Trade agreements and democratic values∗

John Quiggin
Australian Research Council Federation Fellow
School of Economics &
School of Political Science and International Studies
University of Queensland
http://www.uq.edu.au/economics/johnquiggin

The increasingly broad scope of international trade agreements has raised widespread concern about the implications for popular sovereignty. Internationally, most attention has been focused on the World Trade Organization. In Australia, the same issue has arisen in relation to the Free Trade Agreement (FTA) negotiated with the United States in January and recently ratified by the US Congress and the Australian Parliament.1

Questions about the impact of treaties on democratic processes came to the fore in Australia in the 1980s and 1990s. The first major issue was the Commonwealth’s use of the treaty power to legislate on topics, covered by international treaties, that would otherwise have been outside its constitutional power (or, in the slightly tendentious language often employed, ‘reserved to the states’).

The most controversial application of the treaty power was the Hawke government’s World Heritage Properties Conservation Act 1983, introduced to protect the Franklin River in Tasmania from development for a hydro-electric dam. The general argument advanced by supporters of the Commonwealth was that, on an issue of both national and global concern, Hawke’s national mandate should override the views of the majority of Tasmanians, who supported the dam. On the whole this view seems to have been accepted by most Australians. Concerns that the Commonwealth might abuse the treaty power to gain powers over purely local matters, for example, by signing a spurious treaty with a compliant partner, were addressed in part by the creation of the Joint Standing Committee on Treaties in the Australian Parliament.

A second area of concern arose in relation to High Court decisions taking treaties into account. In Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1994-1995) 183 CLR 273 the Australian High Court confirmed that an applicant to the Government for an administrative decision has a legitimate expectation that the decision-maker will take into account Australia’s international treaty obligations when making the decision. In April 2001 the Australian Government introduced a Bill designed to negate the effect of the High Court decision in Teoh: the Administrative Decisions (Effect of International Instruments) Bill 1999, which however lapsed at the 2001 election and has not been re-introduced. (Australian Lawyers for Human Rights http://www.alhr.asn.au/html/main/action.html).

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1 As discussed below, the legislation introduced by the Howard government to implement the agreement was amended by Parliament to discourage abuse of drug patents. As a result, the US government did not immediately certify the legislation as implementing the agreement. At the time of writing (28/8/04) it had still not done so.
Despite some adverse commentary at the time, this history shows that the Teoh case does not raise any fundamental questions of democratic sovereignty. While treaties may have shifted the balance between the courts and the executive in relation to the interpretation of the law, the supremacy of the legislature is not affected. It was open to the Parliament either to direct the courts to ignore treaties generally (the intended effect of the Administrative Decisions Bill) or to clarify the powers of the Minister in particular cases. The latter approach has been adopted in immigration matters, with Parliament frequently over-riding court decisions limiting Ministerial power.

A more serious challenge to democratic decision-making arose from National Competition Policy, which was designed by its proponents as a way of ‘locking in’ commitments to continuing policies of microeconomic reform at a time when popular support for these policies (pejoratively referred to as ‘economic rationalism’) was declining rapidly. The proposed reforms were drafted by a committee which held no public hearings and attracted little public attention. Its recommendations were accepted by a meeting of the Council of Australian Governments (COAG) and passed by State and Commonwealth Parliaments with very little debate.

By virtue of its reliance on inter-governmental negotiations and remoteness from open political debate, the COAG process permitted further extensions of the reform process to be presented as a fait accompli, embodied in the opaque legislation of the National Competition Policy Act. Popular disenchantment with reform was thereby sidestepped.

Marsh (1996, p. 7) agrees, observing that:

The approach follows conventional wisdom about the best way to achieve major policy change. A nominally independent committee — in fact made up of members whose broad sympathies were well recognised and in line with ministerial and bureaucratic dispositions — was constituted. This committee was given the task of evaluating a policy area and suggesting changes. Consultation was confined to a call for submissions. Cabinet endorsed the report which was then negotiated, largely in private, with the immediately affected interests, in this case basically the States. There was minimal parliamentary attention to the process and minimal attempt to 'educate' interests who might be affected in the implementation phase.

