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GLOBAL TRADE POLICY DEVELOPMENT IN A TWO-TRACK SYSTEM

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ABSTRACT

The World Bank identifies two trends within the international trading system: multilateral negotiations sponsored by GATT/WTO based on evolving rules grounded in non-discrimination, and bilateral and regional negotiations between nations that reduce trade barriers on a reciprocal and preferential basis. This article asks how we might enhance the global trade policy development process through interaction and coordination between these two trade policy development systems. It seeks an understanding of the nature of bilateral trade negotiations so that we can compare bilateral and WTO-sponsored multilateral processes. In so doing, we can observe how these two systems naturally interact thus enabling us to consider how that interaction may be better designed to enhance the international trade policy development system. After examining current trends in bilateral and regional trade negotiations, this article considers the opportunities and challenges of a two-track system for developing trade policy by examining bilateral trade negotiations conducted by Australia, Singapore and the United States. The article concludes with observations that may assist in re-framing the current debate over bilateral and multilateral trade negotiations and includes recommendations for the effective management of a two-track trade policy development system.

INTRODUCTION

With the retreat of Socialism from the world stage, it has become unusual to find two major sectors of global society in substantial disagreement over the conduct of world business. On one side of this debate are political leaders or former political leaders of every country on earth but twelve – Mongolia and eleven small island nations;¹ on the other side are some of the world's leading

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¹ The International Bank for Reconstruction and Development – The World Bank, *Global Economic Prospects: Trade, Regionalism and Development 2005* (2005), at 53.

multilateralists. Both sides agree that the global economy will be best served through a WTO-sponsored framework of trade treaties (i.e. the Doha Round). The point of disagreement concerns national trade policy and the role of agreements between two or more national governments that are labelled as 'regional', 'preferential' or 'free', and which this article calls 'bilateral' or 'bilateral and regional' trade agreements.² Multilateralists present three primary concerns about the effect of bilateral and regional trade processes on the global economy. One is that bilateral and regional trade agreements create distortions in the international economy through trade diversion. Such distortions make the global economy less efficient and can harm countries that are not a party to the treaty.³ Their second concern is that transaction costs increase for both business and government.⁴ Third, these trade agreements serve to unravel or undermine the multilateral system.⁵ National leaders and their governments ignore such advice, as they believe that bilateral trade agreements complement the multilateral system and are second-best solutions – or better than nothing, as per the WTO – that are achievable during their term of office. For example, 124 bilateral and regional trade agreements were concluded in the 48-year GATT regime (1947–1994) and 196 bilateral and regional trade agreements have been concluded since (1994–2005) – during the first eleven years of the WTO regime. Most recently, between January 2004 and February 2005, national governments formally notified the WTO of 43 new bilateral and regional trade agreements.⁶ However, the actual number of agreements is much less important than the amount of world trade managed through these agreements. Nearly 40 percent of total global trade now takes place under bilateral and regional trade agreements.⁷

² 'Regional' is a meaningless term when applied to every non-GATT/WTO negotiation. For example, how is the United States–Jordan trade treaty of 2000 regional? This is a bilateral trade treaty. Because of the focus of the current study, I use the more accurate term 'bilateral trade negotiations'. Bilateral, involving two parties is a dispassionate, descriptive and structural term. Regional is a useful term, when there are more than two parties and all parties are part of the same geographical region.

³ Viner's seminal work on trade creation and trade diversion in a customs union continues to serve as the foundation for this concern. See Joseph Viner, *The Customs Union Issue*, (New York: The Carnegie Endowment for International Peace, 1950). For a comprehensive overview see Arvind Panagariya, *Regionalism in Trade Policy: Essays on Preferential Trading* (Singapore: World Scientific Publishing Co. 1999), Chapter 1.

⁴ Jagdish Bhagwati and Arvind Panagariya, 'The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends', 86 *American Economic Review* (1996), at 82–7; Richard Snape, 'Trade discrimination – Yesterday's problem?', 72 (219) *Economic Record* (1996), at 381–96; *Global Economic Prospects 2005*, see above n 1.

⁵ Jagdish Bhagwati and Arvind Panagariya, 'Preferential Trading Areas and Multilateralism: Strangers, Friends or Foes?', in Jagdish Bhagwati and Arvind Panagariya (eds), *The Economics of Preferential Trade Agreements* (Washington, DC: American Enterprise Institute Press 1996), at 1–78; Ross Garnaut, 'An Australian–United States free trade agreement' 56 *Australian Journal of International Affairs* (2002), at 123–41. Panagariya, see above n 3.

⁶ Jo-Ann Crawford and Roberto V. Fiorentino, *The Changing Landscape of Regional Trade Agreements: WTO Discussion Paper No 8* (Geneva: WTO Publications, 2005), at 1–3.

⁷ *Global Economic Prospects 2005*, see above n 1 at 27.

The amount of trade may surprise many, yet we should recognize that this percentage includes EU trade and NAFTA trade. Nevertheless, trade administered via bilateral and regional trade treaties is growing worldwide. Many national governments have embraced non-WTO trade negotiations as fundamental to their international trade policy strategy. This development is interesting and significant.

Complex debates are often collapsed into slogans to facilitate public comprehension. Yet, simplification can inadvertently distort that which the public should be accurately informed of. The essence of this debate is often reduced to a simple either/or question: Do bilateral and regional trade agreements serve as a 'building block' or as a 'stumbling block' to a WTO-sponsored agreement? In recent interviews with several WTO administrators responsible for monitoring bilateral and regional trade agreements, I learned that the WTO seeks to move beyond this dichotomized view to recognize the validity of other views. There is no official WTO position on non-WTO trade negotiations, but a consensus exists within the WTO that these non-WTO trade agreements have both a positive and a negative influence on WTO-sponsored negotiations and world trade; thus the acceptability of bilateral and regional trade agreements is not an either/or question. A more useful question to consider is, what are the positive and negative influences of bilateral processes on WTO-sponsored Doha negotiations and the global economy? Also, useful here is to question the positive and negative influences of bilateral and regional trade negotiations on nations conducting such negotiations. Bilateral trade negotiations and the agreements they produce may contain intrinsic value that is separate from, and independent of, any WTO-sponsored process. If so, we need to understand the fundamental nature of bilateral trade negotiations from the perspective of both the WTO and those nations engaged in such negotiations.

WTO Secretariat staff observe that, for some countries, multilateral and bilateral strategies are equally important parts of their national trade policy, while in many other countries, bilateral and regional trade negotiations have been given a higher priority than WTO-sponsored negotiations.⁸ The players have not shifted to another field, but it is clear that many players now perform on bilateral, regional and multilateral fields.

Bilateral and regional negotiations involving trade in goods have been an accepted part of the multilateral system since the establishment of GATT Article XXIV in 1947. Article V of General Agreement of Trade in Services (GATS), negotiated during the Uruguay Round, applies to all trade in services for bilateral and regional trade agreements. More recently, with the proliferation of bilateral and regional trade agreements, several trade policy trends can be observed: (1) Trade agreements are being negotiated that demonstrate deeper degrees of economic integration, with treaty provisions containing

⁸ Crawford and Fiorentino, see above n 6, at 2.

measures to liberalize, eliminate and harmonize trade-impeding regulatory policies. (2) Enlargement and integration of regional trading blocs (e.g. Europe, Americas and Asia to some extent) via bilateral and regional trade agreements. (3) Trade agreements that link countries from two or more regions. (4) An increase in the number of agreements between developed and developing countries (e.g. European Union–Chile Association Agreement of 2002; Thailand–Australia Free Trade Agreement of 2004). Of all trade agreements in force, 75 percent are bilateral.⁹ Clearly, the global trading system is more complex as a result of these developments.

