

**Legitimacy Begins at Home:
Overcoming the Democratic Deficit in Domestic Trade Policy-Making**

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Introduction

The legitimacy crisis in the global governance of the trade system does not begin or end in the World Trade Organization. In fact, many dimensions of the WTO’s legitimacy problems—severely attenuated lines of delegation and accountability, the lack of consent by democratically elected parliaments, the privileging of one set of actors over another, and inadequate mechanisms for public participation—are replicated within the national domains of the WTO’s member states. This paper is premised on the notion that legitimacy problems in institutions of regional and global governance cannot be considered in isolation of legitimacy problems that exist at the national level. So, in thinking about the institutional reforms that would promote greater legitimacy within the WTO, it is essential to consider reforms that would enhance democratic decision-making at the national level as well.

In the burgeoning literature on the WTO’s legitimacy problems and attempts to over them (e.g. Marceau and Pedersen 1999, Atik 2001, Krajewski 2001, Esty 2002, Howse and Nicolaidis 2003), there is relatively little discussion of the democratic deficits in trade policy making at the national level. I can only speculate on the reasons for this gap in the debates. It may simply be that the widespread disillusionment with the state of democracy within nation state—especially in relation to the quality and legitimacy of decision-making, declining standards of public and political accountability, the politics of ‘spin’, and disengaged and apathetic publics—means that scholars are more interested in thinking about ‘the international’. Given that national political institutions are often seen to be cast in stone, or at least relatively impervious to change, they may seem less attractive as objects for study and analysis among reform-minded

academics, activists and politicians. Moreover, as a new and still-evolving institution for governance in a turbulent environment, the WTO is perhaps a more attractive object for the transformative impulses of the reform-minded.

Another possibility relates more directly to nature and sources of scholarship on the WTO. Political science scholarship on the WTO tends to be dominated by academics working in the sub-disciplines of international relations and IPE, who have traditionally had a greater focus on 'the international'. Moreover, much of the academic literature on the legitimacy problems in the WTO comes from the United States. But by dint of its constitutional arrangements, the United States is virtually unique among WTO members in having well developed, accountable, transparent and participatory processes for the development of trade policy and the negotiation and ratification of trade agreements (Schoenborn 1995). So the problems of the democratic deficit at the national level may simply be less evident to American scholars than to those who have close experience with parliamentary systems.

This paper has three modest aims: to outline the contours of the democratic deficit in trade policy making at the national level; to explore a range of mechanisms used by WTO members to address the perceived shortcomings in the trade policy development process; and to evaluate the effectiveness of these innovations. Although a number of developing countries have been grappling with these issues—notably Argentina, Brazil and India—this paper draws heavily on recent developments in Australia and Canada, as this is where the most research has been done to date. However, both cases offer lessons that are generalisable to modern, pluralistic societies with parliamentary systems of government.

The outline of the paper is as follows. Section One outlines the nature of the democratic deficit in trade policy making at the level of the nation state. Drawing on specific examples, it shows how the trade policy development process fails to meet standards of accountability, transparency and participation that would typically be present in other domestic policy-making processes. Section Two explores the various ways in which governments have sought to address the democratic deficit in the development of trade policy, the determination of negotiating objectives, and the ratification and implementation of trade agreements. It notes that these developments are relatively recent, and are the direct result of the expansion of the increasing incursion of trade rules into policy domains that were hitherto considered to be in the realm of 'domestic' rather than 'international'. Section Three presents a more detailed

case study of Australia's efforts to overcome the democratic deficit in trade policy making since the end of the Uruguay Round. Australia is an especially interesting case because of recent reforms to its parliamentary processes that allow for the scrutiny by parliamentarians of trade agreements at any point in a negotiation. Section Four evaluates the Australian case study, while Section Five presents some general observations about the effectiveness—and desirability—of government measures designed to overcome the democratic deficit.

