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REGIONAL TRADE AGREEMENTS AND AUSTRALIA: A NATIONAL INTEREST PERSPECTIVE

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REGIONAL TRADE AGREEMENTS AND AUSTRALIA: A NATIONAL INTEREST PERSPECTIVE

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[N]early five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception ...

- Report of the Consultative Board to the Director-General of the WTO

Australia will enter into bilateral FTA negotiations where they deliver substantial commercial and economic benefits across all sectors faster than through multilateral reform. Bilateral and multilateral trade activities are mutually reinforcing.

- Trade 2005 Statement, Australian Minister for Trade, Mark Vaile

ABSTRACT

Current debate on regional trade agreements has largely focused on their multilateral or WTO impacts. While this has been constructive, governments will ultimately adopt a pragmatic approach that turns on assessments of national interest. Such interests include: improving market access, securing competitive advantage against other competitors, and avoiding potential discrimination. They also include broader economic, political and strategic considerations such as promoting economic integration, improving global competitiveness, enhancing diplomatic influence and supporting regional peace and stability. The implications (or otherwise) of RTAs for the WTO trading system are therefore only one factor in the matrix of considerations for governments.

Given the range of economic *and non-economic* interests being pursued through RTAs, such arrangements will increasingly constitute a parallel legal framework to the WTO in international trade relations. For middle trading powers like Australia, RTAs provide opportunities for participation and significant risks for non-participation. If, in the words of the authors of a report to the WTO Director-General, the general principle of Most Favoured Nation is no longer the rule but almost the exception, Australia has little to gain and much to lose by departing from the current international trend. There is nevertheless scope for strengthening the existing WTO rules and institutional arrangements relating to RTAs, including as part of the current WTO Doha Round of negotiations.

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I. OVERVIEW

The last decade has seen a proliferation in the number of regional trade agreements negotiated between countries. More agreements have been concluded in the first 10 years of the World Trade Organization (WTO) than in the previous 50 years of GATT. This trend is reflected in Australia's own experience with a significant expansion in negotiating activity. Since 2003, Australia has concluded Free Trade Agreements with Singapore, Thailand and the United States, and is currently in discussions or negotiations with Malaysia, ASEAN, China, Japan, Mexico and the United Arab Emirates.

Regional trade agreements or RTAs have attracted considerable debate, with particular attention on their potential 'multilateral' impacts. Some commentators have expressed concern that RTAs undermine the WTO multilateral trading system by eroding the Most Favoured Nation principle, by discriminating against non-parties and by diverting attention and resources from WTO negotiations. Others argue that RTAs support WTO objectives by promoting trade liberalisation, the development of new rules and closer integration between countries.

While the debate has been constructive, governments will ultimately adopt a pragmatic approach that turns on assessments of national interest. Such interests include: improving market access, securing competitive advantage against other competitors, and avoiding potential discrimination. They also include broader economic, political and strategic considerations such as promoting economic integration, improving global competitiveness, enhancing diplomatic influence and supporting regional peace and stability. The implications (or otherwise) of RTAs for the WTO trading system are therefore only one factor in the matrix of considerations for governments in approaching RTAs.

Given the range of economic *and non-economic* interests being pursued, the paper argues that RTAs will increasingly constitute a parallel legal framework to the WTO in international trade relations. For middle trading powers like Australia, RTAs provide both opportunities for participation and significant risks for non-participation. Australia should therefore continue to pursue RTAs as part of a comprehensive foreign and trade policy strategy. There is nevertheless scope for strengthening the existing WTO rules and institutional arrangements relating to RTAs, including as part of the current WTO Doha Round of negotiations.

II. REGIONALISM AND REGIONAL TRADE AGREEMENTS

At no time in recent history has there been so much activity in the global trade negotiating environment. World trade talks and multiple bilateral and regional trade agreements are all progressing simultaneously.

- New Zealand Ministry of Foreign Affairs and Trade

A. Regional trade agreements defined

The term 'regionalism' has been used in international trade relations to describe preferential, regional or free trade agreements as opposed to the WTO multilateral trading system. Such arrangements typically accord preferential market access to parties through lower or zero duties. Examples of regional trade agreements or RTAs include customs unions, where parties maintain a common external customs policy, such as the European Communities and the Middle East Gulf Cooperation Council. They also include bilateral or multilateral Free Trade Agreements such as the North American Free Trade Agreement (NAFTA), Mercosur and Australia – New Zealand Closer Economic Relations (CER).

While regional trade agreements have traditionally been concerned with the elimination of tariffs or other duties between parties, the scope of contemporary RTAs is considerably broader and includes matters directed at promoting a deeper level of economic integration. These include for example investment facilitation and protection, mutual recognition of technical regulations, customs facilitation, intellectual property protection, competition policy, government procurement, as well as 'non-trade' issues such as labour and environmental protection.

The term *regional* trade agreements remains somewhat of a misnomer. While RTAs have traditionally been pursued between 'natural' trading partners and geographically contiguous countries – such as Australia / New Zealand and NAFTA - governments are increasingly pursuing arrangements beyond immediate neighbours or even countries in the same geographic region. Reasons for this include economic complementarities with countries outside the immediate geographic region, as well as the fact that over time, a country will have exhausted possibilities with its immediate neighbours.¹

Nor is geographic proximity an automatic catalyst for regional arrangements. Historic sensitivities ensure, for example, that India / Pakistan and China / Japan are no closer to negotiating a regional trade agreement today than in the past 50 years. Political sensitivities over Australia's intervention in East Timor also ensured that Australia's first Free Trade Agreements with ASEAN countries were with Singapore and Thailand, and not with its immediate and more populous neighbour Indonesia. Many commentators therefore prefer the term *preferential* trade agreements both to accommodate 'extra-regional' agreements and to emphasise the preferential (and discriminatory) nature of such arrangements.

¹ Jo-Ann Crawford and Roberto Florentino, 'The Changing Landscape of Regional Trade Agreements', Discussion Paper No. 8 (World Trade Organization, 2005), http://www.wto.org/english/res_e/reser_e/discussion_papers_e.htm (accessed 24 December 2005) at 5.

The last decade has seen a proliferation of RTAs being negotiated between countries. Since the entry into force of the WTO in 1995, over 130 RTAs have been notified by WTO Members.² This compares to 124 notifications made to the GATT between 1948 - 1994. More RTAs have been notified in the first 10 years of the WTO than in the previous 50 years of GATT. According to the World Bank, the number of agreements now in force exceeds 200 and that trade between RTA partners currently accounts for over 40 per cent of global trade.³

The global trend towards RTAs is reflected in Australia's own pursuit of Free Trade Agreements. Prior 2003, Australia's only existing RTA was the Closer Economic Relations (CER) Agreement with New Zealand which came into force in 1983. In the last three years, Australia has concluded Free Trade Agreements with Singapore, Thailand and the United States. Australia is currently negotiating or exploring FTAs with ASEAN, China, Malaysia, Japan, Mexico and the United Arab Emirates. This represents an unprecedented expansion in negotiating activity.

B. WTO disciplines on regional trade agreements

Given their nature as preferential trade agreements, RTAs infringe the Most Favoured Nation principle of Article I of the General Agreement on Tariffs and Trade 1994. Most Favoured Nation or MFN obliges WTO Members to accord non-discriminatory treatment to different trading partners in relation to imports and exports. This fundamental discipline is contained in Article I:1 of GATT 1994 which requires that any advantage, favour, privilege or immunity granted by one WTO Member to any country be accorded immediately and unconditionally to the like product of all other WTO Members.

The negotiators to GATT however provided an exception for what they defined as customs unions and Free Trade Areas. This reflected a belief by the GATT founders that RTAs could have an overall benefit to international trade and that some trade liberalisation between some countries was better than none at all. It also reflected a need to support European integration efforts then underway and its importance for European (and international) peace and security.

Article XXIV of GATT 1994 accordingly provides an exception or defence to general GATT obligations – such as Article I Most Favoured Nation – insofar as such obligations 'shall not prevent' the formation of a customs union or Free Trade Area.⁴ Its object is stated in Article XXIV:4 which underlines the fundamental basis for the WTO exception. RTAs must above all be trade-creating as opposed to trade-limiting:

‘The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also

² WTO website, http://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 29 August 2005)

³ World Bank, *Global Economic Prospects: Trade, Regionalism and Development*, Washington (2005), at 27.

⁴ Exceptional treatment is also provided in the Enabling Clause (Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, BISD 26S/203, 28 November 1979) and Article V of GATS.

recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.’⁵

These objects were further expanded by the Understanding on the Interpretation of Article XXIV of the GATT 1994. This included in its preamble recognition that: ‘the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements’ and that ‘such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded’. The preamble also affirmed that ‘the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members’.⁶

A WTO Member seeking to justify a measure (such as preferential treatment to an RTA partner in breach of Article I Most Favoured Nation) must satisfy a number of conditions. First, the RTA must meet the definition of a free trade area or customs union under Article XXIV:8 of GATT 1994. For such arrangements, duties and other restrictive regulations of commerce must have been eliminated on ‘substantially all trade’ between the parties.⁷ This would exclude, for example, investment and economic partnership type agreements that are mainly directed at economic cooperation and investment facilitation.

