

Resurrecting the US Free Trade Agreement:

what US business wants from the Trans Pacific Partnership Agreement and what we can do about it



AFTINET
Australian Fair Trade &
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The Australian Government is involved in negotiations for a Trans Pacific Partnership Agreement (TPPA) with the US, Chile, Peru, Brunei, Singapore, New Zealand and Vietnam to develop a multilateral agreement based on the bilateral agreements the US has with four of these countries. This will resurrect all of the issues that were debated in the Australia-US Free Trade Agreement (AUSFTA).

The Howard Government negotiated the AUSFTA in 2003-04. The US government and companies identified Australian health, cultural and environmental policies as barriers to trade that they wanted to remove or change. These included price controls for medicines under the Pharmaceutical Benefits Scheme, labelling of genetically engineered food, Australian content rules in film, television and radio, and rules for local content and jobs in government purchasing.

The US government also wanted an investor-state dispute process, which would have given US companies the right to sue Australian governments for damages if health or environmental laws harmed their investments.

There was strong community opposition which had significant impact. There was no investor-state dispute process, no changes to GE food labelling, and limited changes to the Pharmaceutical Benefits Scheme and local media content. The Australian Labor Party, then in Opposition, moved Senate amendments to the implementing legislation which limited the right of drug companies to extend their rights to charge higher prices for medicines, and to preserve some local media content for film and television.

The TPPA means that all the issues we kept out of the AUSFTA will be on the table again. We know from submissions made by US business groups that they want to use the negotiations to get more changes to Australian policies on the price controls for medicines, local media content, labelling of genetically engineered food, and government purchasing, and that they support the inclusion of an investor-state dispute process in the agreement.

See these submissions at:

<http://www.regulations.gov/search/Regs/home.html#docketDetail?R=USTR-2009-0041>

The US Government National Trade Estimate Report on Foreign Trade Barriers in Australia in 2010 also lists these policies as trade barriers which they want changed. See www.ustr.gov/about-us/press-office/reports-and-publications/2010.

No further changes to the Pharmaceutical Benefits Scheme



US drug companies want higher prices for medicines

In the US, the wholesale prices of common prescription medicines are three to ten times the prices paid in Australia. Under the PBS, the wholesale price of medicines is controlled because health experts on the Pharmaceutical Benefits Advisory Committee compare the price and effectiveness of new medicines with the prices of comparable but cheaper generic medicines whose patents have expired. The listed medicines are then made available for sale at regulated subsidised retail prices, currently \$5.30 for pensioners and other low income groups, and \$33.30 for others. The difference between the wholesale price and the subsidised retail price is the cost of the PBS to taxpayers.

Pharmaceutical companies argue that Australia's system prevents them from enjoying the full benefits of their intellectual property rights by comparing the price of new drugs with cheaper generic drugs. Our strong community campaign in 2003-04 helped to retain the PBS pricing system.

But the AUSFTA set up a joint Medicines Working Group of US and Australian representatives and in 2007 the Howard Government made changes to medicines policy that enable pharmaceutical companies to receive higher wholesale prices

for some medicines, by creating a new F1 category for medicines that are supposed to have unique health benefits.

Medical studies published in 2010 show that the higher priced F1 medicines are an increasing share of the PBS budget, without enough evidence that they have better health effects. A government review of PBS costs published in February 2010 confirms that the F1 category is contributing to higher costs for the PBS than were predicted.¹

The TPPA provides another opportunity for the pharmaceutical industry to ask for higher prices. They are demanding that all the TPPA governments give a commitment not to implement new policies to control prices, and the US Government trade barriers report asks for more delays on cheaper generic drugs becoming available.

The Australian government should stand firm against these demands, which would prevent them from making changes to reduce the costs of the PBS.

No investor-state dispute process

All trade agreements contain state-to-state dispute processes to resolve conflicts about the agreements.

Investor-state dispute processes are additional dispute processes which give corporate investors rights to challenge government laws and policy and sue governments for damages if they believe their investments have been harmed. These disputes are heard by trade tribunals which give priority to the interests of the investor, rather than to the public interest. The AUSFTA does not contain the investor-state dispute process because strong community campaigning pressured the Howard Government to oppose it.

The investor-state dispute process in the North America Free Trade Agreement (NAFTA) has enabled corporations to challenge laws and sue governments for millions of dollars.

The process is based on US legal principles, which define most public interest regulation as “indirect expropriation” if it affects corporate profits.²

This is an unacceptable expansion of the rights of corporate investors. Governments are elected to develop laws and policies in the public interest through democratic parliamentary processes. Giving corporations extra rights to sue governments undermines the democratic process and places the rights of corporations above the rights of elected governments, as the following examples show.

Ethyl vs Canadian Government 1998-99

US company Ethyl successfully challenged a Canadian ban on the gasoline additive MMT which the Canadian government claimed was harmful to human health and the environment. The Canadian Government agreed to withdraw the ban and pay Ethyl \$13 million.

SD Myers vs the Canadian Government 1998-2000

US waste treatment company SD Myers challenged a Canadian Government ban on the export of toxic PCB chemicals from Canada to the US, even though the ban was based on a multilateral environmental treaty on toxic waste trade.

United Parcel Service vs the Canadian Government 2000-07

US company UPS claimed that Canada Post’s parcel delivery service was unfairly subsidised because it was part of the larger public postal service. UPS did not win this case, but it cost the Canadian Government millions in time and legal fees over seven years.