1. The democratic deficit at the national level

At a fundamental level, that is, where legitimacy is defined simply as 'the right to rule', it is self-evidently legitimate for democratically-elected governments to make trade policy, negotiate trade agreements, and attempt to secure compliance with them. But if we aspire to a stronger test of legitimacy, one which is posited on the notion that democratic decision-making should ensure that those who are affected by decisions should be able to participate in the decision-making process, then in most countries, trade policy-making has traditionally failed the test.

In representative democracies, the notion of accountability and consent for government policies and actions is typically indirect: that is, the governed rely on their chosen representatives to make decisions and to give consent on their behalf. The governed may hold their representatives accountable in two ways: through their participation in the decision-making process, or after the fact, through the electoral process. It is widely understood, however, that this notion of consent and accountability is highly problematic in modern complex states where much of what decision-makers do is not subject to democratic processes. Moreover, to suggest that the governors have consent from the governed in some generalised way is clearly inadequate in the case of many important and contested political actions and decisions.

While this problem is present in many aspects of decision-making across the board, it is even more acute in the case of trade policy, in which international bargaining and domestic policy reform are inextricably linked. Much of the work of trade policy development is delegated to experts—bureaucrats, technocrats and negotiators who have specialized knowledge that is crucial to understanding and navigating the complex world of trade rules and agreements. Moreover, the negotiation of trade agreements has traditionally been conducted by skilled negotiators who share common world views and are insulated from domestic politics. This 'club model' (Keohane and Nye 2001) relies on secrecy as trade negotiations are fundamentally about bargaining and trade-offs, and

successful deal-making depends on minimizing the ability of domestic actors to influence or thwart the process.

A number of scholars have drawn on agency theory to illustrate how this form of bureaucratic delegation undermines the legitimacy of trade policy processes. Howse (2003) defines the democratic deficit as 'a problem of agency costs' in which the agents (trade experts and negotiators) may not have the same values, interests and goals as their principals (legislators and ultimately the public). In agency theory this problem could potentially be curbed if there were meaningful parliamentary oversight of trade negotiations, such that legislators could determine clear parameters for their negotiators. However, in very few national jurisdictions has there been such a role for parliaments.

This lack of a role for parliaments is especially acute in countries that are heirs to the British constitutional tradition, where the power to make international treaties is exercised by the executive branch of government. In these systems, legislatures are sidelined from the trade policy process, unlike the United States, for example, where the separation of powers gives Congress a much greater role in the initiation, negotiation and ratification of trade agreements. Moreover the congressional system provides an array of mechanisms and opportunities for societal input into the trade policy process. By contrast, in most member states of the British Commonwealth the power to make international trade agreements – from the initial decision to negotiate through to the final decision to ratify – is vested in the executive, effectively sidelining legislatures from these processes.

To be sure, at the point of implementation, a trade agreement that involves changes to domestic laws and regulatory arrangements demands the involvement of parliament through normal legislative processes. Thus parliament can be seen to have a formal and important role in the trade agreement process. But this must be tempered by two observations. First, apart from situations involving minority governments, the reality of executive control virtually ensures parliamentary passage of implementing legislation (Harrington 2005, 38). Second, parliamentary refusal to implement a trade agreement is likely to lead to severe repercussions in a country's foreign and trade relations, as it undermines the negotiating credibility of the Executive and its ability to make agreements that will stick. Hence parliaments are unlikely to refuse to implement a trade agreement that has been negotiated and ratified by the executive.

This dimension of the democratic deficit is problematic for at least three reasons. First, trade agreements increasingly have an impact on domestic legislation and the regulatory powers of governments, areas which were once considered to be the preserve of domestic policy-making and therefore subject to legislative control. Second, trade agreements often incorporate procedures for dispute resolution with foreign governments or corporations, which may include provisions for the use of economic sanctions or the payment of compensation. And, third, because trade agreements can be the subject of considerable political controversy, not just because there are 'winners' and 'losers' from the trade liberalization process, but also because the inclusion of domestic regulatory arrangements in trade agreements remains a highly contentious issue in all democratic systems.