Second, the free trade area or customs union must not raise the ‘overall level of protection’ against non-parties.⁸ This requires that the duties applied by the parties to, for example, a customs union after the formation of the customs union must not on the whole be higher than the ‘general incidence’ of duties that were applied by each of the parties before the formation of the customs union.⁹ Importantly, this does not prevent parties from raising duties on individual products although compensatory requirements apply where an RTA-party proposes to raise duties above Article II of GATT 1994 bound rates.¹⁰

Third, the formation of the free trade area or customs union must be ‘prevented’ if the measure being justified under Article XXIV was not permitted.¹¹ This requirement has been stringently applied by the Appellate Body to narrow the range of otherwise WTO-inconsistent measures that might be exempted under Article XXIV. The Appellate Body has considered ‘prevented’ as requiring a test of impossibility: ‘the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union’.¹²

⁵ Article XXIV:4 of GATT 1994.

⁶ Preamble to the WTO Understanding on the Interpretation of Article XXIV of the GATT 1994.

⁷ Article XXIV:8 of GATT 1994.

⁸ Article XXIV:5(a) and (b) of GATT 1994.

⁹ WTO Appellate Body Report, *Turkey – Textiles*, adopted 19 November 1999, para. 54.

¹⁰ Article XXIV:6 of GATT 1994.

¹¹ Chapeau of Article XXIV:5 of GATT 1994.

¹² *Turkey – Textiles*, see n 9 above, para 45. Emphasis in original.

In the *Turkey – Textiles* dispute, India successfully challenged the imposition by Turkey of quantitative restrictions on textile and clothing imports from India. These restrictions were introduced by Turkey following its customs union with the EC. The Appellate Body rejected Turkey's argument that had it not introduced the restrictions, the EC would have excluded those products from the customs union. The Appellate Body considered that 'there are other alternatives available to Turkey and the European Communities to prevent any possible diversion of trade', for example rules of origin. The restrictions on imports from India were therefore not necessary for the formation of the customs union.¹³

Article XXIV of GATT therefore reflects an attempt by the drafters of GATT to balance the interests of countries pursuing RTAs with the rights of non-parties to benefits under GATT such as Most Favoured Nation treatment. The provision seeks to do so by requiring that such arrangements be essentially trade-creating by eliminating duties and other restrictive regulations of commerce on 'substantially all trade', while minimising the potential negative impacts on other countries.

Article XXIV has however proved problematic in its application. The term 'substantially all trade' has never been defined and it remains unclear whether this would equate to, for example, 90 per cent of trade, 80 per cent or even 60 per cent. It is also unclear to what extent the term covers potential trade (i.e. where existing barriers effectively prevent trade in a product) as opposed to current trade. The uncertainty relating to 'substantially all trade' and the degree of flexibility this accorded to RTA parties was considered by the WTO Appellate Body in *Turkey – Textiles*. Conscious of its judicial mandate to apply WTO Agreement provisions and not to interpret them, the Appellate Body clarified - not altogether helpfully - that the term was 'not the same as all the trade' but was 'something considerably more than merely some of the trade'.¹⁴ In the absence of further guidance by WTO Members, panels and the Appellate Body are likely to develop a flexible test that takes into account both qualitative and quantitative considerations on the specific facts of the case.¹⁵

Ambiguities in the application of Article XXIV – as well potential sensitivities over the legal implications of adverse findings – have ensured that while RTAs have been notified by parties for evaluation for GATT-conformity, neither the WTO Committee on Regional Trade Agreements nor the GATT CONTRACTING PARTIES before it have ever been able to complete an examination on an individual arrangement – with only one exception.¹⁶ The current rules and institutional arrangements are therefore limited in their ability to discipline RTAs.

This has important implications for the global trading system. As Australia has recognised, RTAs can undermine the multilateral trading system where they have

¹³ *Ibid.*, para 62 - 63.

¹⁴ *Ibid.*, para 48.

¹⁵ N. Lockhart and A. Mitchell, 'Regional Trade Agreements Under GATT 1994: An Exception and its Limits', in A. Mitchell (ed), *Challenges and Prospects for the WTO*, Cameron May (2005), at 236.

¹⁶ The exception being the Czech Republic and Slovak Republic customs union following the break-up of Czechoslovakia: Peter Sutherland et al, 'The Future of the WTO: Addressing institutional challenges in the new millennium', Report by the Consultative Board to the Director-General of the WTO (2004), para. 77.

‘poor trade-liberalising outcomes and trade distorting effects’.¹⁷ This may be where sensitivities on the part of governments lead to a carve-out of important products or sectors. This may also be where agreements provide for excessively long implementation periods for phasing-in market access commitments.

III. ARTICULATING A NATIONAL INTEREST PERSPECTIVE

Current debate on regional trade agreements has focused on their potential ‘multilateral’ impacts, in particular whether RTAs are ‘building blocks or stumbling blocks’ for the WTO and global trade liberalisation. Some commentators have expressed concerns that RTAs undermine the multilateral trading system and reduce global welfare by eroding the Most Favoured Nation principle, by diverting trade from non-parties and by diverting attention and resources from WTO negotiations.¹⁸ Others argue that RTAs support WTO objectives by promoting trade liberalisation, the development of new rules and closer integration between countries.¹⁹

While the debate is constructive, governments will ultimately adopt a pragmatic approach that turns on assessments of national interest. The paper focuses on the national interest considerations that influence the approach of governments to RTAs. These include economic interests such as improving market access, securing competitive advantage against other competitors, avoiding discrimination from future RTAs and promoting economic competitiveness through integration. They also include *non-economic* interests such as promoting national security, enhancing diplomatic influence and supporting regional peace and stability.²⁰ The implications (or otherwise) of RTAs for the WTO trading system is therefore only one factor in the matrix of considerations for governments.

Australia has adopted a pragmatic approach that seeks to balance the primacy of the multilateral trading system with recognition of the benefits that RTAs can deliver. The Australian Government’s 2003 Foreign and Trade Policy White Paper ‘Advancing the National Interest’ acknowledges that ‘the greatest global trade benefits will come from multilateral liberalisation’ and that the Doha Round is Australia’s ‘best hope for major trade gains’.²¹ The White Paper however states that the Government will ‘pursue pragmatically the advantages that free trade agreements offer Australia’ and that such agreements can ‘deliver important market access faster than a multilateral round’ and can ‘go deeper and further than the WTO’.²²

¹⁷ WTO Negotiating Group on Rules, Submission on Regional Trade Agreements by Australia, TN/RL/W/173/REV.1, 3 March 2005.

¹⁸ See for example, Jagdish Bhagwati *et al*, ‘Trading preferentially: theory and policy’, *The Economic Journal* (1998), 108; and Ross Garnaut, ‘An Australian – US free trade agreement’ (2002) 50 *Australian Journal of International Affairs*, at 23-141.

¹⁹ See for example, Daniel Griswold, ‘Free-Trade Agreements: Stepping Stones to a More Open World’, Trade Briefing Paper No. 18, Cato Institute Centre for Trade Policy Studies (2003).

²⁰ Japan’s Free Trade Agreement Strategy for example identifies five ‘criteria’ or national interest considerations in pursuing RTAs. These include: ‘economic criteria’, ‘geographic criteria’, ‘political and diplomatic criteria’, ‘feasibility criteria’ and ‘time-related criteria’. Ministry of Foreign Affairs of Japan, ‘Japan’s FTA Strategy’, October 2002, <http://www.mofa.go.jp/policy/economy/fta/strategy0210.html> (accessed 30 November 2005).

²¹ Department of Foreign Affairs and Trade, *Advancing the National Interest*, Foreign and Trade Policy White Paper (2003), at 53 and 58.

²² *Ibid.*, at 58-59.

A. MARKET ACCESS INTERESTS

Bilateral and regional free trade agreements play an increasingly important role in international trade. Such agreements are under negotiation by most of our trading partners and have proliferated around the world - particularly in the Asia-Pacific region. It is considered important to ensure that New Zealand is part of this activity thereby enabling it to strengthen economic links and obtain improved access to markets. Moreover, the preferential nature of such agreements means New Zealand exporters might be disadvantaged in markets where other countries have negotiated lower or zero tariffs.

- New Zealand Ministry of Foreign Affairs and Trade

While national trade policies have evolved beyond the narrow mercantilism of the 18th and 19th centuries, governments remain grounded in perceptions of exports as 'good' and imports as 'bad'. To that end, the language of empire and colonies has been replaced with that of modern government and politics - of domestic stakeholders, producer constituencies and trade deficits.

The GATT / WTO transformed the international trading system by establishing a framework for mutual and reciprocal trade liberalisation. In doing so, the system does not seek to alter the primacy of market access interests – couched in the traditional language of offensive exports and defensive imports – in national trade policy. It instead facilitates trade liberalisation by encouraging the greatest possible coincidence of national interests through the principle of reciprocity. Where trade interests fundamentally conflict, as in the issue of agriculture in the current Doha Round, they can prove intractable obstacles to negotiations.

'Mercantilist' market access interests therefore remain an important consideration in national trade policy. In relation to RTAs, market access interests include: (1) improving market access for exports by reducing trade barriers; (2) securing competitive advantage against non-RTA parties; and (3) avoiding potential discrimination from future RTAs.

1. Improving market access

Over the past 50 years, the GATT / WTO has achieved a substantial reduction in trade barriers leading to an expansion in global trade. Import tariffs and duties however remain significant barriers to trade. Industrial tariffs remain high in many developing countries with tariff escalation aimed at protecting local producers and promoting industrial development. Conversely, barriers to agriculture, clothing and textiles are prohibitive in many developed countries, with duties to protect local industries and employment from lower cost developing country producers.

