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The Expansion of Intellectual Property Rights by International Agreement: A Case Study Comparing Chile and Australia's Bilateral FTA Negotiations With the U.S.

BY: RALPH FISCHER*

I. INTRODUCTION

Recently, the United States of America has signed bilateral free trade agreements with Chile and Australia that will greatly impact the intellectual property regimes of both Australia and Chile.¹ For example, both Chile and Australia are now required to essentially pass a form of the World Intellectual Property Organization ("WIPO") Copyright and Performances and Phonograms Treaties and provide greater rights to other intellectual property, like trademarks.² While the U.S. implementation of these treaties resulted in the Digital Millennium Copyright Act ("DMCA"), it

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1. See Australian Government, Department of Foreign Affairs and Trade, Overview of Australia-United States Free Trade Agreement, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/08_intellectual_property.html (last visited Feb. 21, 2005); Ways and Means Committee, *United States - Chile Free Trade Agreement*, at 15-16, <http://waysandmeans.house.gov/media/pdf/chile/hr2738chilessummary.pdf> (last visited Sept. 13, 2005).

2. See Australian Government, *supra* note 1; ROBIN D. GROSS, CHILE-US FREE TRADE AGREEMENT (FTA) ON CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES (TPMs) THAT CONTROL COPYRIGHTED WORKS (Sept. 1, 2004), http://www.ipjustice.org/Chile_US_FTA.shtml#.

may not be necessary for these countries to create such stringent laws to meet the treaties' terms.³ However, prior to the execution of these FTAs, these countries were unwilling to implement the WIPO treaties because of their concerns with enacting intellectual property laws that could be detrimental to their citizens' well being.⁴

Chile and Australia's FTAs with the U.S. illustrate the expansion of IPRs through multilateral or bilateral treaties. Many commentators and activists are concerned by such developments. Specifically, many feel intellectual property rights have expanded to the detriment of "less sophisticated" signatories of such treaties.⁵ However, recent developments have shown that less developed countries are not necessarily as unsophisticated as originally thought.⁶ For example, less developed countries have used regime shifting within various intergovernmental and NGO forums to create favorable outcomes for their desired policies.⁷

This paper is designed to explore the premise that less developed countries are less sophisticated negotiators and are overly susceptible to the pressures of vast economic powers, like the United States or the European Union ("EU").⁸ To test the viability of this premise, this paper uses a case study comparing a less developed country's negotiations to that of a developed country's negotiations with the same vast economic power. In so doing, it compares Chile and Australia's recently successful completion of

3. GROSS, *supra* note 2.

4. AUSTA, *Quick Briefs for Media – Issues Likely to Arise in an Agreement*, <http://austa.net/quickBriefs/quickBriefs3.htm> (last visited Feb. 21, 2005) [hereinafter *Issues Likely to Arise in an Agreement*].

5. See Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819 (2003); Peter Drahos, *Trading in Public Hope*, 592 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 24-30 (2004). See generally IP Justice, available at <http://www.ipjustice.org> (last visited Feb. 21, 2005); Posting of Lessig to http://www.lessig.org/blog/archives/cat_international.shtml (Feb. 21, 2005, 01:38 PST).

6. Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 9 (2004) ("[Developing countries and NGOs] use regime shifting to maximize desired policy outcomes, to relieve pressure for action in other international venues, to create treaties and soft law in tension with TRIPS, and to lay the political groundwork needed to integrate new principles, norms, and rules of intellectual property protection into the WTO and WIPO.").

7. *Id.*

8. See, e.g., Mario E. Carranza, *Mercosur, The Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L.J. 1029, 1058-60 (2004); Drahos, *supra* note 5, at 24-30.

bilateral free trade agreement ("FTA") negotiations with the United States. This case study will evaluate the historical and socio-economic conditions in both countries and how these conditions may have impacted the respective countries' negotiations. The results may show that less developed countries are not nearly as unsophisticated as commentators make them out to be.

Additionally, the case study provides insights into other theories. Specifically, it may indicate whether multilateral or bilateral treaty negotiations are the more equitable forum for negotiating the metes and bounds of intellectual property rights ("IPRs"). Related to this determination is the question of whether non-governmental organizations ("NGOs") should be involved in IPR related negotiations between less developed countries and developed countries in an attempt to make such negotiations more equitable.⁹

The results of this case study and their relation to these topics are discussed more fully below. Section II of this paper provides background on multilateral and bilateral trade agreements, the bureaucratic systems created by such agreements, and the implications these systems have on intellectual property rights and intellectual property law development. Sections III and IV are case studies of Chile and Australia that provide historical, socio-economic, and political background for both countries. Moreover, each section explores the negotiation process used in making a bilateral agreement with the U.S. Section V evaluates the findings of

9. Maura Blue Jeffords, *Turning the Protester into a Partner for Development: The Need for Effective Consultation Between the WTO & NGOs*, 28 BROOK. J. INT'L L. 937, 987 (2003) ("NGOs can put a human face on the WTO. However, like the humans the NGOs represent, they need to be included."); *but see* Hasmy Agam, *Working With NGOs: A Developing World Perspective*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 39, 42 (2002) ("Indeed, some NGOs in developing countries have assumed the attributes or functions of opposition political parties, without the responsibility and accountability of a political party. Although operating with virtual impunity, they expect governments to unquestioningly accept their criticisms and meekly accede to their demands."); Gregory F. Jacob, *Perspective, Without Reservation*, 5 CHI. J. INT'L L. 287, 297 (2004) ("NGOs exert tremendous influence over large numbers of delegates not because they are right on matters of substance, but rather because they are providing the only pro bono legal services available to delegates with no legal experience of their own. In filling this role, the NGOs certainly did not act as disinterested legal advisers, and along the way more than one delegation was hoodwinked into believing the NGOs' all-too-frequently distorted versions of the truth.") (emphasis omitted); *See generally*, Erik B. Bluemel, *Substance Without Process: Analyzing TRIPS Participatory Guarantees in Light of Protected Indigenous Rights*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 671 (Sept. 2004).

this case study, exploring the similarities and differences found in each country's negotiation strategy, and the rationale behind accepting the terms of a bilateral agreement with the U.S. Further, it explores the implications this case study may have on various theories commentators have developed in connection with intellectual property law evolution and free trade agreements.

II. INTERNATIONAL INTELLECTUAL PROPERTY AGREEMENTS, AND THE RESULTING BUREAUCRATIC STRUCTURE

Countries that are net exporters of technology and copyright products created a new strategy to expand the scope of IPRs attributable to these products.¹⁰ The strategy revolved around three sometimes overlapping concepts: (1) the creation of effective dispute settlement for substantive intellectual property rights, (2) the expansion of the definition of investment to include intellectual property rights, and (3) the non-violation complaint alleging nullification or impairment of benefits.¹¹ The U.S., the lead exporter of technology and copyright products, started to implement this strategy in the mid-1990's.¹²

In 1994, the North American Free Trade Agreement ("NAFTA") came into effect, successfully implementing this strategy.¹³ It was later expanded to all the members of the World Trade Organization ("WTO") in 1995, when the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") "came into force and required all WTO members to provide minimum standards of intellectual property protection."¹⁴ Since the signing of these two agreements, various bilateral and other multilateral agreements and negotiations have taken place attempting to broaden the reach and enforcement of intellectual property rights to various other countries.¹⁵

10. See Allen Z. Hertz, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Shaping the Trident: Intellectual Property Under NAFTA, Investor Protection Agreements, and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 261-62 (1997).

11. *Id.* at 261-62.

12. *Id.* at 265.

13. *Id.* at 265 ("For international IP protection a new era began with the entry into force on January 1, 1994 for Canada, the United States, and Mexico of the NAFTA.").

14. Maria Julia Oliva, *Intellectual Property in the FTAA: Little Opportunity and Much Risk*, 19 AM. U. INT'L L. REV. 45, 51 (2003).

15. See *id.* at 47; see also Hertz, *supra* note 10, at 262.

A. TRIPS

The TRIPS agreement expanded and universalized the minimum levels of intellectual property protection for industrialized countries “only after reaching a certain level of development.”¹⁶ The agreed upon scope of protection for IPRs “limited the options for developing countries in the design of their intellectual property systems.”¹⁷ However, the TRIPS Agreement still allowed countries to adopt different strategies and definitions that could affect the scope and enforceability of these rights.¹⁸ This flexibility is “critical for countries to be able to use their intellectual property legislation as a means of achieving a set of economic development, social development, and environmental protection objectives.”¹⁹

To ease the economic and legislative burdens these new standards created, simultaneous implementation of the TRIPS Agreement provisions was not universally required.²⁰ “Developed countries like Canada or the United States had to apply all TRIPS provisions by January 1, 1996.”²¹ However, developing-country WTO Members did not have to apply most TRIPS provisions until January 1, 2000.²² In 2000, developing countries yet to extend product-patent protection to all technology areas could further delay the domestic application of these protections to any area not covered (e.g., pharmaceuticals) until 2005.²³ A least-developed WTO member could delay the implementation of most TRIPS provisions until the start of 2006, at which time the country could further extend this transitional period by successfully persuading the TRIPS Council to exclude its transition period.²⁴

However, commentators have questioned the flexibility TRIPS allegedly provides.²⁵ Specifically, the TRIPS Agreement’s use of the Dispute Settlement Understanding has limited member state’s policy choices due to the mandatory supranational adjudi-

16. Oliva, *supra* note 14, at 52.

17. *Id.*

18. *Id.* (“For instance, the TRIPS Agreement does not define ‘invention,’ thus allowing countries to choose the definition that responds to their own needs.”).

19. *Id.*

20. Hertz, *supra* note 10, at 265.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 265-66.

25. Okediji, *supra* note 5, at 820.

cation that may be incurred by another member state's complaint.²⁶ These adjudications have resulted in the disallowance of various member states' attempts to implement various aspects of TRIPS, while still maintaining some domestic favoritisms or prejudices that were arguably within the scope of the Agreement's terms.²⁷

Some commentators believe that multilateral negotiations are a more favorable forum for less developed countries.²⁸ In contrast, others believe that, at least in the instance of TRIPS, less developed countries negotiated away even more rights and flexibility than they would have in a bilateral setting with a superior power.²⁹ Thus, there is some dispute over whether the bilateral or multilateral is the more equitable negotiation forum. It is quite possible that, contrary to U.S. coercion theorists' claims, it is wiser for less developed countries to use bilateral and regional multilateral agreements to negotiate with a larger, more developed country.³⁰

B. Bilateral and Multilateral Agreements

Since the signing of TRIPS, bilateral agreements have been the most active international intellectual property law forum.³¹ Generally, these agreements are between a developed country,

26. *Id.* at 822-23.

27. Specifically, examples comprise of Indian, American, and Canadian legislative actions that have been altered or overruled by such challenges. *See id.* at 891-910.