The problem of democratic authorization in trade policy-making is further exacerbated in federal systems where national governments may negotiate trade agreements that impact on areas of state or provincial jurisdiction in the absence of adequate mechanisms for their participation or consent. In Argentina, Germany and the United States, sub-national governments have an indirect role in the approval of treaties by dint of their representation in the upper house of the federal government (Parliament of Australia 1995), but at best this is a highly attenuated form of accountability between federal treaty-makers and state level implementers. The accountability mechanisms are even weaker in other large federations, including Canada, Australia and India. In Canada, although the provincial governments are responsible for the implementation of international treaties that affect areas of provincial responsibility, there are no formal accountability mechanisms for their participation in treaty negotiations. In Australia, the 'external affairs' power of the Commonwealth government allows it to enact legislation to bring into effect an international treaty, even if that legislation is in an area of State responsibility. And in India the state governments have virtually no role in the negotiation of trade agreements. The absence of federal-state accountability mechanisms in relation to treaty-making is yet another dimension of the democratic deficit that distinguishes trade policy from domestic policy domains.

The final aspect of the legitimacy problem relates to participation and access. Most western countries have mechanisms that provide business and producer groups with a variety of formal and informal opportunities to communicate their trade policy interests and perspectives to bureaucrats and ministers. Other civil society organisations, such as those representing consumers, the environment or other 'public interests' were afforded few opportunities for representation and

participation in the trade policy process. Indeed, in their survey of 30 WTO members, Bellmann and Gerster (1996) found that only three countries effectively involved civil society organisations in the development of trade policy and negotiating objectives. Of course, governments rely on business to provide them with commercial intelligence and advice in the development of trade policy and negotiating objectives and this privileging of business interests was defensible in the days when trade negotiations focused on the liberalisation of tariff and non-tariff barriers to trade in goods. But the contemporary trade agenda is more wide-ranging, complex, and intrusive; trade rules now extend deeply into many aspects of domestic policy and regulation that were hitherto unaffected by trade agreements. This has led the public to demand greater accountability, transparency and opportunities for participation in the trade policy process.

Many governments have recognized that they cannot afford to ignore concerns about the 'democratic deficit' in the trade policy making. The principle of democratic legitimacy rests in part on the notion that trade agreements are supported by those whom they affect. And the technical and political complexity of contemporary trade policy demands that governments seek advice and foster coalitions of support from a broader range of societal actors than ever before.

2. National government responses

Since the late 1990s, there has been growing public unease about economic globalization and about the expansion of trade rules, their penetration into domestic policy regimes and their impact on people's day to day lives. Part of this unease stemmed from the view that important decisions were being made by secret and unaccountable bodies—the democratic deficit in global governance (Nye 2001). But concerns about the democratic deficit are also played out at the domestic level, and citizens, civil society organisations, and even parliamentarians are demanding greater accountability, transparency and opportunities for participation in the trade policy process.

The response by governments to these concerns has focused primarily on measures to enhance information and participation in trade policy making. Mirroring similar efforts by the WTO Secretariat, many governments have made considerable efforts to make information about trade rules, policy, agreements and negotiations more readily available and easily accessible than was the case even ten years ago. This accessibility has, of course, been greatly facilitated by the internet and the rise of e-governance and trade departments are among those government ministries worldwide that are most commonly found to have a

significant on-line presence (Norris 2001, 122). Though as Norris notes, these websites are used primarily as mechanisms for posting information in the interests of transparency, rather than the promotion of two-way communication and interactivity.

Many governments have also sought to foster greater participation in the trade policy process through the inclusion of business and civil society organisations in delegations to ministerial meetings of the WTO and through the establishment of consultative mechanisms. Hocking (2004) has identified two new types of consultative models that he contrasts with the traditional 'club model': the 'adaptive club' and the 'multi-stakeholder' models. The adaptive club model is one of business-focused consultation based on 'controlled openness operating within established rules'. While it broadens the trade policy process to include greater participation from organized economic interests (business and labour), it is aimed primarily at engendering support for the policy directions determined by government. Argentina, Brazil and the United States are examples of the adaptive club model. By contrast, the 'multi-stakeholder model' expands the consultative process to include civil society representatives, with the implicit aim of countering 'growing opposition to the goals of free trade'. Australia, Canada, and to a lesser extent, the European Union, have adopted a multi-stakeholder approach to trade policy development through the establishment of a variety of mechanisms that brings members of the polity into regular dialogue with trade bureaucrats.