Securing market access concessions and 'export wins' is therefore an important objective for governments in pursuing RTA negotiations, and in building domestic support for a government's trade policy agenda. Such gains can be significant where producers in the export market benefit from high levels of protection and duties are eliminated on 'substantially all trade'. Even in the absence of local production,

exporters can benefit from lower duties by capturing some of tariff rent in the form of higher prices.²³

As an example of the market access benefits that RTAs can provide, the Australia – New Zealand Closer Economic Relations (CER) eliminated all tariffs and quantitative restrictions between the parties by 1990. It is recognised in both countries that CER has led to the expansion of trade, investment, competitiveness and growth for Australia and New Zealand. In the last 20 years, CER has resulted in a five-fold increase in two-way trade and an expansion in two-way investment from \$56 million to \$1.5 billion.²⁴

The Australia – United States Free Trade Agreement has led to reductions in tariffs notwithstanding the already low general incidence of duties in both countries. Under the arrangement, the United States agreed to eliminate duties on over 97 per cent of industrial products and two-thirds of agricultural products as on 1 January 2005.²⁵ Australia agreed to eliminate duties on over 99 per cent of industrial and consumer products, with manufactured goods comprising 93 per cent of US exports to Australia.²⁶ It was estimated that this would save US manufactured goods exporters around US\$ 300 million in duties in the first year of the agreement.²⁷ It however remains to be seen the extent to which the Agreement will deliver significant trade outcomes for businesses and exporters.

An important advantage of RTAs is that they can deliver faster market access benefits than the multilateral system. While a successful WTO round offers the greatest potential gains in reducing global tariffs - and the only means of eliminating significant trade distorting measures such as agricultural subsidies - multilateral negotiations are invariably long and drawn-out affairs. The Uruguay Round of negotiations involved over four years of preparations and a further seven more years of negotiations before a final agreement came into force in 1995.²⁸ After an earlier failure at Seattle in 1999, the current Doha Round was launched in November 2001

²³ The extent to which the tariff rent flows to exporters as opposed to importers who ordinarily bear their cost will depend on a range of commercial factors. These include whether the exporter is the sole supplier in the market, the need to maintain existing importer relationships, and the trade-off between immediate returns and potential long-term benefits against local and third country competitors (such as increased market share).

²⁴ Department of Foreign Affairs and Trade website, <http://www.fta.gov.au/default.aspx?FolderID=283&ArticleID=229> (accessed 26 October 2005)

²⁵ Department of Foreign Affairs and Trade, 'AUSFTA – Facts at a Glance', http://www.dfat.gov.au/trade/negotiations/us_fta/fact_sheets/ausfta_at_a_glance.pdf (accessed 29 November 2005)

²⁶ United States Trade Representative, 'US – Australia FTA Summary of the Agreement – Fact Sheet', 15 July 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/US-Australia_FTA_Summary_of_the_Agreement.html (accessed 5 December 2005)

²⁷ *Ibid.* Similar tariff reductions were achieved as part of the Australia – Thailand Free Trade Agreement. Under the agreement, Thailand eliminated duties on 53 per cent of products on 1 January 2005, accounting for 78 per cent of Australian exports to Thailand. A further 41 per cent of duties will be phased to zero by 2010. See: Department of Foreign Affairs and Trade, 'Principal Outcomes on Trade in Goods', http://www.dfat.gov.au/trade/negotiations/aust-thai/goods_outcome_benefits_031003.html (accessed 29 November 2005)

²⁸ Sutherland *et al*, see n 16 above, para 1.

and is in its fifth year of negotiations with progress still stalled on the contentious issue of agriculture.²⁹

Delays in progressing a WTO round can be attributed to a number of factors. The large number of governments involved in multilateral negotiations, the divergence in their national interests (and negotiating ambitions), and the requirement of consensus decision-making, makes successful conclusion of a negotiating round extraordinarily difficult. The expansion of the current multilateral agenda – to include for example intellectual property, services, trade and the environment, as well as the ‘Singapore issues’ of investment, competition, transparency and trade facilitation – has also served to overload negotiations and deepen North-South divergence.

By comparison, RTAs can deliver faster gains where negotiations are conducted between countries with a high degree economic and political complementarity.³⁰ Between January 2004 and February 2005 alone, forty-three RTAs were notified to the WTO.³¹ These arrangements have delivered potential market access benefits for participants at a time when WTO negotiations remain stalled. From an Australian perspective, bilateral RTAs have delivered immediate benefits compared to the current WTO Doha Round. Since the launch of the Doha Round in 2001, Australia commenced and concluded negotiations on Free Trade Agreements with the United States, Singapore and Thailand.³² All three agreements are now in force with the potential to deliver commercial outcomes for businesses in the form of lower duties.

One criticism of the RTAs is that they potentially raise difficulties for traders by creating a ‘spaghetti bowl’ of overlapping preference arrangements and a multiplicity of customs rules. This can result in higher costs for international traders. While RTAs can give rise to transaction and compliance costs, these would normally be outweighed by the benefits from lower duties. The fact that business and exporter groups continue to support successive RTAs in, for example Australia and the United States, would appear to support this contention.

At a practical level, exporters normally work closely with importers to facilitate compliance with customs and other local requirements which may vary from country-to-country. Such requirements include for instance ingredient or country-of-origin labelling or technical regulations. RTAs can also have precedential effect on subsequent agreements, particularly where negotiated by the same country. This can encourage a confluence, if not necessarily a harmonisation, of provisions across different RTAs such as on customs facilitation and rules of origin.

²⁹ Frustration over delays to launch the eighth (Uruguay) round of multilateral trade negotiations in 1982 led to the United States abandoning its previous aversion to RTAs. The United States concluded Free Trade Agreements with Israel in 1985, with Canada in 1989, with the latter arrangement expanded to include Mexico in 1992 as NAFTA; B. Mercurio, ‘Should Australia Continue Negotiating Bilateral Free Trade Agreements? A Practical Analysis’ (2005), 27(3) *UNSW Law Journal*, at 675.

³⁰ The failure of the Asia-Pacific Economic Forum (APEC) to make meaningful progress on regional trade liberalization could be partly attributed to the diversity of economies involved.

³¹ Crawford and Florentino, see n 1 above, at 1.

³² For example, negotiations on an Australia – United States FTA was launched in March 2003 and concluded in May 2004, with the agreement coming into force in January 2005. Negotiations on the Australia – Singapore FTA were launched in November 2000, with the agreement coming into force in July 2003.

There is a need for caution in how governments frame the domestic debate on regional trade agreements. In pursuing RTAs, governments are often called upon to manage domestic sensitivities of a public sceptical of the notions of globalisation and free trade. Framing the debate exclusively in terms of ‘exports wins’ however gives rise to the language of ‘winners’ and ‘losers’, and ignores the broader economic benefits of RTAs. There is also a danger of the truth being subsumed by excessive political spin which can create unrealistic expectations of benefits.

2. Securing *preferential* benefits

Regional trade agreements – or more accurately, *preferential* trade agreements – discriminate in favour of RTA parties. This can confer a significant competitive advantage to exporters in RTA countries vis-à-vis third country producers. This is particularly in relation to mineral and agricultural commodities where exporters have limited scope for product differentiation. For such commodities, even a 2 per cent duty preference can provide a significant competitive advantage for countries such as Australia.

Securing preferential benefits for exporters is a strategic consideration for governments in approaching RTAs. The extent to which RTAs result in trade distortion as opposed to trade creation, and their overall impact on global welfare, however remains unclear. The United Kingdom’s accession to the European Union in 1973 for example resulted in an almost overnight collapse of Australia’s traditional agricultural export market. The establishment of NAFTA also led to Mexico and Canada becoming the first and second suppliers of textiles and clothing to the United States, ahead of East Asian economies that were the world’s lowest cost producers of such products.³³

Studies to model the net global welfare effects of RTAs have however proved complex.³⁴ In any event, it could be expected that the preferential advantages accorded by RTAs will, over time, be eroded by successive WTO negotiating rounds even if the complete elimination of duties remains a distant prospect. The WTO Sutherland Report accordingly recognised the importance of a successful Doha Round in minimising the discriminatory impact of RTAs.³⁵

3. Avoiding competitive disadvantage

Given that almost every WTO Member is currently pursuing RTAs, countries that exercise restraint risk significant disadvantage as competitors secure preferential

³³ Ross Garnaut, ‘An Australia – United States Free Trade Agreement’, Research Paper, ANU Research School of Pacific and Asian Studies (2001), http://rspas.anu.edu.au/economics/publish/papers/garnaut/2001_1214_AustUS.pdf (accessed 24 December 2005) at 12.

³⁴ The leading work in this field was by J. Viner, *The Customs Union Issue*, Carnegie Endowment for International Peace (New York, 1950).

³⁵ The Report considers: ‘[I]f old PTAs cannot be scrapped and new ones cannot be prohibited, the remedy to the spaghetti bowl of discriminatory preferences that they spawn would be to attack them indirectly through effective reduction of MFN tariffs and non-tariff measures in multilateral trade negotiations. Hence, the urgency of success in the Doha Round is manifest from this perspective – and perhaps a commitment by developed Members of the WTO to establish a date by which all their tariffs will move to zero should now be considered seriously.’ Sutherland *et al*, see n 4 above, para 104.

access to markets. Calls by some commentators that governments focus efforts on the WTO ignore the very real ‘Prisoners Dilemma’ confronting governments. These risks are for example recognised by Japan’s Free Trade Agreement Strategy which notes European Union and the United States’ efforts to create ‘large-scale regional trade frameworks’ and expresses the need for Japan to respond to these trends.³⁶

The Australian Government’s 2003 White Paper acknowledges national interest risks from non-participation in RTAs: ‘Many other countries are in the process of negotiating or seeking free trade agreements with our trading partners. This could pose risks to our interests if our competitors were to gain preferential access to our export markets. It is possible, too, that investment might be diverted from Australia to other countries that have negotiated preferential access with each other.’ The White Paper concludes that: ‘Inaction as others negotiate free trade agreements could risk an erosion of our competitive position in those markets.’³⁷

Australia’s dependence on bulk commodity exports makes it particularly vulnerable to the trade diverting effects of ‘discriminatory’ RTAs. Chile is for example the world’s biggest copper producer and an important competitor with Australian mineral and agricultural exports. In 2005, Chile concluded of a Free Trade Agreement with China which will abolish duties for 92 per cent of Chile’s exports to China.³⁸ This could provide Chile a significant competitive advantage in the Chinese market and provides further impetus for Australia’s own efforts to conclude a Free Trade Agreement with China.

