PRELIMINARY OBSERVATIONS: INDIGENOUS AUSTRALIA AND THE AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT

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The Federal government has become a notable participant in the rapid proliferation of free trade agreements (FTAs) globally. On 1 January 2005, the most important free trade agreement ever signed by Australia, the *Australia-United States Free Trade Agreement*[1] ('AUSFTA') came into effect. The AUSFTA is not the only free trade agreement Australia is party to. Australia has signed free trade agreements in Singapore, Thailand and New Zealand as well as being a key player in the Asia-Pacific Economic Cooperation (APEC).[2] While at first instance Indigenous communities in Australia may not consider the proliferation of Australian free trade agreements as a major law and policy priority, FTAs are indeed important to understand and monitor because of the potential impact trade rules may have upon State and Federal funding for Indigenous communities in Australia. FTAs have the potential to encroach upon laws, regulations and policy making with respect to culture, education, health, environment and heritage and this would have a disproportionately negative impact upon Indigenous communities.[3] While it is true that there have been minor exemptions made for Indigenous peoples in both the AUSFTA and the Singapore FTA, most Indigenous organisations would be unaware of their existence and how to monitor them and indeed it is not clear in the absence of the Aboriginal and Torres Strait Islander Commission (ATSIC) who will monitor them. It is not enough that the former Minister for Trade, the Hon Mark Vaile MP, promised ATSIC before its abolition that 'there was nothing in the AUSFTA that would affect in any way Australia's ability to take whatever action is necessary to protect Indigenous interests should the need arise'.[4]

International trade regulation is now one of the most influential forces

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[1] *Australia – United States Free Trade Agreement* Available at: <http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html>

[2] Thailand – Australia Free Trade Agreement available at: <http://www.dfat.gov.au/trade/negotiations/aust-thai/tafta_toc.html> *Singapore - Australia Free Trade Agreement* [2003] ATS 16 available at:: <http://www.austlii.edu.au/au/other/dfat/treaties/2003/16.html>, Megan Davis, Closer Economic Relations Australia and New Zealand.available at: <http://www.dfat.gov.au/geo/new_zealand/anz_cer/cer.pdf>

[3] Megan Davis, 'Indigenous Australia and the Australia-United States Free Trade Agreement' (2004) 5 *Indigenous Law Bulletin* 20-23. Megan Davis, 'International Trade, the World Trade Organisation and the Human Rights of Indigenous Peoples' (2006) 8 *Balayi* 5-30.

[4] ATSIC submission, Senate Select Committee on the Free Trade Agreement between Australia and the United States [1] available at: <http://www.aph.gov.au/senate_freetrade/submissions/sub504.pdf>

within domestic economies and impacts directly upon policy making. It is therefore prudent for Indigenous communities to examine and understand FTAs and their potential impact upon policymaking in Indigenous affairs in the same way that Indigenous peoples globally have successfully examined and lobbied against World Trade Agreements (WTO) agreements.[5]

This paper examines the existence of free trade agreements in the context of the broader multilateral system of international trade law. It will then examine the major Indigenous concerns of the AUSFTA including listing the exemptions for Indigenous peoples in the AUSFTA. The final aspect of this paper is a comparative example of Indigenous peoples in Canada and how they have dealt with the impact of the North America Free Trade Agreement (NAFTA). The paper concludes by emphasising the important role Indigenous peoples can play in the monitoring of the impact of FTAs upon their communities while noting the very limited resources available to commit to such an exercise.

The Rise of Free Trade Agreements

The global proliferation of FTAs also referred to as, 'preferential market access agreements', 'free trade areas', 'regional trade arrangements' and 'customs unions' is a source of tension in the multilateral international trade system and in particular in Australia.[6] The European Union (EU), the Association of South East Asian Nations (ASEAN), the Southern Common Market Agreement (MERCOSUR) and the North America Free Trade Agreement (NAFTA) are examples of free trade agreements that have been successfully negotiated and exempted under the GATT rules. The WTO