Canada is widely seen as a world leader in the development of measures to enhance public input into trade negotiations. In addition to its business-oriented Sectoral Advisory Groups on International Trade which date back to the 1980s, the federal government established in 1999 an ongoing process of 'multi-stakeholder consultations' between the federal trade bureaucracy and provincial governments, parliament, business, civil society organisations and academics. According to the Canadian Department of Foreign Affairs and International Trade (DFAIT) website (International Trade Canada 2005): 'the Government has made citizen engagement an integral part of the trade policy agenda.' It notes further that: 'By mobilizing popular opinion and keeping people fully informed of the issues and the direction of trade negotiations, transparency and engagement combine to establish legitimacy, consistency and the durability of policy decisions and outcomes'. This is a form of public engagement that is premised on the belief that informed citizens are more likely to be supportive of trade liberalization, but there is no sense here that trade policy makers might also benefit or learn from these processes.

The growing trend to involve the wider citizenry in the development of trade policy has been largely restricted to consultative exercises undertaken by the bureaucracy. Governments have been far less inclined to introduce mechanisms that would enhance the role of parliaments in the development of trade policy. This has been particularly problematic in the British Commonwealth countries where the institutional constraints of the Westminster system have exacerbated the problem of the democratic deficit. In Australia, Canada, India and New Zealand, there have been demands from legislators for greater parliamentary involvement in the development of trade policy and the negotiation of trade agreements (see for instance, Bergeron 2002, Pettigrew 2003, Government of India 2001, Parliament of New Zealand 1997). But with the notable exception of Australia, few reforms have eventuated.

3. Australia and the democratization of trade policy

Australia's traditional approach to trade policy and the negotiation of trade agreements was very consistent with the 'club model' which confined the process to government officials and their ministers. To the extent that consultation occurred outside the bureaucracy, it was limited to the interests of business, industry and producer groups who were broadly supportive of trade liberalization. Moreover, the negotiation and ratification of trade agreements was the prerogative of the Executive, and the parliament's role was limited to the passage of any implementing legislation that was necessary to give effect to trade agreements. Mechanisms to involve or simply to inform State governments of the progress and outcomes of trade negotiations were non-existent.

In these circumstances, the Uruguay Round negotiations (1986-94) generated very little public comment, let alone controversy, in Australia. To be sure, the agriculture negotiations, where Australia played a major role through its leadership of the Cairns Group, were the focus of regular media coverage. But all other aspects of the negotiations including contentious areas such as trade in services, intellectual property rights, investment measures and quarantine rules, were under the radar throughout the round. However, by the mid-1990s, a fierce public debate emerged about the growing impact of international agreements on domestic policies.

While this debate was spurred in part by a general unease about globalization and the way in which international agreements constrained the policy autonomy of national governments, there was particular concern about the lack of

democratic accountability in treaty-making, the secrecy that cloaked international negotiations and the lack of community and parliamentary involvement in these processes (Alston and Chiam 1995). This led to a parliamentary review of Australia's treaty-making practices, which subsequently recommended improved public access to treaty information; greater consultation with business, the community and State governments; and most importantly, an enhanced role for the Commonwealth parliament through the establishment of a treaty committee (Parliament of Australia 1995). In 1996 the newly elected Coalition government, led by John Howard, introduced a package of reforms designed to overcome the democratic deficit in treaty-making.

