The Howard Government's Legacy in International Trade and Investment

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I. Introduction

It is a valuable although daunting task to attempt to assess the legacy of a particular government across a broad spectrum of legal issues, in this case, pertaining to all aspects of international law. This article concentrates on international trade and investment law and policy as one element of that endeavour.

The task is daunting, in the main, because there are a number of methodological challenges in any attempt at a critique of a government's trade and investment law initiatives and performance. Many readers will have differing views about the validity or otherwise of policy aspirations in these areas. For the more extreme critics of the international commercial regime, international trade and investment treaties, whether multilateral or regional, are simply tools of globalisation, which in their view, unduly interfere with democracy, the rights of civil society and too often limits rather than supports the attainment of human rights. To such critics, promotion of trade liberalisation by both the Howard government and the recent Labor government was a distinctly suboptimal policy ideal.

Even for those who instead adopt the mainstream economists' view that specialisation and trade liberalisation holds out the greatest opportunity for efficient allocation of resources, in turn leading to the potential for greater wealth and opportunity for all, there is still the need to accept that much depends on the legal and political infrastructure within any country and the ability of international negotiators to achieve efficient outcomes in the face of relentless rent-seeking by vested interests. In addition, economists acknowledge that increasing total wealth does not guarantee that the wealth will be distributed in ways that are considered fair by whatever philosophical paradigm that is to be determined.

There is also the question as to who should truly be attributed with the outcomes of particular initiatives. Both regional and multilateral negotiations involve a range of governments and their bureaucracies. Because legal aspects of trade and investment policy are concerned with the nature and content of agreements entered into with other nation states, much is dependent on the attitudes of those other states. A proper evaluation of outcomes must also consider the likely cost-benefit results of differing policy options, not just those actually adopted. Hence it is difficult to assess accurately the performance of the Howard

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government and its bureaucrats without having a clear understanding of the gains that could have legitimately been made by them under alternative strategies.

Furthermore, there is a need to consider by what criteria outcomes are to be determined. We would normally assess all legal policy developments from the perspective of fairness and efficiency, the former being a philosophical concept, the latter a matter of economic assessment. An important aspect of the philosophical endeavour is to determine whose interests ought to be represented. For example, international legal initiatives that might disadvantage Australia to some degree but which would increase world welfare would be supported on economic grounds of Pareto efficiency,[1] although philosophers may disagree on the justice behind such a result.[2] Human rights activists will commonly argue that parochial governmental decisions, even if they are wealth maximising for the government concerned, are not appropriately in aid of the development of worldwide human rights.

A consideration of a range of criteria by which to assess outcomes also reminds us that there are inevitably going to be trade-offs between conflicting values and problems in making accurate assessments in the world of second best.[3] The economic theory of second best points out that reform in the direction of an ideal that does not meet the ideal, is not necessarily beneficial on balance. Such a partial shift needs to be analysed on a cost-benefit basis.

In analysing the initiatives and outcomes, attention also needs to be given to what are the ultimate goals. Are the rules, principles and systems to be judged on whether they are good economics? Is that to be determined on an international or national basis? Are they judged on whether they are good politics, by whatever that notion is to be measured? Under what theory of international political relations is the development to be assessed? Are they judged on whether they work effectively as a legal regime encouraging compliance with agreed norms? Is effective legal compliance with a poor economic policy a good thing? If each criterion may be relevant to some degree, what trade-off is appropriate where valid goals conflict? This points to another complication. While it is natural to break down the various categories of assessment of the Howard government's legacy in order to at least be manageable, there is inevitable overlap. As many commentators discussed below

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1 A Pareto efficient solution is one where total efficiency gains outweigh any losses so that the winners can fully compensate the losers and the society as a whole is better off.

2 Eg, under a Rawlsian paradigm such a potentially utilitarian outcome could be seen as unjust, where justice is measured by how a society treats its most disadvantaged. See J Rawls, *A Theory of Justice* (1972). At first, many human rights advocates thought that Rawls' theory would imply an obligation on developed countries to support developing countries. Rawls explained why in his view this was not so in J Rawls, *The Law of Peoples* (1999). Thomas Pogge has taken issue with this view in, T Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002). See further for the Pogge-Rawls debate: R Crisp and D Jamieson, 'Egalitarianism and a Global Resources Tax: Pogge on Rawls' in V Davion and C Wolf (eds), *The Idea of a Political Liberalism: Essays on Rawls* (2000) 90.

3 J P Lipsey and K J Lancaster, 'The General Theory of Second Best' (1956-7) *Review of Economic Studies* 24, 33-49.

note, trade policy is often an aspect of broader international relations. An overriding question is whether a paper of this nature should concentrate on the legal detail of any developments or instead, as this paper seeks to do, look at the broader interdisciplinary perspective.

Another complication in terms of differences in view, as to the optimal policies that might be adopted and the appropriate legal mechanisms for this purpose, is the broader coverage of modern trade and investment agreements. Early multilateral trade agreements were primarily concerned with trade in goods and only then in tariffs versus extreme forms of protectionism. Most breaches were relatively straightforward and were hard to justify on any policy or legal grounds. Modern agreements are much broader and at least in a rudimentary fashion, attempt to explain how trade and investment liberalisation is to sit alongside other important and arguably paramount goals. Thus we now see multilateral and regional agreements covering trade-related aspects of environment, health and culture, either through direct norms or indirectly where such norms are expressed as exempting categories from trade commitments. Investment protection agreements have been particularly sensitive. Regional initiatives have seen significant advances in the protection of investment rights. At the extreme this has seen some highly contentious disputes between private investors and nation states, with the former arguing that certain otherwise meritorious social regulation initiatives are nevertheless indirect expropriations of an investment, giving rise to obligations of compensation.[4]

Another methodological challenge in terms of a discrete analysis of the Howard government's legacy is that much of Australia's international trade policy has been effectively bipartisan in recent years, notwithstanding that political rhetoric might assert otherwise. When the Howard government came into office in 1996, Australia was comfortably intertwined in the multilateral trade system, where it had been since Chifley's administration in the post-war reconstruction. Trade policy also bore the marks of the Hawke-Keating administration. Both of these Labor Prime Ministers were champions of the multilateral system, having been major players in the establishment of the Cairns Group and the Asia-Pacific Economic Cooperation Forum (APEC), and having undertaken extensive unilateral trade reforms in the 1980s and 1990s. Earlier, the Whitlam Labor government had also unilaterally reduced tariffs by 25 per cent in July 1973.

These shifts, prior to the Howard government, were no doubt inspired by policy advice from Treasury and Department of Foreign Affairs and Trade officials and the developing challenges and perceived potential benefits of a more integrated global economy. The broad policy advice from these key ministries did not shift as and when the Howard government took office. Thus, because the Howard

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4 See eg *Metalclad v Mexico*, ICSID Decision of 25 August 2000, <www.worldbank.org/icsid>; *SD Myers, Inc v Canada*, Partial Award, reprinted in 40 ILM 1408 (2001). A more restrained approach that arguably represents the current dominant view is found in *Methanex Corp v United States*, Final Award of the Tribunal on Jurisdiction and Merits, reprinted in (2005) 44 ILM 1345.

government's views were largely in sync with these policies, little can meaningfully be said from an analysis of a broad pro-trade policy perspective.

What did distinguish the Howard government was significant activity in relation to bilateral trade and investment agreements, most particularly the successful conclusion of an Australia-US Free Trade Agreement (AUSFTA).[5] This article will therefore concentrate on an analysis of this shift in focus, with a view to a critical evaluation of this most distinctive legacy of the Howard government in the international trade and investment law arena.

Even this more narrow focus can be problematic for a range of reasons. Governments actively involved in international trade regulation must continually consider the relative benefits and detriments of multilateralism versus regionalism. Their views are invariably dependent upon the potential for multilateral developments, which always remain the first best option. From a legal regulatory perspective, a comprehensive and uniform multilateral agreement will always be better than a tangled web of differential bilateral agreements. Nevertheless, when circumstances do not allow for significant multilateral developments, attention will naturally be drawn to regional and bilateral initiatives. The important point is that a government that is seen to embark upon this route is not necessarily seeking to promote a key policy shift overall, but may instead be responding to short-term constraints beyond its control. Leading commentators had in fact painted an alarming picture many years ago of a future three-bloc world where there would be mutual discriminatory trade between the European Union (EU), a western hemispheric free trade agreement (FTAs) of the Americas and an East Asian bloc. Under such a daunting scenario, it would be natural for Australia to look to protect itself with both regional and United States engagement.