[5] See generally, Megan Davis 'New Developments in International Advocacy: Amicus Curiae and the World Trade Organisation' (2003) 5 *Indigenous Law Bulletin* 14-17; David Hume, 'Indigenous Peoples and the World Trade Organization' (2000) 4(26) *Indigenous Law Bulletin*, 21; Megan Davis 'International Trade Law and Indigenous Peoples: A New Direction in Human Rights Advocacy?' (2005) 8 *Australian Indigenous Law Reporter* 16-22; Russel Lawrence Barsh, 'Is the Expropriation of Indigenous Peoples' Land GATT-able?' (2001) 10 Reciel 13; Arthur Manuel and Nicole Schabus, 'Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law' (2005) 8 *Chapman Law Review* 229; Charles M Gastle, 'Shadows of a Talking Circle: Aboriginal Advocacy Before International Institutions and Tribunals' (2002) *The Estey Centre for Law and Economics in International Trade* 5; Nicole Schabus, 'No Power to International Free Trade With Indigenous Property' (2000) XVIII/2 *Journal fur Entwicklungspolitik* 99; 'Indigenous peoples lash out at WTO inequities: declaration by the Indigenous Peoples Caucus', *Land Rights Queensland* (Brisbane), January 2000, 6.

[6] Byran Mercurio, 'Should Australia Continue Negotiating Bilateral Free Trade Agreements?: A Practical Analysis' (2004) 27 *University of New South Wales Law Journal* 667-702; Mark Vaile, 'Trade – Multilateral and Bilateral' (2002) 14 *Sydney Papers* 154-161; Heribert Dieter, 'Australia's bilateral trade agreement with the United States : significant drawbacks, few gains?' (2006) 57 *Journal of Australian Political Economy* 30-56; Murray Hiebert, 'The perils of bilateral deals' (2004) 166 Far Eastern Economic Review 19-20; Ann Capling, 'Trade, the USA and down under's tyranny of size' (2001) 13 *Sydney Papers* 176-185; Patrick Messerlin, 'The impact of EC enlargement on the WTO' in Mike Moore (ed), *Doha and Beyond: The Future of the Multilateral Trading System* (2004) 146-177.

Committee on Regional Trade Agreements (CRTA) monitors regional trade agreements and it is its mandate to examine individual regional agreements and analyse the implications of these agreements on the multilateral trading system.[7]

According to the WTO the vast majority of member countries to the WTO are parties to one or more regional trade agreements – or free trade agreements.[8] There are over 170 FTAs in force, with a further 70 operational agreements about which the WTO have not been officially notified. It is expected that there will be nearly 300 FTAs in force by the end of 2005.

The inherent tension between bilateral and multilateral trade negotiation derives from the fundamental premise of the WTO as the primary body which governs the multilateral trade system. The WTO was set up to prevent the instability and conflicts that have historically occurred between states over trade - World War I, was an example of this.[9] Primarily, though, the WTO was created to encourage the economic development of nations through free trade. The rules of the WTO were negotiated by member states during the Uruguay Round of Multilateral Trade Negotiations. Those rules are known as the General Agreement on Tariffs and Trade 1994 (GATT 1994).[10] GATT 1994 builds upon the original 1947 text of the GATT (GATT 1947) which was the outcome of the international trade law conference held at Bretton Woods, United States after World War II.[11]

The two fundamental principles that underpin the multilateral system are the 'most favoured nation' (MFN) principle and the 'national treatment' principle. MFN is defined in Article 1 of the GATT and provides that with respect to customs duties and charges of any kind imposed on any member state, any advantage, favour, privilege or immunity shall be accorded immediately and unconditionally to the like product originating in, or destined for, the territories of all other contracting parties.[12] Thus the MFN rule provides that all state members must give other members the same treatment as they would give any other country or member.[13]

On the face of it MFN should preclude the negotiation of free trade agreements or regional trade agreements under the multilateral system. However GATT provides an exemption for these types of agreements even though they conflict with the MFN principle.[14] GATT provides a number of

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[7] World Trade Organisation, WT/L/127.

[8] World Trade Organisation, Regional trade agreements, statistics available at: <http://www.wto.org/english/tratop_e/region_e/region_e.htm>

[9] Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed, 2001) 17-20.