In 2005, the World Bank noted two major trends within the international trading system.¹⁰ One trend gave rise to the creation of the WTO, which has sought to consolidate an evolving system of rules based on non-discrimination among trading partners within a multilateral system. A second trend, rapidly gaining momentum, has resulted from a sudden increase in the number of nations negotiating bilateral and regional trade agreements. This second trend reduces barriers to trade on a reciprocal and preferential basis for nations that are party to such agreements. Some observers argue that this emerging system is complementary to the multilateral system.¹¹ Others articulate deep concerns about the spread of bilateral and regional trade agreements.¹²

Nevertheless, both systems do exist and will co-exist for the foreseeable future. This recognition needs to be accepted so that knowledge can be gained from the challenges and opportunities that exist in this ‘two-track paradigm’.

First, we require deeper understanding of this emerging system of bilateral and regional trade negotiations and the agreements they produce. What are the strengths and weaknesses, and the opportunities and challenges in developing trade policy via bilateral and regional processes? With this knowledge, we can seek to deepen understanding of the interaction or linkage between this emerging trade policy system and the WTO-sponsored global system. This knowledge can then be directed towards enhancing the overall trade policy development process so that we establish simple and transparent trade rules between nations that support free-market principles and encourages trade liberalization.¹³

⁹ Gary P. Sampson, ‘Introduction’, in Gary P. Sampson and Stephen Woolcock (eds), *Regionalism, Multilateralism, and Economic Integration: The Recent Experience* (Tokyo: The United Nations University Press, 2003), at 3–17; Crawford and Fiorentino, see above n 6, at 2–6.

¹⁰ *Global Economic Prospects 2005*, see above n 1, at 27.

¹¹ Roberto Echandi, ‘Regional Trade Integration in the Americas During the 1990s: Reflections on some Trends and their Implications for the Multilateral Trade System’, 4 *JIEL* (2001), at 367–410; Barry Desker, ‘In Defence of FTAs: From Purity to Pragmatism in East Asia’, 17 *The Pacific Review* (2004), at 3–26; Gary P. Sampson and Stephen Woolcock, *Regionalism, Multilateralism, and Economic Integration: The Recent Experience* (Tokyo: The United Nations University Press, 2003).

¹² Jagdish Bhagwati, *The World Trading System at Risk* (Princeton, NJ: Princeton University Press, 1991); WTO Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: World Trade Organization, 2004); *Global Economic Prospects 2005*, see above n 1.

¹³ Sector specific trade liberalization can be achieved all at once and/or incrementally, over decades.

In pursuing these objectives, this study will examine both negotiation process and outcome, as interaction between bilateral–regional and WTO-sponsored trade policy development systems occurs in both dimensions. As such, this article intends to move the debate beyond the ‘building block’ view of national leaders, the ‘stumbling block’ view of some multilateralists, and the ‘stumbling block and building block’ view of the WTO. It is time to broaden and reframe the current debate to supply national political leaders, multilateralists and the WTO with another lens for viewing the world.

In this study, I examine bilateral trade negotiations between Australia, Singapore and the United States to explore the relationship between bilateral and multilateral processes. My analysis identifies bilateral and multilateral methods that appear to enhance the trade policy development process. I also offer recommendations for trade negotiators, trade policy specialists, national leaders and the WTO to improve the role of each in most effectively managing a two-track trade policy development system.

I. CASE STUDY DATA

The observations and conclusions offered in this article are derived from six months of field research into bilateral trade negotiations.¹⁴ From February to July 2004, I interviewed 86 trade negotiators and trade policy specialists in Canberra, Geneva, Singapore and Washington DC.¹⁵ Many of these professionals were involved or had once been involved in GATT/WTO trade talks, but most were involved in one or more of the following bilateral trade negotiations: Singapore–Australia (SAFTA: 11/2000–2/2003), United States–Singapore (USSFTA: 11/2000–5/2003) and Australia–United States (AUSFTA: 11/2002–5/2004). In terms of people who actually sat at the table, I interviewed 29 SAFTA negotiators, 28 USSFTA negotiators and 35 AUSFTA negotiators.

¹⁴ Key interview sources include trade negotiators and trade policy specialists in the organizations that follow. Canberra: The Australian Department of Foreign Affairs and Trade, especially staff in the Office of Trade Negotiations, the Australian High Commission in Singapore, the Australian Embassy in Washington DC, and the Office of the Prime Minister, among other Australian organizations. Singapore: Directorate B of the Trade Division of the Ministry of Trade and Industry, staff in the Singapore High Commission in Canberra, staff in the Office of the Deputy Prime Minister, staff in the Singapore International Chamber of Commerce and other Singaporean organizations. Washington DC: Office of the United States Trade Representative in the Executive Office of the U.S. President, staff in the Embassy of the USA in Singapore, staff in the American Chamber of Commerce in Singapore, and staff in the following U.S. Departments: Agriculture, Commerce, Justice, State, Treasury and the U.S. National Security Council. Geneva: The Permanent Mission of Singapore to the United Nations and staff in the Trade Policy Review Division of the World Trade Organization.

¹⁵ Standard case-study research methodology was followed in conducting this research program. See: Daniel Druckman, ‘Case-Based Research on International Negotiation: Approaches and Data Sets’, 7 *International Negotiation* (2002), at 17–37; John S. Odell, ‘Case Study Methods in International Political Economy’, 2 *International Studies Perspectives* (2001), at 161–76; I. William Zartman, ‘Comparative Case Studies’, 10 *International Negotiation* (2005), at 3–15.

I also interviewed many governmental appointees, diplomats and ambassadors who did not sit at the table but were political strategists within these three trade negotiations or served as a liaison between trade negotiators and national political leaders.¹⁶

There are substantial differences between these three treaties but it is useful to note the similarity in issues that were addressed in each negotiation. All three treaties consider trade in goods and rules of origin (ROO), customs administration, trade in services, financial services, investment, telecommunication and electronic commerce, intellectual property, government procurement, competition policy and dispute settlement.¹⁷ The following three subsections provide a synopsis of SAFTA, USSFTA and AUSFTA negotiation process.¹⁸

A. Singapore–Australia negotiation (SAFTA)

Singapore and Australia announced their decision to commence negotiating a trade agreement on 15 November 2000 at the Asia-Pacific Economic Cooperation (APEC) Leaders' Summit in Brunei. The two sides held ten negotiation rounds with the first round in February 2001 and the last round in October 2002 with meeting sites alternating between Singapore and Australia. Halfway through the process (August 2001 to February 2002) the two sides called a hiatus.¹⁹

Many trade issues were challenging for the 17 SAFTA working groups, as negotiators sought to integrate the Singaporean economy and the Australian economy. Often we find two or three accepted formulas or templates for a specific trade policy issues. Agreement on the type of template to apply to a given issue minimizes such challenges. For example, in negotiations over goods and ROO, Singapore sought to persuade Australia to adopt a 'change in tariff classification system' but Australia refused and so SAFTA (Chapter 3)

¹⁶ During field research, data was also gathered on Australia–New Zealand, Singapore–New Zealand, Japan–Singapore, United States–Chile, Thailand–Australia and China–Australia bilateral trade negotiations although these negotiations were not a primary focus of this research program.