Furthermore, success or otherwise within such negotiations depends very much upon the respective power balances. Australia, as a mid-tier economic power would naturally face a significant power imbalance in any negotiation with the United States regardless of which political party was in power in Australia during the currency of the negotiations. The outcome of negotiations will also be heavily dependent on the abilities of the bureaucracies involved and may even depend to a large degree on the willingness of industries in each country to lobby for or against particular outcomes. Once again it is difficult to allocate responsibility to a particular government.

The economic perspective also raises further questions about the way success or failure might be identified. International trade negotiations are invariably conducted in a perverse manner if the economic theory of comparative advantage is accepted. Negotiators are at times briefed to 'give away' as little trade liberalisation or market access as possible and to seek to gain as much as they can from their negotiating partners. Yet economists assert that unilateral reductions in trade barriers are welfare enhancing from a domestic viewpoint, a view that underlay Labor Party reforms in recent decades. The important point is that a negotiation that is seen as a success in terms of a diplomat's briefing instructions may be a

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5 Australia-United States Free Trade Agreement [2005] ATS 1.

failure from an economic policy perspective. Once again these issues would pervade any government's involvement in negotiations, and would not truly give rise to a distinct evaluation of the Howard legacy. There is also the fact that the AUSFTA-enabling legislation was passed on a largely bipartisan basis making it harder to point to differentials between the Howard government and the Mark Latham-led Labor Party.

One of the most challenging methodological issues in evaluating trade policy ironically provides the best perspective from which to evaluate the Howard government's performance. If Tip O'Neill, the former speaker of the House of Representatives in the United States Congress was correct in stating that 'all politics is local', then international trade policy is simply part of a government's armoury through which it seeks to enhance its domestic approval ratings, whether through being perceived to have strengthened the economy or being perceived as an effective 'player' on the world stage. Furthermore, since the end of the Second World War, with the establishment of the Bretton Woods and the General Agreement on Tariffs and Trade (GATT)[6] economic institutions,[7] harmonious trade policies and peace and security were seen as going hand-in-hand. The Australia-United States free trade negotiations were a paradigmatic example of that, with Prime Minister Howard looking to a close alliance with the United States on a range of strategic initiatives, the first politically contentious step flowing from comments about wishing to be a deputy peacekeeper to the United States in the Asia-Pacific region.[8]

Because of its overly political elements, this very distinctive free trade agreement at least allows for an analysis of a range of important questions. To what extent should trade policy be tied to general strategic policies, particularly within the overriding Australia-United States strategic relationship? What are the relative risks and rewards for high-profile bilateral trade negotiations such as this when compared to multilateral approaches and what lessons does this allow us to draw for Australia's strategic trade policy generally? What was the political context of the negotiations and to what extent were these conducted in a way that allowed Australia to meet legitimate and desirable aspirations? What are the strengths and weaknesses of the resultant agreement? What impact will the outcomes of the

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6 GATT (30 October 1947) 55 UNTS 194.

7 The World Bank and the International Monetary Fund were established as part of the Bretton Woods Agreement immediately following the Second World War. An attempt to establish an International Trade Organisation concurrently failed when the US, as its key proponent, nevertheless could not guarantee Congressional support. The General Agreement on Tariffs and Trade, only intended as an interim measure until the ITO was established, lived on with US Executive support, growing ever stronger in importance until in 1995 it was reformulated as the World Trade Organization; GATT (15 April 1994), 1867 UNTS 187.

8 This unfortunate metaphor arose during a 1999 interview with *The Bulletin*, where Australia was improperly recast with a Deputy Sheriff metaphor and was continually qualified and diluted for the remainder of Howard's time as Prime Minister; see, eg AAP, 'Howard denies that Australia has 'sheriff' role', *The Sydney Morning Herald* (Sydney), 17 October 2003 <http://www.smh.com.au/articles/2003/10/17/1065917588513.html>.

agreement have on Australia's other international trade initiatives, currently in the form of key bilateral negotiations including those with China and Japan?

This article addresses these questions in the following manner. It begins with a brief introduction to the key aspects of the Howard government's trade policy initiatives. The balance of the paper then concentrates on the AUSFTA. It begins with an introduction to advantages and disadvantages of multilateral versus regional solutions and does so within the general context of considering emerging problems of international legal governance. It then looks at the history and outcomes of the AUSFTA negotiations, and then seeks to analyse both the process and outcomes from political, economic and legal perspectives.

II. The Howard Government's Trade and Investment Policy Initiatives

While the dominant view articulated above is that international trade and investment policy tends to be bipartisan in substance, the Howard government's legacy includes several policy initiatives, including changes to the relevant machinery of government, and the establishment of several FTAs.

(a) Machinery of government

Howard's first significant act in trade policy as Prime Minister was the creation of the Joint Standing Committee on Treaties (JSCOT) in 1996, 'as part of a package of reforms to improve the openness and transparency of the treaty making process in Australia'. This has particular importance from a legal perspective in terms of transparency of legislative reform. In relation to JSCOT, Capling recognises that the organisation was created to address the 'democratic deficit', and that it represents a 'significant departure from Australia's traditional approach to treaty making'. [9] She notes, however, that consultation with community-based non-governmental organisations (NGOs) remained largely 'tokenistic', and that the negotiation of trade agreements continued as the 'preserve of ministers and their mandarins, in consultation with those business, industry and producer groups whose own interests and objectives are broadly supportive of trade liberalisation'.[10] Capling expressed concern that the AUSFTA, in particular, lacked public participation in the treaty process, including insufficient input from state and territory governments.[11] Ranald notes that all decisions about negotiations were undertaken in Cabinet confidence and only subject to JSCOT and parliamentary votes after the deal was done.[12]

While the problems are clear, the solutions are not. It is a fundamental issue in terms of the constitutional and political aspects of international law as to how such

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9 A Capling, 'Democratic Deficit, the Global Trade System and 11 September' (2003) 49 *Australian Journal of Politics and History* 372, 374.

10 Ibid 376.

11 Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Australian Senate, *Final Report* (2004) xviii.

12 P Ranald, 'The Australia-US Free Trade Agreement: A Contest of Interests' (2006) 57 *Journal of Australian Political Economy* 30, 39.

initiatives can be optimally integrated into a viable parliamentary process. While the inroads into fundamental principles of democracy alluded to by Capling and others are important matters of concern, it should be acknowledged that it is particularly difficult to incorporate multilateral trade negotiations into a normal political process. Even if trade liberalisation is presumed to be beneficial overall, there are inevitably short-term winners and losers when reciprocal market access is enhanced. Governments negotiate with a range of other key trading partners, offering industry-by-industry market access commitments in negotiations that would cause havoc with markets if open. Furthermore, if the negotiations were fully open, those who feel they would lose out would inevitably lobby against changes. While that seems inherently fair from a political perspective, from a public-choice perspective we would expect that those with most to lose, would overly capture political patronage. While it is undeniable that secret horse-trading by international trade negotiators can have a significant adverse effect on democratic rights and principles, the converse is also arguable. Some see international institutions and constitutional norms as a key means by which governments can promote optimal policies and negate the ability of vested interest groups to capture domestic political processes.[13]

Even more fundamentally from a governance perspective, by what mechanism would the polity determine in advance what negotiating package should be put on its behalf? How should its ongoing views be elicited when inevitably, negotiating partners will make counter offers? In designing an effective governance model, we are thus faced with a choice between two unpalatable options, the first being the secretive negotiations without sufficient involvement of interested citizens, and the alternative being an unworkable cacophony of vested interests that would make beneficial reforms hard to envisage. In these circumstances, regulatory theory might suggest that some alternative construct would be appropriate. For example, it is arguably more important to ensure that political parties seek a mandate for their broad trade and investment policies and that fair and reasonable compensation and adjustment assistance is provided to those who have their interests adversely affected for the greater good of the economy as a whole.

For these reasons, optimal democratic processes for the development of trade policy are open to debate and would on any view be difficult to achieve. JSCOT did not resolve this major problem and never realistically sought to do so. At a minimal level, JSCOT did help redress a publication problem where it has been quite difficult for interested parties to find out exactly what treaties Australia is seeking to negotiate or even has entered into.

While in office, Howard also increased staff through creating the Office of Trade Negotiations, and created an Asia Trade Task Force dedicated to the negotiation of free trade agreements and trade and economic agreements in Asia.

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13 J O McGinnis and M L Movsesian, 'The World Trade Constitution' (2000) 114 *Harvard Law Review* 511, 515-16; E-U Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991); R E Hudec, '"Circumventing" Democracy: The Political Morality of Trade Negotiations' (1993) 25 *New York University Journal of International Law and Policy* 311.