[10] Final Act Embodying Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments - Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125, 1144 (1994).

[11] See generally, M Rafiqul Islam, *International Trade Law of the WTO* (2006) 2-4.

[12] Ibid Article 1.

[13] See generally, Mitsuo Matsushita, Thomas Schoenbaum and Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (2006) 202-217.

[14] Article XXIV of the General Agreement on Tariffs and Trade (GATT) of 1947.

grounds that form a framework for the negotiation of such agreements. FTAs will be exempted if duties are not higher after the formation of the agreement than they were prior to the agreement. Furthermore it is imperative that duties and other restrictions be significantly abolished between those parties to the free trade agreement. The rationale for permitting exceptions to MFN is provided in Article XXIV.4 of GATT:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

Therefore the key argument for allowing FTAs, even though they are trade diversionary, is that essentially any trade is better than no trade. The two opposing positions on FTAs is summed up in the following way:

> Customs unions and free trade areas may or may not be beneficial as they could either be trade diverting or trade creating. Trade diversion occurs where members of the arrangement shift their sources of supply from more efficient foreign suppliers to less efficient but favoured regional suppliers. Trade creation, as the name implies, is where the regional arrangement leads to new trade and hence increased net welfare.[15]

Nevertheless many commentators acknowledge that the sanctioning of free trade agreements by GATT is more a political decision than one of economic theory. When the European Community was established its core area of trade was agriculture and this was at odds with GATT, particularly the Agreement on Agriculture (AOA). According to Pryles:

> …while all such arrangements go through the process of being examined by working parties under GATT and the WTO, there is no real formal assessment of their legal validity under the relevant provisions in a binding adjudicatory sense at least'.[16]

Even though they are exempted under GATT, FTAs dominate contemporary trade debates particularly since the breakdown in negotiations at the WTO Ministerial Council in Cancun, Mexico.[17] While one view is that given the recent stalling of debate at the WTO Ministerial Council in Cancun the continuance of liberalisation in whatever form is a positive development, [18] the opposing view after Cancun is that FTAs fragment global trade liberalisation creating trade distortions and geo-political instability. As alluded to above, the original motivation behind the Bretton Woods conference was to establish a multi-lateral and co-operative trading effort and monetary regulation

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[15] Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law: Commentary and Materials* (2nd ed 2004) 864.

[16] Ibid.

[17] See generally, Michael Fullilove, *International Trade Law* (2006).

[18] Peter Gallagher George Will, 'A chance to rebalance WTO' *Australian Financial Review*. 71 (Thursday 12 February 2004).

to eliminate the aggressive trade blocs that were inhibiting worldwide economic growth in the aftermath of two world wars. However, 'Regionalism and economic integration have raised other problems for the GATT/WTO system. Regionalism tends to encourage member countries to become more parochial, which in turn impact upon multilateral developments'.[19] There is also a view that FTAs divert resources away from the global WTO trading system which is problematic for Australia as a commodities dominant economy:

> A related problem is that a free trade agreement tends to work well and be easier to negotiate when it merely completes long established trends. For example nearly 75 per cent of bilateral trade was already free between the United States and Canada at the time they established a trade agreement. This is not true of most of Australia's trading relationships.[20]

Indeed according to Professor Ross Garnaut:

> The proliferation of FTAs, encouraged influentially by Australia since late 2000, has substantially affected the international trading system in ways that are damaging to Australia. Most importantly, the prospects of liberalisation of agricultural trade in East Asia and globally have greatly diminished as a result of these developments.[21]

It is arguable also that the US alliance has imbued the Federal government with parochialism and with increased intensity of the Australia-United States alliance a more hostile approach was adopted in terms of engagement in multilateral forums such as the United Nations. This was evident in Australia's decision to go to war with Iraq in breach of the United Nations resolution and, equally, Australia's aggressive stance in the UN Working Group elaborating a Draft Declaration on the Rights of Indigenous Peoples. Both decisions mirrored the decisions of the United States and illustrate the way in which FTAs have an impact upon broader multilateral developments.

