

**Submission on behalf of the Australian Fair Trade and
Investment Network (AFTINET) to the Productivity
Commission Review into Bilateral and Regional Trade
Agreements**

Prepared by Dr Patricia Ranald and Harvey Purse

AFTINET

Level 3, Suite 3B,

110 Kippax St

Surry Hills

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Email: campaign@aftinet.org.au

Phone: 02 9212 7242

Fax: 02 9211 1407

www.aftinet.org.au

1. Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of organisations and individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Productivity Commission Review of Bilateral and Regional Trade Agreements.

AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules.

AFTINET supports the concept of multilateral trade negotiations. However we believe that fundamental changes are needed to ensure that the multilateral negotiations are conducted within a framework that guarantees the interests of less powerful nations, regulates corporate influence and is based on agreed international standards for human rights, labour rights and environmental protection.

AFTINET believes that the following principles should guide Australia's approach to trade agreements and multilateral trade negotiations:

- Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective Parliamentary and public consultation to take place about whether negotiations should proceed and the content of negotiations.
- Before an agreement is signed, comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation. Parliament should debate and vote on the full text of trade agreements in addition to the implementing legislation.
- Trade agreements should not undermine human rights, labour rights and environmental protection, based on United Nations and International Labour Organisation instruments.
- Trade agreements should not undermine the ability of governments to regulate on health, environmental, social and cultural issues in the public interest.

2. Overview

This submission addresses general principles and issues of common concern to our members, as well as the terms of reference of the inquiry and issues raised in the discussion papers.

AFTINET has been critical of the approach successive Australian Governments have taken in pursuing Bilateral and Regional Free Trade Agreements. These criticisms include:

- The use of contentious econometric modelling dependent upon inaccurate assumptions.
- The lack of studies and modelling on the environmental, social, labour and human rights impacts of proposed free trade agreements.
- A lack of transparency and democratic processes about the process and decision making of proposed free trade agreements.
- That some free trade agreements have included the negotiation of issues like intellectual property rights on pharmaceuticals and operations of the Pharmaceutical Benefits Scheme, the labelling of genetically engineered food or Australian content in audio visual media. That are important health, social or cultural issues that should be decided through open democratic processes, not through trade negotiations.
- The regular failure to account for Australia's relatively weak position in bi-lateral and regional trade negotiations due to previous unilateral economic liberalisation and removal of many trade barriers, which means that health, social and cultural policies are on the table for negotiation, thus seriously undermining the legitimate rights of governments to regulate in the public interest in these areas.
- The failure to include meaningful commitments by governments to abide by internationally agreed standards on labour rights or protection of the environment.
- The linking of strategic issues such as security alliances to Trade Agreements, at the expense of consideration of the actual economic and social impact of the agreements.
- A focus on bilateral and regional trade agreements at the expense of fair multilateral trade negotiations.

AFTINET has consistently maintained that governments need to retain the right to legislate in the public interest, such as environmental standards, health issues like affordable access to medicines, cultural matters, and in response to crises such as the Global Financial Crisis and climate change. We will address this issue in more detail in responses to some of the questions raised by the Productivity Commission in its briefing papers.

We now turn our attention to direct responses to the terms of reference of the review.

3 Response to Terms of Reference

3.1 Examine the evidence that bilateral and regional trade agreements have contributed to a reduction in trade and investment barriers. Consider also to what extent such agreements are suited to tackling such barriers, including in the context of the proliferation of such agreements between other countries;

The evidence that bilateral and regional trade agreements have contributed to a reduction in trade and investment barriers is contestable. When such

evidence is presented it usually fails to account for the other trade-damaging aspects of such agreements.

Many economists believe that the use of preferential free trade agreements, be they bilateral or regional, leads to trade distortions and diversions. This is because when a tariff, or protective measure, is applied (or removed) unilaterally to all nations, goods and services will be imported from the most efficient producer at the lowest possible cost, whereas with both bi-lateral and regional free trade agreements the most efficient producer may no longer be able to provide the goods or services at the lowest possible cost due to the preferential treatment of the partner/s in those agreements.