The crucial challenge to democracy posed by National Competition Policy were the use of COAG to make long-term policy commitments, without public debate, and the creation of the National Competition Council (NCC), a supragovernmental body with the effective power to fine State governments which, in its view were failing to live up to their commitments. A further problem was that of governments binding their successors in an anti-democratic fashion. By the time the first penalties were levied by the NCC, most of the original signatory governments had lost office.

Unlike the Tasmanian Dams and Teoh cases, National Competition Policy produced a violent public backlash. The policy played a significant role in the defeat of the Borbidge government in Queensland in 1998, and contributed to the upsurge in support for Pauline Hanson’s One Nation party. Although NCP remains in force, the public reaction led the NCC to take a softer and less publicly confrontational line, and allowed
state governments substantially greater scope to make decisions on the basis of political acceptability rather than on conformity with free-market economics.

Although it is not directly accountable, the NCC is subject to the control of the Commonwealth government, which could repeal the relevant legislation without incurring any penalty. Concerns about democratic sovereignty arise in an even more severe fashion in relation to international trade agreements where power is handed to bodies that are not accountable to any government.

The issue has risen to prominence over the last decade or so because the scope of trade agreements has expanded to the point where they are better described, in the term proposed by Alan Oxley of AUSTA (the main lobby group supporting the Free Trade Agreement with the United States) as an ‘economic integration agreement’.

Until the 1990s, trade agreements dealt mostly with the removal or limitation of formal barriers to trade such as tariffs and quotas. The scope of such agreements has expanded for two main reasons. First there were frequent allegations (sometimes justified, sometimes not) that governments were using policies such as environmental, health and quarantine laws to create surreptitious barriers to trade. This led to the creation of arbitration processes within bodies such as the World Trade Organisation (WTO) and the North American Free Trade Agreement (NAFTA). The results of such processes have commonly favoured complainants against governments seeking to protect the environment through measures that restrict trade. For example, a Canadian ban on MMT, a manganese-based fuel additive, was rescinded when the main producer, Ethyl Corporation of the United States, sued under NAFTA.

As with NCP in Australia, there has been a global public backlash. In part this was due to the anti-environmental bias displayed by the WTO, and in part due to its arrogance and unaccountability (its former director, Renato Ruggiero aspired to create ‘a constitution for the global economy’). The backlash came to global prominence with the rioting at the Seattle meetings of the WTO in 1999. Since then, as with the NCC, there has been some softening of the WTO's position and a significant lowering of its profile.

Many of the same concerns have arisen with the Free Trade Agreement between Australia and the United States, most prominently in relation to intellectual property, quarantine policy and the Pharmaceutical Benefits Scheme (PBS). The impact of the Free Trade Agreement on the operations of the PBS remains controversial, but an examination of the history of the issue suggests that there are grounds for serious concern.

When negotiations towards the FTA commenced in 2003, the government stated that the PBS was ‘not on the table’ and its supporters suggested that those who raised the issue were ‘scaremongers’. This position was undermined when the US Congress passed a Medicare Bill in November 2003. Buried in the 1100 pages of the Bill was a clause requiring the Bush Administration to apprise Congress of ‘progress in opening Australia's drug pricing system’. This was generally taken as code for the abolition of the PBS.

When the Agreement was finally announced, it included extensive clauses relating to the operations of the PBS and to enhanced protection for the owners of drug patents. However, the Australian government presented this outcome as a victory, arguing that
the United States had demanded a right of appeal against adverse decisions from the Pharmaceutical Benefits Advisory Committee, but had received only a nonbinding review.