The AUSFTA and Indigenous Peoples' Concerns

The AUSFTA is referred to as a 'top down' agreement and this means that it uses a negative list approach. If 'services', as in Chapter 10 of the AUSFTA is used as an example here, a negative list approach means the agreement includes all services are under the terms of the agreement and for a service to be excluded, such as Public hospitals or Indigenous people's services, it must be explicity exempted. There are two exemptions granted for Indigenous peoples in the AUSFTA text. The first exemption is in the 'Cross Border Trade in Services', Chapter 10, in which Australia reserves the right to:

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[19] Ibid.

[20] Ibid.

[21] Professor Ross Garnaut, Notes on CIE Report for DFAT on US FTA for Joint Standing Committee on Treaties, Supplementary Submission No. 160.2, pp:2.

> … adopt or maintain any measure according preferences to any Indigenous person or organisation or providing for the favourable treatment of any Indigenous person or organisation in relation to the acquisition, establishment, or operation of any commercial or industrial undertaking in the service sector.[22]

This exemption relates to government contracts for the health and welfare of Indigenous people and measures for the economic and social advancement of Indigenous peoples. On investment, Chapter 11 provides:

> Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any Indigenous person or organisation or provides for the favorable treatment of any Indigenous person or organisation.[23]

While the exemptions are important it is not clear how they will be applied or what impact they will have. As in all legal definitions, clarity is important to prevent discretionary interpretation that may render the exemptions nugatory. It is imperative that there is ongoing monitoring of the exemptions in terms of their operation and scope particularly in regards to Indigenous people's health and welfare.

The AUSFTA covers a wide number of areas including agriculture, dairy, seafood, manufacturing, services, intellectual property, health, telecommunications and e-commerce, investment and government procurement contracts. Indigenous peoples primary concerns were expressed at the two Senate inquiries conducted to address the concerns of Australian citizens and other interested parties.[24] One of the broader legal issues arising from the AUSFTA was the challenge of the agreement to Australian sovereignty.[25] The common view was that Australian sovereignty is impinged by the United States government and business sector.[26] This is because the agreement ties the hands of the government in a variety of instances and shifts the capacity of citizens to influence and change policy to external influences. Of interest to Indigenous representatives at the time was that this argument about sovereignty actually provides a useful and concrete illustration for white Australia to better comprehend Indigenous people's arguments about sovereignty.[27]

Generally, the key concerns were the same concerns of the broader civil

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[22] AUSFTA Annex II-1.

[23] Ibid.

[24] Senate Select Committee on the Free Trade Agreement between Australia and United States of America available at <http://www.aph.gov.au/senate_freetrade/; Senate Foreign Affairs, Defence and Trade Committee GATS/US Free Trade Agreement available at: <http://www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2002-04/gats/index.htm>.

[25] Elizabeth Blackwood and Stephen McBride, 'Constraining the Australian State: AUSFTA's impact on Sovereignty' (2006) 57 *Journal of Political Economy* 57-84.

[26] See generally, Linda Weiss, Elizabeth Thurbon and John Mathews, *How to Kill a Country: Australia's Devastating Trade Deal with the United States* (2004).

[27] Larissa Behrendt and Megan Davis, 'Adverse effects of free trade deal will hit indigenous groups hard' *Sydney Morning Herald* (March 8 2004)

society ranging from changes to the health policy such as amendments to the operation of the Pharmaceutical Benefits Scheme to concern about intellectual property and culture such as local content in film, television, new media and other cultural products.[28]

Health is particularly key to Indigenous communities and well-being. The liberalisation of services means that, as Ann Capling has observed of health:

> 'For many Australians ... the benefits to the business community are dwarfed by the costs of the agreement to Australia's social programs ... on the grounds that important public health programs should never have been on the negotiating table in the first place'.29

The submission from Jumbunna Indigenous House of Learning, University of Technology Sydney, similarly focused on health:

