Economic Research, April 1998.

³¹ *Ibid.*

i) Free Trade

All of the foregoing trade theory is premised on a notion of free-trade. This basis leads to a consideration of what free trade is, from both economic and political perspectives.

(1) Economic Theory

Free trade as advanced by the trade theorists just noted is the notion that the most beneficial outcomes for the populace will be realized when the supply of goods is permitted to flow freely to meet demand without government intervention via such devices as tariffs, quotas and other non-tariff barriers. Its advocates offer great promise. Joseph Stiglitz, former chief economist of the World Bank, outlining the arguments for free trade writes that: “opening up to international trade has helped many countries grow far more quickly than they would otherwise have done.... Because of globalization many people in the world now live longer than before and their standard of living is far better.”³² This is the promise of free trade. It was developed once the disastrous beggar-thy-neighbour policies—policies which attempted to support domestic industries and economy at the expense of neighbouring countries—were identified as harmful and causative with respect to the economic hardships and a forum for their elimination was set up.³³ The current free trade regime (trade which favours lower levels of government intervention in the market) follows from the post-Depression and post World War II arrangement of the GATT. This was a coordinated and united effort among several nations to realize the benefits

³² J. Stiglitz, above n. 11, p. 4.

³³ Ibid., 15-16.

of trade by reducing tariffs jointly, on the theory that unilateral reductions would be disastrous for countries doing so on an individual basis.³⁴

Accordingly, free trade view appears justified,³⁵ at least in terms of neo-classical economic theory. Broader measures used by ecological economists indicate that much trade is in fact an economic negative,³⁶ and indeed, this whole historical reconstruction appears to be a myth.³⁷ Nations,³⁸ according to the neo-classicists, should engage in free trade for their own advantage to increase their economies. In political practice, however, trade does not follow the neo-classicists' theory.

(2) Political Reality

Although its advocates have coopted the moniker "free trade"³⁹ actual trade appears to be quite different. Consider for example, that the self-proclaimed "leader" of free trade, the USA, "has imposed more dumping penalties against low-priced imports than... any other government in the world"⁴⁰ and in the years 1993-1996 implemented 61 laws and unilateral executive actions imposing economic sanctions for foreign policy purposes, against 34 countries representing 2.3 billion people, being 19% of the world's markets.⁴¹ Krugman and Obstfeld, citing a study by economists Baldwin

³⁴ The argument that unilateral reductions are harmful to the country doing so do not appear to be borne out in theory or practice, as most countries tend to do so. On the theory aspect, see J. Bhagwati, *Going Alone*.

³⁵ Krugman above n. 16, p. 21-23.

³⁶ H. Daly, above n. 2.

³⁷ See the excellent study by Chang, above n. 5.

³⁸ Again, the neo-classicists appear to ignore the fact that 2/3 of world trade occurs within multinational corporations, and as such is not susceptible to the national trading theories upon which they rely. G. Bird and R. Rajan, "Economics Globalization: How Far and How Much Further? Adelaide University: Centre for International Economics Studies, Discussion Paper 0117, 2001, p. 3.

³⁹ Quotation marks will be used around "free trade" throughout the balance of this paper when referring to this politicized version of trade.

⁴⁰ Bovard, *The Fair Trade Fraud*, (1991) 110.

⁴¹ National Association of Manufacturers (March 1997) *A Catalog of new US Unilateral Economic Sanctions for Foreign Policy Purposes 1993-1996*. Cited in W. Pengilly, "United States Self Interest: A Major Impediment to Agreement on the Principles of International Competition and its Enforcement," 1(2) *J. of International Commercial Law* (2002) 187-228., p. 200. For the USA State Department's justification of the use of sanctions for foreign policy see Victor Comras, "Economic

and Magee,⁴² observe: “it’s hard to makes sense of actual trade policy, if you assume that governments are genuinely trying to maximize national welfare. On the other hand, actual trade policy does make sense if you assume that special interest groups can buy influence.”⁴³ In fact, Krugman has concluded that international trade as it is currently structured is not based on economics, at all, but on politics.⁴⁴ Essentially, then, trade is set up for and dominated by special interest groups—the large multi-national corporations, and financial interests,⁴⁵ and for the political purposes of subjugation of other nations.⁴⁶ Such being the case, it is exceedingly important that the politics of “free trade” be explicated and debated. Unfortunately, it is not. This matter will be brought up and discussed later.

ii) Fair Trade

Fair trade is an effort to bring the element of fairness discussed earlier back to trade and to bring focus to the political aspects of trade. It recognizes that there is no fairness in the current system in which weaker or impoverished nations find their protections are beaten down in rushed liberalization schemes imposed by the wealthy nations at the behest of their financiers.⁴⁷ The hypocrisy of this situation is exacerbated when one realizes that these very same protectionist schemes were critical in permitting the developed nations to achieve their developed economic

Sanctions and U.S. Foreign Policy” Remarks to the Open Forum Washington, DC February 25, 2002 <http://www.state.gov/s/p/of/proc/tr/9128.htm>

⁴² R. Baldwin, and Christopher S. Magee (2000). Explaining congressional voting on trade bills in the 1990’s: from NAFTA Approval to Fast-Track Defeat. Washington, D.C.: Institute for International Economics.

⁴³ Above n 16, p. 233.

⁴⁴ P. Krugman, “The Narrow and Broad Arguments for Free Trade”, *The American Economic Review*, Papers and Proceedings 83, (1996) 83(2) 362-366.

⁴⁵ Stiglitz., above n. 11, p. 9-10, 15-20, 63. et passim.

⁴⁶ Pengilley, above n. 29, p. 195.

⁴⁷ Stiglitz, above n. 11, p. 16-17.

status.⁴⁸ Perhaps worse, the strong nations maintain those same protections today, long after they have served their developmental purpose.⁴⁹

(1) Economic Theory

Fair trade advocates do not categorically reject international trade. They acknowledge benefits that may be had from international trade but recognize that rapid liberalization does not work. As Stiglitz writes:

most of the advanced industrial countries—including the United States and Japan—had built up their economies by wisely and selectively protecting some of their industries until they were strong enough to compete with foreign companies. While blanket protection has often not worked for countries that have tried it, neither has rapid trade liberalization. Forcing a developing country to open itself up to imported products that would compete with those produce by certain of its industries... can have disastrous consequences—socially and economically.⁵⁰

Furthermore, they accept that there is a role for some government protection of infant industries and developing manufacturing and other industries in certain instances.⁵¹

What they reject is “free trade.” As Stiglitz observes, “The free market ideology should be replaced with analysis based on economic science, with a more balanced view of the role of government drawn from an understanding of both the market and government failure.”⁵²

(2) Political Reality

Essentially, fair trade advocates recognize the scarcity of fairness where small, less developed countries are negotiating with the proverbial 800 pound gorilla. “Free

⁴⁸ See Chang, above n. 5. See also, R. Wade, “What strategies are viable for developing countries today? The World Trade Organization and the shrinking of ‘development space.’” Review of International Political Economy (forthcoming). D. Rodrick, See also D. Rodrick “Making openness work: investment strategies” in D. Rodrick ed., *The New Global Economy and Developing Countries* (1999), World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (1993), see also, J. Stiglitz “From Miracle to Crisis to Recovery: Lessons from Four Decades of East Asian Experience” In J. Stiglitz and S. Yusuf eds. *Rethinking the East Asian Miracle* (2001). L. Wallach and P. Woodall, *Whose Trade Organization? The Comprehensive Guide To The WTO*.

⁴⁹ Id.

⁵⁰ Stiglitz, above n. 11, p. 16-17

⁵¹ Ibid, pp. 244-252.

⁵² Ibid, 250.

Trade” advocates calumniate those who disagree with them by calling them “angry left”, diagnosing a pseudo psychiatric condition “globaphobes” suffering from “undying paranoia about American imperialism and global business.”⁵³ They further claim that fair traders oppose all trade. As just indicated, fair trade advocates recognize that trade can provide important advantages to both poor and rich countries and their people;⁵⁴ however, fair trade advocates acknowledge that in such relationships, the strong attempt to take advantage of the weak, the rich take advantage of the poor, and especially, that current rules favour inequitable distributions from the gains from trade.⁵⁵ Specifically, the rules in their current form transfer wealth from the poor to the rich.⁵⁶

As the NGO Oxfam, in its extensive study *Rigged Rules and Double Standards* advises: “The problem is not that international trade is inherently opposed to the needs and interests of the poor, but that the rules that govern it are rigged in favour of the rich.”⁵⁷ The authors continue:

the same [wealthy] governments use their trade policy to conduct what amounts to robbery against the world's poor. When developing countries export to rich country markets, they face tariff barriers that are four times higher than those encountered by rich countries. Those barriers cost them \$100bn a year - twice as much as they receive in aid.⁵⁸

Advocates of fair trade recognize the unfairness of the current trading rules and seek to have the rules changed to be fairer.