¹⁷ Research examined negotiations up to the signing of a trade treaty. Treaty approval by parliamentary or congressional process involved a separate negotiation that is beyond the scope of this study. The Singapore–Australia Free Trade Agreement (SAFTA) can be read in full at <<http://www.mti.gov.sg/>> or at <<http://www.dfat.gov.au/>>. The United States–Singapore Free Trade Agreement (USSFTA) can be read in full at <<http://www.mti.gov.sg/>> or at <<http://www.ustr.gov/>>. The Australia–United States Free Trade Agreement (AUSFTA) can be read in full at <<http://www.ustr.gov/>> or at <<http://www.dfat.gov.au/>>.

¹⁸ For a more detailed examination of these case studies see: Larry Crump, 'Competitively Linked and Non-competitively Linked Negotiations: Examining Bilateral Trade Negotiations in Australia, Singapore and the United States', *International Negotiation* (in press).

¹⁹ Key team members retired or were posted to other assignments, while each side reflected on the challenge of engaging in bilateral trade negotiations when one begins with a multilateral perspective.

uses a 'value added system' based on the net cost of a product.²⁰ Within trade in services, the two most common templates are a 'positive list for trade in services' or a 'negative list for trade in services'.²¹ Australia insisted that the treaty adopt a negative list and Singapore argued for a positive list, but eventually relinquished and so SAFTA uses a negative list for managing trade in services (SAFTA Chapter 7). Investment, financial services and telecommunications are treated separately within SAFTA (Chapters 8, 9 and 10), but trade policy in the services chapter establishes a foundation for these other chapters. Reports indicate that negotiations in these chapters were more positional than integrative, as each side sought to protect their own interests. For example, Singapore has an open market in securities and insurance but wished to retain control over retail and wholesale banking, while Australia wished to maintain control over foreign investment. Each side sought to weaken trade restrictions established by the other side. Government procurement (SAFTA Chapter 6) and intellectual property (SAFTA Chapter 13) were not major issues, while electronic commerce (SAFTA Chapter 14) emerged as an afterthought. When working groups or their co-leaders could not resolve significant issues, the two Chief Negotiators eventually negotiated these issues. Many issues could be resolved but some had political qualities that required political deliberations.

On the edge of an APEC Ministerial Meeting in Los Cabos, Mexico, in October 2002, the Trade Ministers from Australia and Singapore discussed and resolved these remaining issues including financial services, legal services, investment and ROO. The 117-page SAFTA treaty (not including annexes and side letters) was signed by these trade ministers on 17 February 2003 and became effective on 28 July 2003.

B. United States–Singapore negotiation (USSFTA)

On 16 November 2000 (a day after the SAFTA announcement), at the APEC Leaders' Summit in Brunei, Singapore and the United States announced that their nations would negotiate a trade agreement.²² The two

²⁰ Rules of origin (ROO) determine if a good qualifies for preferential treatment (e.g. a reduced tariff), as it establishes a method for defining where a good was actually made. There are several ROO methods, but the two most common methods are the value added or local content system and the change in tariff classification or transformation system. In the former system, a good must contain inputs (material, labor, etc.) above a certain threshold (such as 50 percent) from the exporting treaty partner to receive a tariff reduction from the importing treaty partner. In the later system, the inputs used in making a good are classified under a different tariff classification from the classification of the final product (as defined by the international harmonized system nomenclature) – thus transformation.

²¹ A negative list for trade in services allows for trade in any service unless it is specifically 'excluded' in the trade treaty. A positive list for trade in services allows for trade only if a service is specifically 'included' in the trade treaty. As such, a negative list is considered to be more liberal in encouraging international trade than a positive list. Building a negotiation position for a negative list requires much more governmental planning, as compared to a positive list.

²² USSFTA negotiations and SAFTA negotiation occurred concurrently although overlap in personnel between the Singaporean USSFTA and SAFTA teams was minimal.

sides held 11 rounds of discussions with the first round held in December 2000 and the final round held in November 2002, although the last substantive issue was resolved in January 2003.²³ Most rounds were held in London.

Among the many issues discussed and agreed, a number of issues offered real challenges. From the beginning, the US insisted that goods be divided into non-textile and textile products. In textile negotiations, the US forced Singapore to adopt the US Yarn Forwarding Rule (USSFTA Chapter 5).²⁴ In goods, Singapore has no tariffs on almost all goods and so the US matched this approach but negotiated over when US tariffs would be removed for defined baskets of goods (USSFTA Chapters 2). Singapore sought to eliminate tariffs early and the US sought to delay tariff elimination. Negotiations over goods are not easily separated from negotiations involving ROO (USSFTA Chapter 3). Singapore initially sought to persuade the US to accept a 'value added system' for ROO but agreed to US demands to adopt a 'change in tariff classification system.'

In services (USSFTA Chapter 8), the US insisted on a negative list template and Singapore resisted but eventually agreed after extensive inter-agency consultation. In telecommunications (USSFTA Chapter 9), interviews indicate that Singapore and the US created a state-of-the-art agreement between two open-market economies. In electronic commerce (USSFTA Chapter 14), both sides sought to explore every opportunity to liberalize trade and succeeded in establishing the first trade treaty ever concluded with electronic commerce provisions. In financial services, Singaporean liberalization was a top US priority (USSFTA Chapter 10). For example, the US successfully persuaded Singapore to liberalize its retail-banking sector and to phase out its wholesale bank license quota system for US banks. However, Singapore drew the line on ownership by refusing to allow US banks to acquire local Singaporean banks.

The US delegates arrived in Singapore with a 21-page initial position on intellectual property rights (IPR) based on the US Digital Millennium Copyright Act. Interviews indicate that Singaporean negotiators thought that the US position was very much focused on IPR enforcement where little capacity

²³ USSFTA, first and second rounds were held in December 2000 and January 2001, which was followed by an extend pause (January–May 2001). A change in US administration (from President Clinton to President Bush) explains the intense rush to conclude a deal followed by a temporary halt. With the arrival of the Bush administration, they initially asked why the US should pursue a trade treaty with a nation with such a small economy. Where was the benefit? Eventually the US and Singapore agreed that their trade treaty would be precedent-setting and serve as a model for the kind of trade treaty that the US planned to promote throughout the world. This superordinate goal facilitated re-commencement of USSFTA negotiations in May 2001.

²⁴ The US Yarn Forwarding Rule allows a treaty partner to secure raw materials from anywhere in the world, but the yarn produced from this raw material must come from either treaty partner to gain US tariff benefits. Singapore argued that it is highly inefficient to transport yarn from the US (Singapore does not have a yarn industry), just so that Singaporean textile manufacturers can gain tariff benefits when exporting finished products to the US. The two Chief Negotiators resolved this issue on the final day of the final round, with Singapore's arguments unsuccessful in persuading the US.

for enforcement exists, an approach that was not seen to be especially relevant to Singapore. Nevertheless, much of what the US sought is found in USSFTA (Chapter 16).²⁵ Underpinning USSFTA negotiations was an understanding that an effective free-market economy is grounded in competition policy, although the US arrived in Singapore to find no formal competition policy. Singapore's new competition policy is not a part of USSFTA, but negotiations in Chapter 12 provided a foundation for actions Singapore later took in adopting a formal competition policy.