> Recently compiled statistics by the Fred Hollows Foundation has found that indigenous peoples have a life expectancy of twenty years less than white Australia and a median age of death at 53. In some areas of Australia that median age is 47. Our infants die at a rate comparable with the babies of most developing countries. In remote areas, indigenous children are three times as likely to die before the age of one as white Australian babies. … By two and a half years old, 25% have perforated eardrums and it is estimated that up to a half of Aboriginal children in remote communities have hearing loss. The current rate of ear infections in remote NT communities ranges from 8% to over 50%. This rate is chilling when considered in the context of the World Health Organisation standards that regard a rate of 4% as a 'massive public health problem'.[30]

Despite initial fears from civil society groups about its changing role, the Pharmaceutical Benefits Scheme has been maintained, however there is some concern that the agreement provides the capacity for US corporations to challenge the prices of medicines in the future that could potentially raise the price of medicines. Submissions to the parliamentary inquiries were concerned that such changes would have a disproportionately negative impact upon Indigenous health.

The protection of Indigenous culture and reform of current intellectual property laws were also concerning for Indigenous representatives. US access to the Australian media and audio-visual market may have significant implications for local content quota. This may affect the Australian

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[28] For the major concerns of broader public issues shared by Indigenous groups, See generally, Jock Given, *America's Pie: Trade and Culture after 9/11* (2004); Patricia Ranald, 'The Australia-US Free Trade Agreement: a contest of interests' (2006) 57 *Journal of Australian Political Economy* 85-111; ACOSS Information Papers, *Implications of the Australian-United States Free Trade Agreement: An ACOSS Perspective* (2005).

[29] Ann Capling *All the Way with the USA: Australia, the US and Free Trade* (2005).

[30] Larissa Behrendt, Megan Davis and Robynne Quiggin, Submission of Jumbunna Indigenous House of Learning, UTS, Joint Standing Committee on Treaties Australia- United States Free Trade Agreement available at:
<http://www.aph.gov.au/house/committee/jsct/usafta/subs/SUB106.pdf>.

Broadcasting Authority's quota that ensures commercial TV broadcasts Australian drama or impact on subsidies to the Australian Film Finance Corporation or the Australian Film Commission. It may also impede investment in development of Australian drama such as the legislative requirement for Pay TV drama channels to invest 10% of its budget on developing new Australian drama. This would disproportionately impact Indigenous media and Aboriginal and Torres Strait Islander culture if Australian audiences have less access to Australian content and indirectly Indigenous content (arguably affecting development and broadcast of television shows such as R.A.N).

Corollary to this is the impact of the AUSFTA on Australia's intellectual property law system and its capacity to accommodate Indigenous knowledge. This was of great concern to Indigenous advocates who prior to the AUSFTA negotiations had continually lobbied the Commonwealth for improved intellectual property protection of Indigenous knowledge. The very fact that the government boasts of the Chapter 17 intellectual property provisions moving beyond the WTO TRIPS is alarming because TRIPS has been widely condemned by Indigenous peoples and non-Indigenous scholars internationally as inimical to Indigenous health and to Indigenous knowledge.[31] The TRIPS agreement was pinpointed in the WTO Cancun Declaration of Indigenous Peoples as facilitating bio-piracy and, 'the patenting of medicinal plants and seeds nurtured and used by Indigenous Peoples, like the quinoa, ayahuasca, Mexican yellow bean, maca, sangre de drago, hoodia , yew plant, etc'.32 Given the amount of international research conducted criticising the impact of TRIPS upon Indigenous knowledge it is surprising that there has been so little attention paid to the potentially disastrous impact of stricter and tighter intellectual property laws as inherited through the AUSFTA for Indigenous Australia. As Matthew Rimmer argued before the Joint Standing Committee on Treaties, 'There is no requirement on the United States to provide for recognition of communal ownership of Australian Indigenous cultural works. This is a significant set back given that New York in particular is a hub of the art market'.[33] Therefore, it is extremely concerning that no mention of Indigenous peoples has been made in the intellectual property chapter, particularly because intellectual property rights is one mechanism that ensures Indigenous communities benefit from the financial rewards of their culture and creativity.

There are very different motivations of Indigenous and non-Indigenous peoples for protection of intellectual property and for Indigenous peoples, 'the commodification of traditional knowledge is inherently problematic … that

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[31] Bryan Mercurio, 'TRIPSs, Patents and Access to Life-Saving Drugs in the Developing World' (2004) 8 *Marquette Intellectual Property Law Review* 211.