⁵³ Tony Parkinson “Let’s rid the free trade debate of anti-Americanism” *The Age*, 13, Feb, 2004. cited in Weiss, above, n. 14, p. 151.

⁵⁴ “Trade as a force for poverty reduction” Ch. 2 *Rigged Rules and Double Standards: trade, globalization, and the fight against poverty*. 47-63.
<http://www.maketrade4fair.com/en/index.php?file=26032002105641.htm>

⁵⁵ *Id.*

⁵⁶ Stiglitz, above n. 11, p. 166-180.

⁵⁷ *Rigged Rules* above, n. 15, Executive Summary.

⁵⁸ *Ibid.*

There is irony in the use developed countries make of the term “fair” in discussions of trade. At times, it is used as an excuse to exclude cheap goods from poor countries, allegedly “dumped” by those poor countries—although there has yet to be a single case proved where a poor country has dumped product on a developed country.⁵⁹ By alleging dumping, wealthy countries can invoke countervailing duties against the developing nation and essentially kill that nation’s developing industry during the time the case works through the system. Such actions, however, are not reserved exclusively to protect the wealthy from the poor developing nations. The notion of fair trade has been a major contention between the USA and Japan and resulted in significant sanctions and acrimony between the nations. As Pengilley observes: “When it comes to international trade, ... even developed nations have erected a veritable barrage of barriers which prevent or severely inhibit even the most basic acts of trade taking place or taking place on anything near a level playing field.”⁶⁰ We shall return to this later.

4) FAIRNESS

As just indicated, trade as it is currently structured is anything but fair.⁶¹ Fairness itself, however, is a problematic term. It has different connotations in law, policy, economics, and ethics. Essentially, where fairness is a matter of justice in distribution, there are two competing approaches.⁶² One approach examines merit, essentially focusing on justice from the perspective of desert—that is, those who

⁵⁹ Legal victory in a dumping action is having met the legal criteria which can be quite unrelated to the actual economic facts of the case.

⁶⁰ Pengilley, above n. 29, p. 204.

⁶¹ S. Suranovic, , "International Trade Fairness," The International Economics Study Center, © 1997-2001, <http://internationalecon.com/fairtrade/index.html>.

⁶² See Benedict Sheehy, *Distributive Justice in Law and Economics*. Working paper on file with the author.

have some meritorious characteristics, or engage in some particular meritorious activity deserve a particular proportion of the resource(s) in question. The second approach focuses on the equality of all humanity. This approach starts from the premise that all humans are of equal value and then evaluates arguments for distributions which vary from equality.⁶³

a) Fairness in International Trade

In the context of international trade, fairness has a slightly different character. Indeed fair to one country or one economist is undoubtedly unfair to another, depending, of course on which dimension one focuses on, and on the perspective one takes. For example, a neo-classical economist is likely to favour Maximum Benefit Fairness whereas an ecological economist may have a greater concern for Distributional Fairness. The USA is notorious for its “fairness” complaints under s. 301 of its Trade Act 1974,⁶⁴ which permits USA corporations to instigate investigations alleged unfair trade practices by foreign corporations by the US Dept. of Trade. These investigations are initiated against countries trading with the USA in competition with the USA’s domestic corporations. Although in all likelihood contrary to the USA’s WTO commitments, the USA has thus far managed to escape WTO censure of this law.⁶⁵

⁶³ J. Feinberg, (1973) “Economic Income” in *Social Philosophy*, Prentice Hall, p. 107. Reprinted in Robert White, (1993), *Business Ethics: A Philosophical Reader*.

⁶⁴ For an accessible commentary on the section, see the Counsel for the US Dept of Commerce’s summary at <http://www.osec.doc.gov/ogc/occic/301.html> (now 19 USC s. 2411)

⁶⁵ The USA’s hide and seek game with Super 301 and Special 301 (additional 301 provisions that are enacted and withdrawn periodically) have not been reviewed by the WTO. The limited review of the law in the EU complaint (European Communities (WT/DS152/1)) leaves several important questions outstanding. It is not at all clear that even if the WTO did censure the US for this law that the USA would in fact accept the ruling, particularly in light of its recently increased disregard for international law & institutions. See R. Steinberg and T. Josling, “When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge” 6(2) *J. of International Economic Law* (2003) 369-417.

Nobel laureate in economics, Amartya Sen argues that fairness in international trade is often miscast in debates concerning globalization and development. He observes that the question is often put as “are the poor getting poorer or richer?”⁶⁶ essentially, a Rawlsian test of justice.⁶⁷ Sen believes that this is not the right question. He states: “Even if the poor were to get just a little richer, this need not imply that the poor are getting a fair share of the benefits of economic interrelations and of the vast potentials of globalization. Nor is it adequate to ask whether international inequality is getting marginally larger, or smaller.”⁶⁸

He continues:

To rebel against the appalling poverty and the staggering inequalities that characterize the contemporary world, or to protest against unfair sharing of benefits of global cooperation, it is not necessary to show that the inequality is not only very large, but it is also getting larger.⁶⁹

Sen sets out the issue from an economic perspective as follows.

When there are gains from cooperation, there can be many alternative arrangements that benefit each party.... It is necessary, therefore, to ask whether the distribution of gains is fair or acceptable, and not just whether there exist some gains for all parties (which can be the case for a great many alternative arrangements). As J.F. Nash, the mathematician and game theorist, discussed more than half a century ago...the central issue is not whether a particular arrangement is better for all than no cooperation at all (there can be many such alternatives), but whether the particular divisions to emerge are fair divisions, given the alternative arrangements that can be made.⁷⁰

And on this point he concludes there is no doubt that international trade as it now is conducted is far from fair.

⁶⁶ Amartya Sen Interdependence And Global Justice <http://www.un.org/esa/documents/GLO-UNGA.pdf>

⁶⁷ Theory of Justice (1971)

⁶⁸ Ibid.

⁶⁹ Ibid

⁷⁰ Ibid.

A positivist analysis by economist Steven Suranovic indicates that fairness can be considered to have two principles: equality and reciprocity.⁷¹ More particularly, with respect to trade, Suranovic claims the two principles may be considered as having seven dimensions:

1. Non-Discrimination Fairness,
2. Distributional Fairness,
3. Golden-Rule Fairness,
4. Positive Reciprocity,
5. Negative Reciprocity,
6. Privacy Fairness and
7. Maximum Benefit Fairness.

We will deal briefly with each in turn. Non-Discrimination Fairness, requires equals to be treated equally. Any right granted or duty imposed on one party is equally available or imposed on the other.⁷² Distributional Fairness, requires goods (and evils) to be distributed equally among equal members. It is a fairness evaluated on outcomes: that is the outcome of any distribution must ensure that each party or group receives an amount equal in some way.⁷³ Golden-Rule Fairness, says Suranovic, requires that no action be taken unless the actor is willing to be subjected to the same action.⁷⁴ Positive Reciprocity, permits parties to act so as to gain a benefit from a

⁷¹ S. Suranovic, "A Positive Analysis of Fairness with Applications to International Trade," *The World Economy*, March 2000, 283-307. Suranovic's article is an interesting analysis of fairness and includes examples of each type of fairness in international trade. It is too brief in its legal analysis but that is to be expected given its objective of categorizing and developing a positive analysis of fairness in trade.

⁷² *Ibid*, 288.

⁷³ *Ibid*, 290. For a more detailed and nuanced discussion, see my discussion of outcomes in Sheehy above n. 47.

⁷⁴ *Ibid*, 291.

receiving party equal to one bestowed on that other.⁷⁵ Negative Reciprocity, permits retaliation in kind and quantity in response to a harm done.⁷⁶ Privacy Fairness permits parties to act freely insofar as their actions affect only themselves. Actions which impede this expression of freedom are deemed “unfair.”⁷⁷ Maximum Benefit Fairness requires that when a range of benefits are available from an action but only one outcome can be chosen, the outcome selected must be the one most beneficial in the aggregate.⁷⁸ From this brief overview, one can see the legitimacy of the Oxfam, Sen and the host of developing nation complaints.