The reforms were designed to give Parliament greater scrutiny over the treaty-making process and to promote greater public consultation and awareness of treaty issues. Key changes included a requirement that all treaties be tabled in Parliament for 15 days before ratification, along with a 'National Interest Analysis' to accompany proposed treaty actions. Further, a new parliamentary committee, the Joint Standing Committee on Treaties (JSCOT), was empowered to inquire into and report on treaty matters, at any stage including during negotiation. Its inquiry process can conclude public hearings and a submission-gathering process, and its final report can include recommendations for parliamentary action. All of these documents are made public in an easily accessible format through the parliamentary website.¹

JSCOT represents a significant departure from Australia's traditional approach to treaty-making, and is unique among countries with Westminster systems of government. The Committee has wide powers to inquire into and report on matters relating to existing or proposed international agreements. One of its most important functions has been to provide a forum through which ordinary citizens can make their concerns known to government. Some commentators have focused on JSCOT's shortcomings; for instance, Kim Nossal and I (2003) have argued that it serves primarily as a tool for political management by the government while Madeleine Chiam (2004) notes that it has not fundamentally improved executive accountability. But Harrington (2005: 47) argues that 'those from abroad envy the sheer volume of treaty-making information exposed to public view by the JSCOT process...'

¹ The JSCOT website provides the full text of all its reports as well as submissions to each inquiry. See <<http://www.aph.gov.au/house/committee/jsct/report.htm>> at 30 August 2007.

While the 1996 reforms were meant to address community concerns about globalization and the fear that important decisions were being made in secret by unaccountable officials, they did little to stem the growing controversy around Australia's participation in the WTO. Such concerns of course were mirrored around the world, as mass demonstrations became a regular feature of the meetings of international organisations in the late 1990s. The 'battle at Seattle' in 1999, coupled with violent demonstrations at a regional meeting of the World Economic Forum in Melbourne in 2000, spurred the Howard government to initiate a JSCOT inquiry into Australia's relations with the WTO. In its final report, *Who's Afraid of the WTO?* (Parliament of Australia 2001), the committee noted that: 'A large volume of evidence presented to us spoke of the need to improve community consultation in developing Australia's trade policy'. To that end, JSCOT recommended further reforms aimed at strengthening Parliament's scrutiny of prospective trade agreements through the establishment of a new parliamentary committee whose role would be to hold extensive community consultations and, on the basis of this input, to provide advice to government *at the time that negotiating objectives were being established* for prospective multilateral and bilateral trade negotiations. This recommendation was rejected by the Howard government. Instead, responsibility for public consultations was passed on to the bureaucrats in the Department of Foreign Affairs and Trade (DFAT).

Subsequently, DFAT has put in place a variety of mechanisms to expand community participation in trade policy. A Trade Advocacy and Outreach section was established in 2001 to engage with business and civil society organisations and the public more generally, through the provision of easily accessible information on trade negotiations and trade policy more generally. DFAT is also responsible for convening public consultations concerning potential trade agreements. This may occur through the process of inviting submissions through its website, or more formally, through public hearings.

4. The Australia-US Free Trade Agreement

In late 2000 the Howard Government signalled its desire to negotiate a free trade agreement with the United States. Formal negotiations began in March 2003 and were concluded in February 2004. The Australia-United States Free Trade Agreement (AUSFTA) generated considerable controversy, in large part because its provisions affected a wide range of policy areas that were not previously implicated in Australia's trade agreements with other countries (Capling 2005a, Weiss et al 2004). Among the policy areas affected by the AUSFTA are culture (local content rules in new media); public health (the pharmaceutical benefit scheme and blood fractionation services); and the foreign investment review

regime. In addition, other controversial provisions, including the extension of copyright life beyond Australia's WTO obligations, and the maintenance of high US protection against many Australian exports, ensured that the deal attracted considerable public attention and debate.

The AUSFTA provides an excellent test case of the effectiveness of the Howard government's efforts to overcome the democratic deficit in trade policy. Not only was AUSFTA the first important trade agreement negotiated by Australia since the parliamentary reforms of the treaty-making process, but it was also the opportunity to put to the test DFAT's new mechanisms for public consultations. And given the controversy that surrounded the AUSFTA from the initial announcement of Australia's intentions in November 2000 right through to the passage of the implementing legislation in September 2004, one would expect a fairly robust process for parliamentary and public involvement in these debates. So how does the AUSFTA fare as a test case of the government's pledge to overcome the democratic deficit in treaty-making? The report is mixed.