28. *See* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 62 (2002) ("Matters are perhaps worse still when the U.S. acts unilaterally. . ."); *see also* GENETIC RES. ACTION INT'L, "TRIPS-PLUS" THROUGH THE BACK DOOR: HOW BILATERAL TREATIES IMPOSE MUCH STRONGER RULES FOR IPRS ON LIFE THAN THE WTO (2001), <http://www.grain.org/publications/trips-plus-en.cfm> (last visited Feb. 21, 2005) ("[T]he quietly crafted mini-pacts between Washington and Amman, or Brussels and Dhaka, are where more damage is sometimes being done."); Various other academics and commentators believe multilateral settings are the more equitable forum. *See generally* *Issues Likely to Arise in an Agreement*, *supra* note 4.

29. Okediji, *supra* note 5, at 850 ("[T]he TRIPS Agreement guaranteed a surplus for developed countries greater than what each state could otherwise have obtained on its own, as well as a surplus for developing countries in the form of enhanced trade concession in the areas of textiles and agriculture.").

30. *Id.* If the developed countries have similar special interests groups and are capable of adequate collaboration due to similar or special interests, then their aggregate negotiating power appears to be substantially larger than what any one developed country (even the U.S.) may have alone, in negotiations with one or perhaps a whole region of less developed countries which are similarly situated and share similar policy objectives or interests.

31. Oliva, *supra* note 14, at 52-53.

like the United States, and a less developed country, like Chile.³² Most commentators believe that the less developed countries agree to provide stronger IPRs, or TRIPS-plus, protections in exchange for greater access to the developed country's markets and investors.³³ The TRIPS-plus provisions define various IPRs or expand the scope or standard of an IPR beyond the minimal TRIPS standard, thereby reducing the flexibility provided in the TRIPS Agreement.³⁴ This same model is used for multilateral negotiations including the Central American Free Trade Agreement ("CAFTA"), the Middle East Free Trade Area ("MEFTA"), or the Free Trade Area of the Americas ("FTAA").³⁵

Recently, the United States has been extremely prolific in its bilateral negotiations, reaching agreements with Singapore, Morocco, Chile, Australia, El Salvador, Jordan, and eight other countries.³⁶ The United States has also negotiated extensively with other Latin American and Caribbean countries on the FTAA.³⁷ Moreover, the U.S. is working toward a Middle East Free Trade Area by 2013 and is in bilateral negotiations with five countries within the Southern African Customs Union.³⁸

The United States, as the largest exporter of intellectual property driven goods, seeks to expand IPRs' scope and enforcement.³⁹ Moreover, because the U.S. represents about one fifth of the world economy, it has the most to offer less developed countries in terms of market access and investment opportunity.⁴⁰ Thus,

32. *Id.* at 53.

33. *Id.*

34. *Id.*

35. See, e.g., Press Release, U.S. Consulate General Mumbai, India, U.S. and Bahrain Sign Free Trade Agreement (Sept. 14, 2004), <http://mumbai.usconsulate.gov> (last visited Feb. 21, 2005).

36. *Id.*

37. *Id.* (explaining that in addition to the FTAA negotiations, the U.S. is involved in bilateral negotiations with Panama, Peru, Columbia, and Ecuador).

38. In Africa, the U.S. is bilaterally negotiating with Botswana, Swaziland, South Africa, Lesotho, and Namibia. In Asia, beyond the Middle East, it is also negotiating with Thailand. See *id.*

39. See Patrick Coleman, *The U.S. Competitive Advantage in Intellectual Property Trade*, 27 CHEMTECH 48 (1997), <http://pubs.acs.org/hotartcl/chemtech/97/sep/comp.html> (last visited Feb. 21, 2005).

40. Vivek Arora & Athanasios Vamvakidis, *Economic Spillovers*, FIN. & DEV., Sept. 2005, available at <http://www.imf.org/external/pubs/ft/fandd/2005/09/arora.htm> (last visited Sept. 15, 2005). See generally NationMaster.com, Map & Graph: Economy: GDP, http://www.nationmaster.com/graph-T/eco_gdp# (last visited Feb. 21, 2005) (using 2002

it is not surprising that the U.S. is so active and successful in expanding TRIPS-plus protection to so many countries.⁴¹

C. Non Governmental and Intergovernmental Organizations

A third and emerging party to these bilateral and multilateral negotiations is non-governmental organizations ("NGOs"), which have increasingly challenged the TRIPS Agreement and various bilateral or multilateral agreements expanding TRIPS-plus protections.⁴² With the NGOs' political, or mass media, clout, less developed countries have become capable of renegotiating supposedly settled treaties. For example, less developed countries, acting in tandem with NGOs, were able to extract the Public Health Declaration during a new round of WTO trade talks in Doha.⁴³ This Declaration applies to patented medicines, providing less developed countries access to such pharmaceuticals by granting them a longer transitional time before providing IPRs with such products.⁴⁴ In addition to NGOs, intergovernmental organizations, like the World Health Organization and the Food and Agriculture Organization, are becoming involved in international negotiations affected by intellectual property issues.⁴⁵

This development has increased the number of forums available to different states and parties through which to affect policy, thereby maximizing their respective interests.⁴⁶ Moreover, the various institutional structures, as designed, can provide a built-in bias in favor of developing countries. For example, WIPO administers implementation of existing intellectual property agreements

values).

41. See Office of United States Trade Representative, *Bilateral Trade Agreements*, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Sept. 14, 2005).

42. Helfer, *supra* note 6, at 4, 6.

43. *Id.* at 5. This declaration is often referred to as the Doha Declaration. World Trade Organization, TRIPS and Public Health, http://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm (last visited Sept. 14, 2005). See generally World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, available at http://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm.

44. Helfer, *supra* note 6, at 5.

45. *Id.* at 6. For example, these intergovernmental organizations have had intellectual property issues at or near the top of their agenda negotiations at the Convention on Biological Diversity Conference of the Parties and the Commission on Genetic Resources for Food and Agriculture. *Id.* at 6.

46. *Id.* at 8.

and provides dispute settlement services, generating the revenue needed to fund its activities.⁴⁷ Moreover, WIPO's staff provides technical assistance and training to member states and their national intellectual property offices, the bulk of which is provided to developing countries.⁴⁸ To further meet these developing countries' needs, and to raise more revenue, WIPO has expanded these services to include standing, expert, and intergovernmental committees. These committees carry out studies on particular intellectual property topics and generate soft law guidelines and recommendations for consideration by WIPO member states.⁴⁹ Thus, while WIPO attempts to provide services to facilitate the implementation of negotiated intellectual property agreements, it also interacts most often with and directly impacts the policies of developing countries. This likely creates some conflict of interest since the same organization, made up of the same personnel, greatly affects various states' policies and also adjudicates the validity of such policies in light of the various agreements they must follow.⁵⁰ This may be especially true in light of WIPO's increasingly important role in influencing both TRIPS dispute settlement and member states' proposals to amend or supplement TRIPS.⁵¹ Consequently, it would seem that these organizations would have, at the least, some slight bias towards the developing countries with which they often interact.⁵²

47. *Id.* at 12.

48. *Id.*; Susan K. Sell, *Trade Issues and HIV/AIDS*, 17 EMORY INT'L L. REV. 933, 949 (2003).

49. Helfer, *supra* note 6, at 12.

50. *But see* Sell, *supra* note 48, at 949 (explaining that WIPO receives 85-90% of its budget from PTC application filing fees. The majority of these filings result from large biotech or biolife science corporations.).

51. Helfer, *supra* note 6, at 26.

52. *See id.* at 14, 20. One consequence of this bias may be the United States and European Community (EU) shifting of intellectual property lawmaking from WIPO to GATT due to dissatisfaction with treaty negotiations hosted by WIPO. *Id.* at 20-21. Moreover, GATT is more likely biased in favor of the U.S. and the EU because these parties enjoy substantial negotiating leverage in this forum. *Id.* at 21. *See also id.* at 61 ("[R]egime shifting enhances developing states' bargaining power within the WTO and WIPO. It facilitates a proactive negotiating strategy, enabling governments and NGOs to coordinate their efforts around hard and soft law proposals first vetted and refined in other international venues."); Peter Drahos, *Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach*, 77 TEMP. L. REV. 401, 424 (2004) ("[O]ur nodal world is replete with opportunities for alliances, partnerships, and forum shifting, all of which enable the weak to exercise influence over agendas.").

D. Negotiation Forum Selection

Ultimately, the decision to use either a bilateral or multilateral forum can have a large strategic impact on a country's negotiations. Generally, a multilateral forum decreases a country's control over negotiations because there are many more countries involved in the negotiations, each with their own interests.⁵³ As a result, a country's control over negotiations is diluted due to the coalitions which generally must be formed based on similar interests to negotiate a final outcome.⁵⁴ In fact, the number of countries involved and their political influence are the most important factors to determine whether the multilateral or bilateral negotiation is the most strategically desirable forum.⁵⁵ For example, large multilateral forums can be detrimental to developing countries where the developed countries (e.g., U.S., U.K., and Canada) have similar objectives to most proposals and tradeoffs to offer, while the developing countries' tradeoffs and objectives are more varied.⁵⁶ In this type of setting, developed countries can essentially implement a "divide and conquer" strategy, playing the weaker factions off of each other, to more effectively and substantially enhance their negotiating power than in a bilateral forum.⁵⁷ Moreover, a single country, or even a small group can less afford the option of "walking away" from any deal when a multilateral forum includes a large portion of the world. In order to continue to be a viable global trading partner, other countries involved in the negotiations are likely to decide on standards that these countries will eventu-

53. Okediji, *supra* note 5, at 838-68.

54. *Id.* at 849, 884-85.

55. Okediji, *supra* note 5, at 884-85 ("In the area of intellectual property particularly, state power is a critical variable for predicting outcome because intellectual 'property' is inherently a product of the exercise of state regulatory powers.").

56. *Id.* at 849-850. ("While the proposals submitted by respective states generally fell within the categories of 'developed' and 'developing' countries, the divisions were neither that exact nor predictable. Indeed, over the period of negotiations, the coalition formation between developed countries altered as different issues arose. The same was true for developing countries. Within these descriptive categories, several different coalition configurations emerged with some countries ostensibly acting independently."); *Id.* at 849 n.96 ("For example, the Andean Group (Bolivia, Columbia, Peru, and Venezuela) and the Group of Ten (Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia) focused on different issues at different stages of the negotiations. The Group of Ten had early on opposed the idea of TRIPS while the Andean Group was involved in making proposals at later stages of negotiations.").

57. Ruth L. Okediji discusses this in great detail. *See id.* at 838-68.

ally have to accept.