Dee (2008)¹ uses the example of car sales from the US and Japan and the AUSFTA to highlight this issue. Under the AUSFTA, which gives preferential treatment to US manufacturers, it is possible that an increasing number of cars produced in the US could be sold in Australia at the expense of the more efficient producers or world-best producers, in this case Japan. Further, consumers would not gain the full measure of tariff reduction as the US production costs are higher than the Japanese production costs. Dee observes that such agreements are “as much about redistributing tariff revenue as they are about the benefits of lower cost imports” and that “most of the tariff revenue goes, not to Australian consumers, but to US producers, to make up for their higher production costs.”² The general assumption used in econometric modelling ignores this factor and simply assumes that removal of trade barriers benefits the consumer.

Dee (2008) suggests that the overall effect is likely to be negative because the allocative efficiency gains per unit of trade are usually much smaller than the uncompensated loss in tariff revenue per unit of trade that is diverted.

Crawford and Fiorentino (2005)³ suggest that the proliferation of regional free trade agreements is undermining the transparency and predictability in the multilateral trade system through trade and investment diversion.

In the same study they suggest that the proliferation of such agreements has placed strains on even the largest countries institutional capacities. They suggest that bi-lateral and regional free trade agreements “pose a threat to a balanced development of world trade through increased trade and investment diversion”⁴.

The proliferation of bi-lateral and regional free trade agreements has also led to a costly and complex system of rules of origin (ROOS)⁵. The proliferation of ROOS increases the direct cost to business of establishing their product in

¹ Dee, Phillippa (2008) ‘The economic effects of PTAs’, *Australian Journal of International Affairs*, 62:2,151-163

² *ibid.* p.p.153-154

³ Crawford, Jo-Ann & Fiorentino, Roberto V (2005), *The Changing Landscape of Regional Free Trade Agreements*, p.1

⁴ *ibid.* p.16

⁵ *ibid.* p.16

new markets through increasing administrative and compliance costs⁶, thus creating a new trade and investment barrier. Further they act as a disincentive to take advantage of any trade liberalisation that has occurred.

ROOS can act as a disincentive for business to take advantage of any trade and investment liberalisation through costs outweighing the benefits. Capling states “there is evidence that many companies do not benefit from these preferential advantages simply because the administrative costs of demonstrating their eligibility for preferential treatment under a PTA’s rules of origin is greater than the gains of the tariff reductions itself”⁷.

Moreover, there is evidence that exporters have not experienced the removal of trade barriers resulting from bilateral agreements. A 2010 Australian Industry Group survey of exporting business reported that benefits of FTAs with Thailand, USA, New Zealand, Singapore and Chile were seen as marginal. Less than half of those exporting to the USA had seen benefits, 87% believed that the arrangement hasn’t improved their access to US government contracts, and 75% reported that the AUSFTA is not effective in creating new export opportunities⁸.

The situation is well summed up by Kris Newton, Horticulture Australia Council Chief Executive, who is reported⁹ as saying that his industry hadn’t received a constructive deal out of FTAs and, “In general terms, my response is, what benefits?”¹⁰

3.2. Examine the evidence that bilateral and regional trade agreements have safeguarded against the introduction of new barriers. Consider also the potential for trade discrimination against Australian businesses without full engagement in the evolving network of bilateral and regional agreements;

As highlighted in responses to the previous item of the terms of reference, there is evidence that both bi-lateral and regional free trade agreements distort and divert trade due to their preferential nature. In some cases they have created new barriers such as increasing the number and diversity of Rules of Origin.

As Dee (2008)¹¹ concludes, although such trade agreements may ease one economic distortion they exacerbate another, creating a situation of second

⁶ Dee, Phillipa (2008) op.cit., p.p.155

⁷ Ann Capling, 2008, ‘Australia’s trade policy dilemmas’, *Australian Journal of International Affairs*, 62:2, p. 238

⁸ AIG, Press Release, 07/02/2010, “Business seeks better returns from Free Trade Agreements”, available from AIG website -

<http://www.aigroup.com.au/portal/site/aig/mediacentre/releases/>

⁹ McKenzie, David, ‘Horti Deals Disappoint’, *The Weekly Times*, 13/01/10, available at: http://www.weeklytimesnow.com.au/article/2010/01/13/148701_horticulture.html

¹⁰ Ibid.

¹¹ Dee, Phillipa (2008) op.cit, p.154.

best with no clear gain for the partners involved in the agreement or the world as a whole.