If one is committed to the principle of the equality of humans as members of the same species, a view that informs the UN Charter of Human Rights, one of the most universally accepted explanations of humanity on the planet, one of the primary concerns must be the development and protection of the means of human sustenance. Thus, where institutions, systems and rules support a distribution that fosters their sustenance, one can argue conclusively that the institutions, systems and rules are fair. Logically, where institutions, systems and rules support a distribution that undermines people’s ability to sustain themselves, one can argue conclusively that the institutions, systems and rules are unfair

5) POLITICS OF TRADE: USA FOREIGN POLICY

The history of wealthy northern nations conquering and controlling poorer southern nations is both well known and uncontroversial. The interests of those who lived in

⁷⁵ Ibid, 295.

⁷⁶ Ibid, 299.

⁷⁷ Ibid, 301.

⁷⁸ Ibid, 302.

those poor southern nations were disregarded and the countries were essentially treated as treasury supports for their European masters. This view of the world, of the developed northern nations, “right and destiny” to conquer and dominate the rest of the world, however, has carried on long after the collapse of the European empires. This is particularly true in the case of the USA.

It has been said: “One can colonize by trade or conquest.” The USA has combined these two methods masterfully. As documented carefully by historian Howard Zinn, USA’s aggressive foreign policy has been driven by its economic interests. He quotes Senator Beveridge of 1897 when American foreign policy was still shaping:

“American factories are making more than the American people can use. American soil is producing more than they can consume. Fate has written our policy for us; the trade of the world must and shall be ours.”⁷⁹

America took the policy to its logical military conclusion quite early. Perhaps it is wise to consider America’s policies in their historical context. One of America’s most visionary presidents, (often considered to be among the most humanitarian with respect to foreign affairs,) Woodrow Wilson offered: “Concessions obtained by financiers must be safeguarded by ministers of state, even if the sovereignty of unwilling nations be outraged in the process...”⁸⁰ He made it perfectly clear that the voluntariness of trade partners was not a consideration. He stated: “the doors of the nations which are closed must be battered down.”⁸¹ Elsewhere, this same enlightened

⁷⁹ H. Zinn, *A People’s History of the United States*, p. 292.

⁸⁰ Speech at Columbia University, 1907, quoted in H. Zinn, *ibid*, p. 353.

⁸¹ *Ibid*. This view echoes uncannily the British foreign policy of the nineteenth century. See comment of Lord Shelburne above n. 13.

president explained his intention to force trade on the rest of the world which he described as “the righteous conquest of foreign markets.”⁸²

This approach to foreign policy was carried forward after the end of the Second World War. In setting up the post-WWII world, the USA supported the pre-war division of the world among developed countries which were to be served by their third world colonies. The USA thoughtfully reserved Latin America to itself.⁸³ Lest these discussion and facts be considered outdated or a sentiment peculiar to a particular president, consider G.H. Bush’s concern to protect USA oil supplies in Kuwait claiming that the USA was restoring democracy in the clan bound, autocratic kingdom, or Madeline Albright’s comments to the UN Security Council concerning the Clinton Administration’s desire to act against Iraq: “[the US will] behave, with others, multilaterally when we can and unilaterally as we must.”⁸⁴ In 2002 US Trade Representative Ambassador Robert Zoellick has put it plainly: “America's trade policies are connected to our broader economic, political, and security aims.”⁸⁵ Zoellick acknowledged that it lacks intellectual coherence. He wrote: “This intellectual integration may confound some trade scholars.”⁸⁶ Nevertheless, he makes USA’s policy abundantly clear: “To be sustainable at home, our trade strategy needs to be aligned with America's values and aspirations -- as well as with our economic interests.”⁸⁷

⁸² Ibid.

⁸³ N. Chomsky, Profits over people, neoliberalism and global order, 1999, p. 22-23.

⁸⁴ In 1994.

⁸⁵ <http://usinfo.state.gov/journals/itps/0803/ijpe/pj81zoellick.htm>

⁸⁶ Id.

⁸⁷ Id.

As mentioned, the US has done so continually by two methods: the first and obvious which we are currently seeing in Iraq,⁸⁸ a policy of invasion of sovereign nations⁸⁹ and subversion of democratically elected governments,⁹⁰ and second, by means of terms of trade, whether through protectionism or embargoes against whomever it chooses.

Because of the political unpopularity of foreign invasions for commercial purposes particularly among the lower and middle classes conscripted to fight and die for those commercial interests,⁹¹ and its myths of equality, self-determination, and democracy,⁹² the USA has been reluctant to overtly invade and conquer.⁹³ The exception of course, has been with respect to the aboriginal nations who lived in North America prior to the European invasion, which after the establishment of the USA were subject to constant invasions and concerted efforts and policies of genocide.⁹⁴

Given the outcry disclosure about economic motives for its wars would create for the government and corporations guiding the USA military adventures,⁹⁵ they must continue to mask both domestically and internationally their motives, regardless of the

⁸⁸ Among the first pieces of “legislation” created by the Coalition Provisional Authority was a new trade regime in which Iraq was open to international trade on terms very liberal to the USA. The final outcome of this “legislation” is unknown at the time of this writing as according to international law an occupying power has no legal right to create laws dealing with international relations.

⁸⁹ See Rice above, n. 13.

⁹⁰ For a comprehensive review of the USA’s violent and covert interventions see, W. Blum, *Killing Hope: U.S. military and CIA interventions since World War II*, (1995).

⁹¹ *Ibid.*

⁹² J. Kane, *Virtue and Power: The Perennial Dilemma of US Foreign Policy*.

⁹³ Although it has no qualms about doing so covertly. For a comprehensive review of the USA’s violent and covert interventions see, W. Blum, *Killing Hope: U.S. military and CIA interventions since World War II*, (1995). For discussion, see J. Garrison, *America as Empire: Global Leader or Rogue Power?* (2004). One can see this same ambiguity among contemporary scholars and commentators with respect to speaking of the USA's empire. See, for example, Robert Kaplan who favours speaking of the USA empire.

⁹⁴ See Zinn above n. 63.

⁹⁵ See for example, Zinn, “A People’s War?” Chapter 16 above n. 63, p. 398 ff.

international ridicule their patent falsehoods may draw. Instead of forthrightness, the USA tends to rely on its trade laws.⁹⁶ As former Commissioner of Australian Trade Practices Commission, Professor Warren Pengilley, observes, “Because it [USA] had no widespread territorial base upon which to enact protective trade legislation, the United States sought in its laws to enact legislation principles never previously a part of international law.”⁹⁷

A favourite cover for USA motives, is the oft repeated pretext of “national security”. For example, its embargo of Cuba was advanced on “national security” grounds. It was so transparently ridiculous, that a Mexican diplomat explained his country’s refusal to support the embargo by saying “if we publicly declare that Cuba is a threat to our security forty million Mexicans will die laughing.”⁹⁸ Indeed, the USA instigated the Cuban problem by imposing sanctions against Cuba’s sugar exports—its main cash crop export, to which Cuba responded by confiscating USA property.⁹⁹

This approach is reflected in its laws concerning foreign commerce, and in particular its “effects,” “personal extension” and “contractual submission” doctrines.¹⁰⁰ Each of these legal doctrines is a transparent attempt to extend USA laws beyond territorial or jurisdictional limits otherwise recognized by international law. These laws serve to advance USA foreign policy, particularly, the export of USA’s values¹⁰¹ as well as its

⁹⁶ Pengilley, above n. 29, p. 195

⁹⁷ Ibid, p. 195

⁹⁸ Quoted in Ruth Leacock, *Requiem for Revolution*, (1990) 33.

⁹⁹ Story, “Property in International Law: Need Cuba Compensate US Titleholders for Nationalizing their Property?” (1998) 6 *The J. of Pol. Phil.* 306-333. The same should be noted with respect to the “Cuban Missile Crisis” which was initiated by the USA’s deployment of several hundred missiles along the USSR’s southern front just inside the Turkish border. In response to that initiative, the USSR sought to have its missiles placed in Cuba.