A similar situation was noted by Daniel Griswold in relation to the United States and Chile. Prior to the United States – Chile Free Trade Agreement, US exporters to Chile were subject to a 6 per cent import duty. Competing exporters in the European Union, Canada and Brazil however enjoyed duty free access because of existing RTAs with Chile. The latter’s aggressive pursuit of RTAs, and the absence of a United States – Chile agreement, resulted in a significant fall in US market share for exports such as wheat, soybeans, corn, paper, plastics and fertilisers.³⁹ It is expected that conclusion of the United States – Chile Free Trade Agreement will go some way towards reversing this trend.

Fears of discrimination have therefore created momentum for the pursuit of RTAs in a situation akin to the ‘Scramble for Africa’ of the 19th century. For smaller countries, an RTA with a major economy can encourage other trading partners to undertake similar negotiations. Australia’s negotiation of a Free Trade Agreement with the United States was recognised as a ‘head turner’ in the region and was a factor in raising Chinese interest in a possible Australia – China Free agreement.⁴⁰ Negotiation

³⁶ Ministry of Foreign Affairs of Japan, n 20 above. The Strategy also predicts, somewhat pessimistically, that the current WTO negotiations could be the last multilateral round of negotiations prior to the creation of these regional frameworks.

³⁷ Department of Foreign Affairs and Trade, n 21 above, at 59.

³⁸ Paul Harris, ‘Chile and China head down the free trade route’, *The Age*, 30 November 2005, <http://www.theage.com.au/news/business/chile-and-china-head-down-the-free-trade-route/2005/11/17/1132016925857.html> (accessed 30 November 2005)

³⁹ Griswold, see n 19 above, at 5.

⁴⁰ For a contrary view, see R. Garnaut, ‘An Australia – United States Free Trade Agreement’, Research Paper, ANU Research School of Pacific and Asian Studies (2001),

of Free Trade Agreements with ASEAN countries Singapore and Thailand also encouraged Malaysia to pursue negotiations with Australia despite a previously difficult bilateral relationship.

RTAs can also provide impetus for WTO negotiations by promoting trade liberalisation between like-minded countries, and by encouraging participation in WTO negotiations by countries seeking to redress any loss of competitive advantages from RTAs. Japan's Free Trade Agreement Strategy considers that: 'FTAs increase Japan's bargaining power in WTO negotiations, and the results of FTA negotiations could influence and speed up WTO negotiations.'⁴¹ New Zealand's Free Trade Agreement Strategy also considers that RTAs enable New Zealand 'to set a faster pace towards opening markets by linking up with economies that share the same level of ambition'.⁴² In this way, RTAs 'can make a useful contribution to generating momentum for the WTO process by highlighting the benefits of liberalisation.'

Given the finite resources of government, some commentators have argued that the current focus by governments on RTAs necessarily diverts resources and attention from WTO negotiations. This potentially undermines the ability and commitment of countries to participate in WTO negotiations, and ultimately a successful conclusion of the Doha Round. A number of arguments might be made in response.

First, the argument presupposes that successful conclusion of the Doha Round is a question of resourcing as opposed to politics. Progress in the Doha Round will, ultimately turn on the United States and European Union's political willingness to provide an offer on agriculture acceptable to developing countries. It is unlikely to turn on the number of Australian, Chilean or Singaporean trade experts involved in WTO as opposed to bilateral trade negotiations. This recognition has also encouraged major trading powers like China to pursue a two-track policy to the WTO and RTAs.⁴³

Second, governments have expanded their negotiating capacity to meet increased international demands. In response to the additional resource demands from the Doha Round and expanded RTA activity, Australia's Department of Foreign Affairs and Trade established a new Office of Trade Negotiations and also undertook an extensive program of internal and external recruitment. In negotiating Free Trade Agreements, the Australian Government adopts a taskforce approach that draws upon expertise

http://rspas.anu.edu.au/economics/publish/papers/garnaut/2001_1214_AustUS.pdf (accessed 24 December 2005) at 21-22.

⁴¹ Ministry of Foreign Affairs of Japan, see above n 20.

⁴² Ministry of Foreign Affairs and Trade New Zealand, 'New Zealand's Approach to Free Trade Agreements/Closer Economic Partnerships/Strategic Economic Partnerships', July 2005, <http://www.mfat.govt.nz/foreign/tnd/ceps/nzapproachoftasjul05.html> (accessed 5 December 2005)

⁴³ David Hale writes: 'As China could soon be the world's leading exporter, she has a great strategic interest in promoting an open multilateral trading system rather than a world characterised by regional trade agreements. But China has limited capacity to resolve the issues which are now hampering the completion of the Doha trade round. Those issues do not centre on trade in manufactured goods. The great conflicts centre on agriculture, especially European and American subsidies for farmers, as well as various aspects of service trade. China will therefore pursue a two-track policy. She will encourage an open global trading system but also pursue regional FTAs for both economic and geo-political reasons.' David Hale, 'In the Balance: China's unprecedented growth and implications for the Asia-Pacific', Australian Strategic Policy Institute, February 2006, at 34.

from the Office of Trade Negotiations, the bilateral desks, as well as other government agencies.

Third, it would be incorrect to describe regionalism and multilateralism as a ‘zero sum game’ with mutually-exclusive choices. Governments have thus far demonstrated an ability and commitment to progress both multilateral and bilateral negotiations in parallel, and in pursuit of national interest objectives. Given the broad range of economic *and non-economic interests* that can be pursued through RTAs, they have become important instruments for governments as part of a comprehensive foreign and trade policy strategy.

B. STRATEGIC ECONOMIC INTERESTS

The principal negotiating objectives of the United States regarding trade-related intellectual property are ... to further promote adequate and effective protection of intellectual property rights, including through ...ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law.

- US Trade Promotion Authority, Section 2102(b)(4)

While regional trade agreements have traditionally been concerned with the elimination of tariffs or other duties between parties, contemporary RTAs cover a broader range of matters facilitating trade and economic integration. Second or third-generation RTAs include for example provisions on investment facilitation and protection, technical regulations, government procurement, as well as ‘non-trade’ issues such as labour and environment.

The economic interests in RTAs no longer relate exclusively to the narrow language of quotas and tariffs, but also encompass broader economic objectives such as integration and competitiveness. They also provide a diplomatic instrument for countries to achieve strategic trade policy objectives in a way that might not be possible in multilateral negotiations. For these reasons, Alan Oxley considers the traditional standard of approaching RTAs purely in terms of trade in goods as obsolete.⁴⁴

1. Broader and deeper integration

Regional trade agreements can promote a level of economic integration between countries not otherwise attainable under the current WTO framework. The potential benefits are significant and include increased investment, harmonisation of regulatory systems, reduced operating and transaction costs for businesses, the promotion of business activity, the transfer of skills and technology, access to global distribution networks and increased competitiveness. This is particularly in the era of globalisation where global barriers to goods have already been substantially reduced

⁴⁴ Alan Oxley, ‘Free Trade Agreements in the era of globalization: new instruments to advance new interests: the case of Australia’, APEC Study Centre, Issues Paper No. 22 (2002), at 1.

and where gains from economic integration can be secured by removing barriers to the movement of capital and labour, and by promoting greater competitiveness.⁴⁵

Economic integration was an important factor in the Australia - United States Free Trade Agreement. Given the general incidence of duties between the two countries was already low, the agreement is perhaps more significant in providing a means for deepening Australia's integration with the world's largest and most important economy. The potential benefits from the expansion of trade, investment and business activity are substantial with an early study predicting benefits of over A\$ 6 billion or a 0.7 per cent increase in real GDP.⁴⁶

A key outcome of the agreement was the chapter on investment. While investment is currently the subject of negotiations as part of the Doha Round, the WTO Agreements do not contain specific disciplines on investment other than the limited provisions in the Agreement on Trade-Related Investment Measures. The ITO historically, and the OECD subsequently, failed to deliver comprehensive multilateral rules on investment. This was perhaps most spectacular with the collapse of the Multilateral Agreement on Investment in 1998 after unprecedented opposition by over 600 anti-globalisation non-governmental organizations from 70 countries.⁴⁷

The United States is Australia's most important investment partner and largest source of investment. The United States is also Australia's most important destination for overseas investment. RTA disciplines on investment can therefore benefit business enterprises in both countries. Chapter 11 (Investment) of the Australia – United States Free Trade Agreement established a framework for facilitating and protecting investment. Protections for investors include National Interest rights (Article 11.3); Most Favoured Nation rights (Article 11.4); the 'customary international law minimum standard of treatment of aliens' (Article 11.5); as well as protection against expropriation and adequate compensation (Article 11.7).

Government procurement is another area that has been pursued by countries through RTA negotiations. Government procurement is currently exempted from the basic WTO disciplines such as the National Treatment obligation in Article III of GATT 1994. Limited disciplines are contained in the plurilateral Agreement on Government Procurement, which is binding only on a small number of WTO Members. Under the Australia – United States Free Trade Agreement, the United States agreed to make Australia a 'designated' country in US law, allowing Australian companies to bid in the US Federal Government procurement market. The government procurement provisions also bind the Australian Federal Government and all Australian States. At

⁴⁵ Oxley, see above n 44, at 2-3.