[32] The International Cancun Declaration of Indigenous Peoples 5th WTO Ministerial Conference , Cancun , Mexico, 12 September 2003 cited in (2006) 8 *Balayi* 101-105.

[33] Matthew Rimmer, A submission to the Senate Select Committee on a Free Trade Agreement between Australia and the United States of America, p 55 available at: <http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sub183.pdf >.

commercialisation is not always desired and the regulated use of intellectual property rights is regarded as culturally inappropriate'.[34] According to Dr Erica Irene Daes, former Chair of the United Nations Working Group on Indigenous Populations:

> Indigenous peoples do not view their heritage in terms of property at all … but in terms of community and individual responsibility. Possessing a song or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected.[35]

Nonetheless the benefits of Indigenous peoples' intellectual property to impoverished indigenous communities are important even in light of the philosophical objections of Indigenous peoples. According to Dr Daes:

> 'Global trade and investment in the arts and knowledge of indigenous peoples has grown millions of dollars per year yet most Indigenous peoples live in extreme poverty and their languages and cultures continue to disappear at an alarming rate'.[36]

Madam Daes believes that over the past twenty years:

> … Indigenous peoples have grown acutely aware of the great medical, scientific and commercial value of their knowledge of plants, animals and ecosystems. Indigenous peoples have also attracted growing public interest in their arts and cultures, and this has greatly increased the worldwide trade in Indigenous peoples artistic works.[37]

Despite this, Indigenous peoples are not seeing the economic benefit of their intellectual property and it is unlikely that the AUSFTA will change this situation. Rather it will make reform more difficult because of external influences on Federal government legislation and policy making – and platitudes about parliamentary sovereignty should no detract from this realisation. In fact the world trading system is based on a premise that greater trade liberalisation will 'tackle' poverty in developing countries and this is a point raised by the Australian Council of Social Services.[38] The AUSFTA

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[34] Daniel Gervais, 'Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach' (2005) *Michigan State Law Review* 137; Chidi Oguamanam, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge' (2004) 11 *Indiana Journal of Global Legal Studies* 135. Daniel J Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (2002) 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 929.

[35] Dr Erica-Irene Daes, "Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of indigenous People" (1993) cited in M Blakeney 'The Protection of Traditional Knowledge under intellectual property law' *European Intellectual Property Review* 2000 2(6) 251-261.

[36] Opening address, Madame Daes, WIPO Roundtable on Intellectual Property and Indigenous Peoples (July 23 1998).

[37] Ibid.

[38] ACOSS Information Papers, Implications of the Australian-United States Free Trade Agreement: An ACOSS Perspective (2005).

appears to punish those on low incomes and the most vulnerable and disadvantaged in the Australian community, particularly Indigenous Australians.

The confusion for Indigenous communities and many Australians has been that the estimates of the extent of the economic benefit of the agreement have differed dramatically. The government commissioned report by the Centre for International Economics (CIE) estimated manufactured exports to the United States would increase by $A2 billion a year and estimated overall predicted gains of $6 billion a year.[39] This analysis was widely criticised by other economists and trade experts such as Professor Ross Garnaut was publicly critical of the predicted estimates of CIE and expressed concerns about the risks of Australia entering bilateral preferential agreements.[40] Further, a study undertaken by Dr Phillipa Dee, Australian National University, predicted only small annual gain from the AUSFTA of $53 million a year.[41] The economic predictions and debate over economic modelling was too polarised for the public to be able to determine a reliable benefit that all industry groups agreed upon and this was noted by the Senate Select Committee on the AUSFTA in its report:

> It cannot be said too plainly that, where there has been criticism of the agreement, much of the disagreement has been about the extent of the benefits. The most pessimistic assessment of the agreement, by Dr. Phillipa Dee, estimated the benefits at only $53 million per annum. The Government's own modelling consultant, the Centre for International Economics, assessed the benefits at $6 billion per annum. Most econometricians agreed, however, that the 'dynamic effects' of the agreement were difficult to quantify, since its real benefits will only be seen in its operation.[42]