¹⁰⁰ Discussed in Pengilley, above n. 29, p. 194-204

¹⁰¹ D. Sanger, “U.S. Is Exporting Its Free-Market Values through Global Commercial Agreements.” *NY Times* 17 Feb, 1997

economic interests. Despite its free market rhetoric, USA trade policy is anything but free trade. Consider, for example, that under the supposed liberalization of trade under Reagan.¹⁰² In the Reagan era the USA implemented three times more protectionist policies than any other developed country.¹⁰³ As Pengilley observes, one cannot neatly divide foreign policy, trade and competition.¹⁰⁴

In his enlightening and powerful article, “United States Self Interest: A Major Impediment to Agreement on the Principles of International Competition and its Enforcement,”¹⁰⁵ Pengilley, has demonstrated amply the USA does nothing but advance its self-interests usually with just those same policies. It is not being argued that the USA should act contrary to its self-interest, but that it should take a broader perspective of its self-interest and consider reciprocity as an important principle in its foreign policy.¹⁰⁶ As Pengilley observes, the USA “has a plethora of statutes aimed at advancing its cause to the detriment of its competitors.”¹⁰⁷ This approach is rather surprising as it occurs despite the supposed lessons from the Great Depression and in particular, the problem associated with the beggar-thy-neighbour policies.¹⁰⁸

This use of law, clearly contrary to economic good, seems particularly inappropriate for a nation committed to the Rule of Law. But this is not the only odd or contradictory use of law by the self-proclaimed beacon of the Rule of Law. Indeed congress created laws purporting to give the USA international jurisdiction contrary

¹⁰² Noted, for example, by J. Stiglitz, as a major promoter of free trade in Stiglitz, above n. 11, p. 13.

¹⁰³ Patrick Low Trading Free: The GATT and U.S. Trade Policy, 1995.

¹⁰⁴ Pengilley, above n. 29, p. 202

¹⁰⁵ Ibid, p. 195.

¹⁰⁶ See Rice above n. 13 for expression of the USA position and explanation for the rejection of this view.

¹⁰⁷ Ibid.

¹⁰⁸ This may be another example of what Gore Vidal is concerned about in his work appropriately titled The United States of Amnesia. But see the actual nature of these supposed lessons in Chang above n. 5.

to well recognized and accepted international law¹⁰⁹ and the courts have upheld these doctrines of extraterritoriality. Perhaps the classic case, although later modified in response to world opprobrium,¹¹⁰ is the judgment in *US. v. Aluminum Co. of America*¹¹¹ in which the court stated: “Any state may impose liabilities, even upon persons not with its allegiance for conduct outside its borders that has consequences within its border which the state reprehends.”¹¹²

These USA claims of jurisdiction are widely, and with good reason, regarded as imperialistic:¹¹³ when other countries have attempted to enact reciprocating legislation the USA has refused to recognize such legislation.¹¹⁴ Pengilly concludes “The United States has, to date, used its world trading position, and the necessity for virtually the whole world to trade with it, as a basis both for enacting self-interested legislation and subjecting the trading world to it.”¹¹⁵

In light of this information and perspective with respect to USA foreign policy, we may ask: was Australia entitled to believe it would receive any special treatment in the Australia-USA FTA based on friendship? There are two ways to develop an answer to the question. First, one can examine the actual negotiations and outcome of the negotiations in the FTA. Second, one can examine the outcome in terms of economics and in particular ecological economics.

¹⁰⁹ For discussion, see M. Shaw, *International Law*, 4th ed. (2004), pp. 483-490. See also Pengilly, above n. 29, p. 195

¹¹⁰ See discussion in Shaw, *id.*, p. 484 f.

¹¹¹ 148 F. 2d 416 (1945).

¹¹² *Id.*, p. 443.

¹¹³ *Ibid.*, 188.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* 228.

6) THE AUSTRALIA-USA FTA

United States twice made overtures to Australia for Free Trade Agreement, and both times it was rejected.¹¹⁶ Nevertheless, on 14 November, 2002, Australia instigated¹¹⁷ negotiations with the United States for a bi-lateral trade deal.¹¹⁸ In October 2004, Australia entered the Free Trade Agreement. The speed with which agreement was reached seems to have surprised Australians.¹¹⁹

Australia considers itself a friend of the USA. As Prime Minister John Howard repeatedly advised Australians that the FTA was based on the “friendship” or a “special relationship” between the countries. Indeed, the trade agreement was premised to a certain degree on this notion. Such advice, however, should be taken with a note of caution.

a) Friends & Interests in International Relations

Lord Palmerston, defending his foreign policy in the House of Commons in the mid-nineteenth century remarked, "We have no eternal allies, and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow."¹²⁰ This perspective continues to inform foreign policy among contemporary nation states, and certainly includes the USA. Clearly, one must put such quaint notions as friendship aside and leave them for the popular press. Indeed, the reality of

¹¹⁶ Weiss and Thurbon, above n., 14, p. 6.

¹¹⁷ Foreign Affairs, Defence and Trade Legislation Committee 6 June 2002, Hansard 501-515 <http://sievx.com/testimony/20020606FADT.pdf>

¹¹⁸ The problems associated with bi-lateral and unilateral FTA's vis-à-vis the international trading system are simply explained in J. Bhagwati, R. Garnaut “Say No To This Free Trade Deal” The Australian, July 11, 2003.

¹¹⁹ Weiss, above n. 14, p. 2.

¹²⁰ Parliamentary Debates (3d ser.) 122 (1848), quoted in Respectfully Quoted: A Dictionary of Quotations Requested From the Congressional Research Service 10 (Suzy Platt ed., 1989).

the situation, was made evident in parliament when the member from Murray-Darling pointed out how the USA's "enemy," Cuba, has a better market access for its sugar than does Australia.¹²¹ Such talk is merely governments obfuscating an issue that ought to be thoroughly and thoughtfully debated in public. That aside, what has been the basis for or justification of the FTA?

b) Economic Benefits

Australia purportedly wanted to enter the FTA to avoid being overtaken by other tropical countries, particularly in Latin America, particularly with respect to its trade in agriculture.¹²² Initially, the Australian government claimed gains, in the neighbourhood of \$4 billion per annum over a ten year period.¹²³ Access to USA markets for Australian agricultural products were used to promote support for the FTA.¹²⁴ The Australian government boasted that 66% of agricultural tariffs would be eliminated immediately, and a further 9% reduced to zero within four years.¹²⁵ The Australian government also claimed elimination of 97% of US tariff lines in non-agricultural exports (but, textiles and clothing would not be included).¹²⁶ Access to USA government procurement market was also touted as a benefit,¹²⁷ as was access for Australian service providers.¹²⁸

¹²¹ Mr. Peter Black Urgent Motion, AUSTRALIA-UNITED STATES OF AMERICA FREE TRADE AGREEMENT SUGAR INDUSTRY EXCLUSION, NSW Legislative Assembly Hansard 17/02/2004 Page: 6177.

¹²² Foreign Affairs, Defence and Trade Legislation Committee 6 June 2002, Hansard 501-515 <http://sievx.com/testimony/20020606FADT.pdf>

¹²³ Black above n. 98.

¹²⁴ Department of Foreign Affairs and Trade, "Advancing Australian Agricultural Exports," p. 2 http://www.dfat.gov.au/trade/negotiations/us_fta/fact_sheets/Agriculture.pdf

¹²⁵ Department of Foreign Affairs and Trade, Australia-United States Free Trade Agreement "Advancing Australia's Economic Future," p. 1.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

It is interesting to note how these benefits are evaluated by economists. The Australian government commissioned report, conducted by the Centre for International Economics (CIE) suggested significantly larger GDP gains of \$6.1 billion per annum for the period 2005-2015.¹²⁹ This projection amounts to a \$61 billion gain in the GNP for the period. Alternative modelling, however, based on econometrics presents a dramatically different outcome. Indeed, the study prepared by the National Institute of Economic and Industry Research (NIEIR), indicates a potential change to the Australian economy of -\$47 billion over the same period.¹³⁰ The depth and breadth of the NIEIR study and its criticisms levelled against the CIE study incline one to accept the NIEIR's view of the matter.¹³¹

On the USA side, The Wall Street Journal called the pact a "no brainer" as USA is already running a \$9 billion surplus on \$28 billion of trade with Australia.¹³² Further, as Senator Grassley of the USA Finance Committee observed it will immediately eliminate Australian industrial tariffs on 99% of products.¹³³ The only USA objection to the FTA came from labour and certain special interest groups like agriculture and textiles.¹³⁴ The USA also emphasized the benefit to its agricultural industries which export \$400 million to Australia as part of the duty free goods resulting from the

¹²⁹ Centre for International Economics, "Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States" <http://www.intecon.com.au/reports/AUSFTA.pdf>

¹²⁹ Foreign Affairs, Defence and Trade Legislation Committee 6 June 2002, Hansard 501-515 <http://sievx.com/testimony/20020606FADT.pdf>

¹³⁰ National Institute of Economic and Industry Research, "An assessment of the direct impact of the Australian-United States Free Trade Agreement on Australian trade, economic activity and the costs of the loss of national sovereignty." May 2004 <http://www.aftinet.org.au/campaigns/nier.pdf>

¹³¹ A pessimistic estimation of the impact of the FTA was made by business leaders in Australia as well. See Weiss above n. 14, p. 144-145. One cannot but recall G.B. Shaw's comment: "If all the economists were laid end to end, they still would not reach a conclusion." Nevertheless, one would like to think that the profession has made some advances since Shaw's time.