E. IPR Negotiation Theories

There are generally three types of theories that attempt to explain the use of bilateral and multilateral FTAs to expand IPRs: (1) U.S. or EU coercion of less powerful economic countries⁵⁸, (2) multinational corporation lobbying,⁵⁹ and (3) autonomous policy agreements, which are made to maximize a constituency's well being.⁶⁰ The theories falling within the first category essentially argue that an international hegemon can mostly impose and enforce its desired rules and international policies upon weaker powers.⁶¹ As a result of the hegemon's power, it will usually act through independent decision-making or through bilateral negotiation to maximize the relational power disparity.⁶²

Multinational corporate lobbying theories essentially argue that multinational corporations effectively lobby all parties, even resorting to developing "false hopes," which is a type of subterfuge, in order to obtain international policies favoring their business interests.⁶³ Thus, large multinational corporations or entire industries explicitly or implicitly collude to obtain beneficial policies.⁶⁴ These entities usually lobby all, or a substantial number, of the parties of a negotiation to obtain the desired result.⁶⁵

A third category of theories, i.e., autonomous policy agreement theories, contend that all parties to a negotiation come to an agreement that best serves the public welfare of their constituencies.⁶⁶ The parties achieve these objectives by implementing various negotiating tactics or strategies.⁶⁷ While special interests and NGOs may play some role in the development of each party's ne-

58. See Carranza, *supra* note 8, at 1032-41; cf. Ian L.G. Wadley, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Environment: U.S. and Them: Hubs, Spokes & Integration with Reference to Transboundary Environment and Resources Issues*, 21 BERKLEY J. INT'L L. 572, 572-73 (2003).

59. See Drahos, *supra* note 5, at 24-30.

60. See Carranza, *supra* note 8, at 1058-61.

61. *Id.* at 1034, 1038.

62. *Id.* at 1036.

63. See Drahos, *supra* note 5, at 19.

64. *Id.* at 25.

65. *Id.* at 25, 30.

66. See Carranza, *supra* note 8, at 1053.

67. See *id.*

gotiation strategy, these theories suggest that the parties are sophisticated enough to determine what is actually in its constituency's best interests and act correspondingly.⁶⁸

F. Case Study – Testing Hypotheses

This paper will test each of these three theories against real world bilateral FTA negotiations. A case study comparing negotiations between the U.S. and Chile with negotiations between the U.S. and Australia will be used to test the viability of these theories.

In this case study, Chile will represent a less developed country negotiating with an alleged hegemon, the U.S.⁶⁹ Chile is used because it has recently signed an FTA with the U.S. and it is generally representative of less developed countries. For example, Chile relies on natural resources and agriculture for a majority of its exports and domestic economy.⁷⁰ Further, Chile has only recently become a democracy, having been led by a military junta until around 1990.⁷¹

Australia, on the other hand, will be used to represent a developed country negotiating with a more powerful, but similarly sophisticated power, the U.S. Australia has a sophisticated economy, with services being its economy's largest sector.⁷² Moreover, Australia has been politically and economically stable, and has experienced great economic growth over the past twenty years.⁷³

68. *See id.*; One example of this type of theory would be that the American negotiators knowingly act to maximize IPRs because it will maximize the net benefit to its citizens and a less developed country agrees in return for American concessions that will also yield a maximum net benefit to its citizens. *Id.*

69. *See Carranza, supra* note 8, at 1058-60.

70. Export Council for Energy Efficiency, *Market Assessment of Chile*, (1999), <http://www.ecee.org/pubs/assess/Chile/Chile.htm> (last visited Feb. 21, 2005) (Chile's Economy and Investment Conditions Chapter/Section was specifically referenced.).

71. JOHN HICKMAN, *NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE 199-200* (1998).

72. Economist Intelligence Unit, *Australia Economic Structure*, *THE ECONOMIST* (Feb. 24, 2004), <http://www.economist.com/countries/Australia/profile.cfm?folder=Profile-Economic%20Structure> (last visited Feb. 21, 2005).

73. CIA, *WORLD FACTBOOK AUSTRALIA*, available at <http://www.cia.gov/cia/publications/factbook/geos/as.html> (last visited Feb. 21, 2005) [hereinafter *WORLD FACTBOOK AUSTRALIA*].

III. CHILE

In this case study, Chile is a good example of a less developed country because it embodies many characteristics common among less developed nations. For instance, Chile only recently became a democracy after a fifteen-year junta following a coup of the democratically elected socialist government. In large part, the junta occurred due to mismanagement, massive corruption, and hyperinflation.⁷⁴ Thus, Chile is a less developed country essentially rebuilding its economic and political infrastructure, a situation common among any new government established amid the current turmoil of many less developed countries (e.g., Iraq, Afghanistan, Pakistan, and Ukraine).⁷⁵ Similarly, Chile is rich in agricultural (e.g., fruit) and mineral resources (e.g., copper).⁷⁶ This situation is similar to many other less developed countries that are rich in natural resources.⁷⁷

Based on various theories presented by commentators, one might expect Chile's bilateral FTA with the U.S. to have resulted from various scenarios: it could be a result of the U.S. leveraging its "hegemonic" power by attempting to coerce Chile into an FTA,⁷⁸ it could be Chile's attempt to further its economic policy by negotiating away IPRs for greater access to the U.S. market,⁷⁹ or it could be the result of massive multinational corporations furthering their own economic interests.⁸⁰

In order to test these theories, a brief background of Chile's recent history is necessary to appreciate and understand the potential motivations and objectives that may have been implicated in

74. See HICKMAN, *supra* note 71, at 102-07.

75. See The World Bank, *10 Things You Never Knew About the World Bank*, at 7, <http://www.worldbank.org/tenthings/10things2004-english.pdf> (last visited Sept. 14, 2005).

76. See CIA, WORLD FACTBOOK CHILE, available at, <http://www.cia.gov/cia/publications/factbook/geos/ci.html> (last visited Sept. 14, 2005) [hereinafter WORLD FACTBOOK CHILE].

77. See generally Wikipedia, *Development Geography*, http://en.wikipedia.org/wiki/Development_geography (last modified, Sept. 9, 2005).

78. See Ruth Gana Okediji, *Symposium on Globalization at the Margins: Perspectives on Globalization from Developing States: Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEG. STUD. 117, 133 (1999).

79. Trade Policy Review Body, *Trade Policy Review Chile*, 7-12, WT/TPR/6/124 (Nov. 4, 2003).

80. Drahos, *supra* note 5, at 19-20; See generally Christopher T. Marsden, *Cyberlaw and International Political Economy: Towards Regulation of the Global Information Society*, 2001 L. REV. M.S.U.-D.C.L. 355, 399-401 (2001).

entering into an FTA with the U.S.

A. Democracy Produced by a Totalitarian Response to the Failures of Socialism

Chile has likely enjoyed the most political and economic stability of any country in South America for the last ten to fifteen years.⁸¹ In fact, over the last six years it has experienced annual inflation below 5% and realized an 8% annual GDP growth throughout the 1990s.⁸² It seems hard to believe Chile was a country in chaos around 1970.

Under the Frei government, the Chileanisation, i.e., nationalization, of major copper mines and an agrarian reform allowing the Chilean government to expropriate any landholdings of more than 80 hectares was implemented.⁸³ These reforms included the nationalization of copper mines formerly controlled by American investors.⁸⁴ These socialist reforms were initially passed into law during the mid-1960s.⁸⁵ They were originally hailed as successful and were progressively expanded in the early 1970s by the Frei government.⁸⁶ Moreover, this trend in nationalization extended to Chilean banks and other important financial and manufacturing concerns by 1972.⁸⁷

Because these reforms were initially successful, the socialist political parties responsible for them gained support, instituted wage increases and froze prices in late 1971.⁸⁸ The expansion of such reforms ultimately led to skyrocketing inflation and massive governmental budget problems.⁸⁹ While the Chilean economy grew

81. World 66, *Chile History*, <http://www.world66.com/southamerica/chile/history> (last visited Sept. 13, 2005), compare with Peter Hakim, *Scandalous Brazil; Revelations of government corruption could turn a Latin American success story on its head -- and take U.S. interests with it*, L.A. TIMES, Aug. 30, 2005, at B13 and Kimberly A. Czub, *Argentina's Emerging Standard of Intellectual Property Protection: A Case Study of the Underlying Conflicts Between Developing Countries, TRIPS Standards and the United States*, 33 CASE W. RES. J. INT'L L. 191 (2001).

82. U.S. Department of State, U.S. – Chile Free Trade Agreement Fact Sheet, July 22, 2003, <http://www.state.gov> (last visited Feb. 21, 2005).

83. HICKMAN, *supra* note 71, at 78-79.

84. *Id.*

85. *Id.*

86. *Id.* at 98-99.

87. *Id.* at 95-96.

88. *Id.* at 102.

89. *Id.* at 102-103 (explaining that from 1970-71, Chile's governmental budget went

at around 7.7% in 1971, it also experienced 22% inflation.⁹⁰ By 1972, inflation rose to 260% due to expanded socialist economic reforms. By 1973, inflation had soared to 600%.⁹¹ Ultimately, these conditions became untenable. Similar to other countries that have experienced severe economic misfortune, a military coup occurred, and a junta replaced the old, democratically elected socialist government.⁹²

This junta, led by General Pinochet, eliminated the elected socialist government with the goal of extirpating the communists out of Chile.⁹³ Unfortunately, like other coups or violent uprisings, this goal was taken to its extreme.⁹⁴ Ultimately, Chile's army was responsible for approximately 3,200 deaths or disappearances.⁹⁵

By 1980, the Military began relinquishing its control, allowing the creation of a Constitution.⁹⁶ This eventually led to elections in 1981 which, unsurprisingly, led to the election of General Pinochet for an eight-year term.⁹⁷

from a \$113 million surplus to a \$309 million deficit).

90. *Id.*

91. *Id.* at 103 (explaining that Chile's economy was also affected by a drop in world copper prices. However, this had a relatively slight impact when compared to the conditions created by the Allende government's economic mismanagement).

92. *Id.* at 105-07; cf. George J.W. Goodman, *The German Hyperinflation*, http://www.pbs.org/wgbh/commandingheights/shared/minitextlo/ess_germanhyperinflation.html. (last visited Feb. 21, 2005). Nazi Germany, for example, was created in part, due to the economic conditions created, for the most part, from the Versailles treaty. These conditions led to inflation rates that, at its worst, resulted in food prices doubling or tripling in a matter of hours.

93. HICKMAN, *supra* note 71, at 117.

94. *Id.* at 123. (explaining that the specific targets for most of these deaths and disappearances were the MIR and similar communist related groups. They were progressively tracked down and destroyed by the DINA, which was the secret police force of Pinochet's junta. While the MIR and communist groups were potentially "legitimate" targets for their abusive overseeing of the agrarian reforms and their terrorist-like tactics, DINA went beyond this original mandate. Ultimately, it became powerful enough to scare or destroy any type of opposition group and even earned senior junta members' distrust for its ruthless tactics.).