The Experience of Indigenous Peoples and NAFTA

One comparative example that may be of benefit to Indigenous Australians is the experience of North American Indigenous peoples and the North America Free Trade Agreement (NAFTA). NAFTA is a trilateral free trade agreement negotiated and signed between Canada, Mexico and the United States that came into force, 1 January 1994. It was the first free trade agreement signed between developed and developing countries. Canada

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[39] Economic impacts of an Australia – United States Free Trade Area Centre for International Economics report available at:
http://www.dfat.gov.au/publications/aus_us_fta/aus_us_fta.pdf
See also, John Mathews, Elizabeth Thurbon, Linda Weiss, *Australia's Devastating Trade Deal with the United States* (2004) 9.

[40] Ross Garnaut, Transcript of Evidence, Senate Committee Inquiry Voting on Trade, 22 July 2003, pp. 196.

[41] Dr Philippa Dee, *The Australia-US Free Trade Agreement – An Assessment*, Australian National University, June 2004.

[42] Additional remarks by Government Senators, Senate Select Committee on the Free Trade Agreement between Australia and the United States of America [4] accessed at:
<http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/coalition.htm>.

negotiated a general exemption for Aboriginal peoples of Canada.[43] The exemption covers Investment and Cross-Border Trade in Services. It also covers national treatment, most favoured nation, local presence, performance requirements, and senior management and board of directors provisions. Canada specifically negotiated an exemption for Aboriginal affairs:

Canada reserves the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to Aboriginal peoples.[44]

This exemption allows Canada to maintain special programs and funding provided Aboriginal peoples. According to Indigenous Canadian scholar Brenda Gunn, 'the constitutional protection of Aboriginal and treaty rights in Canada may have required Canada to include such a specific and broad reservation'.[45] Of importance to Indigenous communities in Australia is the lobbying and monitoring that has been conducted on behalf of Canadian Aboriginal peoples. In Canada, the Assembly of First Nations passed two resolutions regarding NAFTA. Resolution number 7/93 states:

> Whereas the North American Free Trade Agreement is being formulated with minimum input from First Nations in Canada; and Whereas the terms and conditions within the NAFTA agreement will adversely affect all First Nations directly and/or indirectly vis-à-vis jurisdiction over the natural resources within traditional territories; and Therefore be it resolved that the Confederacy of Chiefs instruct the National Office of the Assembly of First Nations to begin research and discussion on the long term effects; and Further be it resolved that the Assembly of First Nations assist the First Nations to implement their Treaty and Aboriginal rights so that the agreement not be applicable to First Nations in Canada.[46]

The second resolution passed by the AFN in December 1999 was in regard to the export of water under NAFTA. The resolution stated:

> Whereas Section 35 of the Constitution Act, 1982, recognizes and affirms Treaty and Aboriginal rights; and Whereas Canada and the United States of America have entered into an agreement ratified by the International Boundary Waters Treaty Act; and Whereas the First Nations in Canada have Treaty or Aboriginal rights to their land and water. Whereas Corporations and Governments under the North American Free Trade Agreement (NAFTA) have discussed the export and sale of water without First Nations involvement. Whereas First Nations in Canada never relinquished their right of access to natural resources under any agreement; Therefore be it resolved that

[43] NAFTA, Appendix II.

[44] NAFTA, Annex II, Schedule of Canada.

[45] According to Brenda Gunn "NAFTA, Annex II, Schedule of Canada, under the reservation for Aboriginal Affairs, Canada lists the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 as an applicable existing measure. Section 35(1) of the Constitution Act provides '[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. Section 35(2) defines the Aboriginal people of Canada as 'the Inuit, Indians and Métis.', cited in Brenda Gunn, 'Impacts of the North American Free Trade Agreemets on Indigenous Peoples and their Interests' (2006) 9 *Balayi* 15-16.

[46] Resolution on the North American Free Trade Agreement, AFN Res 7/93, cited in Brenda Gunn, Ibid.