¹³² "A-Waltzing Free Trade" New York, N.Y.: May 20, 2004. pg. A.12

¹³³ Floor Statement of Sen. Chuck Grassley on S. 2610, the U.S.-Australia Free Trade Agreement Implementation Act July 15, 2004 <http://finance.senate.gov/press/Gpress/2004/prg071504a.pdf>

¹³⁴ Wall St. J. above n 109.

FTA.¹³⁵ USA estimates were that the FTA with Australia will increase USA exports by approximately \$2 billion per annum.¹³⁶ The basis for claiming the agreement is so one-sided will be examined next.

c) The Agreement

Australia had a number of objectives and concerns in negotiating the FTA.

Australia's science based quarantine which has kept Australia's agriculture industry free of significant pests,¹³⁷ was a concern that Australia wished to protect.¹³⁸

In the negotiations, Australia was not able to keep its quarantine measures in place.

The USA demanded and received concessions from Australia claiming that the quarantine measures were non-tariff barriers to trade and not proven by USA science.

Australia lost.

Australia has a Pharmaceutical Benefits Scheme (PBS) that makes medicines available to Australians at low cost.¹³⁹ Australia was promised by its government that the FTA would not effect the PBS. The USA framed the PBS as an impediment to the USA's pharmaceutical industry's competition in the Australian market. It therefore demanded and received as a concession from Australia changes to the PBS which will have far reaching negative effects for the average Australian.

¹³⁵ Office of the United States Trade Representative "Bilateral and Regional Negotiation" 2004 Trade Policy Agenda and 2003 Annual Report
http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/asset_upload_file392_4753.pdf

¹³⁶ Office of the United States Trade Representative "Summary of the U.S.-Australia Free Trade Agreement Free Trade "Down Under"" 02/08/2004
http://www.ustr.gov/Document_Library/Fact_Sheets/2004/Summary_of_the_U.S.-Australia_Free_Trade_Agreement.html

¹³⁷ Chapter 7 Sanitary and Phytosanitary Measures, discussed in Weiss above n. 14, p. 35-44

¹³⁸ Foreign Affairs, Defence and Trade Legislation Committee 6 June 2002, Hansard 501-515
<http://sievx.com/testimony/20020606FADT.pdf>

¹³⁹ The Pharmaceutical Benefits Scheme will be seriously damaged by being excluded from the Annex 2-C. A fuller explanation is available in Weiss above n. 14, p. 63-68.

Further, Australia maintained a policy of supporting domestic industry which benefited Australia – much like its American counterpart “Made in USA” policy – and was an important part of Australia’s national economic policy.¹⁴⁰ This policy too came up for scrutiny in the negotiations. The USA demanded and received concessions putting an end to this policy.

Finally, up until the FTA negotiations, Australia followed its own intellectual property polices which were in line with international standards. Nevertheless, it gave in to USA demands for “evergreening”¹⁴¹ intellectual property laws—laws which extend copyrights and patents by permitting dubious patent applications by current patent holders which work to thwart generic competitors. This later provision ensures an extended stream of royalties will flow into the USA for years after they would normally have ceased.¹⁴² In sum, Australia failed to achieve its objectives in four vital areas: quarantine, medicines, government procurement, and intellectual property.

Despite these significant failures, certainly it should be expected that rationality would prevail with respect to the more obvious, less controversial items—items of trade which form the basis for arguments for trade. While certainly tropical fruits could be grown anywhere including the polar regions (given enough energy inputs in matters of light, heat, and fertilizer, much as one can make icebergs in the tropics), it does not take an economist to realize that it is a misallocation of resources to do so. Australia is a tropical and semi-tropical continent. As such, its citrus and sugar industries constitute a significant proportion of its agricultural produce. It would be

¹⁴⁰ Chapter 15.

¹⁴¹ Article 17.20.4

¹⁴² Weiss above, n. 14, p. 116.

instructive therefore to examine how these products fared in the FTA. The case of sugar will be examined, with the caveat that while it is not necessarily a typical example of how goods were dealt with between these two developed nations, it serves as an exemplar of the nature of the problem which is the focus of the balance of this paper.

7) CASE STUDY: SUGAR

In Australia and the USA various studies were undertaken to estimate the losses and gains which could result from truly free trade between the two nations' peoples with respect to sugar. On the Australian side, potential gains from reduced tariffs on sugar were estimated at \$4 billion.¹⁴³ Although not unaware of the USA sugar subsidies and restrictions, it was indicated in preliminary discussions to the Australian Senate Subcommittee that agriculture including exports of sugar¹⁴⁴ to the USA were open to negotiation. This openness was certainly important to Australia as Minister Vaile had declared that access to USA markets for agriculture and sugar in particular were specific objectives.¹⁴⁵ Neo-liberal Prime Minister John Howard adamantly asserted that sugar would not be excluded from the FTA. His assertions proved not to be true and the USA announced in February 2004 that its sugar industry would not be effected.¹⁴⁶ USA sugar producers had indicated to USA negotiators that granting

¹⁴³ Mr. Neville Newell, member for Tweed, Urgent Motion, NSW Legislative Assembly Hansard "Australia-Untied States of America Free Trade Agreement Sugar Industry Exclusion" 17/02/2004 p. 6177.

¹⁴⁴ Foreign Affairs, Defence and Trade Legislation Committee 6 June 2002 at 511.

¹⁴⁵ Media Release, Vaile Announces Objectives for Australia - US FTA Monday, 3 March 2003 - MVT13/2003 http://www.trademinister.gov.au/releases/2003/mvt013_03.html

¹⁴⁶ The concern about sugar was one reason that Australia had refused the previous overtures. The announcement was made by Office of the United States Trade Representative "Summary of the U.S.-Australia Free Trade Agreement Free Trade "Down Under"" 02/08/2004 http://www.ustr.gov/Document_Library/Fact_Sheets/2004/Summary_of_the_U.S.-Australia_Free_Trade_Agreement.html

Australian access to USA markets would likely destroy their industry costing 66,000 jobs, which if expanded to the sweetener industry would encompass 226,000 jobs.¹⁴⁷

Before looking at the specifics of the FTA negotiations, it is worthwhile to review the historical and global background to the international sugar trade and the respective domestic environments of both the USA and Australia.

Over the course of sugar's long history as part of human civilization it has changed from a luxury item to a basic food commodity.¹⁴⁸ Sugar is among the world's most commonly traded, imported and regulated commodities. The global sugar market is in excess of 119 million tonnes per annum.¹⁴⁹ The five main exporters are the EU, Brazil, Australia, Thailand, and Cuba.¹⁵⁰ It is often commented that the sugar market is the most distorted market among the world's commodities¹⁵¹ with approximately a third sold pursuant to special arrangements, meaning, outside of a free market.¹⁵² Sugar, as a commodity has experienced considerable volatility largely related to government interventions, on the world markets.¹⁵³ In the last two decades it has ranged from \$0.404 in 1985¹⁵⁴ to \$0.1344 in 1995¹⁵⁵ per pound.

¹⁴⁷ Submission of the American Sugar Alliance, Office of the United States Trade Representative, United States Department of labor, Request for Public Comment on Review of the Employment Impact of the Proposed U.S.-Australia Free Trade Agreement, p. 1-3.

¹⁴⁸ See, Ray Burke, *The Bee, the Reed, The Root: The History of Sugar* (1997)

<http://class.georgiasouthern.edu/fl/sugar/sugar-b.htm>

¹⁴⁹ Won W. Koo "Major Issues for the U.S. Sugar Industry" in Linda M. Young, James B. Johnson, and Vincent H. Smith, eds. *2000 WTO Negotiations: Issues for Agriculture in the Northern Plains and Rockies*, (1999) at 89. Koo's figure is based older data. A rough calculation based on USDA statistics for the years 1995-2002 would indicate a slightly larger market averaging 126 million tonnes per year. <http://usda2.mannlib.cornell.edu/data-sets/specialty/89019/tab-01.xls>

¹⁵⁰ *Ibid.*, 91.