95. *Id.*; See also Jen Ross, *Legal Momentum Gathers in Chile Against Pinochet*, WASHINGTON POST, Dec. 25, 2004, at A16, available at <http://www.washingtonpost.com/wp-dyn/articles/A24890-2004Dec24.html> (explaining that General Pinochet is now being prosecuted in Chile for his involvement in overseeing DINA's actions).

96. HICKMAN, *supra* note 71, at 134.

97. *Id.* at 135-36.

B. Economic Reforms Initiated by the Pinochet Regime

By 1973, Chilean inflation was over 600% and rising.⁹⁸ The government debt accounted for 25% of Chile's GDP, which was likely to rise because the nationalized industries were losing about \$500 million a year.⁹⁹ However, by Pinochet's election, GDP had risen by 5% in three consecutive years and inflation was down to 31%.¹⁰⁰ The economic reforms that laid the groundwork for Chile's recovery were the result of a Point IV exchange program that sent Chilean students to U.S. universities to receive advanced degrees.¹⁰¹ Many of these students went to the University of Chicago where they studied the monetarist theory of economics validated and made famous by Milton Friedman.¹⁰² In 1973, the Pinochet junta promoted these students to higher government posts so they could administer the economy.¹⁰³ Consequently, these economists, known as the Chicago Boys, drastically cut government spending, significantly dropped tariffs on foreign goods, and abolished price controls.¹⁰⁴ For two years, the economy suffered enormous setbacks, including substantial GDP loss, increases in unemployment, and high inflation.¹⁰⁵

While these reforms were certainly difficult for a supermajority of Chileans, they began having a positive effect by 1980, with high growth in GDP and lower inflation.¹⁰⁶ By 1981, inflation was down to 9.1%, GDP was growing at a 5.5% clip, the fiscal deficit had turned into a surplus, and salaries increased substantially for consecutive years.¹⁰⁷ Moreover, the policy of promoting export-

98. *Id.* at 135.

99. *Id.*

100. *Id.*; see also BRIAN LOVEMAN, CHILE: THE LEGACY OF HISPANIC CAPITALISM 288 (3d ed. 2001) (explaining that while Pinochet may have used his influence to create conditions favorable to his election, the economic recovery he oversaw from 1973-80 likely also contributed to his election).

101. HICKMAN, *supra* note 71, at 135-36.

102. *Id.*

103. *Id.*

104. *Id.* at 140.

105. *Id.* (showing that inflation was at 343% in 1975, which was half of what it was in 1973. Also, GDP fell by 13% and unemployment dropped from 1974 levels. However, the reforms instituted by the Chicago Boys predicted such results from their policies, their thinking being that there would be no lasting, long term gain without some massive short term pain.); see also LOVEMAN, *supra* note 100, at 269.

106. HICKMAN, *supra* note 71, at 145.

107. *Id.* (defining real rise in salary as gross salary increase adjusted for inflationary

driven growth was beginning to produce impressive results.¹⁰⁸ Natural resources, such as fruit, timber, and fishing products, were increasingly produced and exported, diversifying Chile's economy and reducing the country's reliance on its mining industries.¹⁰⁹ With increased prosperity, profits and benefits began to "trickle down," both in wages and in social welfare, as the policy focus shifted to other social policies including labor law development, education, and justice.¹¹⁰ These social reforms ultimately outlived the Pinochet government and have served as models for many other Latin American countries.¹¹¹

C. The Fall of Free Markets and the Demise of Pinochet

In 1982, oil prices skyrocketed and triggered a massive recession, along with wild investment speculation, causing Chile's GDP to fall by over 14%.¹¹² This crash resulted in decreased standards of living and outbursts of street protests by many people in the lower and middle classes.¹¹³ By 1984, Chile's free market model was being reassessed due to the positive influence high tariffs and export incentives, which were implemented in response to the recession of 1982, had on mild deflation.¹¹⁴ In spite of this positive influence, most of the free market policies instituted in the late 1970s were slowly reinstituted because many feared a return to the prior socialist system.¹¹⁵

At this time, the Pinochet government was fielding harsh criticism. Because of his regime's violent and autocratic tactics and Chile's lack of progress toward democracy, U.S. policy turned against Pinochet in 1984.¹¹⁶ In 1988, Chile held a plebiscite to determine if Pinochet and the Chilean military would reign for another eight years or whether Chile would implement democratic elections.¹¹⁷ Pinochet lost by nine percentage points.¹¹⁸

affects).

108. *Id.* at 145.

109. *Id.* (Chile has about 20% of the world's copper supply).

110. *Id.* at 148-49.

111. *Id.* at 149.

112. LOVEMAN, *supra* note 100, at 281.

113. HICKMAN, *supra* note 71, at 181.

114. *Id.* at 184.

115. *Id.* at 184-85.

116. *Id.* at 186.

117. *Id.* at 199.

After elections were held in 1989, elected president Patricio Aylwin agreed with the opposition parties to accept a free market economic system along the same lines of the economic policy established during the military regime.¹¹⁹ By the end of the 1980s, Chile's average per capita income was about \$2,000.¹²⁰ The 1990s saw Chilean economic policies of encouraging free markets result in high GDP growth and decreased unemployment.¹²¹ Six years after free elections, Chile's average per capita income rose by 137% to \$4,740.¹²² Moreover, Chile instituted government programs to enhance the "trickle down" effect of this economic growth, decreasing the proportion of Chileans living in poverty from 40% to 24% by 1996.¹²³ Chile's policies have been wildly successful, resulting in its per capita income increasing 89% from \$4,740 in 1996, to \$8,960 in 2002.¹²⁴

As a result of these economic reforms, Chile's economy has grown and its citizens have achieved the 16th highest GDP growth rate in the world.¹²⁵ Moreover, despite its chaotic past, which involved a coup and resulting junta that caused fifteen years of highly volatile and oftentimes repressive policies, Chile has been the only Latin American country to achieve growth in a steady, stable manner, while diversifying its economy by expanding its manufacturing base.¹²⁶

118. *Id.* at 199. These plebiscites, as required by the 1980 Constitution and developed after the military replaced the corrupt socialist leaders of 1972, were to be held every eight years until the military (Pinochet) lost. After the military lost, democratic elections were to be implemented. Pinochet had the support of the Vice Commander-in-Chief of the Chilean Army to ignore the election result. However, Pinochet refused this opportunity, claiming he had sworn to uphold the 1980 Constitution and would abide by the results. Thus, the military's control ended after 15 years. *Id.* at 200-202.

119. *Id.* at 205-07.

120. *Id.* at 206.

121. *Id.* at 212 (showing that in 1988, per capita income was \$1,890, inflation was 14.7%, and unemployment was 8.3%. By 1995, inflation was 8.2% and unemployment was 5.5%. Additionally, GDP had risen almost 150% to \$4,740.).

122. *Id.*

123. *Id.* at 213.

124. See NationMaster.com, Map & Graph: Economy: GDP (PPP) (per capita) (Top 50 Countries), http://www.nationmaster.com/graph-T/eco_gdp_ppp_cap# (last visited Feb. 21, 2005).

125. See NationMaster.com, Chile Economy, http://www.nationmaster.com/country/ci/Economy&b_define=1 (last visited Feb. 21, 2005).

126. World Bank, *Economy*, at 3 (2002), <http://www.worldbank.org/data/wdi2002/economy.pdf> (last visited Feb. 21, 2005); see also Export Council for Energy Efficiency, *Market Assessment of Chile*, (1999), <http://www.ecee.org/pubs/assess/>

Even though Chile has a large portion of its population still living in poverty, there is little support for government intervention to redistribute the rewards of its economic growth.¹²⁷ Instead, Chilean policies are focused on increasing economic efficiency, expanding access to markets, and exploiting all of Chile's comparative advantages to create the wealth needed to provide for greater overall prosperity.¹²⁸ As a result, in the last decade, Chile has been at the forefront of FTA negotiations to implement its economic policies.

D. Chile's International Policies and Negotiations

Since the early 1990's Chile has pursued its trade objectives through a multidimensional trade policy.¹²⁹ This involved consolidating its unilateral policy of openness as well as negotiating new bilateral free trade agreements, fine-tuning existing agreements, and actively participating in regional and multilateral forums and negotiations.¹³⁰

Having suffered from intermittent boycotts by the U.S. and a general reluctance by Western countries to maintain more than formal relationships with Chile throughout the Pinochet regime, Chile has been interested in ensuring uninterrupted trade relationships.¹³¹ In the late 1980s, Chile began negotiations to enter into various new regional and inter-American agreements.¹³² In 1990, President Bush stated that Chile would be the U.S.'s first choice for inclusion in NAFTA.¹³³ However, in spite of this policy announcement and numerous promises from various U.S. delegations that included visits from various U.S. senators, the U.S. failed to incorporate Chile into NAFTA or negotiate a bilateral agreement similar to NAFTA for fourteen years.¹³⁴

Chile's international focus is not limited to the U.S. market because Chile's foreign trade is relatively evenly distributed be-

Chile/Chile.htm (last visited Feb. 21, 2005) (citing Chapter/Section 1 entitled, "Chile's Economy and Investment Conditions").

127. HICKMAN, *supra* note 71, at 225.

128. *Id.*

129. Trade Policy Review Body, *supra* note 79, at 7.

130. *Id.* at 7-8.

131. HICKMAN, *supra* note 71, at 215.

132. *Id.*

133. *Id.*

134. *Id.* at 216.

tween the U.S., Latin America, the European Union, and Asia.¹³⁵ Thus, Chile expanded its search for other free trade or reduced tariff agreements with various trading partners.¹³⁶ For example, Chile entered into bilateral FTAs with Mexico in 1991, Venezuela and Colombia in 1993, and Ecuador in 1994.¹³⁷ Moreover, while negotiating these bilateral trade agreements, Chile was also involved in various multilateral negotiations, many of which came to fruition by the mid-1990's.¹³⁸ In 1996, Chile became a formal associate member to Mercosur, a free trade agreement between Brazil, Argentina, Uruguay, and Paraguay.¹³⁹ Chile also joined the Asian Pacific Economic Cooperation ("APEC") agreement and entered into an association agreement with the European Union.¹⁴⁰ During these negotiations, Chile was actively involved with the WTO, with the primary focus on promoting further reaching multilateral trade agreements.¹⁴¹

From 1998 to 2002, Chile was able to negotiate more FTAs, making pacts with South Korea, Canada, and various Central American countries.¹⁴² Moreover, Chile moved beyond its association agreement by entering into a full FTA with the European Union.¹⁴³ As a result, goods from Chile's new trade partners replaced American goods in the Chilean market.¹⁴⁴ As Chileans substituted cheaper European goods for American goods, the U.S. went from having a slight trade surplus with Chile to running a trade deficit.¹⁴⁵ After two years of decreasing sales, the U.S. reasserted its desire to negotiate an FTA.¹⁴⁶ While the Americans had been slow to act

135. *Id.* at 216-17.