It has been generally agreed by economists that the best outcomes are obtained through multilateral negotiations of a rules based trading system. Capling (2008)¹² points out that Australia has made its most significant gains through the multilateral trading system and that, as a medium-sized economy, it is in a far better position to influence outcomes in multilateral negotiations than in bilateral negotiations with far larger economies.

Regional Trade Agreements while multilateral in nature lock in existing advantages and undermine the international trade system and the WTO. Dee (2008) points out that recent free trade agreements do one of two things: “either bind the status quo or make concessions on a preferential basis, even when logic suggests they could sensibly be made non-discriminatory.”¹³

3.3 Consider the role of bilateral and regional trade agreements in lending support to the international trading system and the World Trade Organization;

AFTINET supports a multilateral trading system created through rules-based international agreements.

However, we believe that the current rules-based system needs fundamental reform to live up to the objective of sustainable development that is fair and equitable, supports human rights standards, raises environmental and labour standards, through compliance with existing ILO and international environmental agreements, protects local cultural industries, and protects government provision of services such as health, education, water and welfare.

The further development of the multilateral trading system has been affected by the intensification and proliferation of bi-lateral and regional trading agreements. Whilst the reasons for the failure of the Doha Round are many and complex, an important factor is the distraction of resources and intent away from multilateralism in trade to bi-lateral and regional free trade agreements. Capling (2008) identifies that many observers believe that this proliferation has dampened enthusiasm and diverted resources away from multilateral trade negotiations.¹⁴

Pascal Lamy, the Director General of the WTO, recognises this problem in his forward to *Multilateralizing Regionalism: Challenges for the Global Trading System* when he states “the first element here is that governments need to pay proper attention to their multilateral interest. We neglect the unique advantages of an inclusive, non-discriminatory multilateral trading system at

¹² Ann Capling, 2008, op.cit, p.p. 229-244.

¹³ Dee, Phillippa (2008), op.cit, p.157

¹⁴ Ann Capling, 2008,op.cit,p. 233

our peril. It is these self same governments that own the WTO and that enter into regional trading arrangements.”¹⁵

This should be of significant concern for Australia, as a small to mid-size player in trade, which has a major interest in agricultural trade.

US and EU agricultural export subsidies are a major issue in WTO negotiations, allowing them to flood export markets with unfairly subsidised agricultural products. This is particularly damaging to developing countries, but also to Australia as an agricultural exporter. Because subsidies are not tariffs, but are paid directly to farmers, they cannot be reduced on a bilateral basis, but can only be reduced through multilateral negotiations. Bilateral trade agreements allow the US and the EU to keep their subsidies while obtaining access to individual markets whose governments have weaker bargaining positions. It can be argued that such bilateral agreements undermine multilateral negotiations by removing the incentive for the US and EU to reduce their subsidies.

These concerns were reflected in the early scepticism of the National Farmers’ Federation about the AUSFTA. Mark Davis reported that in 2003 the NFF was not confident that an FTA would achieve real agricultural market access for Australian farmers and were aware that it would leave US agricultural export subsidies untouched. They were concerned that “the preoccupation with an FTA should not detract from the bigger prize of global agricultural trade liberalisation.”¹⁶

3.4 Analyse the potential for trade agreements to facilitate adjustment to global economic developments and to promote regional integration;

The Global Financial Crisis is an important example of a global economic development which required immediate government action at national and international levels. Bilateral agreements which include “WTO-plus” financial liberalisation measures may limit the flexibility of governments to respond to the crisis.

As Prime Minister Rudd has written, the crisis was “the culmination of a 30-year domination of economic policy by a free-market ideology that has been variously called neo-liberalism, economic liberalism, economic fundamentalism, Thatcherism or the Washington Consensus. The central thrust of this ideology has been that government activity should be constrained, and ultimately replaced, by market forces.

“We have seen how unchecked market forces have brought capitalism to the precipice. The banking systems of the Western world have come close to

¹⁵ Baldwin, R & Low, P, *Multilateralizing Regionalism: Challenges for the Global Trading System*, Introduction p.xii.