One aspect of the 'democratic deficit' was evident from the outset, in the way in which the Australian and the United States governments came to the initial decision to negotiate the agreement. On the American side, President George W. Bush was required to secure Congressional approval before his Administration could enter into trade negotiations with Australia. Following a lengthy process of public hearings, Congress granted this approval in late 2002. By contrast, the Australian cabinet took the decision to negotiate AUSFTA without reference to the Australian Parliament, a decision that was first communicated to the Australian public by means of a speech in Washington given by the ambassador to the United States. The Australian parliament was involved neither in the initial decision to negotiate the Agreement nor in the establishment of Australia's negotiating objectives.

With respect to the all important process of formulating negotiating objectives, it is notable that JSCOT did not invoke its powers to convene a parliamentary inquiry at the outset of the negotiation, where it might have tried to influence the government's objectives. There was a round of public consultations undertaken just prior to the commencement of negotiations, but this was a bureaucratic rather than a parliamentary process. The consultations were coordinated by DFAT officials, no report was issued on the 200 or so submissions that were received, nor was there any explanation of their impact, if any, on Australia's negotiating objectives. The absence of a 'feedback mechanism' gave weight to

the view that the DFAT consultations were conceived primarily as an exercise in public relations, aimed at giving the appearance of community consultation.

The JSCOT has the power to convene parliamentary inquiries into international treaties at any stage of their negotiation; indeed JSCOT has played a significant role during a number of international treaty negotiations including the controversial Multilateral Agreement on Investment in 1997-98 (Capling and Nossal 2003). However, in the case of the AUSFTA, JSCOT refrained from convening an inquiry until after the AUSFTA negotiations were completed and signed in February 2004. At this point, JSCOT convened public hearings in Australia's capital cities and received 215 submissions, many of which were critical of the agreement and of the lack of opportunities for public input prior to and during the negotiation of the AUSFTA.

In its report on the agreement (Parliament of Australia 2004a), JSCOT noted public concerns about the transparency of treaty-making processes and the role of parliamentary involvement, as well as specific concerns about the Agreement itself that had been raised in the evidence provided to the inquiry. But the Government majority on the Committee concluded that ratification was Australia's 'national interest', and recommended that binding treaty action be taken. By contrast, the opposition party members on JSCOT issued a dissenting report that was critical of the haste in which the inquiry had been undertaken, and recommended against ratification 'until adequate opportunity has been given to consider the necessary legislative, regulatory and administrative action that underpins the implementation of the treaty'. So, while the JSCOT processes certainly afforded opportunities for Australians to represent their views to parliament—at least after the fact—there was still considerable dissatisfaction about the adequacy of these mechanisms.

Another aspect of the AUSFTA process that attracted considerable criticism was the government's use of commissioned studies to support the agreement: a 2001 study to identify key 'issues' (Australian APEC Studies Centre 2001); a modelling exercise (Centre for International Economics 2001) before the commencement of the negotiations, and an analysis after the conclusion of the agreement (Centre for International Economics 2004). The CIES modelling was heavily criticised by a number of prominent trade economists, but more important was the question as to why the government bypassed its own independent source of trade policy research and analysis, in favour of private consultants and think tanks. Australia is virtually unique in the world in having an independent institution within government which provides research and advice on trade policy matters. This

institution, the Productivity Commission, has been heralded by the WTO Secretariat for its work in enhancing government accountability, transparency and public debate over the merits of Australian trade policy (WTO Secretariat 2007, vii). The government's decision to contract out the analysis and modelling of the AUSFTA rather than using the Productivity Commission raised concerns about independence, neutrality and transparency in the process of evaluating the agreement (Lloyd 2006, Banks and Carmichael 2007).

So far, this analysis has focused on government-initiated processes, but another important feature of the AUSFTA negotiations was the way in which the Australian Senate sought to play an active role in these deliberations. In 2003, when the agreement was still under negotiation, the Senate Foreign Affairs, Defence and Trade References Committee initiated a public enquiry into the AUSFTA. Many of the submissions argued that there were still too few opportunities for public and parliamentary involvement in the crucial early stages when negotiating objectives were being established. The Senate Committee, which was dominated by members of the opposition parties, produced a majority report that recommended that the Australian parliament be empowered to scrutinise and endorse proposed trade negotiations prior to the commencement of negotiations, thus emulating US practice (Parliament of Australia 2003).