136. *Id.* at 217.

137. Press Release, World Trade Organization, Trade Policy Review: Chile 1997, Sept. 10, 1997, available at http://www.wto.org/english/tratop_e/trp_e/tp60_e.htm (last visited Oct. 29, 2005).

138. *See id.*

139. *Id.*

140. *Id.*

141. *See id.*

142. Lindsay M. Faine, Note, *The Internationalization of Chilean Agriculture: Implications of the United States-Chile Free Trade Agreement*, 13 MINN. J. GLOBAL TRADE 383, 390-91 (2004); Trade Policy Review Body, *supra* note 79, at 9.

143. *Id.*

144. Faine, *supra* note 142, at 399, 401.

145. *Id.* at 401.

146. *Id.*; see also Aaron Schavey, *How Trade Promotion Authority Would Bolster the Manufacturing Industry*, THE HERITAGE FOUNDATION, (June 21, 2002), <http://www.heritage.org/Research/TradeandForeignAid/BG1561.cfm>.

under the Bush and Clinton administrations of the 1990s, the economic losses it experienced provided the necessary motivation and urgency for Chile to negotiate an FTA it had coveted for over ten years.¹⁴⁷

Chile's history of economic and political development provides a basis for analyzing which of these theories best explains Chile's decision to enter into a bilateral FTA with the U.S.

IV. AUSTRALIA

Australia is the only developed country, other than Canada, to agree to some type of FTA with the United States, and is the only one to do so in a bilateral forum.¹⁴⁸ Australia also provides a good comparison with Chile because both countries' main exports to the U.S. are minerals (e.g., gold, iron ore, and coal) and agricultural goods (e.g., wool, wheat, and beef).¹⁴⁹ Australia, however, has been more politically stable and has a more developed economy, with services and manufacturing making up larger parts of its economy.¹⁵⁰

Based on the various theories presented by commentators, one would expect Australia's bilateral FTA with the U.S. to have resulted from one of these scenarios: (1) The U.S. coercing Australia into the FTA by its "hegemonic" power;¹⁵¹ (2) Australia attempting to further its economic policy by negotiating away IPRs for greater access to the U.S. market;¹⁵² or (3) Massive multinational corporations lobbying to further their own economic interests.¹⁵³

In order to appreciate and understand the potential motiva-

147. *Id.*; HICKMAN, *supra* note 71, at 216-17.

148. See USTR-Bilateral Trade Agreements, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Oct. 24, 2005).

149. American Australian Association, *Australia Fact Sheet*, at 1, <http://www.americaaustralian.org/Corporate/pdf/australiafactsheet.pdf> (last visited Feb. 21, 2005).

150. Compare WORLD FACTBOOK AUSTRALIA, *supra* note 73 (looking at Australia's more sophisticated and advanced main exports and imports including machinery and transport equipment, computers and office machines, telecommunication equipment, and parts), with WORLD FACTBOOK CHILE, *supra* note 76 (looking at Chile's less sophisticated exports and imports commodities including consumer goods, chemicals, motor vehicles, fuels, electrical machinery, heavy industrial machinery, and food).

151. See Okediji, *supra* note 78, at 133.

152. Trade Policy Review Body, *supra* note 79, at 8.

153. Drahos, *supra* note 5, at 20-21; see also Marsden, *supra* note 80, at 400-04.

tions and objectives that may have been implicated in entering into an FTA with the U.S, a brief background of Australia's economy and recent history is necessary.

A. Traditionally Stable First World Economy

Traditionally, Australia's economy was dependent on natural resources, specifically wool and gold, to achieve its political and economic success.¹⁵⁴ In the 1890's, Australia was a moderately protectionist country, with Free Traders and Protectionists compromising to achieve efficient production and redistribution policies.¹⁵⁵ Protectionists in Australia thought that tariff increases could increase employment and redistribute income to the less wealthy.¹⁵⁶ However, as the mining industry became a large portion of Australia's income and a major source of its exports, this attitude became less popular.¹⁵⁷

Australia's system of protection relied heavily on administratively allocated quotas that were designed to protect items of mass consumption like textiles, footwear, and clothing.¹⁵⁸ This policy, however, closed off opportunities for the expansion of Australia's more productive industries.¹⁵⁹ For example, productive industries that benefited most from these quotas (textiles, clothing, and footwear) experienced steep declines in domestic consumption during the 1970s.¹⁶⁰ By contrast, less protected industries, such as the automobile manufacturing industry, grew at a much larger rate than textiles, even though the textile industry was disproportionately favored by tariffs.¹⁶¹ Additionally, industries protected by quotas experienced large declines in employment.¹⁶² Thus, in spite of the fact that protectionist measures redistributed income to the protected industries in a larger proportion, it yielded no improved

154. ROSS GARNAUT, *SOCIAL DEMOCRACY IN AUSTRALIA'S ASIAN FUTURE* 131 (Matthew May ed., Asia Pacific Press 2001).

155. *Id.* at 44.

156. *Id.* at 45.

157. *Id.*

158. *Id.* The quotas were not like tariffs because they affected only selected income. Accordingly, the quotas essentially acted as a government subsidy to certain groups at the expense of other groups.

159. *Id.*

160. *Id.* at 41.

161. *Id.* at 132.

162. *Id.* at 41.

result.¹⁶³ Moreover, the government subsidy was used to artificially enhance goods that disproportionately and detrimentally affected poor Australians' purchasing power because these measures were applied to necessities, such as clothing and footwear.¹⁶⁴

As it became more apparent that Australia's protectionist measures and system were flawed, disproportionately affecting the economic well-being of the poor, Australia began to rethink its economic and trade policies.¹⁶⁵ As a result, Australia began liberalizing its trade policies in the early 1980's.¹⁶⁶ Australia raised its international competitiveness of all production of tradeable goods and decreased its reliance on wool and mineral exports.¹⁶⁷ While wool and mineral exports increased, manufacturing and services expanded even more.¹⁶⁸ Nonetheless, wool and mining industries still represent the bulk of Australian exports.¹⁶⁹

The net effect of Australia's trade liberalization policy is that it suddenly made Australia a credible participant in bilateral, regional, and multilateral negotiations in textile trade, greatly affecting its large wool industry.¹⁷⁰ Thus, one of Australia's primary objectives was to advance textile trade liberalization in order to further increase its market access to the global wool and textile markets.¹⁷¹

B. International Economic Policies

Australia's trade liberalization has a large impact on its policy outlook. Australia is committed to achieving free and open trade with all the developed Asian Pacific Economic Cooperation coun-

163. *Id.*

164. *Id.* at 41, 46.

165. *Id.* at 46.

166. *Id.* at 132; *see also* Press Release, World Trade Organization, Trade Policy Review: Australia 2002, Sept. 25, 2002, *available at* http://wto.org/english/tra-top_e/tptr_e/tp202_e.htm (last visited Feb. 21, 2005) (explaining that tariff reduction from 1970-2001 has seen a drop from 34.9% to 4.8% for manufacturing and 28% to 6% drop for agriculture. Australia also continues to disproportionately favor clothing and footwear sectors, but has dropped this support significantly, and plans to continue decreasing the disproportionate favoring.).

167. GARNAUT, *supra* note 154, at 131.

168. *Id.* at 132 & 134.

169. *Id.* at 139.

170. *Id.*

171. *Id.*

tries by 2010, and the less developed ones by 2020.¹⁷² Specifically, Australia is focused on investment liberalization and expanding and encouraging business cooperation.¹⁷³ Additionally, Australia has sought to strengthen IPRs, but not copyright related IPRs.¹⁷⁴

Australia also has signed an FTA with New Zealand and, in addition to its objectives within APEC, is looking to expand FTAs with other regional associations, particularly The Association of South East Asian Nations ("ASEAN").¹⁷⁵

C. Decision to Enter Into an FTA With the U.S.

Australia also recently entered into an FTA with the U.S. Unlike Chile, there was extensive internal debate as to whether entering into this FTA was in its best interests. The proponents of entering into a bilateral FTA with the U.S. cited various reasons, some of which were similar to Chile's.¹⁷⁶ For example, Australia wanted to increase its access to U.S. markets, better facilitate American foreign investment, and enhance protections for its American investments.¹⁷⁷ Unlike Chile, which lacks significant anti-globalization organizations or political parties, Australia has po-

172. Press Release, World Trade Organization, Trade Policy Review: Australia 2002, *supra* note 166. This is significant because APEC represents about 50% of global trade.

173. *Id.*

174. *Id.* While Australia accepted TRIPS, it has not attempted to strengthen or expand IPRs in the biotech/pharmaceutical industry that would negatively affect its Pharmaceutical Benefits Scheme. For example, Australia was not willing to ratify the WIPO Copyright and WIPO Performances and Phonograms treaties until signing an FTA with the U.S. (The U.S. implementation of these WIPO treaties was the Digital Millennium Copyright Act (DMCA)). See *Issues Likely to Arise in an Agreement*, *supra* note 4.

175. AUSTL. CHAMBER OF COM. AND INDUSTRY, ASEAN-AUSTRALIA / NEW ZEALAND FREE TRADE AGREEMENT WORTH PURSUING 1, (Aug. 20, 2004), http://www.acci.asn.au/text_files/issues_papers/Trade/ASEAN-Aust-NZ%20_August%202004_.pdf (last visited Feb. 21, 2005).

176. Compare AUSTA, *Quick Briefs for Media - General Issues*, <http://www.austa.net/quickBriefs/quickBriefs1.htm> (last visited Feb. 21, 2005) [hereinafter *General Issues*] with Trade Policy Review Body, *supra* note 79, at 7.

177. See Alan Oxley, *Report on the New Year*, THE AUSTRALIAN FINANCIAL REVIEW (Jan. 2, 2002), available at <http://www.austa.net/publicForum/publicForum4.htm> (last visited Feb. 21, 2005); AUSTA, *Increasing Investment Too*, FTA ANALYST, Sept. 5, 2003, <http://www.austa.net/analyst/analyst16.html> (last visited Feb. 21, 2005) (stating 42% of Australia's foreign investment was distributed to the United States); see also DAVID RICHARDSON, FOREIGN INVESTMENT AND THE AUSTL. U.S. FREE TRADE AGREEMENT 5 (Mar. 8, 2004), <http://www.aph.gov.au/library/pubs/cib/2003-04/04cib07.pdf> (last visited Feb. 21, 2005) (showing that U.S. foreign investment represented 33 percent of the total value of foreign investment in 2002-03).

litical parties that are anti-globalization or anti-United States.¹⁷⁸ Moreover, Australia has influential commentators that are against bilateral agreements due to their feared negative impact on forming multilateral agreements.¹⁷⁹ However, the political parties opposing an FTA with the U.S. made up only about ten percent of Australia's electorate.¹⁸⁰

While there was more public debate in Australia than in Chile, the supermajority of its electorate appear to have come to a similar conclusion: even if it had to strengthen IPRs, an FTA with the U.S. was in its best interest.¹⁸¹

Australia's economic development and history over the past few decades should provide some insight into determining which of the hypotheses best explains Australia's decision to enter into a bilateral FTA with the U.S. These hypotheses are more extensively assessed below.