¹⁶ Davis (2005b) “Bilateral thinking’s rise from the ashes of WTO firefights” *Australian Financial Review*, 06/01/10, p. 44.

collapse. Almost overnight, policymakers and economists have torn up the neo-liberal playbook and governments have made unprecedented and extraordinary interventions to stop the panic and bring the global financial system back from the brink.”¹⁷

In the medium term, the September 2009 G20 Leaders’ Summit on the crisis committed to ensure that “our regulatory systems for banks and other financial firms reins in the excesses that led to the crisis”. The commitments include national and international regulation to raise capital standards, to implement strong international compensation standards aimed at ending practices that lead to excessive risk-taking, to regulate the derivatives market and to create more powerful tools to hold large global firms to account for the risks they take. ¹⁸ There has also been discussion of the need for regulation of banks to ensure that they do not become so large that their market dominance means that they are “too big to fail.”

These policy changes require that governments retain full powers to regulate financial services. These powers should not be limited by trade agreements, in particular by agreements for liberalisation of financial services, which have been a feature of some bilateral agreements.

3.5 Assess the impact of bilateral and regional agreements on Australia's trade and economic performance, in particular any impact on trade flows, unilateral reform, behind-the-border barriers, investment returns and productivity growth;

During the period of expansion of free trade agreements Australia has faced increasing growth in its trade deficit. Neo-liberal economic orthodoxy ignores these outcomes so long as trade itself continues to grow. But persistent trade deficits can lead to negative economic outcomes, contributing to balance of payments deficits and currency instability.

Priestly (2008)¹⁹ found that a common feature of the free trade agreements with Thailand, Singapore, Chile and the US is “their impact on trade flows”, and that the free trade agreements were followed by higher Australian trade deficits and a significantly slower rate of reciprocal export growth.

Trade between Australia and Thailand totaled \$12.3 billion in 2007, compared with \$6.8 billion in 2004. Priestley found that since the Thailand-Australia free trade agreement, bilateral trade has nearly doubled and Australia’s trade deficit has risen from \$711 million to \$3.5 billion²⁰. In relation to the Singapore free trade agreement he found that Australia’s trade deficit has more than doubled in the same period, rising from \$3 billion in 2004 to \$6.4 billion in

¹⁷ Keving Rudd (2009) ‘The global Financial Crisis’ in *the Monthly*, No. 42, February 2009

¹⁸ G20 Group of Governments (2009) *Leaders Statement: the Pittsburgh Summit* , September 24-5 , p.2

¹⁹ Priestley, Michael, (2008), ‘Australia’s Free Trade Agreements’, Background note prepared by Australian Parliamentary Library.

²⁰ *Ibid*, p2

2007, while bilateral trade between Australian and Singapore was worth \$14.5 billion in 2007 compared to \$9.4 billion in 2004²¹. The Chile-Australia free trade agreement, initially saw Australia's trade deficit with Chile rise from \$141 million in 2007 to a trade deficit of \$239 million in 2008²².

Priestley found that "in the year following the AUSFTA and in 2007, exports to the US fell while US imports increased."²³ He highlighted that in 2007 Australia's \$13.6 billion trade deficit with the US was the highest trade deficit Australia has recorded with any trading partner. Priestley also pointed out that as well as the widening trade deficit, the two-way trade with the US had fallen to a record low, accounting for only 9.5 per cent of total trade in 2008²⁴.

The background paper concluded that anticipated gains for Australian exporters fell well short of estimates. Priestley concluded that the risks of the bilateral free trade model included: "structural trade imbalances leading to higher trade deficits favouring the FTA partner country, long phase-in periods for free trade (in particular agricultural trade), and negative impacts on the Australian economy which are related to trade diversion."²⁵

The Mortimer Review into Australia's export policies and programs, *Winning in World Markets*, has found that the benefits from Australia's FTAs are inconclusive. The review found that there has been a worsening of Australia's terms of trade with all FTA partners, the rates of increased market share are ambiguous, there is limited evidence of new market entrants, and with the exception of some food, manufacturing and service exports, many exporters saw no increase in exports²⁶.

The impacts that these trade agreements have had so far aren't just restricted to the macro economic level. It is estimated that under all of Australia's FTAs there have been 26,000 job losses which have been almost all in the manufacturing area, with no significant job creation in the mining or agriculture sectors²⁷. The inclusion of the Joint Medicines Working Group under the AUSFTA has resulted in price increases in the Pharmaceutical Benefits Scheme (PBS) through the creation of a medicine category not subject to reference pricing.