⁴⁶ Centre for International Economics, 'Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States', April 2004, http://www.dfat.gov.au/trade/negotiations/us_fta/economic_analysis_report/index.html (accessed 24 December 2005). The study must however be treated with caution given the actual outcomes of the agreement between Australia and the United States.

⁴⁷ Kenneth Dam, 'The Rules of the Global Game: A New Look at U.S. International Policymaking' (2001), at 175; cited in: Matsushita, Shoenbaum & Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford University Press 2003), at 523.

the time of writing, 31 US states have also agreed to participate in the arrangements, including California, New York and Pennsylvania.⁴⁸

An advantage of RTAs is that they can improve the global economic competitiveness of countries that are party to them. This can be by reducing trade barriers, reducing regulatory and business costs, creating larger internal markets, and promoting economies of scale. Economic competitiveness was an important factor in the launch of the ASEAN Free Trade Area in 1992. The initiative was a response by ASEAN governments to the growing economic dominance (and threat) of China. This had led to the diversion of trade and investment flows that would otherwise have benefited South East Asian countries.⁴⁹ European integration has also made EU Member countries more attractive to investment by US, Japanese and other third country firms.⁵⁰ To that end, eliminating barriers to trade within a region can encourage foreign investment attracted by a larger potential market.⁵¹

Finally, RTAs can provide a platform for countries to explore opportunities for further integration and liberalisation. This can include harmonisation of business and regulatory systems to reduce compliance and transaction costs, as well as facilitating the movement of business people. The Australia – United States Free Trade Agreement for example established a number of bilateral working groups. These provide a useful forum for both governments to examine ways to build on the existing agreement.

2. Strategic trade policy interests

Regional trade agreements can provide a useful diplomatic instrument for countries – particularly, large countries - to achieve strategic trade policy objectives in a way that might not otherwise be possible in multilateral negotiations. Examples include the use of RTAs by the United States to pursue investment and intellectual property objectives, and China’s use of RTAs to achieve recognition of market economy status.

2.1 Investment

As a leading capital-exporting economy, the United States has been active in pursuing investment facilitation and protection as part of RTA negotiations. The US Trade Promotion Authority Act identifies negotiating objectives on investment as including: reducing or eliminating foreign investment barriers; ensuring that foreign investors in the United States are not accorded greater substantive rights than US investors in the United States and securing rights comparable to those available under US legal principles and practice.⁵² Investment obligations have been included in the United

⁴⁸ Australian Minister for Trade, the Hon. Mark Vaile MP, ‘Australia – United States FTA Opportunities Continue to Expand’, Media Release MVT90/2005, 13 December 2005, http://www.trademinister.gov.au/releases/2005/mvt090_05.html (accessed 24 December 2005)

⁴⁹ The ASEAN Free Trade Area has been largely unsuccessful in stemming the diversion of trade and capital flows to China. Disagreements between ASEAN governments over protection of ‘national industries’ such as Malaysia’s car industry have proved to be major obstacles.

⁵⁰ Bernard Hoekman and Richard Newfarmer, ‘Preferential Trade Agreements, Investment Disciplines and Investment Flows’ (2005), 39(4) *Journal of World Trade*, at 961.

⁵¹ *Ibid.*, at 951.

⁵² United States Trade Promotion Authority Act of 2002, 19 USC 3801, Sec. 2102(b)(3).

States' recent Free Trade Agreements with Australia, Chile, Central America, Jordan and Morocco.⁵³

Investment chapters in RTAs typically provide for: national treatment (foreign investors to be treated no less favourably than local investors in the establishment, acquisition and operation of investments); Most Favoured Nation (not to discriminate against investors from the RTA party vis-à-vis investors from other countries); and protection against expropriation. They may also include dispute settlement mechanisms, such as 'investor-state' rights whereby an investor from one party can bring an action against the other party for non-compliance with RTA obligations. Where, however, countries have comparable legal systems, domestic legal mechanisms may already provide adequate protection for foreign investors and additional RTA processes are unnecessary. The Australia – United States Free Trade Agreement does not for example contain investor-state provisions over and above government-to-government processes.

Investment protections can encourage foreign investment, particularly to developing countries. Given investment decisions by multinational companies are made against a matrix of commercial return and sovereign risk, RTA provisions can reduce risk perceptions and increase investment flows in the absence of other incentives. Under NAFTA for example, Foreign Direct Investment to Mexico has doubled as a share of GDP as foreign investors sought to benefit from Mexico's access to its northern neighbours.⁵⁴ Many developing countries however remain suspicious of investment obligations which they perceive as an infringement of national sovereignty.

2.2 Intellectual property

The United States has been active in pursuing harmonisation of intellectual property protection with US laws and the stringent enforcement of national regimes through RTA negotiations. This reflects the United States' economic interests with the country accounting for 35 per cent of all international patent applications in 1994.⁵⁵

While US efforts have largely focused on developing countries, the United States has not been reticent to pursue intellectual property objectives with developed country partners. As part of the Australia – United States Free Trade Agreement, the United States secured a commitment by Australia to increase copyright protection from 50 years to 70 years after the life of the author. The forcefulness with which the United States pursued intellectual property issues in the negotiations, notwithstanding the fact that Australia already maintained an effective domestic protection regime, underlines the importance of the issue for US trade policy. Bilateral negotiations therefore allow the United States to negotiate with trading partners one-by-one to raise national levels of intellectual property protection. It might not otherwise be able to do so in multilateral negotiations involving the TRIPS Agreement.

⁵³ Hoekman and Newfarmer, see above n 50, at 949.

⁵⁴ *Ibid.*, at 961.

⁵⁵ This compares to 16 per cent for Japan, 12 per cent for Germany, 1.5 per cent for Australia and 1.4 per cent for China: WIPO, 'PCT Statistical Indicators Report: Annual Statistics 1974 – 2004', April 2005, http://www.wipo.int/ipstats/en/statistics/patents/pdf/yearly_report_2004.pdf (accessed 8 December 2005)

2.2 Market economy status

China has been successfully using RTA negotiations – and indeed the prospect of commencing negotiations - to pursue strategic objectives on anti-dumping. Anti-dumping is a matter of particular sensitivity for China, including in relation to actions by the United States and European Union against Chinese imports. These sensitivities relate to paragraph 15 of China’s Protocol of Accession to the WTO which provides for ‘non-market economy’ methodology in national dumping investigations involving Chinese product.

Paragraph 15 permits importing governments to use methodologies not based on domestic prices or costs in China if Chinese producers cannot show that market economy conditions prevail in the industry. In practice, the United States has applied ‘surrogacy’ whereby prices in a surrogate or third country – such as India or Mexico – may be used to determine the ‘normal value’ of the good. Given the higher level of input prices in these markets, this would normally lead to a finding of dumping against Chinese product and the imposition of anti-dumping duties.

China has been working to build general international consensus on its ‘market economy’ status through RTA negotiations. As preliminary to Free Trade Agreement negotiations, Australia and China concluded a Trade and Economic Framework in 2003. The Framework committed the parties to conducting a joint feasibility study into a possible Free Trade Agreement. Importantly, the Framework recognised ‘China’s tremendous achievements in establishing a market economy’ and committed Australia – during the course of the study - not to apply the ‘non-market economy’ provisions of China’s WTO Protocol of Accession.

The Framework also conditioned any future decision to negotiate a Free Trade Agreement on Australia’s formal recognition of China’s ‘full market economy status’. Australia has accorded this by no longer treating China as an ‘economy in transition’ under Australian anti-dumping legislation.⁵⁶ Similar concessions were attained by China in its Free Trade Agreement negotiations with other countries, such as Chile and New Zealand.

⁵⁶ Australian Department of Foreign Affairs and Trade, ‘Australia – China Free Trade Agreement Fact Sheet on Market Economy Status’, http://www.dfat.gov.au/geo/china/fta/facts/market_economy.html (accessed 15 December 2005)

C. POLITICAL AND STRATEGIC INTERESTS

An FTA with the United States offers us not just direct economic and commercial benefits, It also is the single greatest strategic opportunity, in foreign and trade policy, presented to Australia for many decades. Our hard work and persistence, over almost three years, has resulted in an opportunity to negotiate deeper integration with not only the world's largest economy, but also the world's pre-eminent strategic power.

- Australian Minister for Trade, Mark Vaile, 2003.

The last decade has seen something of a transformation in international trade relations. Increasingly, governments are approaching foreign and trade policy as mutually-supportive strands of the same instrument - a trend that draws parallels to the mercantilism of the 18th and 19th centuries and indeed the political/economic clash of the Cold War. This approach is most evident, for example, in the United States pursuit of RTAs as part of its 'Global War on Terror'.

Any examination of RTAs must therefore take into account (non-economic) political and strategic interests that motivate governments. Such interests include strengthening relationships with existing neighbours and allies, enhancing a country's regional diplomatic influence, and promoting regional peace and security.