With Trade Minister Mark Vaile, Howard launched the Exporting for the Future Initiative, to strengthen the image of trade and exporting in Australia. The initiative included a general education program, and an outreach program for regional Australia. The Howard government issued two White Papers on Foreign Policy and Trade, *In the National Interest*, in 1997, and *Advancing the National Interest*, in 2003, which were Australia's first White Papers in the area. Both documents identify advancing free trade as a governmental priority, but also highlight the importance of bilateral agreements for Australian prosperity.

(b) Forums

The 1980s and early 1990s saw the development of a number of regional trade forums, including APEC in 1989, and the Association of Southeast Asian Nations (ASEAN) Free Trade Agreement in 1993.

While APEC was not initially intended to be a forum for trade liberalisation, this goal soon became 'the centrepiece of APEC's agenda', pushed by the Western members of the forum including Australia.[14] Yet by the time of Howard's first term, optimism about the capacity of the forums had faded due to a poor track record[15] and the Howard government gave the APEC forum 'little meaningful support'.[16] Perhaps in recognition of the forum's failure to deliver on regional free trade, the 2003 White Paper *Advancing the National Interest* noted that:

> APEC's agenda goes well beyond trade liberalization … Australia has been and will continue to be active in driving APEC's work on corporate governance, strengthening economic legal infrastructure, movement of business people and improving the functioning of markets.[17]

When the 2007 APEC summit, was held in Sydney, Howard preferred to use the forum to raise regional issues almost completely irrelevant to trade, including the war on terror.

While Australia is not a member of ASEAN, the political implications of Australia's involvement with the forum are important. ASEAN was created in 1967, and in 1977 adopted a limited program of preferential trade agreements (PTAs). Foroutan did not see ASEAN as an effective trade-promoting regional organisation at the time that Howard came to power.[18] Howard's invitation to the 2004 ASEAN meeting in Vientiane was significant, however, as it marked a level of association that Australia had never before had with the organisation. The

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14 J Ravenhill, 'APEC Adrift: Implications for Economic Regionalism in Asia and the Pacific' (2000) 13 *The Pacific Review* 319, 321.

15 N Bisley, 'Asia-Pacific Regionalism and Preferential Trade Agreements: The Australian Case' (2004) 4 *International Relations of the Asia-Pacific* 239, 242; M Beeson, *Trade and the National Interest* (2003) <http://www.australianreview.net/digest/2003/04/beeson.html>.

16 Bisley, above n 15, 244.

17 Commonwealth Department of Foreign Affairs and Trade, *Advancing the National Interest* (2003) 64 <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN014354.pdf>.

18 F Foroutan, 'Does Membership in Regional Preferential Trade Arrangement Make a Country More or Less Protectionist' (1998) 21 *World Economy* 305.

ongoing dialogue with the organisation, including negotiations for a FTA were politically significant for Howard's claim that Australia was well-received in Asia.[19] Despite entering free trade negotiations in 2004, it was not until 2005 that Australia acceded to ASEAN's Treaty of Amenity and Cooperation (TAC), which rules out the use of force to settle regional disputes.[20] Howard's initial reluctance to sign the document can perhaps be contrasted with his enthusiasm to sign AUSFTA, in part as a marker of the security alliance with the United States.

(c) Preferential trade agreements

As noted at the outset, the balance of this paper concentrates on PTAs, in particular AUSFTA. Before addressing AUSFTA directly, a few observations about the shift to regionalism are appropriate.

From having been strongly protectionist for most of the twentieth century, Australia became a champion of the multilateral trading system under the Labor governments of Hawke and Keating. When the Howard government was elected in 1996, it shared the emphasis on the advantages of multilateralism. In the 1997 White Paper *In the National Interest*, Howard outlined the dangers of bilateral agreements, in that a prolific number of them could undermine the political stability of the multilateral system.[21]

The decade for which the Howard administration held power in Australia saw changes in the world that impacted on other states' trade policy. The east-Asia financial crisis and the 2001 terror attacks in the United States caused insecurity. By 2003, Howard's statements were much more positively inclined towards bilateral agreements in general, and the 2003 White Paper *Advancing the National Interest* explained that:

> while the emphasis of the government will remain on multilateral trade liberalization, the active pursuit of regional and, in particular, bilateral liberalization will help set a high benchmark for the multilateral system. Liberalisation through these avenues can compete with and stimulate multilateral liberalization.[22]

Howard's new enthusiasm for bilateral agreements was also representative of a shift towards bilateralism across the region. The move towards bilateralism was seen by some observers as a significant divergence from Australia's trade policy of the last 50 years,[23] and represented a break from Australia's commitment to non-discrimination in trade policy.[24] Ravenhill notes that the emergence of bilateralism in the Asia-Pacific 'derives from three major factors: the recognition that regional institutions are not able to guide trade liberalisation; the perception

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19 T Conley, 'Issues in Australian Foreign Policy: July to December 2004' (2005) 51 *Australian Journal of Politics and History* 257, 269.

20 Treaty of Amity and Cooperation in Southeast Asia (24 February 1976) [2005] ATS 30; M Bliss 'Amity, Cooperation and Understanding(s): Negotiating Australia's Entry into the East Asia Summit' (2007) 26 *Aust YBIL* 63.

21 H Dieter, 'Australia's bilateral trade agreement with the United States: Significant drawbacks, few gains?' (2006) 57 *Journal of Australian Political Economy* 90.

22 DFAT, above n 17, 49.

23 Bisley, above n 15, 243.

24 A Capling, *All the Way with the USA: Australia, the US and Free Trade* (2004).

that other PTAs have brought significant gains; and a change in domestic political-economic interests. In Australia these factors are significant.'[25]

Bisley explains that in signing several FTAs the Howard government was 'seeking to further advance Australia's trading position through agreements some of which would guarantee access to large markets and, it hopes, link these liberalisation gains to the multi-lateral system. It has decided that a strict adherence to non-discrimination is no longer helpful to its trade aims.'[26] Bisley also suggests that the Coalition promoted bilateralism as a way of distinguishing itself from the Labor governments.[27] Furthering the domestic political theme, Capling states that 'the emphasis on the "national interest" and "bilateralism" was aimed at a domestic audience that was spooked by many aspects of globalisation, including the putative loss of sovereignty associated with participation in international agreements and institutions such as the WTO.'[28]

While the Howard government set several free trade agreements in motion, the decision to negotiate an FTA with the United States particularly marked a break with past policy. Australia had twice rejected the offer of an FTA with the United States. In 1997, Howard rejected an FTA on the grounds that the United States was unwilling to open key markets, notably for sugar and dairy products.[29] The AUSFTA, signed in 2004, was seen to be advantageous as an alliance-building tool. In proposing a free trade agreement with Australia to the United States Senate, the then United States Trade Representative Robert Zoellick referred to 'strengthening the foundation of our security alliance', and 'the promotion of common values so we can work together more effectively with third countries'.[30] Australia's 2003 White Paper *Advancing the National Interest* explained that 'the Government's pursuit of a free trade agreement with the United States is a powerful opportunity to put our economic relationship on a parallel footing with our political relationship'.[31]

It was also naturally seen as important in terms of market access. In the 2003 White Paper, the government explains that 'an FTA would benefit Australian exporters by providing close ties to the world's largest and most dynamic economy', through providing Australian exporters greater access to the United States market, making Australia more attractive for United States investment, and exposing Australian firms to higher competition.[32]

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25 Bisley, above n 15, 252.
26 Ibid 256.
27 Ibid 253.
28 Capling, above n 9, 374.
29 Dieter, above n 21, 90.
30 Cited in Ranald, above n 12, 35.
31 Senate Select Committee, above n 11, xvi.
32 DFAT, above n 17, 61. Other FTAs have been based primarily in the Asia-Pacific region. The Singapore-Australia Free Trade Agreement (SAFTA) [2003] ATS 16, and the Thailand-Australia Free Trade Agreement (TAFTA) [2005] ATS 2. Australia has active FTA negotiations or discussions with Malaysia, ASEAN, China, Chile, Japan and the Republic of Korea. Australia is also involved in a free trade arrangement with New Zealand, through the Closer Economic Relations (CER).