> the Assembly of First Nations through its Treaty Relations and Land Rights Units, prepare a strategy to deal with this very critical issue. Be it Further Resolved that the strategy be presented to the Executive Council within 60 days for its approval and implementation.[47]

The Mexican government also negotiated an exemption for the minority affairs sector:

> Mexico reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged groups which applies to national treatment (article 1202), and local presence (article 1205).[48]

This exemption refers to Article 4 of the Mexican Constitution which extends to the Indigenous peoples of Mexico,[49]

> The Mexican nation has a pluriethnic composition originally based on its Indigenous peoples. The law shall protect and promote the development of their languages, cultures, uses, customs, resources and specific forms of social organization, guaranteeing to their individual members an effective access to the jurisdiction of the State. In the agrarian suits and proceedings in which those members are a party, their legal practices and customs shall be taken into account in the terms established by the law.

The United States also made a reservation under Minority Affairs:

> The United States reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities, including corporations organized under the laws of the State of Alaska in accordance with the *Alaska Native Claims Settlement Act*.[50]

More broadly Indigenous peoples in Canada, the United States and Mexico viewed NAFTA as detrimental to their interests.[51] One particular study found NAFTA's impact to be detrimental to small-scale corn farmers.[52] Nevertheless there has been greater attention and monitoring of the agreement's impact. This is directly related to resource capacity and governance structures as well as stronger legal recognition and protection than exists for Indigenous Australia. Since the abolition of ATSIC it is difficult to envisage how Indigenous peoples can do this effectively, particularly given the impenetrable nature of the Australian media on reporting on Indigenous

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[47] Resolution on the Export of Water Under (NAFTA), AFN Res 91/99, cited in Brenda Gunn, above n 38, 13-14.

[48] NAFTA, Annex II, Schedule of Mexico.

[49] NAFTA, Annex II, Schedule of Mexico.

[50] NAFTA, Annex II, Schedule of United States.

[51] Valerie J. Phillips, 'Identifying National and International Vacuums Potentially Impacting NAFTA and Indigenous Peoples' (2001) 2 *The Estey Centre Journal of International Law and Trade Policy*.

[52] Keith Sealing, 'Indigenous Peoples, Indigenous Farmers: NAFTA's Threat to Mexican Teosinte Farmers and What Can Be Done About It' (2003) 18 *American University International Review* 1383.

people's concerns outside of violence and negative criminal justice stories.

Conclusion

Free trade agreements in many ways complicate an already complicated scenario of how WTO rules impact upon domestic legal systems. International trade regulation now plays a dominant role within domestic economies and it is prudent for Indigenous people to understand how these systems affect their interests. The Australian government has negotiated a number of exemptions in the agreement for Indigenous peoples. As noted above preferences for Indigenous people in the nature of government procurement will remain where it concerns the health and welfare of Indigenous people and measures for their economic and social advancement. The other exemption allows for 'the right to adopt or maintain any measure with respect to investment that accords preferences to any Indigenous person or organisation or provides for the favourable treatment of any Indigenous person or organisation' in relation to goods and services. However no exemptions were provided in the way of cultural rights, intellectual property or any other rights. The actual AUSFTA text is vague in its exemptions for Indigenous peoples and provides very little real protection for Indigenous people. It is difficult to garner the effectiveness of the exemptions at such an early stage of the agreement, however no official monitoring mechanism has been set up to analyse its impact. Since the demise of ATSIC it is imperative for Indigenous organisations to be active in the civil society groups that organise themselves in opposition to, and analysis of, the impact of implementation of trade rules in Australia.

Of course this is difficult when the policy responses of Aboriginal and Torres Strait Islander peoples in Australia are dominated by criminal justice issues such as deaths in custody and controversy over continuing institutional racism. While Indigenous peoples in the Canada and US have treaties and constitutional recognition and have space to participate in public debates on trade including how to exploit trade opportunities themselves, Indigenous Australians are faced with ongoing legislative diminution of their rights and decades old institutional racism that allows an Aboriginal man to die in custody and resist attempts to investigate the reasons for his death. To that extent it is a flawed assumption of the international trading system that the benefits of globalisation brought about by trade liberalisation will be enjoyed by all.