The evidence indicates that Australia's free trade agreements aren't delivering the economic benefits promised and are having wider negative social impacts on the community.

²¹ Ibid, p2.

²² Ibid, p3.

²³ Ibid, p3.

²⁴ Ibid, p3.

²⁵ Ibid, p4.

²⁶ Mortimer, D., (2008) *Winning in World Markets*, pg. 96-98.

www.dfat.gov.au/trade/export_review.

²⁷ Australian Manufacturing Workers Union, *The Potential Impacts of the Australia-China Free Trade Agreement*, Sydney, (2007), p21

3.6 Assess the scope for Australia's trade agreements to reduce trade and investment barriers of trading partners or to promote structural reform and productivity growth in partner countries. Consider alternative options for promoting productivity improving reform in partner countries;

As discussed above, Australia is not in a strong negotiating position, having previously reduced and minimised trade barriers such as tariffs on a unilateral basis. This means Australia's ability to influence change on a bi-lateral or regional basis is severely restricted.

As Capling observes "the Australian economy is already very open as a result of unilateral liberalisation..., Australia lacks significant 'negotiating coin'²⁸.

3.7 Assess the scope for agreements to evolve over time to deliver further benefits, including through review provisions and built-in agenda;

As highlighted earlier in this submission Australia is not in a position to be able to apply the required negotiating coin to obtain further benefits through the evolution of bi-lateral or regional free trade agreements. For example, further liberalisation of the AUSFTA could not include removal of distorting US agricultural subsidies which can only be removed through multilateral negotiations. Even improved market access on particular products could require further concessions on health, investment cultural and food regulation policies which should be decided through democratic parliamentary processes, not through trade negotiations

4. Response to Questions Raised by the Productivity Commission in its briefing paper "Bilateral and Regional Trade Agreements: Productivity Commission Issues Paper" December 2009.

Finally this submission will directly address some of the key questions raised by the Productivity Commission in its briefing paper "Bilateral and Regional Trade Agreements: Productivity Commission Issues Paper" December 2009.

4.1 What role should comprehensive TAs play in achieving Australia's foreign policy objectives and other non-trade related objectives such as influencing labour and environmental standards in partner countries? What are the advantages and disadvantages of using TAs as the vehicle for achieving such objectives?

The US uses the 'comprehensive' model of the North American Free Trade Agreement (NAFTA) in all its bilateral and regional negotiations. The NAFTA model has been extremely controversial because it attempts to impose

²⁸ Ann Capling, (2008), op.cit., p. 237

'comprehensive' US legal frameworks for investment, intellectual property rights, health, environmental and social policies. The model contains only weak clauses on labour rights and the environment, which are not enforceable.

These issues were raised in the AUSFTA negotiations and are likely to be raised again in the negotiations on the Trans Pacific Partnership Agreement between the US, Australia, and six other countries, four of which have bilateral agreements with the US.

This model has met opposition in Australia and other countries because it attempts to make policy through trade negotiations in areas which should be decided through democratic parliamentary processes.

A 2002 letter from the US Trade Representative to the US Congress and 2003 publications of the US pharmaceutical industry identified the following issues as trade barriers to be reduced or removed in the US-Australia Free Trade negotiations:

- price controls on medicines under the Pharmaceutical Benefits Scheme,
- Australian content laws for film and television, quarantine laws,
- labelling of genetically engineered food
- the Foreign Investment Review Board
- quarantine laws²⁹

The NAFTA 'comprehensive' model also contains an investor-state disputes process. This gives corporations additional rights to take legal action to sue governments for damages and to force changes in domestic law. US corporations have used NAFTA rules to sue Mexican and Canadian governments for hundreds of millions of dollars.

Chapter 11 of NAFTA defines 'investors' widely and grants them broad rights. Only the parties - that is, the governments - to NAFTA may be sued, but they may be sued by investors, that is, corporations. The government 'measures' which can be challenged as infringing on investors' rights, include 'any law, regulation, procedure, requirement or practice' at all levels of government.