III. Multilateralism versus Bilateralism

Before analysing the details of the AUSFTA, it is important to contextualise it in terms of policy options in trade liberalisation, particularly as between multilateralism and bilateralism. Debate about the move towards bilateralism has two major components. The first part relates to the potential effects of a large number of bilateral agreements on the multilateral system. On one side, some academics contend that moving towards FTAs is undermining the international system.[33] Australia's engagement with FTAs has two potential negative effects: resources spent negotiating PTAs are diverted from negotiating in the multilateral arena, which may impact on Australia's ability to negotiate benefits through the Doha Round at the World Trade Organization (WTO). There is also a net effect of weakening support for the WTO and lowering liberalisation standards.[34] For example, Capling notes that an agreement with low trade liberalisation, as the Japan-Australia FTA is likely to have, will set a low standard for other trade liberalisation in the region.[35]

There is also the ongoing legal transaction cost problem of trying to unravel a complex web of bilateral agreements. There are two legal features that add to the complexity where there is a proliferation of bilateral and regional agreements. The first is that there is no consensus on the best rules of origin by which to determine the ambit of any free trade agreement. In the modern world, traded goods are often made in a number of places. Legal rules of origin, which determine the jurisdictional ambit of particular agreements, vary from those that look to where the major value was provided, where the major work was provided, where the last substantial process of transformation occurred or where the goods were transformed into their final tariff classification category. These are complex and uncertain tests to employ in a global economy. Hence it is difficult to determine on a product-by-product basis just which agreement applies. Furthermore, there is a need to consider how bilateral rights and responsibilities are to be integrated with multilateral rights and responsibilities and how different bilateral agreements are to fit together. In some cases agreements will seek to expressly indicate their relative priority. In other cases it will be left to the demarcation provisions within the Vienna Convention on the Law of Treaties.[36]

Most importantly, all key agreements will incorporate most-favoured-nation (MFN) obligations. Hence one cannot simply look to an individual bilateral agreement to determine the rights and obligations between the two signatories. Each party would have to look at all other treaties of a similar nature that each has entered into to determine which rights and obligations have been incorporated under an MFN norm.

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33 Bisley, above n 15.
34 Ibid 256.
35 A Capling, 'Preferential Trade Agreements as Instruments of Foreign Policy: An Australia-Japan Free Trade Agreement and its Implications for the Asia Pacific Region' (2008) 21 *The Pacific Review* 37, 37.
36 (23 May 1969), 1155 UNTS 331.

Bisley recognises that these complications, which the leading economist Jagdish Bhagwati described as the 'spaghetti bowl'[37] effect of a proliferation of PTAs, may have implications for Australia's domestic arena through high administrative costs, the possibility of one PTA setting out an obligation that contravenes another PTA, and that net gains may not be achieved.[38]

Others disagree. The APEC Study Centre report argued that both AUSFTA and the WTO are important, and recommended that Australia continue to pursue both. Oxley thinks that there is no reason why the concerns that Bisley has raised must be the case.[39] The Study Centre's major point is that multilateral negotiations may be hastened through the introduction of FTAs. As noted above, the 2003 White Paper thought that bilateral liberalisation 'will help set a high bench mark for the multilateral system.'[40] Because the Doha Round of WTO trade negotiations have not been concluded, it is difficult to assess these more favourable assertions at this point in time. The negative camp might argue that the proliferation of PTAs could be a key reason why there is foot-dragging on multilateral reform.

Beyond the implications for international organisations and multilateral negotiation, FTAs have political implications for the countries involved. Drahos suggests that the dispute settlement mechanisms of FTAs could leave weaker countries open to bullying from the more powerful countries, although that is not a concern with AUSFTA given that it did not incorporate a significant and distinct dispute settlement mechanism.[41] Some would see the absence of such a mechanism as a defect in its own right.[42] Bisley suggests that the 'hub-and-spokes' approach to trade agreements in the Asia Pacific, where the United States seeks to have a model FTA as the hub, and designated security and trading partners as the spokes, may leave weaker countries open to stronger countries calling the shots.[43]

Low contends that regional trade agreements (RTAs) are 'first and last political, never mind the economic rhetoric, and political maturity and vision vie with economic idealism as to how far, how deep and how fast Asian regionalism can go'.[44] He also believes that 'regionalism can complement and supplement outward oriented trade policy, globalisation and multilateralism'.[45] Bergsten notes two sides

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37 J Bhagwati, 'Regionalism versus Multilateralism' (1992) 15 *World Economy* 535.
38 Bisley, above n 15, 255.
39 A Oxley, 'Free Trade Agreements in the Era of Globalisation – New Instruments to Advance New Interests – The Case of Australia' (2003) 57 *Australian Journal of International Affairs* 165, 181.
40 DFAT, above n 17, 49.
41 P Drahos, 'Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution' (2007) 41 *Journal of World Trade* 191.
42 B C Mercurio and R La Forgia, 'Expanding Democracy: Why Australia should Negotiate for Open and Transparent Dispute Settlement in its FTAs' (2005) 6 *Melbourne Journal of International Law* 485.
43 Bisley, above n 15.
44 L Low, 'Multilateralism, Regionalism, Bilateral and Cross-regional Free Trade Agreements: All Paved with Good Intentions for ASEAN?' (2003) 17 *Asian Economic Journal* 65, 84.
45 Ibid 83.

of the debate about regionalism.[46] Opponents believe that regionalism can lead to clashes between nations, but enthusiasts believe that regionalism causes deeper relationships between nations.

Baldwin explained an earlier round of regionalism as an effect of a domino theory.[47] If this is true, he asserts, 'regionalism may be a powerful force for multilateral liberalisation',[48] particularly where North-South preferential agreements open markets that were exempted from some GATT initiatives. Baldwin thus did not think that regionalism would have particularly negative or positive implications for multilateral free trade.[49] More recently, Sauve responds to the argument that RTAs can be a useful laboratory to experiment on deeper forms of integration by pointing out that recent WTO disputes are already dealing with such contentious issues as health, environment, culture and reparations for colonial exploitation.[50] Sauve notes further that in the one area where FTAs tend to have achieved commitments far beyond the WTO, namely investment, such initiatives may well have dissuaded stakeholders from undertaking multilateral commitments.[51]

An added legal complexity in the regionalism versus multilateralism debate is the lack of adequate supervisory mechanisms for regional agreements within the WTO Agreement itself. At the time of the negotiation of the GATT Agreement in 1947, Article XXIV was included as an exception to the non-discrimination norms in Articles I and III. This was on the basis that, while comprehensive liberalisation was the ultimate goal, support for more rapid liberalisation by customs unions and free trade areas was seen as a worthwhile step in the right direction. Where trade in services is concerned, regional trade agreements are regulated in a similar manner under Article V of the General Agreement on Trade in Services (GATS).[52] Preferential rules also apply to agreements among developing countries based on the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, known as the Enabling Clause.[53] On 10 July 2006, WTO Members also approved a new WTO Transparency Mechanism for Regional Trade Agreements.[54]

It was only after the conclusion of the GATT agreement in 1947 that a leading economist, Jacob Viner, wrote a seminal analysis pointing out that customs unions and free trade areas cannot be presumed to be welfare enhancing.[55] This will

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46 C F Bergsten, 'Open Regionalism' (1997) 20 *World Economy* 545, 548.
47 R Baldwin, 'The Causes of Regionalism' (2007) 20 *World Economy* 865.
48 Ibid 885.
49 Ibid 886.
50 P Sauve, 'Canada, Free Trade and the Diminishing Returns of Hemispheric Regionalism' (1999-2000) 4 *UCLA Journal of International Law and Foreign Affairs* 237, 243.
51 Ibid.
52 (15 April 1994) 1869 UNTS 183 reprinted I (1994) 33 ILM 1167.
53 GATT BISD (26th Supp) 203 (1980).
54 See Negotiating Group on Rules, *Transparency Mechanism for Regional Trade Agreements*, JOB(6)/59/Rev.5 (29 June 2006).
55 J Viner, *The Customs Unions Issue* (1950).

depend on the circumstances of each agreement and its constituent norms as to whether overall they are trade diverting, that is, they will undesirably shift trade from more-efficient to less-efficient suppliers, or whether they are trade enhancing, namely, provide for increased beneficial trade overall.

Furthermore, the key norms within Article XXIV that must be met before a customs union or free trade agreement is acceptable, are drafted in an ambiguous and uncertain manner. For example, GATT Article XXIV.8 provides that the relevant agreement must eliminate tariff and other trade restrictions on 'substantially all' intra-regional exchanges of goods within a 'reasonable' period of time. An example of the uncertainty is whether the phrase 'substantially all trade' should be looked at qualitatively, quantitatively on a monetary basis, on a product-by-product basis and whether it is exhaustive, for example in preventing members from relieving other free trade agreement partners from safeguards and anti-dumping actions. Other uncertainties relate to whether there needs to be reciprocity, whether the provisions also apply to agreements with states that are not contracting parties to the WTO, the determination of a reasonable time period and the requirement in Article XXIV:8(a)(ii) that the parties to customs unions must apply 'substantially the same duties and other regulations of commerce' in relation to third parties. In addition there is the obligation in Article XXIV:5 that duties and other regulations of commerce imposed by the RTA 'shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable' prior to the RTA.