The Senate again asserted a role for itself by convening an inquiry into the AUSFTA following the signing of the agreement. The Senate Select Committee was more comprehensive and thorough than the JSCOT inquiry, and it included public hearings in major capital cities and specialist roundtable discussions on the most controversial aspects of agreement. It also commissioned its own economic modelling of the impact of the agreement. Subsequent to the Select Committee report (Parliament of Australia 2004b), the Labor Opposition forced two amendments to the enabling legislation that implemented the AUSFTA (Capling 2005a, 74-5).

It has been suggested that the Senate inquiries are evidence that parliamentarians are becoming much more active in trade policy-making, through the use of institutional mechanisms that have always been available to them but rarely used. Certainly John Uhr (2005) is correct in arguing that these examples demonstrate boldness against executive domination that has hitherto not been evident in the Australian parliament. An alternative interpretation is that this Senate activism is motivated primarily by partisan considerations and was part of the political jousting that occurred in relation to the AUSFTA (Capling 2005b).

As a number of other potentially controversial trade agreements are currently under consideration in Australia, we should soon have a better sense of which interpretation has greater weight.

Finally, it is worth noting that the act of negotiating with the United States forced a level of transparency into the Australian process that was otherwise unlikely to have occurred. Prior to the commencement of the negotiations, the US announced its offensive and defensive objectives, as required to by Congress, leaving the Australian government with no other choice than to do the same. Similarly, at the conclusion of the negotiation, the Office of the United States Trade Representative posted a copy of the agreement on its website, accompanied by an analysis of the benefits of the deal for the American economy. Again, this forced the Australian government to match this action with its own immediate analysis of the deal, though there is otherwise no legislative requirement for Australia to do so.

5. Evaluating the AUSFTA Case

The trade policy development process in Australia is much more open and participatory than was the case just a decade ago. As a result of the 1996 reforms to the treaty-making process, there now exists a significant parliamentary process that, at the very least, allows for scrutiny of trade agreements. Moreover, the government has become much more sensitive to the need to better inform the public on trade policy matters by making pertinent information about trade policy, trade negotiations, and Australia's relations with the WTO easily available on the DFAT website. The government has also ensured that there are multiple opportunities for the public to express their views at various stages of the trade negotiating process through bureaucratic and parliamentary consultative processes, leading to more informed public deliberation on these matters.

The case study of AUSFTA demonstrates however that processes to enhance participation, transparency and accountability in decision-making remain subject to close political management by the government. This was particularly evident during the all important period prior to the commencement of the negotiations, when negotiating objectives were being determined, and it was manifested in three ways.

First, in commissioning an 'issues paper' and prospective modelling of an AUSFTA, the government bypassed its own source of independent expertise, the Productivity Commission. The Commission's processes typically involve the

seeking of submissions, open public hearings, and the publication of reports that can help governments to identify the implications of different policy choices. The independence of the Productivity Commission and the openness and transparency of its processes ensure that its advice is seen to be uncompromised and unbiased. But the government's decision to outsource the 'issues paper' to a consultant who subsequently led the business coalition that lobbied for the AUSFTA, undermined the transparency and independence of this process.

Evidence of political management was also apparent in the JSCOT's unwillingness to involve itself in the early phases of the AUSFTA. Although JSCOT has the power to conduct inquiries at any stage in the process of a trade negotiation, it chose not to use its authority to hold public hearings at the pre-negotiation phase when negotiating objectives were being established. Instead, it limited its activities to holding a hearing only after the deal was signed, which contributed to a perception that government, which was able to control JSCOT through its majority on the committee, was determined to 'tick and flick' the agreement.

The public consultation exercises convened by DFAT also involved an element of political management, albeit in an indirect way. These public consultation exercises were the only opportunity for community organisations to express their views to the government during the objective-setting phase of the negotiations. (By contrast, business groups had more formalised and privileged access through the various sectoral advisory committees that reported to the Trade Minister.) While welcoming of the opportunity to express their views to government officials, many of those who participated in the DFAT public consultations considered them to be tokenistic.