1. Diplomatic and strategic interests

The object of diplomacy is the promotion of national interests through international means. The practice of diplomacy is therefore one of influence, with a country's effectiveness in securing its national interest objectives dependent on its ability to influence others. Regional trade agreements enhance a country's diplomatic influence by promoting economic integration between trading partners, and by promoting people linkages through a government-to-government framework. They also signify a desire to demonstrate a closer relationship between countries.⁵⁷

Diplomatic and strategic influence was a key objective in Australia's pursuit of a Free Trade Agreement with the United States. It is beyond the scope of this paper to provide a detailed analysis of depth of the Australia – United States relationship. The strategic benefits in concluding an agreement with Australia's closest political, economic and defence partner – and the world's most important economic and military power – are however apparent. This was captured in part by the Australian Government's 2003 White Paper: 'Australia's longstanding partnership with the United States is of fundamental importance. The depth of security, economic and political ties that we have with the United States makes this a vital relationship. No other country can match the United States' global reach in international affairs. Further strengthening Australia's ability to influence and work with the United States is essential for advancing our national interests'.⁵⁸

While it would appear intuitive, it is difficult to test the extent to which RTAs enhance a country's bilateral trade diplomacy, particularly in situations where

⁵⁷ Oxley, see above n 44, at 2.

⁵⁸ Department of Foreign Affairs and Trade, see above n 21, at 86.

competing national interests intersect on trade remedies. Australia's 'special relationship' with the United States did not, for example, prevent the US Administration from imposing damaging safeguard measures on Australian lamb imports following lobbying from domestic political interests. It did however assist in having Australian steel imports excluded from US safeguard measures on imported steel.⁵⁹ To that end, RTAs can provide additional protections on the imposition of trade remedies. Chapter 9 (Safeguards) of the Australia – United States Free Trade Agreement contains a provision that commits the parties to 'consider' excluding products from the other party from any global safeguard measure (Article 9.5). The scope of its application is however unclear given it is subject to disciplines under the WTO Agreement on Safeguards.⁶⁰

Bilateral trade agreements can also serve to promote a country's diplomatic interests at a regional level. The Australia - United States Free Trade Agreement had a wider regional effect and served to increase China's receptiveness for a similar arrangement with Australia. Australia's Free Trade Agreements with Singapore and Thailand also supported Australia's regional diplomacy. Pursued with countries with whom Australia already maintained close economic and defence relationships,⁶¹ they served broader foreign policy objectives by deepening Australian engagement with ASEAN in the face of previous Malaysian opposition. Indeed, the agreements – coupled with the departure of the Malaysian Prime Minister Mahathir Mohammed – helped transform Australia's relationship with the region that was otherwise affected by memories of the White Australia policy, adverse perceptions of the Australia – United States security relationship and Australian intervention in East Timor. Australia is currently negotiating with Malaysia on a possible Free Trade Agreement, and is engaged in broader negotiations with ASEAN alongside New Zealand.

Political and strategic considerations also explain Australia and China's interests in negotiating a free trade agreement. From Australia's perspective, China – alongside the United States – is a key partner in promoting regional peace and security in the Asia-Pacific region, particularly in relation to Taiwan and North Korea. China has emerged to become an engine of regional and global economic growth, and a key market for Australia's mineral exports. This was recognised by the Department of Foreign Affairs and Trade's 2003 White Paper which foreshadowed Australia's interest in pursuing a Free Trade Agreement: 'China's rising economic, political and strategic weight is the most important factor shaping Asia's future ... Building a stronger partnership with a growing and more international China is an important objective in Australian policy'.⁶²

⁵⁹ Both safeguard measures were applied prior to negotiation of the Australia – United States Free Trade Agreement.

⁶⁰ In *United States – Wheat Gluten*, both the panel and Appellate Body ruled that the United States had breached Articles 2.1 and 4.2 of the WTO Agreement on Safeguards when it excluded imports from NAFTA-partner Canada from the application of its safeguard measure despite including imports from all sources (including Canada) in its investigation on imports and the effects on the US domestic industry. WTO Appellate Body Report, *United States – Wheat Gluten*, WT/DS166/AB/R, adopted 19 January 2001, para. 95-96; WTO Panel Report, WT/DS166/R, adopted 19 January 2001, para.9.2.

⁶¹ The Singapore FTA also marked a political maturing of the bilateral relationship which experienced difficult periods during the 1980s and early 1990s.

⁶² Department of Foreign Affairs and Trade, see n 21 above, at 79.

From China's perspective, a Free Trade Agreement with Australia would provide additional economic security given the importance of Australian resource exports to fuelling the Chinese economy. It would also serve as a strategic counterpoint to Australia's relationship with the United States. In the event of conflict over Taiwan, a Free Trade Agreement would assert strong pressure on Australia to use its close US relationship to moderate the actions by the latter to secure a peaceful outcome to any dispute.

2. Promoting regional peace and security

As the Australia – China example suggests, regional trade agreements can support international peace and stability by promoting closer economic integration between countries and by expanding government and commercial linkages. RTAs make wars unprofitable by deepening economic integration and interdependence between countries. Given the traditional object of diplomacy is enhanced security, RTAs are an important foreign policy instrument of governments and a means of managing international relations.⁶³

The European Union remains the outstanding example of political and strategic interests. Security was the paramount concern of the founders of the European Community in the aftermath of the Second World War. The Common Market was promoted as a means of promoting economic and political integration, particularly between France and Germany, and in so doing halt the disastrous cycle of European wars. This purpose was recognised in the preamble to the 1951 treaty establishing the European Coal and Steel Community which stated as its object: 'To create, by establishing an economic community, the basis for broader and deeper community among peoples long divided by bloody conflicts.'⁶⁴

While some have criticised aspects of the European Union's trade policy, few would dispute European integration as one of the most important political achievements in modern history. The contribution to European and also global security and stability has been incalculable. No member of the European Union has gone to war with another in the past 50 years, a significant achievement given the previous two centuries of European history. The eastward expansion of the European Union now provides an opportunity to promote political and economic stability in the former Soviet bloc countries, with perhaps Russian membership as a long-term possibility.

European integration helps explain the apparent paradox in GATT between Most Favoured Nation and preferential discrimination. While the GATT evolved into an institution concerned with the technical language of tariffs and trade, its founding rationale was very much one of peace and security. The WTO Sutherland Report recalled the words of economist John Maynard Keynes on the negotiations at the end of the Second World War that led to the establishment of GATT. Keynes – and other leading government and private individuals – recognised that restoration of multilateral trade and discouragement of 'bilateral barter and every kind of discriminatory practice' would avoid the recent history of conflict. The alternative would be to return to the 1930s 'where separate blocs and all the friction and loss of

⁶³ Oxley, see above n 44, at 3 and 4.

⁶⁴ OECD, 'Regional Integration Agreements', January 2001, available at: <http://www.oecd.org/dataoecd/39/37/1923431.pdf>, accessed 24 December 2005, at 12.

friendship they must bring with them are expedients to which one may be driven in a hostile world where trade has ceased over wide areas to be cooperative and peaceful and where are forgotten the healthy rules of mutual advantage and equal treatment.’⁶⁵

The need to prevent a repeat what Keynes’ described as ‘separate blocs and all the friction and loss of friendship’ was reflected in the Most Favoured Nation principle which became the central pillar of multilateralism. At the same time, however, the GATT founders were fully conscious of efforts then underway on future European integration – in particular between France and Germany – and the importance this held for European and international security.

Political and strategic interests have driven other ‘regional’ RTAs, such as Mercosur, APEC and ASEAN.⁶⁶ These have made important contributions to regional peace by promoting dialogue and engagement between parties, by building regional confidence, and by promoting economic growth and development in member countries. By establishing a framework that facilitates trade and investment, RTAs can provide an economic counterpoint for countries otherwise affected with a history of enmity or conflict.

ASEAN was for example established in 1967 against a regional backdrop of decolonisation, divergent cultural and religious identities, minimal trade between countries, and ongoing military conflict. ASEAN had as its stated objectives the strengthening of economic and social stability in the region, national economic development, and regional peace and security.⁶⁷ Regional security was of particular concern given the recent ‘Confrontation’ between Malaysia and Sukarno’s Indonesia, ongoing political and racial tensions between Singapore and Malaysia after a failed attempt at union, and the spectre of Communism and the Cold War.

While originally a political and security arrangement, ASEAN’s economic focus has expanded with the establishment of a Preferential Trading Arrangement in 1977 and the ASEAN Free Trade Area (AFTA) in 1992. These arrangements support ASEAN’s objectives of regional peace and security by promoting regional trade and integration. The expansion of ASEAN to include Burma, Cambodia, Laos and Vietnam provides a means of promoting development and stability in these countries with a history of ethnic and ideological conflict.

Similarly, a potential RTA between China, Taiwan and Hong Kong could significantly contribute to stability in the Asia-Pacific. Tensions between China, Taiwan and the United States constitute perhaps the greatest source of potential conflict in the region. Alan Oxley suggests that while China and Taiwan’s accession to the WTO will promote economic interdependence between the two countries and help manage economic disputes through a common set of rules, this can be further enhanced with a China – Taiwan – Hong Kong Free Trade Agreement.⁶⁸

⁶⁵ Sutherland *et al*, see n 16 above, para 107.

⁶⁶ *Ibid.*, at 13. MERCOSUR was for example an attempt to reduce military tensions between Argentina and Brazil.

⁶⁷ Preamble to the ASEAN Declaration (‘Bangkok Declaration’) 1967, Bangkok, 8 August 1967.

⁶⁸ Oxley, see above n 44, at 6.

3. Super blocs and international security

The emergence of truly regional trading blocs such as the European Union, NAFTA and ASEAN has however raised concerns about their potential impact on international security. Such arrangements can raise international tensions by discriminating against other countries. Indeed, it was in response to these concerns that the GATT founders established unconditional Most Favoured Nation as a fundamental pillar of the multilateral trading system.