Disputes are decided in one of two international arbitration panels originally set up for the resolution of disputes between private, rather than public, bodies. These bodies – UNCITRAL and ICSID – do not provide the levels of openness of national courts. While investors sue governments seeking public money and seeking rulings on the appropriateness of public policy decisions,

²⁹ Zoellick, R (2002) "Letter to the US Senate" dated 13 November 2002, p.5, cited at <http://www.ustr.gov/releases/2002/11/2002-11-13-australia-byrd.PDF>
Pharmaceutical Research and Manufacturers of America, (2003), *National Trade Estimate Report on Foreign Barriers to Trade of December 2003*, Washington, December 12.

members of the public are not informed of the disputes or afforded the opportunity to be heard.

The most remarkable feature of the NAFTA investor-state disputes process is this right of private enforcement granted to foreign corporations to enforce the constraints the agreements impose on government policy and regulation. This differs significantly from the WTO agreements, in which actions may only be brought by member states, which have reciprocal obligations. In investment treaties such as NAFTA, such reciprocity is absent - foreign investors have no obligations under the treaties that governments may enforce³⁰.

The investor-state disputes process was decisively rejected in the OECD in 1997 and has been rejected by the majority of WTO members when they rejected proposals for an investment agreement in the WTO Doha Round. Public opposition to it in Australia also resulted in its exclusion from the AUSFTA, the only US bilateral agreement which does not include it.

There was also strong community opposition to changes to the other policies listed above, which limited the changes to the PBS and in other policy areas.

However, there were some changes to the PBS which mainly benefit pharmaceutical companies. Ravenhall notes that the US "has successfully pursued through PTAs various agendas advocated by domestic corporations. The most controversial agenda has been that of large pharmaceutical companies, which have enlisted the US government in their battle against state regulation of pricing and against generic medicines. Faunce and Shats find that the provisions of the AUSFTA have diluted the mechanism by which Australia's Pharmaceutical Benefits Scheme determines pricing by reference to the demonstrated therapeutical significance of new medicines - a change primarily resulting in benefits to foreign pharmaceutical companies."³¹

The article by Faunce and Shats notes that the Howard Government passed significant legislative changes to the PBS in August 2007 which had been discussed in the Medicines Working Group of the AUSFTA and which had been advocated by the major pharmaceutical companies. The companies and the US Government had sought since 2002 "to achieve the elimination of government measures such as price controls and reference pricing which deny full market access for United states products"³².

Reference pricing is the method through which the PBS makes medicines available at affordable prices to all Australians by comparing the prices of new

³⁰ Shrybman, S.(2002) *Thirst for Control*, Council of Canadians, Toronto.

³¹ Ravenhall, John (2008), 'Preferential trade agreements and the future of Australian trade policy', *Australian Journal of International Affairs*, 62:2, p.126.

³² Thomas Faunce and Kathy Shats (2008), "Bilateral Trade Agreements as drivers of national and transnational benefit from health technology policy: implications of recent US deals for Australia", *Australian Journal of International Affairs*, Vol.62, No.2, p. 199.

medicines with the prices of existing medicines with the same therapeutic effect whose patents have expired, and have lower prices. The 2007 PBS legislation creates two separate pricing formularies for new medicines. The F1 formulary comprises more 'innovative' medicines which are not subject to reference pricing and for which much higher prices can be charged. Faunce and Shats conclude that "the pricing of new 'innovative' medicines in the F1 formulary risks diminishing the extent to which the PBS processes now can be said to be based on objectively demonstrate therapeutic significance"³³.

AFTINET advocates that the Australian government should reject the NAFTA model and should not support the investor-state disputes process in any trade negotiations. It should also clearly reject further changes to the PBS and the other policies listed above.

Australia is a signatory to numerous international agreements, such as ILO labour standards, and United Nations treaties in areas of Human Rights, and the Environment.

It should be a prerequisite trade agreements that parties to the agreement abide by international standards on human rights, labour rights, Indigenous rights and environmental sustainability, as defined by the United Nations (UN) and the International Labour Organisation (ILO). Trade agreements should not undermine these standards.

Australia must ensure that it does not give preferential access to goods and services from countries where labour rights and human rights are being violated.