178. *Issues Likely to Arise in an Agreement*, *supra* note 4.

179. *Id.* See generally, THE AUSTRALIAN INTEREST, <http://www.australianinterest.com> (last visited Feb. 21, 2005) (various websites and links and articles provided on the FTA with the U.S.). But see BUSINESS COUNCIL OF AUSTL, OPINION PIECE IN AUSTRALIAN FINANCIAL REVIEW: FREE TRADE AGREEMENT WITH THE U.S. (Feb. 10, 2004), <http://www.bca.com.au/content.asp?newsID=94430> (last visited Feb. 21, 2005). It is rather surprising that groups against an FTA argue that Australian business will suffer considering business groups are generally very optimistic about the FTA and the new prospects it may create. Moreover, Australia's government even thinks its trade liberalization policies are a major reason for its economic success of the past ten to fifteen years. It is possible, however, that some Australians may be negatively impacted in ways that may not affect businesses. For example, it is claimed by some sources that drug prices will go up as a result of this FTA. See Media Release, Public Health Association of Australia, Howard Government Plays Mean and Tricky on the PBS in The Australia/US Free Trade Agreement (March 4, 2004), http://www.phaa.net.au/Advocacy_Issues/howardgovfta.htm. Thus, while an FTA may have a net positive impact on business, it could have a net negative impact on individuals or possibly just health related sectors of Australian society/business (assuming prices do go up as a result of the FTA). Regardless, it seems that most of these claims of a net negative economic impact are likely over exaggerated because both a vast major of political parties and business leaders promoted the FTA. See AUSTRALIAN BROADCASTING CORP., AUSTRALIA VOTES: FEDERAL ELECTION 2004, <http://www.abc.net.au/elections/federal/2004/results> (last visited Nov. 28, 2004); *General Issues*, *supra* note 176.

180. AUSTRALIAN BROADCASTING CORP., AUSTRALIA VOTES: FEDERAL ELECTION 2004, <http://www.abc.net.au/elections/federal/2004/results> (last visited Nov. 28, 2004). Both the Labor (leading minority party) and Liberal (Prime Minister Howard's party) parties in Australia were for the FTA with the U.S. While people vote on numerous issues, this supermajority illustrates, at the least, that an FTA with the United States was a minor issue for most voters in this election.

181. Cf. Trade Policy Review Body, *supra* note 79, at 7.

V. SUMMARY OF FINDINGS

This part of the paper will analyze the results discovered in parts III and IV to assess each country's experience through the lens of each generalized theory: U.S. hegemony, multinational corporate lobbying, and autonomous policy implementation. Additionally, this section will project these findings onto other areas of discourse. Specifically, it will discuss the ramifications these results may have on determining whether a bilateral or multilateral forum is more equitable for less developed countries negotiating with developed countries and whether NGOs should be involved in IPR-related negotiations.

A. Chile

Chile obviously was not coerced into an FTA with the United States. Instead, Chile had to negotiate for over a decade and first enter into an FTA with the EU before the United States would agree to meaningful negotiations.¹⁸² In fact, were it not for the loss of market share that U.S. goods experienced as a result of Chile's previously made agreement, it is possible that the U.S. would have continued to shun Chile, especially when considering the potential political ramifications that the agreement could have caused in the 2004 elections.¹⁸³ Thus, Chile's negotiating tactics reveal an experience or sophistication that enables Chile to balance the interests of various partners, while also negotiating with various other parties. Chile was not just negotiating with the U.S. during this time. It was and is also involved in numerous other organizations and bilateral agreements, ranging from APEC to bilateral talks with various other countries, including South Korea, Canada, and other Latin American countries.¹⁸⁴ Consequently, it appears the U.S. was coerced into an agreement with Chile by Chile's successful negotiation of an FTA with the EU, which arose, in part, because the EU knew its goods could become more competitive with American goods by agreeing to such an FTA.¹⁸⁵

Thus, it appears that both developed and less developed

182. See discussion *supra* Part III.D.

183. Cf. Paul Blustein, *Central American Agreement Could Have Been Big Campaign Issue*, WASHINGTON POST, May 28, 2004, at E4.

184. See Faine, *supra* note 142, at 390.

185. See *id.* at 401; see also Schavey, *supra* note 146.

countries have various tactics and powers available to them in bilateral negotiations that are not inherently unfair or biased. In fact, this case study suggests that less developed countries are just as capable and sophisticated negotiators as developed countries. Specifically, Chile's decision to engage in bilateral negotiations provided it the necessary freedom to make an agreement with the U.S. A multilateral setting would not have allowed Chile to play the U.S. against other large interest groups like the EU, because the EU and the U.S. would have been much more likely to be aligned against a less developed country like Chile.¹⁸⁶ Moreover, because Chile has been a stable government for only about fifteen years, it is not necessarily true that a significantly long time period is required to develop negotiation expertise.¹⁸⁷

Chile, as a democracy, represents the will of the majority of its citizens in negotiating FTAs and other international agreements. Because it views its trade liberalization policy as the main reason for its quintupled per capita income over the last fifteen years, its decision to continue to further this policy goal is unlikely due to outside coercion.¹⁸⁸ Instead, it appears to reflect the apparent success its policies have had and its population's desire to continue to expand these policies. Specifically, agreeing to increased IPRs in order to expand its competitiveness and market access to core economic interest groups is a well-reasoned and politically justifiable action.¹⁸⁹ Moreover, as history has indicated, it appears to be working and will provide the opportunity for Chile to increasingly develop a manufacturing base and educational institution expertise.¹⁹⁰ It takes excess money to create improved institutions of education, which provide educated work forces capable of more technologically sophisticated production of goods related to

186. Okediji, *supra* note 5, at 850.

187. Mehdi Shafaeddin, United Nations Conference on Trade and Development, Geneva Switz., Dec. 1998, *How Did Developed Countries Industrialize? The History of Trade and Industrial Policy: The Cases of Great Britain and the USA*, 11, http://www.unctad.org/en/docs/dp_139.en.pdf (last visited Feb. 21, 2005) (explaining that very fast and timely policy implementation may be necessary for a less developed country to have any success at effectively implementing their economic policy goals).

188. Trade Policy Review Body, *supra* note 79, at 7.

189. *See Id.*

190. *See* WORLD FACTBOOK CHILE, *supra* note 76 (economy overview section) and EUR. TRADE COMMISSION, BILATERAL TRADE RELATIONS-CHILE, (Oct. 2002), http://www.europa.eu.int/comm/trade/bilateral/chile/index_en.htm (last visited Feb. 21, 2005).

pharmaceuticals, software, or electronics.¹⁹¹ Furthermore, Chilean dependence on American foreign investment and its desire to increase or at least maintain this same level of investment is directly benefited from increasing various measures.¹⁹² Thus, Chile appears to have given up very little in order to gain greater access to one fifth of the world's economic marketplace.

1. Testing Hypotheses

i. U.S. hegemony

Based on the long period of time it took the U.S. to enter into a bilateral FTA with Chile, it appears unlikely that the FTA resulted from any direct application of American hegemonic power. Because the U.S. only entered into meaningful negotiations after Chile successfully negotiated an agreement with the EU, it seems that Chile used different negotiating tactics in order to facilitate an FTA with the U.S, which had been one of its major policy goals since 1990.¹⁹³

In fact, Chile has engaged in various forums to further its trade liberalization policies. From entering Mercosur, to bilateral FTAs with the EU, Mexico, Canada, and other countries, to entering APEC, it is unlikely that these activities can be truly attributed to U.S. hegemonic power or influence. Instead, it seems Chile actively seeks to implement its policies by promoting agreements and effectuating occurrences it believes will increase its citizens' well being.¹⁹⁴ At the very least, it does not appear that the Chilean government felt coerced into the bilateral agreement.¹⁹⁵ As the Chilean government wrote in its most recent WTO report:

[The] Free Trade Agreement [with the U.S.] shows that a developing country can reach a mutually satisfactory and comprehensive agreement with a developed country, an agreement which does not merely focus on market access, but also attaches

191. Shafaeddin, *supra* note 187, at 6 and *cf.* BJORN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST* 176-77 (explaining that economic growth is necessary to support the costs of environmental protection).

192. See Evgenia V. Sorokina, *Chile's Free Trade Agreements: Can Their Benefits Survive Chile's Continuing Controls on Foreign Capital?*, 18 AM. U. INT'L L. REV. 1217, 1218 (2003).

193. HICKMAN, *supra* note 71, at 216.

194. Trade Policy Review Body, *supra* note 79, at 7.

195. *Id.* at 9-10.

importance to institutional matters that contribute to transparency and improved conditions of competition which, over time, will benefit all countries that trade with Chile.¹⁹⁶

In view of the Chilean government's understanding of its FTA negotiations with the U.S. and the economic occurrences underlying the American negotiation and agreement to the FTA, it does not appear that American hegemony or coercion played any role in the negotiations.¹⁹⁷

ii. Multinational Corporate Lobbying

The Multinational Corporate Lobbying theory appears to have more applicability than American hegemony. After all, the Americans were not actively interested in negotiating an FTA with Chile until after Chile had an FTA with the EU, which negatively affected American trade.¹⁹⁸ While corporate lobbying over the FTA likely occurred in both countries, it does not appear that there was any concerted effort to lobby or present some type of "false hope" or misleading claim to either government. Instead, it seems that the interested and affected corporations and other parties of each respective country lobbied to further their inapposite corporate interests.

The one "hope," or effective lobbying that could be attributable to some multinational or large American corporation(s) is the FTA's provision requiring capital market reforms to create increased foreign investment in Chile.¹⁹⁹ However, this appears to have been something Chile recognized and attempted to address using a variety of policies.²⁰⁰ Moreover, the increased liberalization of Chile's capital market and the increased market access gained through the FTA actually support its policy of growing exports.²⁰¹ It does not appear that Chile agreed to this provision as a result of effective lobbying of some multinational corporation because medium sized Chilean corporations were greatly affected by Chile's

196. *Id.* at 9.

197. *See also* Carranza, *supra* note 8, at 1064 ("[T]he Southern Cone countries are now makers and not simply takers of international policy. . . .").

198. Schavey, *supra* note 146.

199. *See* Trade Policy Review Body, *supra* note 79, at 7.