The argument however appears less persuasive today than historically given the depth of integration and interdependence in the global economy. Where empires and trading blocs could in the past exist in 'splendid isolation' provided they had access to key strategic resources, specialisation and technological development have resulted in a far more diffuse pattern of global trade. For a modern international economy, access to new technology, information flows and the broadest range of consumer products has become no less important than strategic resources.

This trend is reflected for example in the European Union's experience over the past 20 years. In 1980, intra-EU trade represented around 58 per cent of total EU trade. As EU integration progressed in the 1980s and 1990s, this increased to 65 per cent of total EU trade in 1992 before falling to below 60 per cent in 2002. The fact that trade with non-EU parties continues to comprise 40 per cent of total EU trade underlines the degree of integration with the global economy of even the most expansive RTA.⁶⁹

In any event, regional trade agreements are, with a few exceptions, being pursued by countries on an individual bilateral basis. This includes countries already party to regional trading blocs. Membership of NAFTA has not prevented the United States from pursuing an aggressive RTA strategy with other countries. Similarly, ASEAN membership has not prevented Singapore, Thailand and Malaysia from pursuing Free Trade Agreement negotiations with Australia and other trading partners.

Nor is this trend limited to free trade areas as opposed to customs unions. Members of the Middle East Gulf Cooperation Council (GCC) have been active in pursuing an independent RTA strategy. This in part reflects frustration by some GCC countries at the slow pace of economic reform within the group and the need to provide an external impetus for reform.

The multiplicity of bilateral RTAs being negotiated therefore serves to moderate the discriminatory impact of regional trading blocs. To the extent that a regional trading bloc could be described as an exclusive gentlemen's club, its members would appear far from reserved in frequenting other establishments.

⁶⁹ Tommaso Padoa-Schioppa, 'Speech at the Bank of Korea on Regional co-operation: experiences in East Asia and Europe', by Member of the Executive Board of the European Central Bank, Seoul, 1 July 2003, <http://www.ecb.int/press/key/date/2003/html/sp030701.en.html> (accessed 1 December 2005)

4. Regional trade agreements and the ‘Global War on Terror’

The events of September 11 and the invasion of Afghanistan and Iraq fundamentally transformed US foreign policy and indeed international relations. The ‘Global War on Terror’ has become the United States government’s overriding international and domestic priority. This has had a profound impact on other policy agendas including the United States’ approach to regional trade agreements.

The United States is actively pursuing RTAs as a means of encouraging economic development, political reform and stability in Middle Eastern countries. By providing access to US markets, the strategy aims to combat the domestic (economic) causes of terrorism and promote liberal political development. The US government’s September 9/11 Commission Report recognised the importance of economic openness and the linkages between international trade, economic development and political reform.⁷⁰ The Report noted the United States’ long-term goal of a Middle East Free Trade Area or MEFTA by 2013 and US efforts in pursuing RTAs with Middle Eastern nations ‘most firmly on the path to reform’.⁷¹ The Report recommended that: ‘A comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children’s future.’⁷²

The United States has concluded Free Trade Agreements with Israel, Jordan, Morocco, Bahrain and Oman, and is currently negotiating similar agreements with the UAE. Morocco, for example, is not a major trading partner of the United States and the potential benefits of an RTA would be far greater for Morocco than the United States. The country is however considered a moderate and pro-reform country in the Arab World and an RTA serves United States foreign policy objectives.⁷³

Similarly, the United States’ Free Trade Agreement with Jordan has delivered substantial economic benefits to the latter, including a more than ten-fold growth in exports from US\$ 31 million in 1999 to US\$ 412 million in 2002.⁷⁴ The benefits have been particularly significant in the labour-intensive sector of textiles and clothing, which supports the employment-creating objectives of the agreement.⁷⁵

⁷⁰ ‘The policies that support economic development and reform also have political implications. Economic and political liberties tend to be linked. Commerce, especially international commerce, requires ongoing cooperation and compromise, the exchange of ideas across cultures, and the peaceful resolution of differences through negotiation or the rule of law. Economic growth expands the middle class, a constituency for further reform. Successful economies rely on vibrant private sectors, which have an interest in curbing indiscriminate government power. Those who develop the practice of controlling their own economic destiny soon desire a voice in their communities and political societies.’ 9/11 Commission Report, July 2004, http://www.9-11commission.gov/report/911Report_Ch12.pdf (accessed 8 December 2005) at 378

⁷¹ *Ibid.*

⁷² *Ibid.*, at 379.

⁷³ Griswold, see above n 19, at 12.

⁷⁴ *Ibid.*

⁷⁵ Daniel Griswold writes for example on the link between open markets and open societies: ‘Increased trade and economic integration promote civil and political freedoms directly by opening a society to new technology, communications and democratic ideas. Economic liberalization provides a counterweight to governmental power and create space for civil society. And by promoting faster growth, trade promotes political freedom indirectly by creating an economically independent and

More broadly, the United States has pursued RTAs for ‘Marshall Plan’ objectives of promoting economic development and political stability. An example is the United States – CAFTA agreement. While Central America was a major international hotspot at the height of the Cold War and a major challenge to US foreign policy, each of the CAFTA countries is today peaceful with a functioning multiparty democracy with an elected government.⁷⁶ The United States – CAFTA agreement therefore aims to consolidate ‘Central America’s Freedom Revolution’ by promoting access to US markets, and growth and investment in CAFTA countries.⁷⁷ Unlike the Marshall Plan, however, RTAs do not require direct capital contributions by the United States Government – an important advantage in the face of an increasingly hostile Congress.

The United States has also used RTAs as a means of rewarding and strengthening allies and (indirectly) punishing opponents.⁷⁸ It is significant that the United States’ first Free Trade Agreement was with Israel, concluded in 1985. While both the United States and Australian Governments have strenuously denied any linkages between the two, it would be manifestly naive to hold that Australia’s support for the US-led invasion of Iraq had no effect in enhancing Administration and Congressional support for a Free Trade Agreement, especially given the contentious issue of agriculture. This was evident for example in public and private statements of support by Congressmen during the intense lobbying for approval of the final agreement.

By comparison, New Zealand’s vocal opposition to the war in Iraq, and the country’s continuing ban on visiting nuclear warships, has effectively placed it near the end of the queue in negotiations involving the United States.⁷⁹ This is despite the New Zealand government’s strongly expressed desire to pursue a Free Trade Agreement, and the fact that a bill authorizing negotiation of a Free Trade Agreement and expedited congressional consideration was introduced in the US Senate in May 2001.⁸⁰

There are potential benefits for Australia in pursuing a Free Trade Agreement with Indonesia. As a newly democratic nation, Indonesia faces immense political,

politically aware middle class.’ D. Griswold, ‘Trading Tyranny for Freedom: How Open Markets Till the Soil for Democracy’, Trade Policy Analysis Paper No. 26, Cato Institute Centre for Trade Policy Studies (2004), at 1.

⁷⁶ Daniel Griswold, ‘The Case for CAFTA: Consolidating Central America’s Freedom Revolution’, Trade Briefing Paper No. 21, Cato Institute Centre for Trade Policy Studies (2005), at 9.

⁷⁷ See also, Griswold, above n 19.

⁷⁸ When asked whether the United States used Free Trade Agreements to reward allies, former US Trade Representative Robert Zoellick said: “Clearly on the non-economic side, it helps to have a positive and friendly relationship.” ONE News, ‘Friendship influences US policy’, 23 July 2003, http://onenews.nzoom.com/onenews_detail/0,1227,207861-1-8,00.html (accessed 29 December 2005)

⁷⁹ Public comments by New Zealand Prime Minister Helen Clark that the invasion of Iraq would not have occurred had Democrat candidate Al Gore won the 2001 US election were not helpful. Commenting on the United States refusal to progress a Free Trade Agreement with New Zealand, US Trade Representative Robert Zoellick said: “There’s been some things done recently that would make (a free trade agreement) harder to carry” to Congress. ONE News, ‘No free trade deal with US’, 22 May 2003, http://onenews.nzoom.com/onenews_detail/0,1227,191975-1-7,00.html (accessed 29 December 2005)

⁸⁰ United States – New Zealand Free Trade Agreement Act of 2001, 107th Congress, 1st Session, S.943, 23 May 2001.

economic and social challenges. As Australia's nearest and most populous neighbour, Indonesia has critical importance for Australia's long-term security. A Free Trade Agreement that provides Indonesia immediate and preferential access to Australia – such as to Australia's protected clothing and footwear markets - could assist in combating poverty and political extremism. As a stand-alone bilateral agreement, an Australia – Indonesia Free Trade Agreement would also provide an institutional framework for improving people and government links, in a way that a broader AFTA – CER arrangement would not.⁸¹

4. Power disparity and developing countries

One criticism of RTAs is that they can place smaller developing countries in a disadvantaged bargaining position compared to a WTO multilateral round. The same concerns would also apply in negotiations between a middle trading power like Australia and the United States / China. Unlike in the WTO, smaller countries negotiating RTAs are limited in their ability to form negotiating blocs – such as the Cairns Group - to pursue collective interests in sensitive sectors. They are also limited in the amount of 'negotiating coin' they can offer in securing reciprocal market access concessions from the other party. This is a particular disadvantage where their export interests are confronted by entrenched domestic interests in the developed country.⁸²

Diplomatic and geo-strategic interests can partly redress this by enhancing a developing country's attractiveness as a potential RTA partner. Examples include Australia's interest in negotiating a Free Trade Agreement with a much smaller economy in Singapore, China's interest in negotiating a Free Trade Agreement with Australia, and the United States' negotiating an agreement with the Central American Free Trade Agreement (CAFTA) countries.