At the very least, these legal uncertainties add to the transaction costs of such initiatives. The history of GATT and WTO practice also shows that notwithstanding the proliferation of FTAs that have come under scrutiny of the organisation, there is no emerging jurisprudence for two reasons. First, a political 'precedent' was established whereby the relevant committee would not pass definitive judgment on FTAs, in particular because the first key agreement was establishing the European Community, which was strongly supported by the United States in the post-Second World War cold war era. Second, because the review committee was distinct from the dispute settlement processes, there was a concern that it would unduly encroach on the judicial functioning of the system were it to attempt to pass definitive judgment on legal agreements. Whatever the rights and wrongs of these reasons, the end result is that the WTO constitutional norms provide little clarity and regulatory pressure on the development of optimal FTA norms.

IV. United States Free Trade Agreement Content

A number of authors have sought to analyse specific legal aspects of the AUSFTA agreement.[56] Because of the length and detail of the agreement as a whole, this paper instead seeks to try and draw broad conclusions from a more broad-based analysis of its outcomes. Key outcomes from Australia's perspective were as follows. Where manufacturing is concerned, duties on 97 per cent of United States'

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56 See eg B C Mercurio, 'The Impact of the AUSFTA on the Provision of Health Services in Australia' (2005) 26 *Whittier Law Review* 1051.

non-agricultural tariff lines were made immediately duty free. Textiles and clothing were excluded by both sides, being highly protected industries in both economies. Australia was given access to the United States federal government procurement market. Approximately 66 per cent of United States agricultural tariffs were reduced to zero with a further 9 per cent to be reduced to the same level within four years. Modest increases to the beef quota, comprising 18.5 per cent over 18 years were to lead to free trade as of then. Greater reductions were found in relation to lamb and sheep meat quotas. Dairy quotas were also increased over time. Immediate zero tariff was provided for some horticulture products and cereals, with phase-in tariff reductions for some processed foods and greasy wool. Wine tariffs were to reduce to zero over 11 years. Metal and mineral exports were to become immediately duty free. The preferred FTA status also operates to exempt Australia from most safeguard restrictions.

Where services are concerned, more limited and general commitments were made. Where intellectual property is concerned, Australia agreed to harmonise some of its intellectual property laws with that of the United States, particularly in relation to copyright terms. While the AUSFTA chapters on labour and environment were relatively weak, they are seen by one commentator as a precedent for the Australian government in negotiating free trade agreements with other states.[57]

Early criticism of the agreement at the Australian end was based on the grounds that AUSFTA would have a detrimental impact on Australian institutions. Institutions that were asserted to be affected adversely included the Pharmaceutical Benefits Scheme (PBS),[58] quarantine laws, government procurement regulations, and intellectual property rights.[59] Weiss, Thurbon and Mathews believe that the impacts of these policies on institutions like the PBS and IP laws will leave Australia less egalitarian.[60] They argued that the agreement has meant that various regulatory bodies, such as Biosecurity Australia, have been restructured or dismantled to comply with changed laws, particularly quarantine laws.

In fact early concerns that the single-desk Australian Wheat Board, the PBS that makes medicines affordable and local content rules for Australian television were to be undermined, were in fact unfounded. This all adds to the complexity of analysis of the outcomes. The policy issues are complex in addition to the lack of consistency in detailing the outcomes. From a policy perspective, undermining these aspects of Australian domestic policy purely for United States gains would be undesirable. On the other hand, improving their regulatory performance in relation to aspects such as transparency may be beneficial.

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57 Ranald, above n 30, 48-9.

58 Under the National Health Act 1953 (Cth) and the National Health (Pharmaceutical Benefits) Regulations 1960 (Cth), the Australian Commonwealth approved certain medicines for subsidisation to ultimate consumers.

59 L Weiss, E Thurbon and J Mathews, *How to Kill a Country: Australia's Devastating Trade Deal with the United States* (2004) 8.

60 Ibid 33.

Even from a negotiating perspective, an ultimate deal that allowed the United States to give less than Australia asked for in sugar and other agricultural products, with the United States asking less in relation to these contentious areas is also difficult to evaluate. Where PBS is concerned, AUSFTA called for greater transparency and an independent appeals process that was to review decisions of the Pharmaceutical Benefits Advisory Committee. The appeals process was not to be allowed to compel ultimate government decisions in relation to pharmaceutical support.

Another methodological issue in any comprehensive assessment would be whether a particular agreement can be analysed in its own right or can only be compared to alternatives. For example, a comparison with the United States FTA with Chile shows that Australia does not have the 'special country status' that is claimed, as Chile's imports are not subject to such tight restrictions.[61] This paper does not attempt such a task.

Another method of assessment is to look at what was originally hoped for. The United States refused to move on sugar quotas and on certain aspects of ship building. Given that a comprehensive agreement on agriculture was an oft-stated aim of the Australian government, the deal presented was at least in that sense skewed in favour of the United States, to the extent that Howard's negotiators tried to walk away from it. Howard, of the view that 'a bad deal was better than no deal',[62] overrode Trade Minister Mark Vaile and the negotiators' opinion and ensured that the deal was signed.[63]

It is interesting to note the post-agreement political rhetoric. Vaile and United States Trade Representative Zoellick both made reference to this being a deal that has touched sensitive sectors in both countries in a joint press release in 2004. Nevertheless, they both said that the deal will be beneficial to both economies. Zoellick stated that the President felt that this is an important deal for the United States' economic interests, and commitment to free trade. The United States was pleased with the result on pharmaceuticals. In his view Australia got a good deal in terms of agricultural market access, and should not feel disadvantaged over sugar access. The United States did not like the monopoly aspect of the Australian Wheat Board, but looked at changing only some aspects of it. This deal was in his view, one of the best that the United States has had in eliminating tariffs 'very, very quickly'. This is an agreement 'for all time' that will deepen the integration of the Australian and American economies. America considered Australia to be an extremely strong ally, but the benefits are largely to be created by the private sector. Fact sheets showed that AUSFTA had 'already shown benefits for American workers, farmers, ranchers and service providers'.[64] In the first quarter

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61 Weiss, Thurbon and Mathews above n 59.
62 Capling, above n 24, 73.
63 Dieter, above n 21, 94.
64 See <http://ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file204_7872.pdf>.

of 2005, American trade surplus with Australia grew by 31.7 per cent, and helped improve the overall United States trade deficit situation.[65]

Vaile stated that while sugar was supposed to be a key factor in the deal, it was negotiated out because of an holistic look at what was available to the Australian market. He stated that Australia would continue to pursue market access for sugar in the multilateral arena.

V. Political Dimensions

While this paper seeks to make separate observations in relation to the political, legal and economic dimensions of AUSFTA, the categories are of course not mutually exclusive.[66] For example, trade policy is an important component of Australia's foreign policy, as Australia's economy is highly trade reliant.[67] Trade policy has political implications in the domestic and international arenas, and both domestic and international forces can shape trade policy. Nevertheless, the importance of a discrete consideration of political elements invites consideration of the way that international legal instruments fit within international relations theory and practice. Because there is no consensus as to the role of international law in international relations theories, this itself will impact upon the possible conclusions that can be drawn in relation to any individual international legal initiative by a particular government.

Some commentators highlight this issue. Baldwin identifies three approaches used by political scientists to explain the formation of trade policy.[68] The first approach views trade policy as 'being shaped through the process of political competition among various common-interest groups'.[69] The second approach sees states as rational actors that compete against each other for political and economic power.[70] Baldwin notes that the second approach relies on the existence of a hegemonic power, and when that power loses dominance, as he claims the United States has, protectionist policies will emerge. The third approach stresses that 'foreign economic policy stresses the significance of a state's institutional and ideological structures in shaping international economic policies', and the liberal trading system has been maintained through liberal institutions like the GATT, despite the decline of the United States.[71] Baldwin and others have offered criticisms for each of the approaches. As Capling says of the rational element of Baldwin's second approach, it 'cannot begin to explain how policy formation

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65 Ranald, above n 30.

66 For an argument that the legal and political dimensions cannot be readily divorced and must equally be promoted see J Pauwelyn, 'The Transformation of World Trade' (2005-6) 104 *Michigan Law Review* 8.

67 Bisley, above n 15, 256.

68 R Baldwin, 'The political economy of trade policy: Integrating the perspectives of economists and political scientists' in R C Feenstra, G M Grossman and D A Irwin (eds), *The Political Economy of Trade Policy* (1996) 147.

69 Ibid 153.

70 Ibid.

71 Ibid 154.

occurs in the real world'.[72] Dalrymple contends that Howard's trade policy showed realist tendencies, through linking us to great and powerful allies in uncertain times.[73] He argues that realist foreign policy has been a theme through the Coalition's other times in government, just as Labor has shown a tendency towards 'idealist' foreign policy.