¹⁵¹ Donald Mitchell, "Sugar Policies: Opportunity for Change," Development Prospects Group, The World Bank, World Bank Policy Research Working Paper 3222, Feb 2004, p. 6. Noted also by J. Roney, "The U.S. sugar industry: Large, efficient, and challenged," 106 *International Sugar Journal* (2004) 315, at 321. Although an industry journal, the discussion here is a helpful summary.

¹⁵² Queensland Sugar Corporation, *Sugarnotes* (1997), p. 40.

¹⁵³ N. Arguea, R. Harper, "Linkages in US and World Sugar Futures Contracts" 20(4) *Managerial Finance* 25-37 (1994).

¹⁵⁴ Economic Research Service of the US Department of Agriculture *Sugar and Sweetener Yearbook* (89019) tab 02 <http://usda2.mannlib.cornell.edu/data-sets/specialty/89019/tab-03.xls>

¹⁵⁵ *Ibid.*

a) USA Sugar Programs and Policies

Sugar in the USA is governed by a complex legal regime¹⁵⁶ which maintains a number of supports for the local sugar industry. These supports are a complex of import taxes,¹⁵⁷ special loans,¹⁵⁸ market supports, and marketing fee assessments.¹⁵⁹ The import taxes amount to approximately 100% of the cost of raw sugar as measured against the Caribbean raw sugar price, (which is usually considered the base price).¹⁶⁰ Commitments by the USA government to date have been to reduce import taxes on second tier-duty (the tier after a quota has been filled) for raw cane sugar to \$0.1582 per pound and \$0.1621 per pound for refined sugar.¹⁶¹ The USA operates both internal supports and external subsidies for its sugar industry. Government subsidies cost the USA consumers between \$800 million and \$1.9 billion per annum.¹⁶²

Although the USA itself is also a major producer, its total sugar production is insufficient for the demands of its domestic market. As a result of this insufficient production combined with the distortions caused by the USA government's subsidy programs by which it acquires domestically produced sugar, the USA is in the bizarre position of having large quantities of sugar to dump on the world market, while its importers bring in 1.25 million tons of sugar annually.¹⁶³

¹⁵⁶ From the 1949 Agriculture Act, s. 206 establishing the sugar regime, to the 1985 Food Security Act, to the repeal of s. 206 under the Federal Agriculture Improvement and Reform Act, 1996, s. 701, to the most recent changes pursuant to the 2002 Farm Bill.

http://www.taxpayer.net/agriculture/learnmore/factsheets/TCSSugarCommodityFactSheet_2003.pdf

¹⁵⁷ US Dept. of Ag. Econ. Res. Serv. Referred to in Koo, above n. 126, p. 94.

¹⁵⁸ Through the Commodity Credit Corporation

¹⁵⁹ Koo, above n. 126, p. 94-5.

¹⁶⁰ Ibid, p. 92.

¹⁶¹ Ibid, p 96.

¹⁶² M. Grunwald, "When in doubt, blame Big Sugar" The Washington Post June 25, 2002.

¹⁶³ S. Salisbury, "Trade Fight not over for citrus, sugar" Palm Beach Post, Nov. 22, 2003. Set at 1.13 in 1997, Sugarnotes, above n. 129, p. 44.

Economists' modelling leads them to estimate that without these supports and subsidies that the world sugar prices would increase by a dramatic 61%,¹⁶⁴ effectively transferring the majority of the gain to the major, poor southern producers.

With respect to production, USA growers produced \$960 million worth of sugar in 2003.¹⁶⁵ Among its states, subtropical Florida is a major sugar producer. The efficiency of cane growth in subtropical areas, however, is questionable: Florida cane growers produce approximately 1/3 to 1/4 of the amount per acres of growers in tropical climates.¹⁶⁶ Florida yields are approximately 34.5 tons of cane per acre.¹⁶⁷

b) Australia Sugar Programs and Policies

Australia too has a significant sugar industry with a long history including at times, considerable government intervention.¹⁶⁸ Sugar production is spread along some 2,100 kms of Australia's eastern coast in the states of Queensland and New South Wales,¹⁶⁹ with the former accounting for 94% of the production and the latter 5%.¹⁷⁰ Australian exports supply about 12% of the world market.¹⁷¹ The Australian government first enacted legislation to comply with the International Sugar

¹⁶⁴ M. Benirschka, W. Koo and J. Lou, World Sugar Policy Simulation Model: Description and Computer Program Documentation." Dept. of Ag. Econ. Ag. Econ. Report 356, N. Dakota State Univ. 1996.

¹⁶⁵ USDA Crop Values 2003 Summary at 35. <http://usda.mannlib.cornell.edu/reports/nassr/price/zcv-bb/cpvl0204.pdf>

¹⁶⁶ J.R. Magness, G.M. Markle, C.C. Compton. 1971. Food and feed crops of the United States. Interregional Research Project IR-4, IR Bul. 1 (Bul. 828 New Jersey Agr. Expt. Sta.).

http://www.hort.purdue.edu/newcrop/Crops/Sugar_cane.html
¹⁶⁷ Based on figures from USDA/ERS publication #SSSV20N2, June 1995; estimated production, 1995-1996 table in Robert J. Meagher, Jr., USDA/ARS, Insect Attractants, Behavior and Basic Biology Laboratory, Gainesville, Florida Radcliffe's IPM World Textbook
<http://ipmworld.umn.edu/chapters/meagher.htm>

¹⁶⁸ K. Walker and K. Crowley, Australian Environmental Policy 2, (1999) 88-90.

¹⁶⁹ Sugarnotes, p. 8.

¹⁷⁰ Sugar Research Limited, <http://www.sri.org.au/sugarindustry2.html>

¹⁷¹ Queensland Sugar Corporation, Sugarnotes, (1997) p. 1.

Agreement of the 1930's.¹⁷² Subsequently, the commonwealth and Queensland state governments negotiated an embargo on the importation of white sugar which pursuant to the Queensland Sugar Agreements lasted until 1989.¹⁷³ Since that time there has been a successive reduction on tariffs.¹⁷⁴ In terms of Australia's export market, sugar is its second most important crop, following wheat.¹⁷⁵

The sugar export market is operated exclusively by the Queensland Sugar Corporation, a state operated enterprise established pursuant to legislation.¹⁷⁶ Queensland exports about 80% of its raw sugar and has receipts of about AUD\$2.0 billion, per annum.¹⁷⁷ Although Australia abolished its embargo on imported sugar, it too continues to protect its sugar industry, with a tariff at a rate of \$38 per tonne.¹⁷⁸ Annual production is approximately 5.0 million tonnes.¹⁷⁹

Given its tropical climate, Australia's sugar production is efficient. Yield is approximately 80-100 tonnes of cane per acre.¹⁸⁰ Prior to the FTA, Australia's sugar quota with the USA was 87,000 tonnes—the equivalent of two boatloads per annum.¹⁸¹ USA producers realized that if Australian producers were granted a level playing field, Australians would sell a much larger proportion of their sugar crop to the USA and destroy the USA sugar industry.¹⁸² Accordingly, they lobbied the

¹⁷² Leading to International Sugar Agreement opened for signature London, 1-24 December 1958.

¹⁷³ Sugarnotes above n. 129, p. 4, 48.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid, p. 5.

¹⁷⁶ Sugar Industry Act, 1999, Qld.

¹⁷⁷ Id.

¹⁷⁸ Sugarnotes, above n. 129, p. 46.

¹⁷⁹ Ibid, p. 45.

¹⁸⁰ Ibid, p. 11

¹⁸¹ Black, above n. 98.

¹⁸² American Sugar Alliance "Proposed Free Trade Agreement Negotiations Between the United States and Australia: Advice Concerning Probable Economic Effect" submissions to United States International Trade Commission Hearing: Investigation Nos. TA-131-24 and TA-2104-04 Washington

government which succumbing to pressure to protect USA domestic corporate producers simply refused to grant Australia a level playing field. As a result, Australia did not improve by one iota access for one of its major agricultural export products: sugar. Sugar is explicitly and completely excluded from the FTA,¹⁸³ and Australia, despite its rather dramatic concessions, continues to be limited to its quota of a mere two boatloads—exactly the same as before the FTA.