In any event, arguments on the power disparity between developed / developing countries understate the ability of developing country governments to make determinations of their own national interests in both pursuing – and concluding - an RTA with a more powerful economy. A decision to conclude an RTA is ultimately on the basis of the additional benefits it would provide over the *status quo*, and not whether the final package met all of the country's negotiating objectives. A pragmatic objective for countries negotiating RTAs should therefore be to secure a final package that represents the 'best possible outcome *in the available circumstances*'.

⁸¹ There are however considerable political obstacles in pursuing such an arrangement. Antipathy remains strong in some sections of Indonesia over Australia's intervention in East Timor. Other tensions in the bilateral relationship include Australian drugs accused in Bali and Indonesian illegal fishing in Australian waters.

⁸² The United States for example refused to provide meaningful market access on sugar as part of its free trade agreement negotiations with Australia or the Central American Free Trade Agreement (CAFTA) countries.

IV. REFORMING THE WTO RULES

The paper has shown that governments pursue regional trade agreements for a broad range of national economic and non-economic interests. These include economic interests such as improving market access, securing competitive advantage against other competitors, avoiding discrimination from future RTAs and promoting economic competitiveness through integration. They also include non-economic interests such as promoting national security, enhancing diplomatic influence and supporting regional peace and stability. The potential (adverse) impact of RTAs on the multilateral trading system is only one factor in the matrix of considerations.

Calls by some observers for governments to show restraint in pursuing RTAs may therefore be impractical. It is for this reason that the WTO Sutherland Report recognised that ‘old PTAs [Preferential Trade Agreements] cannot be scrapped and new ones cannot be prohibited’ and that the only way to address them is ‘to attack them indirectly through effective reduction of MFN tariffs and non-tariff measures in multilateral trade negotiations’.⁸³ There is nevertheless scope for clarifying the existing WTO rules, and strengthening the institutional WTO arrangements relating to RTAs.

A. Clarifying and improving the existing WTO rules

Article XXIV of GATT 1994 is currently being examined as part of the Doha Round, with negotiations ‘aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements’.⁸⁴ Australia has suggested changes to Article XXIV to further define the meaning of ‘substantially all trade’ and to provide additional disciplines on implementation periods.

First, Australia has proposed that ‘substantially all trade’ be defined as eliminating all duties on a minimum of 95 per cent of tariff lines at the six digit level of the Harmonised System. Countries would however have the flexibility of a ten year implementation period as well as the ability to exclude from commitments 5 per cent of tariff lines – provided the second condition below is met.⁸⁵ This would support both the trade liberalising objectives of the Article XXIV exception while according adequate flexibility for countries to exclude the most sensitive products.

Second, Australia has proposed a standard that at least 70 per cent of tariffs at the six digit level are eliminated on entry into force of an RTA. Duties must be eliminated on at least 95 per cent of all tariff lines at the six digit level within 10 years after entry into force of the agreement.⁸⁶ A ten-year implementation period would accommodate existing practice in RTAs providing for transitional periods notwithstanding that such periods are not permitted under Article XXIV of GATT 1994. Under the current rules, only agreements notified as interim agreements can provide for implementation

⁸³ Sutherland *et al*, see above n 16, para 104.

⁸⁴ Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001, para. 29.

⁸⁵ WTO Negotiating Group on Rules, ‘Submission on Regional Trade Agreements by Australia’, TN/RL/W/180, 13 May 2005, para 4-6.

⁸⁶ *Ibid.*, para 7-10.

periods. 'Final' agreements notified under Article XXIV must meet the requirement of eliminating duties on substantially all trade *at the time of entry into force*.⁸⁷

The proposals could go some way towards strengthening the existing WTO disciplines by ensuring that RTAs are genuinely trade liberalising and comprehensive. They would also ensure that agreements deliver immediate liberalisation and not 'backload' commitments to lengthy implementation periods.⁸⁸

These concerns were evident in recent agreements involving the United States and agriculture. Under Australia – United States Free Trade Agreement, the US quota on imports of Australian beef would only be removed after 18 years, after which time no quota and no out-of-quota tariff would apply.⁸⁹ The United States – CAFTA Free Trade Agreement provides for a 20-year phasing period for US tariffs on dairy products.⁹⁰ Such outcomes serve to undermine the market access basis of RTAs and the justification for the Article XXIV exception. They also entrench domestic protectionist interests and can have a precedential effect on future multilateral and bilateral negotiations.

B. Strengthening the institutional arrangements

The WTO Committee on Regional Trade Agreements (CRTA) currently has responsibility for evaluating individual RTAs and to undertake an ongoing work program on the implications of RTAs for the multilateral trading system. As of September 2005, 141 agreements are currently being examined by CRTA, a considerable workload given the breadth and detail of the agreements.⁹¹ With one exception, no examination report has in the past been finalised because of a lack of consensus. This could be attributable in part to ongoing disagreement between WTO Members on the meaning of key provisions in Article XXIV of GATT 1994 and concerns about the potential implications of CRTA report findings for dispute settlement processes.⁹²

A possible solution could be to amend Article XXIV to formalise the institutional basis and mandate of the CRTA, and to provide that CRTA reports are concluded on a 'without prejudice' basis. The exclusion of CRTA reports from potential dispute settlement proceedings could encourage WTO Members to participate more fully in the CRTA process and reduce the circumstances in which RTA-parties feel compelled

⁸⁷ *Ibid.*, para 18.

⁸⁸ *Ibid.*, para 8.

⁸⁹ Australian beef exports will have access for an additional 15,000 tonnes of beef in year 2 of the Agreement, increasing to 70,000 tonnes in year 18, and then effectively free trade. In-quota tariffs will be eliminated immediately, and over-quota duties will be phased out from years 9 to 18 of the Agreement: Department of Foreign Affairs and Trade, 'Australia – United States Free Trade Agreement: Agriculture Fact Sheet', http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/03_agriculture.html (accessed 12 December 2005)

⁹⁰ United States Trade Representative, 'Central American – Dominican Republic – United States Free Trade Agreement: Overall Agriculture Fact Sheet', March 2005, <http://www.fas.usda.gov/info/factsheets/CAFTA/overall021105a.html> (accessed 12 December 2005)

⁹¹ WTO Committee on Regional Trade Agreements, 'Report (2005) of the Committee on Regional Trade Agreements to the General Council', WT/REG/15, 3 November 2005, para. 5.

⁹² WTO website, 'Work of the Committee on Regional Trade Agreements (CRTA)', available at: http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (accessed 12 December 2005)

to block consensus. While there is a risk of WTO panels and the Committee arriving at different conclusions, this risk is low compared to the benefits that the process would provide in terms of greater transparency.

The WTO has in the past adopted instruments on a ‘without prejudice’ basis. In 2000, the WTO Committee on Sanitary and Phytosanitary Measures adopted ‘Guidelines to Further the Practical Implementation of Article 5.5’ of the SPS Agreement. The Guidelines are intended to assist governments in implementing Article 5.5 and are expressly stated to ‘not add to nor detract from the existing rights and obligations of Members under the SPS Agreement nor any other WTO Agreement’ and ‘not provide any legal interpretation or modification to the Agreement itself’. The Guidelines are also stated to be ‘without prejudice to the right of a Member to determine its appropriate level of sanitary and phytosanitary protection against risks to human life or health, or to animal and plant life or health’.⁹³

The WTO Sutherland Report also recommended the adoption of an equivalent Trade Policy Review Mechanism of individual RTAs.⁹⁴ This would provide a process by which WTO Members could regularly review individual RTAs and their external impacts, and improve transparency. It is however unclear to what extent this process will involve additional time and resources on the part of WTO Members and the Secretariat. Given the number of RTAs being notified to the WTO, it would be impractical to conduct a detailed review of every RTA – notwithstanding the existing mandate of the CRTA.

CONCLUSION

Examining the national interest considerations that comprise a government’s approach to regional trade agreements is akin to gazing at a stained glass window. The image is multi-faceted, with individual shards of glass coloured by a range of trade, economic, political and strategic interests. Together, these shards of glass compose a larger picture which could be termed ‘national interest’.

Current debate on regional trade agreements has largely focused on their multilateral impacts. While this has been constructive, governments will ultimately adopt a pragmatic approach that turns on assessments of national interest. These interests include traditional trade interests of improving market access, securing competitive advantage against other competitors, and avoiding discrimination from future RTAs. They also include broader economic, political and strategic interests such as promoting economic integration, improving global competitiveness, enhancing diplomatic influence and supporting regional peace and stability.

The approach of governments to regional trade agreements will accordingly be driven by assessments of national interest as opposed to any preference or prejudice for regionalism or multilateralism. It would be incorrect to describe the two as a ‘zero sum game’ and governments have thus far shown an ability and commitment to progress both multilateral and bilateral negotiations in parallel, and in pursuit of national interest objectives. Given the economic and non-economic interests being

⁹³ WTO Committee on Sanitary and Phytosanitary Measures, ‘Guidelines to Further the Practical Implementation of Article 5.5’, G/SPS/15, adopted 21-22 June 2000.

⁹⁴ Sutherland *et al*, see above n 16, para 105.

pursued, concerns about the potential (adverse) WTO impact of RTAs will not, alone, serve to restrain governments.

Pragmatism and realism therefore dictate that regional trade agreements will increasingly constitute a parallel legal framework to the WTO in international trade relations. For middle trading powers like Australia, RTAs provides opportunities for participation and significant risks for non-participation. For this reason, Australia should continue to pursue RTAs as part of a comprehensive foreign and trade policy strategy. If, in the words of the authors of the WTO Sutherland Report, 'MFN is no longer the rule; it is almost the exception', governments have little to gain and much to lose by departing from the current trend.