USSFTA negotiations moved towards a conclusion when the US Trade Representative and the Singaporean Trade Minister met at an APEC Ministerial Meeting in Los Cabos, Mexico in October 2002, followed by meetings between the US and Singaporean Chief Negotiators. These meetings narrowed the list of outstanding issues from 30 to five or six issues – competition policy, financial services, investment, intellectual property and textiles. At the final round, in mid-November 2002, ten negotiators from each side resolved all but one issue – investment and technology transfer (USSFTA Chapter 15) – which was resolved in mid-January 2003. US President Bush notified the US Congress of his intention to sign the USSFTA on 30 January 2003 and he and Singaporean Prime Minister Goh signed the 240-page treaty (800 pages when all annexes are included) on 6 May 2003 at the White House. The treaty became effective on 1 January 2004.

C. Australia–United States negotiation (AUSFTA)

The United States and Australia announced that they would commence negotiating a trade agreement on 14 November 2002 with the first negotiation round held in Canberra in mid-March 2003.²⁶ The two sides held six rounds between March 2003 and February 2004 – two in Canberra and two in Honolulu with the final two in Washington, DC. Each round lasted one week except the last round, which lasted three weeks.

The two sides confronted a number of substantive challenges but also faced an unusually brief time period to conclude negotiations (the initial deadline was December 2003), as each side sought to avoid US Congressional treaty approval deliberations in the middle of the 2004 US presidential election.²⁷

²⁵ One high-level Singaporean official defended the US position on intellectual property rights by stating that Singapore is small and can be bullied by a county like the US. At the same time, the US could back all their requests with specific examples. Nevertheless, Singaporeans directly involved in IPR negotiations questioned the relevance of the USSFTA IPR chapter to Singaporean conditions.

²⁶ Many members of the Australian AUSFTA team were brought together initially to negotiate SAFTA and many members of the US AUSFTA team were brought together initially to negotiate USSFTA.

²⁷ Outcome quality may not be known for five or ten years, but the AUSFTA negotiation may be the most efficient trade agreement ever conducted between the governments of two developed economies. The formal process (from first to last round) required eleven months. Actual face-to-face negotiations involved eight weeks and around forty total days at the table. It does not happen much quicker when the governments of two complex economies seek integration.

Negotiations over goods did not present substantial challenges (AUSFTA Chapter 2) – the focus was on tariff reduction – but some of the most contentious issues were contained in sectors involving goods such as textiles, agriculture and pharmaceuticals. Although Australia had recently rejected Singapore's proposal for a 'change in tariff classification system' for ROO, US negotiators succeeded in persuading Australia to adopt this same system (AUSFTA Chapter 5). The US also convinced Australia to adopt the US Yarn Forwarding Rule to regulate trade in textiles and apparel, but Australia negotiated a very long phase in period to allow Australian industry to prepare for US competition (AUSFTA Chapter 4).

Agriculture was the major AUSFTA issue for Australia. The US claimed that the Australian Import Risk Assessment system served as a non-tariff barrier to trade, while the two sides eventually agreed on an enhanced science-based risk assessment system with a dispute resolution process (AUSFTA Chapter 7). Initially, Australia reduced tariffs on all US agricultural goods to zero but this is not so meaningful, as US agriculture is not very competitive in Australia. In return, Australia hoped that the US would do the same but knew that this was not politically feasible. Australian exports of greatest importance to Australia are sugar, beef and dairy products. Australia achieved no allowance for additional sugar exports to the US and its export quota for beef was increased by only 70,000 tons. Australia secured small increases across many dairy product categories resulting in some gains although over a long phase-in period.

Australian negotiators did not think that a national health program such as the Australian pharmaceutical benefits scheme (PBS) should be included in a trade agreement, but the US insisted and so it is (as an annex to AUSFTA Chapter 2). The Australian government subsidizes certain prescription medication for the public via the PBS. The US argued that such action is a form of price control (the PBS buys in quantity) that results in lower prices and ultimately hurts everyone, as research funds for the pharmaceutical industry are reduced. The US was unsuccessful in seeking changes that would increase PBS medication prices, although Australia agreed to enhance PBS processes involving transparency, information access and an independent review of certain decisions. The US was very unsatisfied with this outcome, just as Australia was very unsatisfied with the outcome in agriculture.

The two nations successfully established an agreement to allow companies from each nation to bid on state and federal government contracts via an open tender within government procurement processes (AUSFTA Chapter 15). In services, both nations proposed and adopted a negative list for trade in services. The most contentious services issue involved Australia's right to ensure that local cultural content would be presented on Australia media, while both parties were generally pleased with the outcome they achieved (AUSFTA Chapter 10 including annexes). Within telecommunication (AUSFTA Chapter 12), financial services (AUSFTA Chapter 13) and electronic commerce (AUSFTA 16), the two sides adopted a cooperative framework

that further integrates the two economies. Investment presented two challenges, as the US sought to dismantle the Australian Foreign Investment Review Board (FIRB) – an agency that reviews all foreign investments in Australia over \$50 million. It is unusual for a developed nation to have such a system. Nevertheless, Australia would not relinquish FIRB but did increase the threshold to \$800 million for US companies (AUSFTA Chapter 11). The US was also unsuccessful in providing investors with the right to seek international arbitration in disputes with governments (investor–state issues), but can redress disputes in state court (AUSFTA Chapter 11). In intellectual property (AUSFTA Chapter 17), Australia basically agreed to the same deal, with minor adjustment for international cooperation, that the US gave Singapore.

AUSFTA negotiations moved towards conclusion in January–February 2004 after missing the December 2003 deadline, as solutions were found for disagreements in agriculture, cultural content in the media, FIRB, investor–state relations, intellectual property and the PBS. Agreement was reached and negotiations concluded on 8 February 2004. US President Bush notified the US Congress of his intention to sign the AUSFTA on 13 February, and the United States Trade Representative and the Australian Trade Minister signed the 264-page treaty (over 1,000 pages when annexes and side letters are included) on 18 May 2004 at the White House. The treaty became effective on 1 January 2005, as only the third bilateral trade agreement between developed economies.²⁸

II. CASE STUDY ANALYSIS: TRADE POLICY DEVELOPMENT

This section examines these three negotiations to gain greater understanding of the strengths and weaknesses, and opportunities and challenges presented by a bilateral trade policy development system. In so doing, we will also seek understanding of the interaction or linkage between this emerging trade policy system and the WTO-sponsored global system. Here our focus is on identifying methods and processes to enhance development of international trade policy. In considering bilateral trade negotiations in relation to trade policy development process, I examine (1) bilateral versus multilateral approaches to trade policy development; (2) creating, testing, refining and learning about trade policy solutions; (3) bilateral trade negotiations and facilitation of domestic reform; and (4) trade policy negotiation and process management.

A. Bilateral versus multilateral approaches

Regardless of bilateral or multilateral processes, trade policy is a product that is manufactured by governmental officials, diplomats and political leaders.

²⁸ The first Free Trade Agreement between developed economies was between Australia and New Zealand in 1983 and the second was between the US and Canada in 1988 (later to become NAFTA).

Although the outcome is the same – a trade treaty concerned with goods and services – bilateral process or multilateral process, creating such treaties differs inherently from each other. This difference in process provides opportunities and challenges for effective global trade policy development. One significant difference between bilateral and multilateral negotiations is in the degree of complexity because of differences in the number of parties at the negotiation table. For example, around 150 negotiators participated in the two-party AUS-FTA negotiations. Compare this to the 148 parties (technically speaking) and the thousands of official negotiators that attended the WTO Fifth Ministerial Conference in Cancun in 2003 or the WTO Sixth Ministerial Conference in Hong Kong in 2005. Responding effectively to this complexity is a substantial challenge for all parties as each lose some control in managing process and securing a desired outcome in multilateral, as compared to bilateral negotiation.²⁹ Differences in the degree of complexity and in the extent to which a party can exercise control are defining characteristics when bilateral and multilateral negotiations are compared with each other. In multilateral trade negotiations, the degree of complexity negatively influences a party's ability to efficiently achieve the outcomes that it seeks. In bilateral trade negotiations there is a much stronger relationship between input and output, risk and reward, and action and outcome. For example, SAFTA and USSFTA required 24 and 29 months respectively from the first negotiation round to the signing of a treaty, while AUSFTA only required 14 months. Compare this to the GATT Uruguay round, which required seven and a half years from start to finish.