The NAFTA dispute process discourages governments from raising standards of public regulation. Between 1994 and January 2009, 59 cases were launched against governments, an average of almost 4 cases per year. Most of these have not succeeded, but they involve governments in years of expensive litigation, even if damages are not awarded.

A more recent example comes from a bilateral investment treaty containing an investor-state dispute process based on the NAFTA principles and has direct implications for Australia.



Tobacco companies could take legal action against plain packaging if the TPPA includes an investor-state dispute process

Philip Morris vs Government of Uruguay 2010 ongoing

Philip Morris International, based in Switzerland and the US, filed a claim against Uruguay in February 2010 challenging tobacco advertising restrictions introduced by Uruguayan health authorities, based on World Health Organisation rec-

ommendations. The company claims that the measures violate the terms of the Switzerland-Uruguay bilateral investment treaty by preventing it from displaying its trademark, and claimed “substantial” damages.³

The Australian government announced in April 2010 that it would introduce similar legislation. Philip Morris immediately threatened legal action against the Australian Government, claiming that the legislation would violate Australia’s international trade obligations including the US-Australia Free Trade Agreement.⁴

The current AUSFTA does **not** have an investor-state dispute process, so this is an empty threat. But if the Government agrees to an investor-state dispute process as part of the TPPA it would hand the tobacco companies the weapon to sue it for millions of dollars of damages in a law suit against the plain packaging legislation. US firms could also use it to challenge laws on the PBS, local content in media and government purchasing, and GE labelling. US firms are far more likely to sue our governments than vice versa because they have more resources and because Australia generally has more public interest legislation than exists in the US.

Strong labour and environmental clauses



Without strong protections workers and the environment could be exploited

The AUSFTA has weak labour and environmental clauses which are not enforceable. The Australian government should support strong labour clauses that require signatories to enforce the core International Labor Organisation (ILO) standards in the ILO Conventions, and strong environmental clauses that require signatories to meet all applicable international environmental standards including those contained within UN environmental agreements, with trade penalties for non-compliance.

Local content in media and in government purchasing



Without local content laws we would have less local drama, comedy, documentaries and music.

Australia still has local content requirement for television and radio, to ensure that Australian stories and songs are heard. These are being targeted as trade barriers by US media companies. US industry groups have also targeted the local content rules for Australian government purchasing implemented in 2009, as ‘trade barriers’.

Genetically engineered food labelling and regulation of GE Crops



Without labeling we may not know if our food is genetically engineered

The US is the world’s largest producer of GE foods and these companies are again targeting Australia’s GE food labelling and regulation of GE crops as barriers to trade.

Australian government position

Australia already has Free Trade Agreements with most of the TPPA countries in Asia and South America, so Australia will not get any more access to their markets. The government wants to try to use the agreement to improve Australian access to US agricultural markets, which was not achieved in the AUSFTA. But this is very unlikely. The danger is that further changes to the PBS and the other policies will be demanded as trade-offs.

Trade Minister Simon Crean has said on the one hand, that “everything is on the table” in the negotiations, and on the other hand that there will not be a “re-opening of obligations in relation to the Pharmaceutical Benefits Scheme that were settled in 2005”. He also said that the government has “serious reservations about the inclusion of investor-state dispute settlement provision in this agreement.” (letter to the Canberra Times, March 17th, 2010)

Given that there is clearly pressure from both US business and the US government on all of the issues listed above, we believe the government should adopt a clear set of principles that there will be no concessions on public interest issues in the negotiations, and that they will support strong and enforceable labour and environment clauses.

What we want

AFTINET is a network of unions, church, environment, health and other community groups which supports fair trade based on human rights, labour rights and environmental sustainability, and which supports fair trading relationships with all countries.

Over 30 organisations have asked the government to adopt the following principles in the TPPA negotiations, which are also consistent with ALP policy:

- No further changes to the Pharmaceutical Benefits Scheme which would increase wholesale prices and reduce affordable access to medicines
- No investor-state dispute process which would give special rights to international corporations to sue governments for damages
- Full rights to regulate labelling of genetically engineered food and to regulate GE crops, including existing moratoria
- No further weakening of Australian Government power to regulate audiovisual media for Australian content purposes
- Retention of the Foreign Investment Review Board, and of its powers to review foreign investment in the public interest
- No weakening of quarantine regulations

- No reductions in the ability to have local content requirements for government purchasing and industry policies that support local employment
- Strong labour clauses that require signatories to enforce the core International Labor Organisation (ILO) standards in the ILO Conventions, with trade penalties for non-compliance
- Strong environmental clauses that require signatories to meet all applicable international environmental standards including those contained within UN environmental agreements, with trade penalties for non-compliance.

What you can do

Send a message to Trade Minister Simon Crean to support these principles in the TPPA negotiations, through our website www.aftinet.org.au.

Get more information and join AFTINET through our website www.aftinet.org.au.

Thanks to: Australian Manufacturing Workers Union, Community and Public Sector Union - SPSF Group, Community and Public Sector Union - PSU Group, Sisters of Charity Foundation, Australian Services Union, Construction Forestry Mining and Energy Union, SEARCH Foundation, Uniting Care NSW & ACT, Australian Education Union, Finance Sector Union, NSW Teachers Federation, National Tertiary Education Union, Rail Tram and Bus Union - National Office.

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2. Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press, 2009.

3. International Centre for Trade and Sustainable Development, *Bridges Weekly*, 10 March 2010, <http://ictsd.org/i/news/bridgesweekly/71988/>.

4. Philip Morris spokesperson quoted in Nick O'Malley, “Hard Sell in a dark market”, *Sydney Morning Herald*, April 24 2010, features, p. 1.