Some theorists are concerned that in linking trade policy to other foreign policy, Howard has acted against Australia's best interests, and undermined its ability to act on the global level. Specifically in relation to the AUSFTA, Thurbon and Weiss argue that the legacy of the policy has been to reverse Australia's strong role in the multilateral trade arena to that of a United States 'pawn'.[74] Capling thinks that by signing up to the agreement, Australia has committed itself to the rough end of a mercantilist arrangement. She notes that the agreement 'opens up the Australian economy to United States commercial interests on terms and conditions which were historically associated with colonial powers and their subordinate colonies … The major difference [being] that the colonial relationship was imposed by force.'[75]

Dieter argues that AUSFTA has not turned Australia into a superpower, and the United States continues to make alliances with other countries in the region. Involvement with Asian trade forums has happened despite the FTA, not because of it.[76] Bilateral agreements in general, and AUSFTA is no exception, weaken the dispute settlement mechanisms of the WTO,[77] often do not comprehensively liberalise trade, and cause an administrative burden.[78] Dieter asserts that this trade agreement weakened Australia's credibility as a champion of the multilateral system, and eroded Australia's sovereignty:

> It has become apparent that what is most important for the US in this deal is not really "more and freer trade" but, instead, the inflicting on Australia – and through this example eventually on others – of an economically indefensible extension of the protection of US monopoly power over intellectual property, particularly in the drugs, film and publishing industries.[79]

Aside from AUSFTA, Capling observes that the negotiation of FTAs within the region could have the effect of upsetting other diplomatic alliances. She uses the example that an Australia-Japan FTA could have the effect of drawing Australia into an anti-China alignment.[80]

There has also been debate about the potential impact of Australia's relationship with the United States on Australia's Asian credentials. For example,

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72 A Capling, *Australia and the Global Trade System: From Havana to Seattle* (2001) 5.
73 R Dalrymple, *Looking for Theory in Australian Foreign Policy* (2003) <http://www.australianreview.net/digest/2003/04/dalrymple.html>.
74 E Thurbon and L Weiss, *From Player to Pawn: Howard's Trade Legacy* (2003) <http://www.australianreview.net/digest/2006/02/thurbon_weiss.html>.
75 K Davidson, 'An Unequal Treaty' (2005) 179 *Overland* 86, 90.
76 Dieter, above n 21, 89.
77 Ibid 103.
78 Ibid 108.
79 Ibid 102.
80 Capling, above n 35, 38.

Emerson compares Australia's trade relationship with the United States to a form of insurance against the Doha Round of negotiations failing, with the 'insurance premium' being Australia's relationship with Asia.[81] Similarly, Garnaut believes that the AUSFTA will have negative effects on Australia's diplomatic relations with Asian neighbours, as trade is diverted from them towards the United States.[82]

Conversely, Oxley believed that an FTA negotiated with the United States will have no significant impact on Australia's relations with Asia and that Australia should be pursuing trade agreements with all major trading blocs.[83] Oxley pointed to examples of Asian countries excluding Australia from regional trading initiatives, but suggested that the arrangements were probably not worth joining because they did not seem to be active in liberalising trade.[84] He suggested that economic integration will enhance security, and that the political rationale for negotiating a FTA with the United States was that 'in an era when economic systems of relations among states now sit alongside systems which are based on military and political interests, and will grow in importance, a new measure of the closeness of one country with another is the formation of an economic integration agreement'.[85]

The APEC Study Centre report notes that 'commitment to facilitate freedom of trade and investment between two countries has become an important way of building and cementing a closer relationship between them in a broader context. The proposal for a Free Trade Agreement between the United States and Australia needs to be seen in this context.'[86] AUSFTA would cement the strong relationship between the countries, which is based on common values, and would reinforce the importance of the relationship to younger generations. The report recognises that there will be other pulls on the United States' attention, and it is in Australia's long-term interest to maintain Washington's attention.[87]

Australian public opinion was also critical of the agreement, as were economic editors in major newspapers.[88] While this paper does not seek to resolve debates at the cutting edge of international relations theory, any critique of international law must to some degree be situated within, or at least acknowledge that debate. What can be said is that the above criticisms from political analysts are typical and with the exception of the APEC Study Centre, virtually all such political analyses of the content of AUSFTA have been critical.

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81 C Emerson, 'East is East and West is Best: A triumph of prejudice over policy' <http://evatt.org.au/publications/papers/63.html>.

82 R Garnaut, 'Effects of a Free Trade Agreement with the United States on Australia's multilateral and regional interests', Paper presented to the APEC Centre Conference on the Impact of an Australia-United States Free Trade Agreement, Canberra, 30 August 2002.

83 Oxley above n 39.

84 Ibid.

85 Ibid 166-9.

86 APEC Study Centre, *An Australia-USA Free Trade Agreement: Issues and Implications* (2001) x.

87 Ibid xvi.

88 Ranald, above n 30, 40.

VI. Economic Dimensions

While there is much criticism from NGOs and human rights lawyers in relation to globalisation and the economics of liberalised trade, few if any leading economists seek to argue that trade liberalisation ought not to be welfare enhancing, at least in states where there are appropriate institutional mechanisms to provide for fair and efficient distribution of benefits.

On the other hand, public choice theorists using classical economic techniques have pointed to the ability of vested interests to capture the political agenda. This is because politicians follow their own economic price signals, namely the desire for support and re-election, even where it may conflict with the economic wellbeing of the nation and indeed the world as a whole.[89] Thus international economic law performs a constitutional function in protecting governments against the vested interests that would seek to distort domestic policies in welfare reducing ways. Under this perspective, governments that enter such agreements are not limiting their sovereignty, but are instead providing for effective sovereignty.

Within the field of trade economics, some have sought to show why governments accepting of the economic theory, but still acting in their national economic interest, may at certain times pursue policies that would be welfare reducing on a world stage even absent the political pressure of vested interests. Large economies that may influence world prices can seek to adopt an optimal tariff rate in order to increase their terms of trade with a view to enhancing national welfare.[90] Any such unilateral strategy is doomed to failure, however, when as is likely, it appeals to a number of states; a classical prisoner's dilemma situation. Reciprocity, as a keystone of multilateral trade relations prevents this suboptimal strategy being employed.

A bilateral agreement such as AUSFTA is just one example of such a reciprocal arrangement and has been the subject of discrete economic evaluation, primarily during its negotiation phase. The AUSFTA has now been in place for over three years. While that might appear to be enough time to gather data on which to evaluate the economic outcomes, there are in fact few detailed studies that post-date the agreement. One possible reason is that many commitments are only due to be phased in over time.

There are inevitable problems with any such modelling exercise. At first glance one might expect that trade liberalisation would greatly benefit the states involved. However, the exact consequences of free trade agreements are notoriously difficult to predict with any degree of accuracy, and predictions can vary greatly depending on the assumptions relied upon. One concern with the classical economic approach is that the benefits from trade can often be overvalued if negative externalities are not appropriately considered. For example, a report by Oz Prospect argued that the AUSFTA analyses by economic consultants failed to consider the environmental

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89 J M Buchanan and G Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962).

90 H G Johnson, 'Optimum Tariffs and Retaliation' (1954) 21 *Review of Economic Studies* 142.

impact. The authors of that report suggested that opening up primary production markets for Australian farmers would lead to a very significant increase in water use.[91]

Economic modelling completed prior to and shortly after the agreement was reached also provided differing results. Today, three years after the agreement took effect, the full benefits and costs of AUSFTA are not observable and will not be for some years. However, using recent analysis and trade statistics it can be argued that the benefits to the Australian economy will not be as pronounced as first promised.

It has been shown that the effects on participating states can be ambiguous, or at the very least the gains are not that strong. It has also been shown that free trade agreements can have a negative effect on non-participating states and therefore the world economy.[92] As noted at the outset, the overall impact of a free trade agreement such as AUSFTA is influenced in large part by the amount of efficient new trade created as opposed to the amount of trade inefficiently diverted from existing sources. Trade creation is the desired outcome and is new trade between Australia and the United States that was not occurring with other states before the agreement. Trade diversion occurs when, for example, Australia starts to import goods from the United States that it previously imported from Japan, even in circumstances where Japan is still the most cost-effective producer of the goods. The reason that Australia would import from the United States rather than Japan post AUSFTA in this example is because there are now lower tariffs in the United States. This is an inefficient outcome as Japan is still the better producer of the goods.