Just as some trade policy problems are best managed or can only be managed on a multilateral basis, other trade policy problems are best managed bilaterally. One WTO staffer who I interviewed observed that 'Some issues are too complex to deal with at a multilateral level but they can be dealt with in regional [or bilateral] trade negotiations. Other issues, such as the 'Singapore Issues' are unacceptable to some WTO members in multilateral settings but can be addressed in regional trade agreements'.³⁰

For example, trade in services is much more complex than trade in goods, although an international consensus appears to be emerging that a 'negative list' is less complex than a 'positive list' for trade in services.³¹ A negative list is more liberalizing and more transparent because it opens markets by clearly identifying those services that are not tradeable within a nation. An international businessperson can review a negative list for a specific nation and quickly determine if a nation has restrictions on a particular service (if it is not

²⁹ Larry Crump and I. William Zartman, 'Multilateral Negotiation and the Management of Complexity', 8 *International Negotiation* (2003), at 1–5; I. William Zartman, 'Conclusion: Managing Complexity', 8 *International Negotiation* (2003), at 179–86.

³⁰ The 'Singapore issues' generally emerged at the First WTO Ministerial Conference in Singapore in December 1996. They include trade facilitation, rules on investment, transparency in government procurement and competition policy.

³¹ Above n 21.

listed then it can be assumed that it can be traded when a trade treaty applies). Although a negative list is superior to a positive list, a positive list for trade in services is the approach used by most nations because GATS uses a positive list.

The process of building a positive list rather than a negative list is substantially different for a national government and holds significantly different consequences if errors and oversights are involved. When compared to a negative list, building a list of services that can be traded in a nation (i.e. a positive list) requires much less thought and analysis, much less inter-agency consultation and much less government–business consultation. Forget to add a specific service on a positive list and the only party damaged is a foreign company (domestic consumers may also experience damage but usually domestic consumers are unaware). Forget to add a specific service on a negative list and foreign competition may suddenly bankrupt a domestic business, while it is possible that foreign competition can remove an entire economic sector from a domestic economy. This may be beneficial to domestic consumers but it is not beneficial to the political leaders and trade policy specialists who agreed to such arrangements; hence, the reluctance to pursue such a trade policy and a willingness to accept a second-best multilateral solution that comes with fewer costs but also produces much lower liberalizing benefits.

In observing Singapore’s shift from a positive list to a negative list for trade in services, I learned that a nation does not conduct such an analysis once and then apply it to every subsequent bilateral trading partner. Unlike a positive list, a negative list is not a one-size-fits-all solution (e.g. compare Singapore’s negative list in SAFTA Chapter 7 and in USSFTA Chapter 8). Shifting from a positive list to a negative list requires substantial government planning including inter-agency and business consultation. Part of this planning needs to be conducted only once, but additional analysis is required each time a national government starts negotiating with a new trading partner over trade in services, as this latter analysis is focused on the economic integration of the services on offer in the two nations negotiating a treaty.

How can this understanding be used at the multilateral level via WTO-sponsored trade negotiations? By its very nature, it is less likely that a negative list for trade in services will be adopted in a multilateral setting, since it does not offer a one-size-fits-all solution although it is more liberalizing, while the trade policy is inherently more simple and more transparent when compared to a positive list. If a negative list for trade in services were adopted, it is likely that each WTO member nation’s negative list would be so long as to make the exercise meaningless. On the other hand, as nations become more familiar with a negative list for trade in services through bilateral trade negotiations and then through the actual administration of such trade policy, they will become better able to conduct such analysis in a meaningful manner. Singapore resisted US and Australian arguments to adopt a negative list for trade in services for a year, but finally accepted this template in the end. Now the

Singaporean government has much greater understanding of the strengths and weaknesses of positive and negative lists through bilateral processes.

On the basis of such observations, WTO members could pursue an intermediate step in facilitating trade liberalization in services. This intermediate step would have the WTO disseminate information to encourage member states to investigate the strengths and weaknesses of positive and negative lists in services by experimenting with negative lists via bilateral and regional processes. In so doing, the WTO will be motivating nations to use a solution that is simpler, more transparent and more effective in liberalizing trade, while encouraging countries to become familiar with both trade policy and trade policy administration for a negative list for trade in services. Via a bilateral trade policy strategy, WTO member nations may then become sufficiently familiar with the planning and management of a negative list for trade in services to be able to negotiate a global services agreement that is based on a negative list – perhaps 20 or 30 years from now. It is doubtful whether the WTO and its members will be able to truly liberalize trade in services until a majority of nations become familiar with the concept and application of a negative list. For the present, the WTO can only hope to facilitate understanding, thereby laying a foundation for future liberalization – perhaps in the round that follows the round that follows Doha. Here is an example of how bilateral and multilateral processes can be combined to improve international trade policy over an extended time period.

In addition to issues of complexity, some national governments are simply unwilling to consider trade policy issues in a multilateral forum but are willing to consider these same issues in a bilateral setting. For example, government procurement is one of four ‘Singapore Issues’ that many nations refuse to discuss in multilateral settings. In 1980, a handful of GATT members negotiated the Government Procurement Agreement (GPA) of 1981, and since then almost 40 countries have signed the GPA. Conspicuously, Australia is one of the few developed countries not to have signed the GPA because Australia believes this trade policy is too prescriptive, although it has recently begun to experiment with some GPA ideas via bilateral processes.

After protracted bilateral negotiations between the US and Australia regarding government procurement, Australia agreed to relinquish its system of invited tenders or selective tendering and adopt an open tender process – procedures that are at the foundation of the GPA (AUSFTA Chapter 15). Operationally this means that Australia agreed to announce and set a date to receive expressions of interests via the Internet for all federal and state tenders that are above a defined threshold. In making this compromise, Australia’s government procurement policies became consistent with the 1979 US Trade Agreement Act, which will now allow Australian companies to compete for US Federal and State government contracts. In addition to this tangible achievement, this process also provided Australia with an opportunity to re-examine its government procurement process and the trade policy principles

underlying this process, which should give the Australian government some insight into this sector. A multilateral government procurement agreement established in 1981 was unable to bring such enlightenment to the Australian government, but bilateral negotiations were successful in this regard.

Some trade policy solutions, such as a negative list for trade in services, may require analysis that is too complicated to conduct in multilateral settings until national governments become familiar with the administration of such transparent and liberalizing trade policy.³² As suggested in this article, the WTO can actively facilitate such learning. In other cases, national governments are willing to liberalize trade on a bilateral basis but not on a multilateral basis. However, once bilateral experience is gained it may be possible that these national governments will be willing to liberalize on a multilateral basis. Australia's government procurement trade policy may be worth watching in this regard.