Despite vigorous debate, little light was shed on the issue until, as its price for passing the FTA legislation, Labor demanded a relatively minor amendment, focusing on the practice of ‘ever greening’ (seeking to extend the life of patents through trivial modifications to existing drugs). Until this time, the government appeared set for a major political victory, with Labor having dithered for months before finally accepting the Agreement. This victory could have been secured if the government had simply accepted the amendments, while dismissing them as an unnecessary concession, designed purely to allow Labor to save face. In the end the government was forced to accept the amendments, and turned a guaranteed political victory into a significant defeat.

The reasons for the government’s resistance became apparent when the US Trade Representative (and later the US Ambassador) announced that the US government had not decided whether to certify the Australian legislation as implementing the legislation, stating rather ominously that the US had chosen not to intervene in Australia ‘at this point’. It has now become apparent that the agreement gives the US and US-based pharmaceutical companies immense power over this, and any future Australian government. Many of the relevant points have been made by supporters of the agreement, seeking to point out the difficulties created by Labor’s amendments. For example, Pearson (2004) notes that:

It is more likely that they are contrary to the agreement. This is because the FTA incorporates the terms of the World Trade Organisation Agreement on Intellectual Property as if they were an integral part of the FTA. One of those terms – Article 27 (1) – precludes discriminatory treatment between different sectors. Clearly pharmaceuticals cannot be singled out for special restrictive measures.

The second aspect of the amendments likely to cause concern is that trade agreements are negotiated on the basis of ‘standstill’. In other words, once an agreement is reached, the parties are expected not to introduce legislation that would alter their relative positions.

Finally, the Americans could argue that the amendments are likely to give rise to a dispute under the ‘reasonable benefits’ clause, in the event that their drug companies are unable to realise benefits that they anticipated would flow from the agreement.

The consequences don't look good for Labor, whether it is in Opposition or government. The Americans can respond in several ways. They could agree to implement the FTA on the basis of an exchange of letters, through which both governments resolve that the Labor amendments will in no way inhibit the right of companies to protect their intellectual property as defined in the FTA (in effect agreeing that the amendments are redundant).
Then again, they might ... refuse to bring the FTA into force for the time being, pending further negotiations. Or, if worst came to worst, they could reserve their position by stating that the measures were likely to give rise to a dispute in the future. This might well suit the American political class, with an election impending. They could tell the US pharmaceutical companies that they were prepared to indicate that there was a dispute as soon as those companies could provide prima facie evidence of disadvantage to their position.

It is critical to observe that these points have nothing to do with the specific content of Labor's amendments. They apply to any legislation concerning the PBS that an Australian government might seek to introduce in the future and, arguably, to any administrative decisions made by Ministers. That is, the FTA gives the Americans an effective veto power over anything we might attempt to do to improve the functioning of the PBS.

A crucial lesson from disputes over NCP and the WTO is that the resolution of these issues is as much political as legal. The willingness of a US government to pursue an expansive interpretation of the provisions of the FTA depend as much on the degree of political resistance it encounters as on the legal drafting of the agreement.

Hence, the election outcome is likely to prove crucial. It seems likely that a Howard government would either repeal the Labor amendments (if it had an effective Senate majority) or agree to an exchange of letters of the kind described by Pearson. On the other hand, if Labor is elected and stands on its current position, the US will be faced with a choice between repudiating the agreement altogether or certifying Labor’s legislation. This would make it politically difficult to pursue the courses of action envisaged by Pearson.

In the long run, there is little doubt about the inevitability of closer global integration. It is necessary, in this context, to go beyond disputes about the conflict between trade agreements and national sovereignty. What is needed is more democratic accountability for bodies like the WTO and the various panels set up under free trade agreements. In this respect, developments in Europe are of particular interest. Economic integration within the EU has gone further than anywhere else. In principle, this development is subject to democratic accountability through the European Parliament. In practice the Parliament is weak and only tenuously connected to its electorate. Europe’s success or failure in closing the ‘democratic deficit’ will be an important signal to the rest of the world.

References