An early effort to predict the economic effects was contained in the 2001 Centre for International Economics (CIE) report which estimated that, over 20 years, Australia would benefit by US$10.9 billion and the United States by US$16.9 billion. Assuming full implementation in five years, the study predicted a welfare gain for Australia of 0.5 per cent by 2020. Other predictions were that exports would increase, Australia's current account balance would improve by 0.9 per cent and trade creation would exceed trade diversion. The study also assumed that all major sectors (including sugar), would be liberalised in the agreement.[93] An updated report by the CIE in 2004, based on the draft AUSFTA, predicted an even higher increase in welfare in the order of US$57.7 billion over 20 years.[94] This result seems strange as the 2001 report was based on full liberalisation whereas the 2004 report was based on the actual draft agreement, which excluded key areas such as sugar.[95] One of the main reasons that the 2004 report predicted higher gains is that the report included investment liberalisation

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91 M Cebon, *The Australia-US Free Trade Agreement: An Environmental Impact Assessment*, Oz Prospect, October 2003 <http://www.ozprospect.org/pubs/FTA.pdf>.

92 P Lloyd and D Maclaren, 'Gains and Losses from Regional Trading Agreements: A Survey' (2004) 80 *The Economic Record* 445, 464.

93 Senate Select Committee, above n 11, [1.31].

94 Centre for International Economics, *Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States* (2004) xi. http://www.dfat.gov.au/trade/negotiations/usfta/economic_analysis_report.

95 Lloyd and Maclaren, above n 92, 457.

that the previous report did not.[96] There were also reports that conflicted with the predictions provided by the CIE. A report by ACIL Consulting on behalf of the Rural Industries Research and Development Corporation in 2003 found that there would be a 0.09 per cent decrease in GNP per year for the period 2005-2010.[97]

The difference between the results of the various reports was the cause of some controversy at the time and begs the inevitable question of which predictions were the right ones. This question is almost impossible to answer with much certainty as economic modelling faces severe limitations.[98] Some of these limitations include resource and technology constraints as well as the fact that mathematical models are a major simplification of the real economy. Differences in assumptions made also have a major impact on results. The idea that should be taken from these restrictions is that point estimates of gains or losses from free trade agreements are not that useful in making public policy decisions. In fact it has been argued that if the CIE and ACIL Consulting used an approach that predicted intervals for the impact of the agreement, rather than point estimates, their results would not have been that different.[99]

Another important caveat to analysing the impact of the AUSFTA is that the Department of Foreign Affairs and Trade emphasises a long-term approach.[100] Despite this DFAT is pointing to early positive impacts:

> Australia's two-way trade with the United States grew 12 per cent to $47.5 billion in 2006. The Australia-United States Free Trade Agreement (AUSFTA), in its second year of operation, is supporting growth in the trade relationship. Exports grew, reversing the downward trend evident from 2001 to 2005, with various manufactured goods and services, especially business services, showing robust growth. Australian companies are benefiting from the opening up under the AUSFTA of the $200 billion US government procurement market. Continuing work to reduce regulatory barriers is boosting services trade involving Australian professionals.[101]

However, it is unclear whether the AUSFTA is truly having a significant impact on trade between Australia and the United States. For example a simple comparison shows that total goods and services exports to the European Union increased by 25 per cent to $28.6 billion in 2006,[102] whereas total goods and

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96 Senate Select Committee, above n 11, [1.63]; Centre for International Economics, above n 94, ix.

97 ACIL Consulting, *A Bridge Too Far? – An Australian Agricultural Perspective on the Australia/United States Free Trade Area Idea* (2003) 38.

98 Lloyd and Maclaren, above n 92, 457.

99 Lloyd and Maclaren, above n 92, 456.

100 A D Clarke and X Gao, 'Bilateral Free Trade Agreements: A Comparative Analysis of the Australia-United States FTA and the Forthcoming Australia-China FTA' (2007) 30 *UNSW Law Journal* 844, 845.

101 N Charpentier, 'Australia-United States Trade: Recent Trends' in Department of Foreign Affairs and Trade, *Australia's Trade with the Americas 2006* (2007) 5 <http://www.dfat.gov.au/publications/stats-pubs/downloads/AM_2006.pdf>.

102 P Bartlett, 'Recent Trends in Trade Between Australia and the European Union' in Department of Foreign Affairs and Trade, *Australia's Trade with the European Union 2006* (2007) 6 <http://www.dfat.gov.au/publications/stats-pubs/downloads/EU_2006.

services exports to the United States increased by 9 per cent to $15.6 billion in 2006.[103] Therefore while trade is increasing with the United States, it would not seem to be expanding at a rate out of proportion to Australia's trade with other nations where there is no FTA. DFAT is able to point to some industries that have benefited by the AUSFTA but the overall impact on welfare is probably not that large. The industries include lamb, dairy products, nickel, silicon, parts for precision and surgical instruments, axles and wheels for locomotives and space navigation instruments.[104]

A recent analysis of the AUSFTA has predicted that Australia's real GDP increases by only 0.1 per cent. Even if dairy and sugar were included in the agreement the prediction only improves to an increase of 0.13 per cent in real GDP.[105] Of course, these predictions suffer from the same constraints as the reports discussed previously and the authors acknowledge that their results are probably on the pessimistic side.[106] However, it is reasonable to say that the evidence so far suggests that there has not yet been significant gains from the AUSFTA for the Australian economy overall. Considering that the analysis also predicts losses for many of Australia's trading partners it could be conceivably argued that the agreement will cause significant difficulties for Australia when negotiating future trade agreements.

Another way to look at the outcomes is to look at the impact it has had upon the most distortive measure from an economic perspective. Here the key problem is that tariffs are not the real issue between the two countries' trade relations but instead the disparity in distortive subsidy practices between the United States and Australia. The United States Farm Bill in particular, provides massive subsidies to United States agriculture, which not only distorts bilateral trade between the two countries but adversely affects Australia's export performance on third country markets. The FTA simply does not aim to redress this problem, which is also a key stumbling block in the conclusion of the Doha Round of WTO Negotiations.

VII. Legal Dimensions

As noted at the outset, modern regional agreements have less to do with promoting free trade per se than they do about other aspects of regulatory constraint. As the norms have moved away from border-based tariff protection to domestic regulatory fields of intellectual property protection, services qualifications and culture, the norms go well beyond the treatment of foreign trade in goods and services and go to the heart of domestic regulatory capacity.

In that context it is not surprising that commentators are not only often critical of the content of the norms but also see the development as an invasion of sovereignty. It is not the purpose of this paper to enter into a broad debate about the

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103 Charpentier, above n 101, 8.

104 Ibid 11.

105 M Siriwardana, 'The Australia-United States Free Trade Agreement: An Economic Evaluation' (2007) 18 *North American Journal of Economics and Finance* 117, 125.

106 Ibid 131.

nature of sovereignty in international law, including such questions as the power of a current parliament to bind regulatory freedom for future generations and the sovereignty basis of the Westphalian construct versus a human rights paradigm, but merely to again note that any critique must be placed within that context. For example, one AUSFTA specific commentary tries to make a correlation between different concepts of sovereignty and different specific aspects of the negotiated agreement. Blackwood and McBride identify what they see as four types of sovereignty: international legal sovereignty, domestic sovereignty, Westphalian sovereignty, and interdependence sovereignty.[107] In their view, AUSFTA has affected Australian sovereignty in all areas except the first. Westphalian sovereignty is challenged by AUSFTA provisions that impact on Australia's quarantine and biosecurity measures.[108] Biosecurity Australia was succumbing to pressure over Import Risk Assessments, even as negotiations were taking place.[109] They felt that the Joint US-Australia Medicines Working Group will probably influence decisions made through the PBS.[110] Domestic sovereignty has also been said to be influenced by the changes to the PBS decision-making process, as intellectual property rights are prioritised over consumer access and equitable distribution.[111] Interdependence sovereignty, defined as the 'the ability of public authorities to control transborder movements',[112] is challenged by changes to the investment regulatory capacity, and restrictions placed on performance requirements for foreign investors.[113] They conclude that AUSFTA has seen Australian autonomy ceded in areas crucial to United States interest, but the same is not true of the United States.[114]

A contrary view would be to suggest that many modern complex regulatory fields are about proper process and administrative practices as well as an identification of a policy goal. Thus for example, where quarantine and biosecurity are concerned, all governments should be obliged to have fair and efficient processes by which risk assessments can be made. International legal obligations can be seen as a legitimate means by which governments effectively promise not to use such regimes for protectionist purposes. This perspective would suggest that the devil is in the detail. If the norms are too constraining on any government's ability to set policies towards a low-risk strategy consistent with the wishes of its constituent voters, then that would be problematic. There is nothing in the language of AUSFTA in relation to biosecurity and pharmaceutical decisions that suggest that this problem exists. Instead, many critics seem merely to conclude that any commitments in this arena are inevitably constraints on sovereignty, a position that

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107 E Blackwood and S McBride, 'Constraining the Australian State: AUSFTA's Impact on Sovereignty' (2006) *Journal of Australian Political Economy* 57, 60.
108 Ibid 63.
109 Ibid 65.
110 Ibid 66.
111 Ibid 68.
112 Ibid 74.
113 Ibid.
114 Ibid 75.

fails to note the concept of effective sovereignty adequately through reciprocal legal obligations.[115]

One legitimate concern relates to general fragmentation of international legal norms and the uncertainty that arises in trying to integrate various commitments. At the very least, where AUSFTA is concerned, under Article 1.2, the parties 'affirm their existing rights and obligations with respect to each other under existing bilateral or multilateral agreements to which both parties are party, including the WTO Agreement'. A purposive approach to interpretation would therefore lead to a presumption that everything within AUSFTA is intended to be consistent with existing norms.