B. Solution creation, testing and refining

Observations about bilateral and multilateral trade policy negotiations by a senior Singaporean trade official are enlightening. The official I interviewed concluded that:

Free [bilateral] trade negotiations are essentially a laboratory for testing new ideas. This opportunity can provide a new way to frame a typical trade policy problem or provide an opportunity to develop policy solutions that have never been tried anywhere in the world or have never been attempted by the negotiating parties. The process of engaging in a free-trade negotiation often prompts countries to consider new approaches and positions. For years, a particular country may have taken a specific position in multilateral negotiations and now has an opportunity to consider arguments in a fresh manner – without all the background noise that accompanies multilateral process and without the large audience that is observing position shifts. Conducting a free-trade negotiation allows a country to re-examine its national trade policy and to escape or bypass previously entrenched positions, as internal discussions can acknowledge that a particular position which made perfect sense in a multilateral forum is not now as valid or as desirable in a bilateral setting.

This Singaporean trade official observed that WTO-sponsored negotiations are more limited in their ability to create this type of environment.

Numerous examples illustrate these observations. During the Third WTO Ministerial Conference held in Seattle in 1999, the digital economy received substantial attention although nothing tangible followed within Doha. When the US and Singapore began bilateral trade negotiations in 2000, the US found that Singapore was receptive to considering electronic commerce although electronic commerce had never previously been included in a trade treaty. The Singaporean

³² Party familiarity, acceptance, adoption, implementation and management will neutralize complexity.

official responsible for negotiating electronic commerce reported that this chapter (USSFTA, Chapter 14) was painstaking and involved creative groundbreaking work. For example, sidestepping a WTO debate about whether a digital product is a good or service, Singapore and the US created special rules for digital products. Trade negotiators on both sides reported that their basic attitude was to explore every possible opportunity to liberalize trade via electronic commerce, as these two countries extended most-favored nation (MFN) status and national treatment to each other for all digital products. Since then, we find electronic commerce chapters in the SAFTA, AUSFTA and the Chile–US free trade agreement (CUSFTA). There are also reports that the US took the USSFTA Chapter on electronic commerce to APEC and proposed it be used as model language for APEC trade policy on electronic commerce.

Eventually, WTO-sponsored negotiations will give serious consideration to establishing trade policy on electronic commerce. By then, policy will be better informed because of lessons learned from bilateral negotiations conducted in Australia, Chile, Singapore, the US and other countries. Nations with electronic commerce trade policy can report to the WTO about their experience in administering such policy. When the WTO decides to develop a trade policy on electronic commerce, it is reasonable to assume that it will be developed in a more thoughtful manner because WTO policy in this area will be based on tangible experience of WTO members rather than concepts and speculation about what could be possible. As with any manufacturing process, efficiency and product quality are enhanced when a prototype is first developed and tested in regional markets before going global.

Sometimes a bilateral trade negotiation serves as a venue for less dramatic accomplishments, although such developments are still significant to the nation or nations involved. Australia's experience with ROOs is illuminating in this regard.³³ Australia and New Zealand basically adopted a local value-added ROO system in their 1983 Closer Economic Relationship (CER) trade agreement. At Australia's next bilateral trade negotiation, with Singapore in 2001, Singaporean trade negotiators report that they actively sought to persuade Australia to adopt a change in tariff classification or transformation ROO system. Australia was not persuaded, and so SAFTA contains a value-added ROO system (see SAFTA Chapter 3). However, when preparing to confront the same proposal from the US in AUSFTA negotiations in 2003, Australia recanted its preference for a value-added approach and accepted a transformation ROO approach.³⁴ Subsequent reports indicate that Australia and New Zealand are now holding talks to modify their 1983 trade treaty to adopt a transformation ROO system for determining product origin, as Australian Customs officials report that the transformation approach is

³³ Above n 20.

³⁴ Australia and Thailand also adopted a transformation ROO approach (this development occurred slightly before AUSFTA negotiations began) in their trade treaty of 2004.

straightforward and simple to administer. If so, here is an example of how one nation moved from resistance to acceptance in adopting what may be a more efficient system of customs administration. Bilateral trade negotiations provided parties with an opportunity to experiment with new ideas and methods. Such experience can only benefit the WTO, as Australia now has a much greater understanding of the strengths and weaknesses of various ROO systems. It is reasonable to assume that this same kind of experience is built repeatedly via bilateral trade processes in other countries. It therefore appears that future WTO-sponsored negotiations can only be better informed, resulting in enhanced WTO trade negotiation agreements.

In sum, we find that new and creative solutions can be developed via bilateral trade negotiations, which can be tested and refined in regional settings before they are introduced globally. We also find that individual nations can gain greater insight into trade policy alternatives via movement away from long-held positions and towards new trade policies and positions – opportunities that are less likely to occur in multilateral settings.

C. Facilitation of domestic reform

Bilateral trade policy negotiators seek to establish a foundation for the integration of two economies and the harmonization of their economic institutions. Along the way, bilateral trade negotiations can provide national governments with the power or insight to make domestic reforms that might have been impossible or could be possible but difficult without such action forcing events.³⁵ An ambassador in Singapore observed:

Although people talk about the government as ‘Singapore Inc.’, in fact Singapore has some vested interests that seek to protect arrangements that are not in the best interests of Singapore. These vested interests are resistive to change. Free-trade agreements serve as a lever for domestic change. For example, the Singapore government knew that they had to introduce competition policy and AUSFTA and USSFTA helped the government to do this.

When the US and Australian trade negotiators began their separate negotiations with Singapore, they found a country without a formal competition policy or law. An Australian trade negotiator responsible for competition policy said that Australia did not want to be seen to be telling Singapore what to do in this area, but Australia wanted a commitment that Singapore would respond to non-competitive practices in a non-discriminatory and transparent manner that provided due process. Both Australia and the US sought a

³⁵ This study is not the first to make this important observation. See: Roberto Echandi, ‘Regional Trade Integration in the Americas During the 1990s: Reflections on some Trends and their Implications for the Multilateral Trade System’, 4 *JIEL* (2001), at 367–410; John H. Jackson, ‘Part I: The State of International Economic Law’, 8 *JIEL* (2005), at 3–15.

commitment from Singapore to move forward on establishing a comprehensive competition law, and SAFTA Chapter 12 and USSFTA Chapter 12 were negotiated with the understanding that Singapore would quickly take such action. In April 2004, about a year after these two treaties were signed, Singapore sought public comment on draft legislation to regulate anti-competitive practices such as price-fixing and other market share agreements, and dominant market players that use their strength to drive out new entrants. The law established a Competition Commission that imposes financial penalties and sanctions, conducts investigations and grants exemptions.

Strengthening its commitment to a free market is not the only domestic reform that Singapore achieved through its program of bilateral trade negotiations, as Singapore has also sought to enhance its commitment to democratic processes.

Leaders of international and foreign chambers of commerce in Singapore and Singaporean trade negotiators observed that Singapore's experience negotiating with the US assisted the Singaporean government in understanding the important role that government-business consultation plays in managing bilateral trade negotiations. Singaporean trade negotiators report that traditionally the Ministry of Trade and Industry (MTI) consulted other governmental agencies only while engaged in trade negotiations. However, the Ministry changed its attitude during USSFTA negotiations. The US has what could be the world's most extensive government-industry trade policy advisory system, including 26 sector and functional committees with a total membership of around 700.³⁶ More than one Singaporean trade negotiator reported that access to detailed industry knowledge and examples of specific international trade problems, often only obtained from those directly involved in a specific economic sector, is invaluable at the negotiation table. As a result, MTI began to establish formalized consultative processes with business and industry, starting in around 2002. One outgrowth of this effort was the establishment of the Singapore Business Federation in April 2003 – an umbrella body that includes the five major chambers of commerce in Singapore, plus representatives of foreign chambers of commerce based in Singapore, various industrial associations and 15,000 companies based in Singapore. It is too early to determine the success of these government-business consultative systems, but the establishment of these consultative systems demonstrates a move to enhance democratic processes.