Environmental protection must not be undermined by Australia's trade policy. Australia's trading relationships should support and strengthen multilateral environmental agreements as well as actions taken by the United Nations Environment Program. This includes not only environmental protection but also the right to develop in a sustainable way.

On a domestic level, trade policy must not undermine the ability of governments to regulate in the interest of protecting the environment. This includes ensuring that disputes settlement processes at both a multilateral and bilateral level do not erode the space for governments to regulate. As discussed above, Australia should avoid any mechanism such as the investor-state disputes settlement process in its bilateral agreements. Such a mechanism has seen rulings against governments trying to regulate in the interests of environmental protection.

Trade policy must also work cohesively with measures to address climate change. Trade agreements should recognise the primacy of environmental agreements, and trade rules should not restrict governments from regulating to address climate change. WTO rules currently recognise the right of governments to regulate for environmental goals, but there is still debate

³³ Ibid, p. 202.

about the legal meaning of this. If there is a conflict between trade rules and the ability of governments to regulate, we believe trade rules should be clarified or amended to enable such regulation.

4.2 Can Processes be improved?

4.2.1 Process of Trade Agreements

AFTINET is concerned that the process involved in investigating, considering, creating and finalising trade agreements is flawed. The flaws are related to the economic analysis, the failure to examine and incorporate social and environmental impacts, and the failure to implement effective and inclusive community consultation, democracy and transparency.

4.2.2 Econometric Modelling and Studies:

The econometric modelling that is used by Australia as a basis for entering into negotiations on trade agreements has been flawed. Econometric modelling has been based on assumptions of perfect labour mobility and complete and instantaneous market access, assumptions that do not reflect the operation of real economies or the actual outcomes of final agreements. Such assumptions underestimate damaging effects like unemployment, trade diversions and increasing trade deficits, whilst exaggerating the potential economic benefits.

An example is the AUSFTA. The economic gains from the FTA predicted in the study by the Centre for International Economics were extremely modest, and hedged with the many qualifications shared by all such econometric modelling (see, for example, Quiggin 1996³⁴). The estimated gains were based on a number of assumptions which were uncertain at best. The study predicted that, if all trade barriers were removed, there could be net benefits of \$US 9 billion over a 20-year period, and that the GDP increase in 2010 could be US\$ 2 billion or A\$ 4 billion³⁵. However the study then conceded that gains would be proportionately less if not all trade barriers were removed³⁶. This figure of a \$A4 billion gain in GDP was widely quoted with much more certainty than it deserved, particularly in light of the strong acknowledgement by trade academics, trade advisors and foreign affairs officials that it was highly unlikely for the US to lift or alter its agricultural protections in a significant way. For example, the Australian APEC Study Centre study conceded that there would be strong resistance by the US to removal of all trade barriers, particularly in agriculture³⁷, but it then goes on to quote the \$A4

³⁴ Quiggin, J. (1996) *Great Expectations: Microeconomic reform and Australia*, Allen and Unwin, Sydney

³⁵ Centre for International Economics (2001) *Economic impacts of an Australia-United States Free Trade Area*, Centre for International Economics, Canberra. p.1

³⁶ Centre for International Economics (2001) *op.cit.*, p.2

³⁷ Australian APEC Study Centre (2001) *An Australia-US Free Trade Agreement: Issues and implications*, Commonwealth of Australia, Canberra. p.xi.

billion GDP gain without the qualification that it would be reduced if not all trade barriers were removed.

The CIE study's assumptions about removal of all trade barriers were questioned by other trade economists, and its results were contradicted by another study with less heroic assumptions done by ACIL consultants for the Rural Industries Research and Development Corporation. This study, also done in 2002, reflected the original scepticism among farmers about agricultural market access, assumed limited market access, and found that there would be net losses to the Australian economy from an FTA.³⁸

A second round of econometric studies were conducted in 2004 based on the actual outcomes of the negotiations, as access to both US agricultural and manufacturing markets fell far short of the assumptions of the original studies. The government commissioned CIE consultants to produce a second study which showed that gains for Australia resulting from agriculture and merchandise trade liberalisation were marginal. However the study included a chapter that showed huge gains from predicted increased US investment in Australia, and therefore a net economic gain³⁹. The assumptions about investment were so far outside conventional econometric modelling assumptions that prominent trade economist Professor Ross Garnaut of the Australian National University said that "they did not pass the laugh test"⁴⁰. Other studies including one commissioned by the Senate Inquiry Committee from Philippa Dee, an ANU trade economist formerly employed at the Productivity Commission, estimated that the economic gains from the agreement were marginal or negative for Australia.⁴¹

In addition to the problematic econometric aspects of the modelling, such studies also exclude the social and environmental impacts of an FTA.