200. Sorokina, *supra* note 192, at 1228-29.

201. *Id.*

current capital market regulatory structure.²⁰² Consequently, lobbying from affected corporate interests within its constituency seems to be the most likely influence on Chile's acceptance of this provision, which is more akin to typical politics than geopolitical objectives driven by large corporate interests.

iii. Chile's Autonomous Policy Implementation

The most likely explanation for Chile's decision to enter into a bilateral FTA with the U.S. was to further its own interests. In light of Chile's struggles in the 1970s and 1980s, and its belief that its free market and trade liberalization policies have been a major reason for its recent economic success, its desire to enter into a trade liberalization agreement with the U.S. is consistent with this policy.²⁰³ In fact, it furthers this policy.²⁰⁴

One can argue that Chile's economic policies are wrong or improperly developed, but Chile has found stability and success compared to other countries, especially in the past fifteen years.²⁰⁵ Moreover, these economic policies are strongly supported by the country's populace.²⁰⁶

In fact, Chile's decision to enter into a bilateral FTA with the U.S. without seeking to diminish American agricultural subsidies, (a problem that greatly affects Chileans' large farming industry), may be a strategic negotiating decision. Currently, the FTAA has become bogged down due to an impasse over American agricultural subsidies, the strengthening of IPRs, and other issues.²⁰⁷ Consequently, this FTA may be a decision by Chile to make more immediate and certain gains in the American market.²⁰⁸ Thus, Chile is able to continue to address problems associated with American subsidies in the FTAA forum, in which it may have greater success due to the presence of Brazil and other Mercosur countries, which are largely responsible for the FTAA negotiation impasse.²⁰⁹ As

202. *Id.* ("[T]he brunt of protection against capitales golondrina is borne by Chilean companies, and in particular, by medium size companies that cannot raise cheaper capital to finance their operations and expansion.").

203. Trade Policy Review Body, *supra* note 79, at 7-8.

204. See Sorokina, *supra* note 192, at 1218.

205. STIGLITZ, *supra* note 28, at 18.

206. HICKMAN, *supra* note 71, at 224-25.

207. Carranza, *supra* note 8, 1051-52.

208. See discussion *supra* Parts III.C-D.

209. Carranza, *supra* note 8, at 1062 ("[T]he United States had threatened to build

these issues specifically relate to IPRs and agrarian subsidies, it is Brazil and Argentina that have the most to lose in granting stronger IPRs since both countries have relatively large pharmaceutical and agricultural industries.²¹⁰ In contrast, Chile has no substantial industries relying on IPRs and is not overly concerned with American farm subsidies, either because it is secretly hoping for Brazil's success in FTAA negotiations or because it is not concerned with the long-term effects of subsidies on Chilean products.²¹¹

Consequently, it appears that Chile entered a bilateral FTA with the U.S. to further its own trade policies. Moreover, Chile appears little concerned with potential problems that stronger IPRs may present to its economic or technological development.²¹² This is due to Chile's economy having no substantial industries that rely on IPRs, like the pharmaceutical industry. Another explanation is that Chile hopes the FTA will increase the rate of transfer and dissemination of various technologies, which would either offset or be a net benefit when compared to any negative implications associ-

the FTAA with or without Brazil, but it soon became apparent that without Brazil there would be no real FTAA."'). Of course, in the FTAA negotiations, Chile has taken a more pro-American stance as compared to the other Latin American countries. *See generally id.* This could be due to the above mentioned strategy of relying on Brazil to further Chile's policy hopes without preventing Chile from obtaining a further delayed bilateral FTA with the U.S., or it could be due to Chile being less concerned with U.S. subsidies than its compatriots or being more influenced by American economic power. Since Chile is already an associate member of Mercosur, it appears Chile is essentially on both sides of the negotiating table, receiving a net positive outcome regardless of the FTAA negotiations (i.e. wins if Mercosur gains concessions from U.S., but doesn't face the prospect of losing greater access to American markets if the FTAA falls apart or is greatly delayed due to its current FTA). *Id.* at 1043-47.

210. *See* Marta Beckerman, *Static and Dynamic Impacts of Mercosur: The Case of the Pharmaceutical Sector*, 75 CEPAL REV. 217, 220-22 (2001), available at http://www.un.org/esa/desa/ousg/articles/pdf/lcg2150i_Bekerman.pdf (last visited Nov. 6, 2005); Alan F. Holmer, *The Pharmaceutical Industry View*, 18 MULTINATIONAL MONITOR 4, April 1997, available at <http://www.multinationalmonitor.org/hper/mm0497.14.html>; *see also* Carranza, *supra* note 8, at 1062.

211. *See* SIMEON TEGEL, CENTER FOR LATIN AMERICAN STUDIES, U.C. BERKELEY THE WTO COTTON CASE: A FAIR TRADE WATERSHED? (2004), <http://www.clas.berkeley.edu:7001/Events/fall2004/10-04-04-summer> (last visited Feb. 21, 2005); *cf.* Helfer, *supra* note 6, at 55, 61. Chile may feel American subsidies are more properly limited through regime change in the WTO or through the FTAA negotiation process.

212. Maria Julia Olivia, *Intellectual Property in the FTAA: Little Opportunity and Much Risk*, 19 AM. U. INT'L L. REV. 45, 54 (2003) ("Intellectual property systems designed for highly industrialized countries may actually hinder innovation relevant to developing countries.").

ated with granting stronger IPRs.²¹³ Since Chile relies on exports to fill most of its manufacturing and technological needs, it is likely that technological transfer increases will increase its citizens' well being without many negative affects to its industrial interests.²¹⁴

B. Australia

As compared to Chile's fifteen year FTA negotiation process, the U.S. was much more willing to negotiate with Australia. This is surprising in light of many commentators' claims that developed countries are less willing to be coerced by the U.S. Allegedly, this attitude is why the U.S. does not entertain bilateral talks with many developed countries, specifically the EU.²¹⁵ In contrast, it took a relatively short time to make a similar pact with Australia. This may be due to Australia having more accessible and experienced negotiators when talks were initiated. Alternatively, it may be due to artificial or inherent prejudices that American policy has against countries that do not share its Anglican heritage and language. However, as with Canada (albeit to a lesser extent), Australia is dependent upon the American market for a large amount of its agriculture and gold mining exports.²¹⁶ Since these two industries are large, they had a great impact on the political decision to acquiesce to an FTA providing greater IPRs.²¹⁷ Moreover, such an agreement is consistent with recent Australian policies, which have focused on expanding its IPRs over the last few years.²¹⁸ This is probably particularly true when considering Australia's small entertainment and software industries.²¹⁹ Moreover, because Australia

213. *Id.*

214. *Id.*

215. Cf. Wadley, *supra* note 58, at 578-80.

216. Economist Intelligence Unit, *supra* note 72 (explaining that mining and agricultural products, while respectively making up 4.6 % and 2.8% of Australia's GDP, are its principal exports).

217. See AUSTA, *Latest Developments*, <http://www.austa.net/index.php> (last visited Feb. 21, 2005) [hereinafter *Latest Developments*]; Economist Intelligence Unit, *supra* note 72.

218. *Trade Access: Negotiating for Better Market Access*, AUSTRALIAN INDUSTRY GROUP, Feb. 7, 2004, 2, <http://www.austa.net/pdf/AIGfeb04.pdf> (last visited Feb. 21, 2005).

219. ALLEN CONSULTING GROUP, *THE ECONOMIC CONTRIBUTION OF AUSTRALIA'S COPYRIGHT INDUSTRIES* ii-iii (2001), available at [http://www.copyright.com.au/reports%20&%20papers/\(c\)_Value.pdf](http://www.copyright.com.au/reports%20&%20papers/(c)_Value.pdf) (last visited Feb. 21, 2005).

lia has increasingly expanded its manufacturing industries over the past ten to fifteen years, the increased market access provides an avenue to create accelerated growth.²²⁰ Likewise, as with Chile, Australia relies heavily on American foreign investment and Australia had much to gain and little to lose in agreeing to expand IPRs for greater foreign investment access.²²¹

Australia was also concerned that less developed countries were becoming more competitive and gaining greater access to American markets as a direct result of their FTAs with the U.S.²²² Thus, the less developed countries may be greatly impacting developed countries' decisions in making bilateral agreements, at least in the case with Australia.²²³

More importantly, as with Chile, Australia considers its trade liberalization policies of the last ten to fifteen years as being a major reason for its success in expanding its economy and growing its manufacturing and other industries.²²⁴ Thus, Australia's agreement also reflects its population's decision to continue implementing a policy that has been credited with greatly increasing its financial well-being. Moreover, for most Australians, greater IPRs are likely to provide a negligible problem when compared to the positive impacts of the FTA and stronger IPRs on Australia's industries.²²⁵

220. *Trade Access, Negotiating for Better Market Access*, *supra* note 218, at 2.

221. Compare Bruce Rasmussen, *An Analysis of the Biomedical Sectors in Australia and Canada in a National Innovation Systems Context* 7 (Ctr. for Strategic Econ. Studies, Working Paper No. 21, 2004), available at http://www.cfses.com/documents/pharma/21-Biomedical_Sect_Aust_&_Can_Innovation_Rasmussen.pdf, with ALLEN CONSULTING GROUP, *supra* note 219, at ii-iii.

222. See *General Issues*, *supra* note 176; AUSTA, *Public Forum*, <http://www.austa.net/publicForum/publicForum20.htm> (last visited Feb. 21, 2005) [hereinafter *Public Forum*].

223. See AUSTA, *Quick Briefs for Media – International Economic Issues*, <http://www.austa.net/quickBriefs/quickBriefs2.htm> (last visited Feb. 21, 2005) [hereinafter *International Economic Issues*].

224. See THE AUSTL. APEC STUDY CTR., *AN AUSTRALIA-USA FREE TRADE AGREEMENT: ISSUES AND IMPLICATIONS* 49 (Monash University) (Aug. 2001), available at <http://www.austa.net/pdf/chapter5.pdf> (last visited Sep. 24, 2005).

225. See *Issues Likely to Arise in an Agreement*, *supra* note 4. This could change if IPRs negatively impact Australia's pharmaceutical entitlement program, but this is not expected to occur.

1. Testing Hypotheses

i. U.S. Hegemony

U.S. negotiations with Australia appear to have progressed relatively smoothly. While Australia was willing to agree to stronger IPRs, it also gained the greater access to U.S. markets and foreign investment it desired.²²⁶ In lieu of the fact that Australia has relatively small IPR-oriented industries, it appears Australia sacrificed very little to achieve its objectives.²²⁷

In agreeing to an FTA with the U.S., it seems Australia was reacting to various factors.²²⁸ The largest factor was the increased competition in American agricultural markets resulting from the FTAs the U.S. made or was planning to make with various Latin and Central American countries.²²⁹ Other factors included Australia's concern for recent anti-free trade actions, like the tariffs placed on American steel imports originating from countries with whom the U.S. had no FTAs, and Australia's desire to further its trade liberalization policies.²³⁰

Thus, it seems there could be some support for a U.S. coercion hypothesis in relation to Australia because of American anti-free trade tariffs and subsidies. However, the steel tariff was only transitory in nature and repealed after a WTO ruling invalidated the tariff fifteen months after it was created.²³¹ Moreover, Australia was able to exempt its largest steel exporter, BHP Steel, from most of these tariffs.²³² While U.S. tariffs and subsidies may have been an Australian concern, there were already avenues in place to deal with this issue. Therefore, this cannot adequately explain Australia's desire for an FTA.