Not all domestic reforms inspired by bilateral trade negotiations are trade liberalizing. Bilateral agreements containing provisions on intellectual property, which are said to be TRIPS plus, are more restrictive than what is provided under TRIPS.³⁷ USSFTA Chapter 16 and AUSFTA Chapter 17 on intellectual property offer examples of this. Investors in the pharmaceuticals,

³⁶ In addition to US interview data, see: USTR, 'Trade Policy Advisory Committee System', <http://www.ustr.gov/outreach/advise> (Visited 7 January 2005).

³⁷ Above n 6, at 6.

computer software, publishing, television, movie and music industries should be pleased with the intellectual property trade policies in USSFTA and AUSFTA, as these chapters are about property rights, not trade liberalization. For example, AUSFTA required Australia to increase its protection of copyright material from 50 to 70 years (70 years beyond the life of an author in published works and 70 years from the point of copyright for film and sound). A Senior Advisor to the Australian Prime Minister reported that this latter issue was sufficiently sensitive to include the judgement of the Prime Minister in the final decision. Australia generally accepted the US demand on intellectual property, although it drew the line on weakening the Australian pharmaceutical benefits scheme.

It is apparent that special interest groups are reducing trade liberalization, but this can occur in bilateral and multilateral trade negotiations. Nevertheless, overall bilateral trade agreements appear to enhance trade liberalization and can contribute to positive domestic reform, as we can find examples where a nation's commitment to a free-market system and democratic processes were strengthened.

D. Trade policy and process management

One Australian trade negotiator observed that an active and robust trade negotiation agenda can enhance the skill and ability of a nation's negotiation team. If WTO Doha negotiations slow down and if this is a nation's only trade negotiation, then this delay contributes to the loss of a nation's trade negotiation capacity. Bilateral trade negotiations, conducted concurrently with WTO-sponsored negotiations, maintain a nation's negotiation ability. He felt that this was especially important for developing countries. Moreover, this trade negotiator had observed fundamental differences between WTO and bilateral trade negotiations. A bilateral trade negotiation helps a nation to focus on what negotiating a trade treaty actually means. Experience gained in WTO Doha negotiations may prepare participants to negotiate at the United Nations, but WTO negotiations are less helpful in preparing participants to understand processes relevant to trade negotiations.

Bilateral trade negotiations may be one effective way to prepare a national government to make an effective contribution to WTO-sponsored negotiations. To perform effectively in trade policy negotiations requires that national governments learn how to manage processes at the organisational level and at the individual level. For example, the management of governmental interagency relations and government-business relations are especially important for the successful outcome of bilateral trade negotiations. Trade negotiators in Australia, Singapore and the US each observed that engaging in bilateral trade negotiations requires a 'whole of government approach'. Successful trade negotiators must identify trade issues likely to emerge far into the future, as well as current issues and then communicate with the relevant agency to gain information or guidance and/or to build a consensus so that a

decision can be made on a particular position or issue. In a WTO-sponsored negotiation, this same information is useful, but there is less urgency to gather it because it takes much longer to conduct WTO-sponsored negotiations, while normally the process is compressed in a bilateral trade negotiation. Bilateral trade negotiations can require a high degree of interagency communication and coordination within a tight schedule, with a short turn-around time for gathering and analyzing information and then turning this analysis into approved policy that guides development of negotiation positions and compromises. Although substantially enhanced via bilateral processes, improvement of interagency relations will be beneficial for bilateral and multi-lateral negotiation process.

Government–business relations is another area that a national government must consider in bilateral trade negotiations. Australia found that shifting from a multilateral to a joint bilateral–multilateral trade strategy required careful rethinking about how to manage government–business relations in a bilateral trade negotiation context. One administrator responsible for the Australian Office of Trade Negotiation within the Department of Foreign Affairs and Trade (DFAT) considered the government’s experience in seeking external consultation since the establishment of the WTO and concluded that DFAT had engaged in more consultation leading up to the AUSFTA negotiations than in the prior ten year period. Experience conducting government–business consultation in bilateral trade negotiations should readily transfer to WTO-sponsored negotiations.

Operating a two-track bilateral–multilateral trade strategy offers a national government benefits in enhancing the skills and ability of a nation’s negotiation team and in focusing interagency relations and government–business relations on trade policy. However, what this strategy does is not cost free. A Counsellor to the Delegation of the European Commission to Australia and New Zealand asked, ‘Where was Australia during the WTO Fifth Ministerial Conference in Cancun?’ He claimed that the Cairns Group³⁸ fell asleep when Australia was engaged with the US in negotiating a free-trade agreement. He observed that Australia’s negotiation resources were diverted and as a result, some Cairns members departed and joined the G-20 in Cancun. Clearly, it can take some time for a nation to move effectively from a multilateral to a bilateral–multilateral trade policy strategy. Errors may be made along the way, but these also represent opportunities for learning. In the final analysis, nations that do not properly resource the administrative units responsible for trade negotiations will have difficulty mounting a two-track bilateral–multilateral strategy. In the case of Australia’s management of US bilateral and WTO multilateral negotiations in 2003, the Europeans may dislike the emergence of

³⁸ The Cairns Group is a coalition of 17 agricultural exporting countries (led by Australia) from Latin America, Africa and the Asia-Pacific region that has sought to reform international agricultural trade policy since 1986.

a new voice for developing countries via the G-20, but not everyone perceives this as undesirable.

In sum, WTO members that divert resources from WTO meetings are not stopping other WTO members from focusing on WTO processes and reaching consensus on trade policy decisions. If anything, the absence of these members could decrease multilateral complexity. This study concludes that bilateral trade negotiation process enhances a government's understanding of both trade policy and negotiation process, and increases its capacity to prepare for multilateral negotiations via internal and external trade policy consultation systems that operate more efficiently and effectively.

III. DISCUSSION

Although much easier to achieve than multilateral trade agreements, bilateral trade agreements are still second-best options.³⁹ Bilateral and regional trade agreements can produce benefits that go far beyond the liberalization of trade in goods and services. On the other hand, multilateral trade agreements provide a greater degree of economic liberalization and integration when compared to bilateral trade agreements. Multilateral solutions are preferred but it must be recognized that some multilateral solutions are poor quality. A positive list for trade in services is a good example of a low-quality trade policy solution derived via multilateral processes. How are WTO member nations to learn about higher quality solutions if they are never exposed to new ideas? Learning is best achieved when we gain direct and tangible experience. For example, this article recommends that the WTO take greater control of bilateral and regional processes by playing an informational role to encourage WTO members to learn about negative lists for services by experimenting with such templates in their bilateral and regional trade negotiations. Once a sufficient number of WTO members are familiar with the development and administration of negative lists, the WTO may then be able to sponsor a multilateral solution – 20 or 30 years in the future.

The WTO can and should be somewhat more prescriptive about the type of bilateral trade agreements that member nations sign. In addition to services, the WTO could also be prescriptive about some of the 'Singapore Issues'.⁴⁰ For example, the WTO could again play an informational role that encouraged member nations to consider adopting some of the basic principles found in the Government Procurement Agreement of 1981 in any bilateral and regional trade negotiation. Gently pushing nations to adopt such trade policy through bilateral and regional negotiations may result in these nations agreeing to multilateral arrangements later. Change is often achieved incrementally.