4.2.3 Consultation and Transparency around the process and decision making

It is widely recognised that consultation, transparency and the democratic process have been neglected in the area of trade policy. For example the Director General of the WTO, Pascal Lamy, identified political legitimacy and

³⁸ ACIL Consulting (2003) *A Bridge too far? An Australian Agricultural Perspective on the Australia/United States Free Trade Area Idea, Report for the Rural Industries Research and Development Corporation*, Canberra.

³⁹ Centre for International Economics (CIE) (2004) *Economic analysis of AUSFTA: impact of the bilateral free trade agreement with the United States, prepared for the Department of Foreign Affairs and Trade*, CIE, Canberra.

⁴⁰ Garnaut, Ross, (2004) Evidence given to the Joint Standing Committee on Treaties, Australia-United States Free Trade Agreement Hearings, 3 May, Official Committee Hansard, Canberra, p.64 .

⁴¹ Dee, Philippa, (2004) *Submission to the Senate Inquiry on the Australia-US Free Trade Agreement*, June, Australian National University, Canberra.

representation of people as the most serious issue, facing the WTO and the governance of trade⁴².

To facilitate effective community debate, it is important that the Government and DFAT develop a clear structure and principles for consultation processes that can be applied to all proposed trade agreements. The Senate Foreign Affairs, Defence and Trade Committee made detailed recommendations for legislative change in its November 2003 report, *Voting on Trade*, which, if adopted, would significantly improve the consultation, transparency and review processes of trade negotiations⁴³. The key elements of these recommendations are that:

- Parliament will have the responsibility of granting negotiating authority for particular trade treaties, on the basis of agreed objectives;
- Parliament will only decide this question after comprehensive studies are done about the economic, regional, social, cultural, regulatory and environmental impacts that are expected to arise, and after public hearings and examination and reporting by a Parliamentary Committee; and
- Parliament will be able to vote on the whole trade treaty that is negotiated, not only on the implementing legislation.

These matters were also recognised by the Joint Standing Committee on Treaties (JSCOT) in its support for transparency mechanisms following examination of the Australia/Chile FTA:

“The Committee recommends that, prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the costs and benefits. Such assessments should consider the economic, regional, social, cultural, regulatory, and environmental impacts which are expected to arise.”⁴⁴

Australian Government should adopt and implement the recommendations of the Senate Foreign Affairs, Defence and Trade Committee and the Joint Standing Committee on Treaties. This would allow for greater transparency and for the government to implement its commitments on community consultation and involvement that were outlined in the ALP’s National Platform and Constitution 2009, which it will take to the 2010 Federal election, which states:

⁴² Lamy, P. ‘Speech given at Bocconi University’, 9th November 2009, available at: http://www.wto.org/english/news_e/sppl_e/sppl142_e.htm

⁴³ Senate Foreign Affairs, Defence and Trade Committee, *Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, 26 November 2003 at paragraph 3.91.

⁴⁴ Joint Standing Committee on Treaties Report 95, 2008, p 35.

“Labor is committed to sustaining a new depth of transparency into the process of entering trade agreements, by providing full community consultation prior to entering into new trade agreements.”⁴⁵

AFTINET believes that to properly increase transparency and democracy the Parliament should be the body that decides on whether or not to approve a trade agreement, not just its implementing legislation. The Government should set out the principles and objectives that will guide Australia’s consultation processes for all trade agreements and negotiations and the Government include regular consultations with unions, community organisations and regional and demographic groups which may be adversely affected by the agreements.

The Government should establish parliamentary review processes, which give parliament the responsibility of granting negotiating authority for all trade agreements and WTO multilateral negotiations and that Parliament should vote on the agreements as a whole, not only the implementing legislation.

⁴⁵ Australian Labor Party (2009), *National Platform and Constitution 2009, Chapter 2*, ‘Securing our future with responsible economic management’, p.7.