8) EVALUATING THE FTA FOR FAIRNESS

Having demonstrated a considerable number of losses, economically, and ecologically, are there other justifications that need to be considered before engaging in an evaluation of the FTA for fairness?

a) Benefits and explanations

The Australian government claims that one of the main motivations for the FTA was its political and military alliance with the USA – already made firm by the ANZUS treaty. The incumbent Prime Minister emphasizes the USA's role in defeating the Pacific's imperial power, Japan, in the Second World War.¹⁸⁴ This argument seems weak if not altogether specious. Surely, there are no powers in the Pacific greater

D.C. Jan. 21, 2003. 1-2, See also Submission of the American Sugar Alliance, Office of the United States Trade Representative, United States Department of labor, Request for Public Comment on Review of the Employment Impact of the Proposed U.S.-Australia Free Trade Agreement, p. 1-3.

¹⁸³ United States - Australia Free Trade Agreement, Final Text, s. 2 National Treatment and Market Access for Goods, Annex 2-B Tariff Elimination, Schedule of Australia, Ch. 17.
http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/Annex2b_Tariff_Elimination/Annex_2-B_Australia_Tariff_Schedule.pdf

¹⁸⁴ Paul Sheehan, in the January 2003 Sydney Morning Herald, quotes a Howard advisor: "The PM [believes that] If one day we ever have to face a militant Indonesia, we've only got one ally[USA] who can do the job."

<http://reg.smh.com.au/login.do?status=FAIL&errMsg=&errCode=10001&site=SMH&server=http%3A%2F%2Fwww.smh.com.au&data=%2Farticles%2F2003%2F02%2F05%2F1044318667099.html%3Fonclick%3Dtrue&count=0>

than Australia with the exceptions of China and Japan. Japan, however, has given up its imperial designs and its constitution expressly forbids the development of an offensive military force.¹⁸⁵ And China is more than sufficiently occupied with its domestic and regional problems including Taiwan, Tibet, Kazakhstan, Kyrgyzstan, Tajikistan, Afghanistan and Pakistan all of which border on the Xinjiang Province, not to mention the troubles it has had with India and Vietnam on the outside¹⁸⁶ and other ethnic groups within. In the most unlikely event that China were to invade Australia, it is very difficult to imagine the USA becoming involved, particularly since China is the leading foreign buyer of USA Treasury Bonds second only to Japan.¹⁸⁷

Were any lesser power to attack and were Australia unable to repel it, the United States would intervene in any such situation on account of its own interests¹⁸⁸— indeed, the aggressiveness and complete disregard for the rights and interests of other sovereign nations is one of the main complaints brought against the USA.¹⁸⁹

¹⁸⁵ The Japanese Constitution reads: “Chapter II Renunciation of War, Article 9 (1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of aggression of the state will not be recognized.” Trans. from Universität Bern Institut für Öffentliches Recht)

http://www.oefre.unibe.ch/law/icl/ja00000_.html#A009_

¹⁸⁶ See, for example, the analysis George Lindsey, Senior Research Fellow at the Canadian Institute for Strategic Studies and former Chief of Operations Research of the Department of National Defence in George Lindsey, “Should China Be Contained Or Engaged?” 6(2) NATIONAL NETWORK NEWS (1999), http://www.dann.ca/Backissues/nn6-2_10.html

¹⁸⁷ United States Treasury, indicates that China holds \$196 bn second only to Japan at \$707 bn.

“MAJOR FOREIGN HOLDERS OF TREASURY SECURITIES” <http://www.ustreas.gov/tic/mfh.txt>

¹⁸⁸ The USA maintains at least installations at Woomera, <http://cicg.free.fr/diremp/usmili.htm> and its involvement in Pine Gap although not an installation, is notorious as is its presence in Nurrungar first disclosed to the Australian public in Des Ball, A Base for Debate The US Satellite Station at Nurrungar (1987) See also A. Broinowski “No US Bases in Australia, Says Myers” ASEAN Focus Group, (Feb. 2004) chronicles the recent political pronouncements concerning US military bases in Australia .

<http://www.aseanfocus.com/asiananalysis/article.cfm?articleID=709>

¹⁸⁹ See for example the discussion in Shaw, above n. ???

Given Australia's rejection of two prior approaches for an FTA by the USA, there was some concern about the priority USA would accord to Australia.¹⁹⁰ Despite much assurance from Mr. Deady of the Department of Trade that it was an important agreement receiving full attention from the USA, the USA's Office of the Trade Representative mentions the Australian FTA in a mere paragraph while extolling the coup of other agreements with Chile and Central America.¹⁹¹

Other parties in favour of the FTA were the Business Council of Australia and some other smaller industries that have considerable trade with the USA. The Business Council of Australia is made up of Australia's largest corporations, many of which are controlled or at least closely tied to USA corporations.¹⁹² These corporations have no interest in Australia's well-being. These other parties have been harassed by the USA's notorious and unending barrage of litigation and trade complaints to such a degree that an agreement with nearly no concessions but which may smooth their access to the USA markets is better than the current situation.¹⁹³

It would appear that Australia had already given away most of its tradable chips prior to entering into the negotiation. Accordingly, it was left with nothing with which to extract concessions, and essentially, received none. The USA merely sat silently as Australia put its last available concessions on the table, then made some further demands with the resulting agreement as it is. Authors of the NIEIR economic impact

¹⁹⁰ See Questions of Senator Cook in Foreign Affairs, Defence and Trade Committee of the Australian Senate, above n. 106.

¹⁹¹ The President's 2003 Annual Report on the Trade Agreements Program "Regional and Bilateral Trade Negotiations" Ch. 3 of Report http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/asset_upload_file392_4753.pdf

¹⁹² Weiss above, n. 14, p. 18.

¹⁹³ Ibid, p, 17-18.

study observe: “the AUSFTA is a partnership of unequals. This is likely to be expressed in terms of the senior partner being highly litigious towards anything Australia wants to do and highly arbitrary in terms of what it wants to do.”¹⁹⁴

A further matter for concern is Australia’s level of commitment to the FTA.

Australia’s federal system has granted to the commonwealth government constitutional power to bind the individual states. Accordingly, individual Australian states cannot block or reject the FTA, nor can there be any changes to the agreement once signed. By way of contrast, as Pengilley points out: “USA does not bind itself to treaties—individual states can accept or reject any trade agreements negotiated by the federal government, and there is therefore little, if anything, binding the USA side in a trade agreement.”¹⁹⁵ Accordingly, any state can create legislation to block any aspect of the FTA it does not like. Furthermore, despite its signature by the President of the United States, the FTA must pass Congress when the President has not been granted Fast Track Authority. In such instances, Congress is free to make whatever changes it desires.¹⁹⁶

b) Analysis of Economic Fairness

We turn now to consider economic fairness in the FTA. FTAs always have the appearance of fairness. Quite simply, each side commits to the same language in the document. Generally, the provisions governing the rights and duties of the parties are mirrors of one another. Of course, then, the FTAs must be fair, or must they? If we return to consider Suranovic’s framework for analysing fairness in this FTA we will be able to make an informed evaluation. Of particular concern are his Positive

¹⁹⁴ Above n. 107, p. 117.

¹⁹⁵ Pengilley, above n., 29, p. 225-227.

¹⁹⁶ See discussion in Pengilley, above n. 29.

Reciprocity Fairness, Privacy Fairness, and Maximum Benefit Fairness. On none of these criteria can the FTA be declared a successful or fair deal.

The FTA fails the Positive Reciprocity Fairness test. This test requires that effects which carry a value (negative or positive) be reciprocated. The FTA appears to be heavily weighted in favour of the USA which stands to gain \$42 billion while leaving Australia with a loss of approximately \$47 billion on a twenty year horizon. The second aspect of the test deals with loyalty and betrayal. Loyalty is important because, as Suranovic observes, it “confers benefits on other individuals or groups who have taken actions beneficial to you.”¹⁹⁷ In the case at hand, Australia has conferred benefits on the United States, particularly by its participation in the unpopular Iraq invasion. Further, positive reciprocity fairness requires that benefits that accrue are approximately equal.¹⁹⁸ Again, as demonstrated above, the FTA certainly does not have this outcome, and most certainly not in the case of Australia’s second most important agricultural export, sugar. It includes notions about the reciprocal diminution of tariffs. Again, Australia gains access on many goods after a four year period while the USA gains immediate access for most of its goods.

The mirror language of the FTA hides the real outcomes of law. Perhaps the most famous illustration of this truism is Anatoile de France’s aphorism: “The law, in its majestic equality, forbids the rich and the poor alike to sleep under bridges, to beg in the streets, and to steal bread.” For example, the FTA’s provisions with respect to intellectual property law will greatly harm Australia while greatly benefiting the USA. Australia is a net importer of intellectual property: the USA is a net exporter.