³⁹ Barry Desker, 'In Defence of FTAs: From Purity to Pragmatism in East Asia', 17 *The Pacific Review* (2004), 3–26; Mark S. LeClair, *Regional Integration and Global Free Trade: Addressing the Fundamental Conflict*, (Aldershot UK: Avebury-Ashgate, 1997).

⁴⁰ Above n 30.

WTO membership should also be more prescriptive about negotiation process as it relates to bilateral and multilateral interaction. One challenge for the WTO Doha round is that it is too ambitious with a very large agenda. What criteria should WTO members use in restricting the number of agenda items? This is a complex issue, however WTO members should recognize that generally new solutions that are considered in WTO-sponsored negotiations will be of higher quality if they have been developed and tested in bilateral settings first. Generally, WTO members should discourage consideration of new issues or new solutions in WTO-sponsored negotiations until prototypes have been carefully examined in bilateral settings (i.e. electronic commerce). Future WTO-sponsored negotiations can only be better informed, when lessons from past experience are absorbed. Changes in trade policy may occur more slowly, but the change that does occur will be of a higher quality.

The WTO could also be more prescriptive about the scheduling of bilateral and multilateral meetings – again via an informational role. Bilateral trade meeting between trade ministers or other high level officials often occur on the fringe of multilateral conferences (e.g. see SAFTA, USSFTA and AUSFTA cases). Such meetings should be encouraged, given scheduling difficulties for such officials however; the WTO Director General could passively seek to coordinate interaction between bilateral and multilateral processes by simply recommending that no bilateral formal rounds (or public hearings) be held the week prior to, after or during a WTO Ministerial Meeting. This is just an initial step – perhaps even a symbolic step – in managing interaction between bilateral and multilateral processes. Eventually, the WTO Director General should sponsor a conference with every administrator of a national trade negotiation unit so that active coordination between bilateral and multilateral processes can be examined more closely.

Operating a two-track trade policy development system comes with additional costs and complexity that can be effectively managed via planning and coordination. The WTO must conduct such coordination, as no other institution can assume this role.

Case study data and other sources⁴¹ focus on the loss or diversion of trade negotiation resources when a nation pursues a two-track trade policy strategy. It is natural to worry about such diversion, but these concerns should be balanced by recognition of benefits available to the WTO, because bilateral processes can deliver a range of outcomes that cannot be realized in multilateral settings. For example, it is clear that a bilateral trade policy system enhances the skills of a negotiation team, as team members have an opportunity to begin and conclude agreements involving trade in goods and services (in some nations negotiators have such experiences via bilateral processes repeatedly). Generally, the WTO has been unable to provide this type of experience

⁴¹ Jagdish Bhagwati, 'U.S.–Chile and U.S.–Singapore Free Trade Agreements' (Testimony presented before the US House of Representatives, Committee on Financial Services, Subcommittee on Domestic and International Monetary Policy, Trade and Technology on 1 April 2003).

to trade negotiators since the Uruguay Round of GATT concluded. We also find that the short-term and intense nature of bilateral trade negotiations, relative to WTO-sponsored negotiations, contributes to enhanced interagency coordination and enhanced government–business relations. Strengthening the negotiation team, strengthening relations between the team and relevant governmental agencies, and strengthening relations between the team and the business community can only benefit both bilateral and multilateral negotiations.

Bilateral trade negotiations clearly provide national governments with a source of power that they can use to bring about domestic reform. Singapore's decision to enhance government–business communication and to formalize competition policy is an example of such domestic reform. Australia's decision to liberalize government procurement policies also demonstrates how bilateral trade policy can be used to bring about domestic reform. International organizations and institutions such as the U.N., the World Bank, the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD) and many other organizations and institutions are concerned about political, economic and social governance. Here are tools that can help governments effectively implement domestic change.⁴² This is an area that requires greater investigation.

Economics, international relations, negotiation, and political science have examined the multilateral trade policy development system via GATT and the WTO for many years. Such knowledge is critical to our understanding of the international trading system but how much do we really know, at a micro-level and at a systems level, about this new and emerging trade policy development system that reduces barriers to trade on a reciprocal and preferential basis? Although not exclusively bilateral, the most outstanding structural feature is the bilateral nature of a large majority of the trade agreements that are signed. As with any emerging system, the first step is to describe its fundamental nature. Structural analysis, process analysis and outcome analysis will be most effective in this regard. But this is just the first step, as the real purpose in describing this emerging bilateral trade policy system is to evaluate the interaction between bilateral and multilateral processes. This is where the critical work lies. These two trade policy development systems will continue to co-exist for the foreseeable future. It will be useful to understand how these two systems interact naturally so that we may be able to strengthen each system and the interaction between them in order to maximize social value. If we are successful we can expect to create an enhanced international trade policy development system, greater national movement towards democratic and free market principles, and negotiation teams that effectively interact within their government and with their stakeholders. All of this is possible if we begin by carefully examining this new and emerging trade policy development system.

⁴² See Jackson, above n 35, at 14.

IV. CONCLUSION

The WTO is a membership-driven institution and – for better or worse – its members clearly wish to engage in bilateral and regional trade negotiations. The WTO should broaden its vision of what it is and what it should become. It is not the Multilateral Trade Organization but the World Trade Organization. Success or failure at the next WTO Ministerial Conference will not stop further bilateral and regional trade negotiations and hence, the continuing development of this two-track system. Since WTO members conduct bilateral and regional trade negotiations under GATT/WTO authority, the WTO Secretariat should assume greater control over this emerging system so that this multilateral–regional/bilateral system is managed more effectively.⁴³ Initially, the WTO Secretariat should play an informational role to encourage WTO members to experiment with new trade policies and/or trade policies that are more liberalizing to learn of their strengths and weaknesses. Inefficiencies that emerge along the way will likely be superseded by a WTO-sponsored agreement in the future.⁴⁴ This is not an ideal arrangement, but the present multilateral trade policy system minus all these bilateral and regional agreements is not ideal either.

For too many years, multilateralists have argued that bilateral trade negotiations are a ‘stumbling block’ to the development of a WTO-sponsored trade agreement, political leaders have argued that bilateral trade negotiations are a ‘building block’ towards a WTO-sponsored trade agreement, and the WTO has essentially argued that bilateral trade negotiations are a building block and a stumbling block. It is time to broaden and reframe this debate by constructing another lens for viewing international trade policy and the circumstances in which it is developed.

I argue that multilateral trade negotiations realize tangible outcomes that are unachievable via bilateral trade negotiations. But this is not the full story, as bilateral and regional trade negotiations serve functions that are not served via multilateral processes. The time has come to examine global trade policy development with this new lens and recognize that a two-track system exists. Each part of this system has strengths and weaknesses and provides opportunities and challenges. The critical question is how can we design these two systems and the interaction between them so that we can further enhance the global trade policy development system.

⁴³ Others have also called on the WTO Secretariat to exercise greater strength. See WTO Consultative Board at n 12; Peter Van den Bossche and Iveta Alexovicova, ‘Effective Global Economic Governance by the World Trade Organization’, 8 *JIEL* (2005), at 685–90; Patrick A. Messerlin, ‘Three Variations on “The Future of the WTO”’, 8 *JIEL* (2005), at 302.

⁴⁴ Studies recognize that a regional trade agreement in the Americas will harmonize a diverse number of bilateral agreements. This same logic can be applied at a global level. See: Jose Antonio Rivas-Campo and Rafael Tiago Juk Benke, ‘FTAA Negotiations: Short Overview’, 6 *JIEL* (2003), at 682.