Another aspect alluded to is the lack of an investor-state dispute resolution mechanism with respect to the investment chapter of AUSFTA. From a political science perspective, it is natural that negotiations between states with disparate power levels will see the stronger party less inclined to adopt binding dispute resolution models.[116] While that is a natural presumption all other things being equal, one interesting variation where Australia and the United States are concerned is that Australian investors in the United States have stronger constitutional protections than United States investors in Australia. This is because the Australian Constitution only prohibits taking of 'property' without just compensation.[117] Absent an 'acquisition' of property, the provision does not apply. This has been seen as dealing with direct taking of property. United States jurisprudence on the other hand in relation to the Fifth and Fourteenth Amendments to the United States Constitution has held that government action that does not take over or encroach on property can still constitute a taking if the regulatory effect is of sufficient impact.[118]

Other concerns with stronger dispute settlement models in FTAs include the fact that providing private party rights to foreigners places them in a more favourable position than domestic investors and secondly that the broader reach of most FTAs, which cover broader investment protection and intellectual property provisions than is the case with the WTO, makes the discrete dispute settlement function have a greater impact upon regulation of the domestic economy than might be seen as desirable. A further concern is where there is some mismatch

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115 For general aspects of sovereignty and compliance with international law see H Hongju Koh, 'Why do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599; A Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823; A Chayes and A Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

116 See eg J McCall Smith, 'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts' (2000) 54 *International Organisation* 137, 148; see also W S Dodge, 'Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1.

117 Constitution s 51(xxxi) provides that the Commonwealth Parliament may make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.

118 *Pennsylvania Coal Co v Mahon* 260 US 393, 413 (1922).

between the strength of the obligations and the strength of the dispute settlement processes. The less significant the immediate commitments, the less desirable it is to hold out via a strong dispute settlement function that there are immediate hard law commitments in operation.

While the purpose of this paper is not to analyse comprehensively all FTAs per se, what can be asserted with some confidence is that there is too little homogeneity in the legal terminology and structure of Australia's various FTAs negotiated during the Howard government's term of office. They vary in terms of the nature and extent of dispute settlement processes, preferential rules of origin, approaches to contingency protection measures such as anti-dumping and at times apply differing tariff rates to a single product. The added complexity and uncertainty and potential for forum shopping is inherently undesirable. At the very least, a government that intends for whatever reason to engage in a greater number of bilateral agreements ought to be at the forefront of developing optimal models for such processes. On the other hand, in a world of power politics where the United States has adopted a hub-and-spokes mentality, AUSFTA is inevitably based on United States preferences and any other Australian government would have had identical political constraints.

VIII. Conclusion

This paper has sought to analyse the most distinctive feature of the Howard government's legacy in the fields of international trade and investment regulation. There are a number of ways in which the Howard government had an impact on Australia's trade policy. The most prominent was a shift in balance between multilateralism and bilateralism. Second in importance is Howard's linkage of trade policy to other strategic and security policy. Finally, it is clear that Howard's policies were prompted by a view on what was in Australia's best interest, and in part by domestic political factors.

In other aspects of trade and investment policy, little distinguishes Liberal and Labor Party attitudes in recent years and of the above three aspects, it is only the second that might with confidence be seen as a distinct Howard government development. As noted, where AUSFTA is concerned, and indeed the growing bilateral activity of the Howard government, it is important to be wary of viewing this as a major policy shift undermining multilateralism and instead to be able to acknowledge that the Howard government faced a very different scenario than was the case during the Uruguay Round of GATT negotiations that culminated in the establishment of the WTO. While there has been significant bilateral activity under the Howard government this was against the backdrop of the failure of the multilateral WTO discussions at Cancun, the United States push for a free trade agreement of the Americas and its willingness to engage in a range of other FTAs. This was also the case with a number of Australia's other key trading partners including China, Thailand, Singapore and Malaysia. An ever expanding European Union can look within its own borders to relative self-sufficiency and the United States willingness to build on its North American Free Trade Agreement (NAFTA) experience with a hub-and-spokes strategy, in part in response to European agnosticism to WTO reform, would have forced the Howard government and its

advisers to choose between remaining outside these developments or entering into a state of bilateral negotiations with gusto.

While the responses to such pressure were perhaps inevitable, this is not to say that an agreement of any nature was necessary or desirable. If international law and legal institutions are to have any meaningful effect, they must somehow temper the utilisation of raw power and help promote the interests of small and medium nations in a world dominated by larger players. FTAs entered into between small/medium countries and larger players will systemically tend to be biased in favour of the interests of the latter, both because of differentials in bargaining power and because the political interests in a successful outcome are much stronger for the smaller country. One of the greatest problems in this scenario is if the smaller country has made great political play of the likelihood of a successful outcome, thereby imposing incentives for it to accept a weaker deal while trying to play up its strengths, rather than being prepared to walk away from a poor offer. In this sense it is strongly arguable that AUSFTA appears to have been too tied to the political alliance of Australia's supposed favoured status with the United States in relation to the war on terrorism and the likely hope that a strong agreement would help the Howard government in its re-election endeavours. An analysis of the shifts in political rhetoric, which began with the hope for a robust agreement on agriculture, to the final stages where excuses were made for the key sectors excluded, appears to be illustrative. These political drivers can even impact upon an Opposition. It is likely that the Latham Labor Party did not wish to be seen as anti-American prior to a key election. In turn, that kind of forced bipartisanship limits the ability of a strong Opposition to provide robust input into the negotiations.

On the one hand, these political concerns need to be tempered by economic considerations. As noted, evaluating success or failure by what one 'got' and 'gave up' in return, goes against economic wisdom as to the potential benefits of liberalisation even on a unilateral basis. Nevertheless, an analysis of the areas left out and the pre- and post-negotiation economic predictions suggest a modest economic outcome and certainly one where high early expectations would have been frustrated.

Of more concern is the fact that modern agreements cover far more than border trade barriers. To the extent that new forms of international trade and investment treaties enter into domestic regulatory fields such as health, safety, the environment and culture, bilateralism will also lead to small/medium countries being asked to adopt the legal regulatory models employed by the larger economy. In some cases this would be beneficial where for example the latter has a more sophisticated regulatory mechanism, but in the case of AUSFTA, the key differentials were in relation to purely protectionist intellectual property protections that were seen as being in the self-interest of the United States, and challenges to mechanisms to redress imbalances in bargaining power such as the single-desk wheat export policy and social welfare mechanisms such as subsidies for medicines through PBS. Nevertheless, while a number of criticisms were of an alarmist nature, there is nothing in the express agreement or practices to date that suggest that good

domestic regulatory practices had been undermined as a result of the agreement, save for a purely protectionist extension of the copyright protection period.

The most significant criticism is in relation to the willingness to drive a trade agreement based on political concerns. While it is conceded that all trade agreements have a political element, if the political aspirations outweigh the trade aspirations, it is too easy to commit to an imbalanced process in a way that will inevitably lead to an undesirable outcome. Capling is similarly sceptical about the Japan-Australia FTA.[119] She notes that the deal is driven primarily by political concerns, and outlines that when politics, rather than economics, are the drivers of trade negotiations, a likely result is that Australia will compromise in key areas like agriculture, with a detrimental effect for the country's prosperity. At the time of writing it has already been noted in the press that both Japan and China have made strong statements to the effect that agricultural commitments should be excluded from our current negotiations with them, in part based on an analysis of what Australia was prepared to concede in AUSFTA. In a submission to JSCOT, John Quiggin observed rightly that accepting weak commitments on agriculture can only make it harder to achieve meaningful outcomes at the multilateral level.[120] To that extent at least, the agreement will not meet the White Paper's aspiration of setting a high benchmark for the multilateral system. From a legal perspective that is a particular concern given the hope that such institutions can be the best means to overcome vested interests in sectors such as this.

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119 Capling, above n 35.

120 J Quiggin, 'A Completely Misleading Description: The US-Australia Free Trade Agreement' <http://evatt.org.au/publications/papers/128.html>.