¹⁹⁷ Suranovic, above, n. 55, p. 295.

¹⁹⁸ Ibid, p. 297.

Australia's efforts to increase its strength as a knowledge based economy through various protections and subsidies has been given away under the FTA. The USA will benefit for a long time from Australia's surrender of this precious resource.

Privacy Fairness is the fairness that results from parties being able to act freely with respect to actions which have bearing only on themselves. In international trade, Suranovic identifies this fairness as involving national sovereignty.¹⁹⁹ As previously noted,²⁰⁰ the USA's legal doctrines of "effects," "personal extension" and "contractual submission" have the opposite intent and effect. The costs of this submission to USA dominance are considerable.²⁰¹ It includes USA interference with the quarantine system and involvement with and undermining of Australia's pharmaceutical benefits scheme. Further, the changes imposed on Australia's intellectual property regime are invasive. The FTA fails this test as well.

What are Australia's options? Clearly, it did not learn from Canada's hard learned lesson with the USA from NAFTA²⁰² nor Mexico's with the same.²⁰³ Australia is stuck with the FTA the way it is. It can withdraw from the FTA only on its terms.

9) CONCLUSION

¹⁹⁹ Ibid, p. 301-302.

²⁰⁰ Discussed above Section 4 Politics of Trade: USA Foreign Policy and Pengilly, above n. 29, p. 194-204

²⁰¹ The cost of the loss of sovereignty figure significantly in the NIEIR report, above n. 107.

²⁰² Weiss above n. 14, p. 13-17.

²⁰³ For a full discussion chronicling the Mexican experience see J. Audley, S. Polaski, D. Papademetriou, and S. Vaughan, NAFTA'S PROMISE AND REALITY: Lessons from Mexico for the Hemisphere, 2003, Carnegie Endowment for International Peace http://www.ceip.org/files/Publications/NAFTA_Report_full.asp

In the global picture, it is evident that small countries are not about to be treated fairly or equitably by the USA, and by extension, one may assume by other larger trading blocks. Even in the face of obvious ecological benefits and economic harms, the developed nations are not about to give way to the needs or interests of the underdeveloped and poor.

Sugar, like all agricultural products, is a very important commodity for tropical producers. Much has been made of the harm done to poor countries by the current subsidies regime.²⁰⁴ For example, UNCTAD has indicated that in West Africa, the increase in revenues resulting from free trade would be about \$1.0 billion,²⁰⁵ more than all the aid those countries receive combined. An UNCTAD study modelling the relative harms and gains of duty and quota free trading regime indicates that gains to LDC's (Less Developed Countries) resulting from reductions in subsidy programs would be dramatic while causing minimal disruption in the quad countries (USA, EU, Japan, and Canada).²⁰⁶ Nevertheless, despite the great humanitarian benefit to those suffering in poverty and the minimal disruption to the wealthy corporations and their employees, the rich countries simply refuse.²⁰⁷ Indeed, the developed countries refusal to implement their promises concerning reduction in agricultural subsidies has seriously undermined their credibility among trading partners on other issues. As

²⁰⁴ See for example, the study by B. Hoekman, F. Ng, M. Olarreaga, "Eliminating Excessive Tariffs on Exports of Least Developed Countries". World Bank Development Research Group.

²⁰⁵ UN General Assembly "World commodity trends and prospects" 5 Sept. 2002 A/57/381, at 5

²⁰⁶ Bijit Bora, Lucian Cernat and Alessandro Turrini, Duty And Quota-Free Access For LDCs: Further Evidence From Cge Modelling, Policy Issues In International Trade And Commodities Study Series No. 14 UNCTAD/ITCD/TAB/15 at http://www.unctad.org/en/docs/itcdtab15_en.pdf

²⁰⁷ Developed countries sometimes argue that altering the terms of trade will harm them. (See for example, Commission of the European Communities, "Growth, Competitiveness, Employment," (1993); World Economic Forum, World Competitiveness Report, 1994. The impact on the developed countries of revised terms of trade would be negligible. Krugman, above n. 16, p. 103-4. Bonapas Francis Onguglo Developing Countries And Unilateral Trade Preferences In The New International Trading System *Chapter* in Miguel Rodriguez Mendoza, Patrick Low and Barbara Kotschwar (editors), Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations. Washington, D.C.: The Brookings Institution Press/Organization of American States, 1999 http://www.wto.org/english/tratop_e/devel_e/sem01_e/ongugl_e.doc

noted in the UNCTAD report prepared in 2000 “LDCs continue to face peak MFN rates for... sugar and sugar products.”²⁰⁸

Because of its market size and dominance, there is no free trade if the markets of the USA are not involved.²⁰⁹ Poor countries who depend on their agricultural commodities have suffered greatly. Commodity prices have declined over the last three decades and the poor countries in the tropics have borne the brunt of this decline.²¹⁰ Although there may be some argument for maintaining national agricultural programs for food security policies, the reality is that these have largely out-lived their usefulness. Indeed, agriculture makes up but a small fraction of international trade—merely 13%.²¹¹ Notwithstanding this marginal amount, wealthy countries are not about to give in.

It is important to consider the significance of this refusal in terms of poverty reduction. Oxfam reports:

The human costs of unfair trade are immense. If Africa, East Asia, South Asia, and Latin America were each to increase their share of world exports by one per cent, the resulting gains in income could lift 128 million people out of poverty. Reduced poverty would contribute to improvements in other areas, such as child health and education....

The World Bank acknowledges that this trend continues despite the collapse of trade talks in Cancun in 2003. As David de Ferranti, a World Bank Vice-President observed in March 2004:

²⁰⁸ The Post-Uruguay Round Tariff Environment For Developing Country Exports: Tariff Peaks And Tariff Escalation UNCTAD/WTO joint study, TD/B/COM.1/14/Rev.1, 28 January 2000 <http://www.unctad.org/en/docs/c1d14r1.en.pdf>

²⁰⁹ Pengilley, above n. 29, p. 211.

²¹⁰ Rigged Rules, above n. 15, “Primary Commodities—trading into decline” Ch. 6, p. 149-174.

²¹¹ G. Scott, ed. “Completing the Uruguay Round, 1990,” cited in M. Pryles, J. Waincymer, M. Davies, *International Trade Law: Commentary and Materials*, p. 837.

Analysis by the World Bank and others indicates that major global trade opening in agriculture could provide a substantial boost to the developing world as a whole, and to many poor rural producers. Yet the existing barriers and subsidies in agriculture are defended by highly-entrenched lobbies in a number of the OECD countries.²¹²

Beyond these direct economic harms, scholars Michel Damian and Jean-Christophe Graz note, “Free trade damages the social structure in countries of the South, especially where women and small farmers are concerned.”²¹³ Yet, this is the system increasingly being imposed on us.

The evidence is clear: international trade as driven by the USA²¹⁴ is stacked against the small, the weak and the poor. Even in the case of Australia, a developed nation with a “special relationship” with the USA, with all the benefits nature could bestow to grow tropical produce, the larger more powerful nation, the USA demonstrated no intention of creating a level field. It is as if the FTA were another instance of friendly fire, where allies kill each other on the battle field. Regardless of the motive and rhetoric, the outcome is the same.

This rather discouraging analysis begs for resolution. What alternatives are there? Certainly, given the government’s misrepresentation of the situation, citizens cannot count on support for justice there. It turns citizens concerned about justice back to the fundamental tools we have always had: citizen activism, true democracy.²¹⁵ While

²¹² David de Ferranti, Opening Remarks at the Conference on the Future of Trade Liberalization in the Americas World Bank Vice President, Latin America & the Caribbean Region Santiago, Chile, March 22-23, 2004

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:20226376~menuPK:64021753~pagePK:64020865~piPK:149114~theSitePK:239071,00.html>

²¹³ Michel Damian and Jean-Christophe Graz “The World Trade Organization, the environment, and the ecological critique.” UNESCO 2001, 603

²¹⁴ This is not to deny the benefits USA has granted certain Caribbean nations, but the politics surrounding those programs and concessions, including supporting coups, and other attempts to overthrow governments and suppress the populations makes a discussion of them a separate study in itself.

²¹⁵ See Chomsky’s fascinating expose of government fear of citizen action in “Consent without Consent,” above n., p.67, 43-62.

not swift, where persistent, it has always been the most effective weapon against the powerful elite who continue to choose to run the planet, its people and resources into dust for their own pitiful gains.