Similar shortcomings have been identified in participatory processes in other countries, notably in Canada's 'multi-stakeholder' consultations. In the Canadian case, meetings between officials of the Department of Foreign Affairs and International Trade and 'stakeholders' have been characterized as 'tell and sell' sessions, devoted primarily to the explanation and defence of government policies with little opportunity for discussion of how conflicting interests and concerns might be reconciled (Lerner 2003). Stairs (2000) has argued that the multi-stakeholder approach risks generating false expectations among participants, especially because officials are not in a position to make political judgements. Smythe and Smith (2006) have observed that in the absence of feedback to civil society organizations about how (or indeed, whether) their contributions influenced the policy process, they are likely to 'dismiss

consultations as a public relations exercise and a waste of time'. Indeed, public consultation exercises that induce frustration or cynicism may reinforce or even intensify rather than alleviate perceptions about the legitimacy of the policy development process (Crozier 2007).

The AUSFTA case study also showed that parliamentarians are continuing to search for ways in which to participate in the trade policy making, and the convening of three different parliamentary inquiries into the AUSFTA was unprecedented in the history of Australian trade agreements. But there may be limits to the generalisability of this case. First, the AUSFTA generated a great deal of public controversy; Australia has negotiated and signed other less controversial bilateral trade agreements in this period that have not been the subject to the same level of parliamentary interest or scrutiny. Second, the extent to which parliamentarians can involve themselves in trade policy depends to a great extent on the structure of the party system and on the institutional mechanisms available. For example, minority governments are much more likely to consult closely with parliamentarians on controversial policy matters because of the need to ensure majority support (Langhelle and Rommetvedt 2004). By contrast, in the Australian case of majority governments, the executive there are fewer imperatives to consult.

Conclusion

In recent work that proposes a public standard for the legitimacy of global governance institutions, Buchanan and Keohane (2006) note the importance of addressing also the democratic deficit at home. With regard to international treaty-making in general, and the negotiation of trade agreements in particular, there can be little doubt that the democratic deficit is a significant problem: given the importance of treaty-making in contemporary policy and governance, and its impact on many aspects of domestic policy and affairs, the executive power of treaty-making looks increasingly anachronistic. This is especially pertinent in relation to trade policy; in most nations around the world (with the notable exception of the United States) the negotiation of trade agreements suffers from severe deficits of accountability, representativeness, transparency and participation.

Over the past decade, governments around the world have introduced a wide variety of mechanisms to overcome these deficits, in attempts to generate greater levels of legitimacy in the trade policy process. Much of this activity has focused on the provision of information (transparency) and the engagement of citizens (participation) in trade policy matters. The findings in this paper suggest

however that mechanisms designed to promote greater consultation in trade policy have been fairly shallow, especially when compared to those used by governments to promote more participatory processes in other domains such as the environment, health and social policy (see for example Barnes, Newman and Sullivan 2007). Moreover, if we conceive of participation as a hierarchy that goes from the provision of information, to one way consultation (ie. seeking 'input'), to two way consultation (ie. interactive communication between policy makers and those affected by policy decisions), we can find little evidence of the latter in trade policy making. Instead, governments have assumed that concerns about the legitimacy of trade policy making can be addressed primarily through the provision of information and opportunities for citizens to register their views about proposed trade agreements. But to the extent that these are experienced by participants as little more than a public relations exercise, they are an inadequate response to the democratic deficit.

The role of parliamentarians also remains problematic. It is axiomatic that in democratic systems, where political legitimacy and social cohesion are of fundamental importance, governments should ensure that trade agreements are broadly supported by those whom they affect. But executive control of trade policy limits the role of legislatures to the very final stages of the trade negotiation process, when it is too late to debate policies or affect outcomes. And as Australia's recent experience indicates, if institutional innovations that promote a greater role for politicians in the trade policy process are still subject to political management and manipulation, they too are insufficient to overcome the democratic deficit.

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