226. See *Public Forum*, *supra* note 222; see also discussion *supra* Parts IV.C.

227. This could prove to be inaccurate if this FTA impedes Australia's drug program. Australia, however, would not have knowingly negotiated IPR protection away. See *Issues Likely to Arise in an Agreement*, *supra* note 4.

228. See *International Economic Issues*, *supra* note 223.

229. See *id.*; *General Issues*, *supra* note 176.

230. *Id.*; *Public Forum*, *supra* note 222.

231. U.S. Steel Tariffs Officially Ruled Illegal, THE AUTOBEAT DAILY, July 14, 2003, at 1, <http://www.autobeatdaily.com/pdfs/07-14-03.pdf> (last visited Feb. 21, 2005).

232. The Australia United States Free Trade Agreement Business Group, *Can Australia Negotiate with the US?*, FTA ANALYST (Issue No. 5), Mar. 12, 2003, available at <http://www.austa.net/analyst/analyst5.html> (last visited Feb. 21, 2005) [hereinafter *Can Australia Negotiate with the US?*].

Moreover, Australia felt it had adequate negotiating power.²³³ This is validated because business and political leaders generally seem happy with the FTA.²³⁴ Consequently, it does not appear that Australia was coerced into making this agreement. Instead, Australia appears to have been interested in making the agreement to further its own interests while increasing or maintaining American attention in the Pacific region.²³⁵

ii. Multinational Corporate Lobbying

The multinational corporate lobbying theory appears to have much more applicability to the Australian-U.S. FTA than it did for the Chilean-U.S. FTA. Some of the major proponents of the Australia-U.S. FTA were Alcoa, Kellogg, Caterpillar, IBM, and Mobil.²³⁶ Moreover, the mining, metals, and manufacturing industries are expected to make the largest gains from the FTA.²³⁷ These results would clearly help Alcoa and Caterpillar.

Additionally, the FTA signed by Australia and the U.S. appears to help a vast array of Australian business, especially agricultural interests, and its automotive industry.²³⁸ Consequently, it appears that Australia attempted to help all of its industries in making the FTA, not just large multinational corporations. The U.S. was also more willing to make concessions that could help companies that have a substantial business presence in the U.S. due to effective lobbying.²³⁹ However, the magnitude of this effect remains unclear. Moreover, the fact that this agreement increased Australian financial investment into the U.S., and will also help

233. See *General Issues*, *supra* note 176; *Can Australia Negotiate with the US?*, *supra* note 232.

234. See *Latest Developments*, *supra* note 217. One major exception would be Australia's failure to obtain greater access to the U.S. sugar market. *Id.* However, some commentators believe it is best to deal with this issue in the WTO. *General Issues*, *supra* note 176. Moreover, numerous commentators use Canada as an example to indicate that Australia will still greatly gain from the FTA, in spite of this failure. See e.g., Tony Parkinson, *Why We Have Lots To Gain From The FTA*, (July 3, 2004), <http://www.theage.com.au/articles/2004/07/02/1088488151256.html?from=storylhs&oneclick=true> (last visited Nov. 6, 2005).

235. THE AUSTL. APEC STUDY CTR., *supra* note 224, at 77.

236. AUSTA, *Who are we?*, <http://www.austa.net/whoAreWe.htm> (last visited Feb. 21, 2005) [hereinafter *Who are we?*].

237. *Trade Access, Negotiating for Better Market Access*, *supra* note 218, at 2.

238. *Id.*

239. *Who are we?*, *supra* note 236.

Australian firms of various sizes enter American markets, indicates that the agreement was not aimed solely at multinational corporate interests.²⁴⁰

Thus, while multinational corporate interests were involved in the FTA negotiation process, it does not appear to have been Australia's sole, or even major, aim in the negotiations.²⁴¹ Instead, it appears Australia was more interested in promoting Australian business interests, especially the agricultural and mineral interests, which make up a large portion of Australia's economy and exports.²⁴²

iii. Australia's Autonomous Policy Implementation

While there is some evidence of U.S. coercion or multinational corporation lobbying, the largest factor affecting Australian negotiations were indigenous Australian interests in furthering its trade liberalization policies and economic opportunities for principally Australian businesses.²⁴³ Australia is committed to promoting economic policies that have proven successful at growing Australia's economy, which essentially consist of trade liberalization policies.²⁴⁴ In fact, Australia is lowering its tariffs unilaterally through 2005 as part of this robust policy.²⁴⁵

Australia has also been committed to expanding IPRs.²⁴⁶ Consequently, Australia's decision to acquiesce to U.S. demands on expanding IPRs is consistent with this policy. Strengthening IPRs is unlikely to negatively affect Australia's overall economy. In fact, stronger IPRs will likely help Australia's biotechnology industry,

240. AUSTA, *Australian Business Reviews the FTA*, <http://www.austa.net/reaction.html> (last visited Feb. 21, 2005).

241. *Trade Access, Negotiating for Better Market Access*, *supra* note 218, at 2 (explaining that Australian agricultural, mineral, and automotive industries appear to be major winners from bilateral FTA negotiations. None of these industries, with the exception of minerals, involves extensive multinational corporate involvement that would be detrimental to Australian employment or business interests).

242. Media Release, Department of Agriculture, Fisheries and Forestry, Australian Farmers to Reap Benefits from an FTA (Nov. 14, 2002), <http://www.maff.gov.au/releases/02/02321wt.html> (last visited Feb. 21, 2005).

243. *Trade Access, Negotiating for Better Market Access*, *supra* note 218, at 2.

244. Press Release, World Trade Organization, Trade Policy Review: Australia 2002, *supra* note 166.

245. *Id.*

246. *Id.*

which is considered to be “world class.”²⁴⁷ However, the greater rights are expected to negatively affect Australia’s computer and technology industries.²⁴⁸ In spite of this negative impact, the FTA may have created a sufficiently substantial net benefit to Australian commerce that it was willing to risk negatively affecting this relatively small segment of Australia’s economy.²⁴⁹

C. Implications of These Results

1. Bilateral vs. Multilateral

The success that Chile had in its bilateral negotiations, especially when compared to the highly unfavorable results attributable to the multilateral TRIPS negotiations, suggests that the best forum for less developed countries are bilateral negotiations.²⁵⁰ Bilateral negotiations allow each country to fully analyze the claims made by its trading partner and discern which are “false hopes” and which are not. This is particularly true when the negotiators are highly capable, such as the case in some less developed countries like Chile or Brazil.²⁵¹

Furthermore, it appears that a multilateral setting may not be necessary, and is likely even harmful, to less developed countries’ interests during any negotiation process. Less developed countries are probably better off using bilateral negotiations or negotiations between one developed country and a group of less developed

247. Compare Rasmussen, *supra* note 221, at 7, with AUSTL. TRADE COMM’N, BIOTECHNOLOGY CAPABILITY OVERVIEW, (Nov. 11, 2004), http://www.austrade.gov.au/overseas/layout/0,,0_S3-1_-2_-3_PWB1108372-4_-5_-6_-7_,00.html (explaining that Australia considers its biotech industry, while relatively small, to be an “emerging” one).

248. LOUISE VAN ROOYEN & PETER L. HIGGS, AUSTRALIAN INTERACTIVE MEDIA INDUSTRY ASSOCIATION, AUSTRALIA’S DIGITAL CONTENT FUTURE AND THE FTA: THE VIEW FROM AUSTRALIAN INTERACTIVE MEDIA INDUSTRY ASSOCIATION (AIMIA) 8, http://www.aimia.com.au/i-cms_file?page=533/AIMIA_FTA_Preso_Final.pdf (last visited Feb. 21, 2005); DR. ANDREW TRIDGELL, FTA DISASTROUS FOR AUSTRALIAN COMPUTER INDUSTRY AND USERS (July, 2004), http://samba.org/~tridge/fta_statement.html (last visited Feb. 21, 2005).

249. ALLEN CONSULTING GROUP, *supra* note 219, at ii-iii. (explaining that Australia’s copyright industries combine to comprise 3.3 percent of Australia’s GDP. Moreover, Australia is a net importer of copyright materials by over \$1 billion).

250. Success here is viewed from the viewpoint that Chile wanted and won an FTA agreement with the U.S.

251. Carranza, *supra* note 8, at 1051-52.

countries, similar to the FTAA negotiations.²⁵² This strategy provides a forum that is less likely to be overwhelmed by powerful special interests that are capable of separating any cohesion existing within the less developed countries' negotiation tactics.²⁵³

2. NGO Involvement

The case study results appear to impact some aspects of the current commentary regarding NGO involvement in intergovernmental negotiations.²⁵⁴ Specifically, the notion that NGOs should be involved in bilateral and multilateral negotiations appear to make little sense if less developed countries are capable negotiators for their best interests. Moreover, when dealing with democratically elected officials, it seems unnecessary to involve parties that have no constituency or concrete interest in the results of the negotiations. If the population doesn't agree with its government's policies, it votes for a change; this is particularly true for bilateral negotiations, where each country's interested parties have the loudest voices in whether policies or tradeoffs are acceptable.²⁵⁵ Whatever positive influences NGOs have in this environment appear to be minimal, since it is unlikely that another barrier to finding mutually agreeable terms would be a positive influence on a negotiation process.²⁵⁶ Additionally, it is unlikely NGOs would be

252. Compare *id.*, with Okediji, *supra* note 5, at 850.

253. See *id.*

254. See Jeffords, *supra* note 9, at 987 ("NGOs can put a human face on the WTO. However, like the humans the NGOs represent, they need to be included."). See generally, Bluemel, *supra* note 9; Helfer, *supra* note 6, at 50 n.227.

255. The recent action by the population in Ukraine to improper and corrupt leadership and voter fraud is one example of the power and voice of a democratic population that is inherently present when two democratic countries enter negotiations. See Yuliya Tymoshenko, *Ukraine's Orange Christmas*, (Dec. 23, 2004), http://www.tompaine.com/articles/ukraines_orange_christmas.php (last visited Feb. 21, 2005)

Nobody ever doubted that Ukraine had changed vastly in its twelve years of independence. Yet, caught in the sights of a gun barrel, nobody – not even the brave men and women who camped in their hundreds of thousands in the snow before Ukraine's parliament – knew with certainty whether those changes had wrenched Ukrainians from the grip of fear and apathy. The success of their defiance shows the power of the idea that bewilders outgoing President Leonid Kuchma and his acolytes: that democracy means taking responsibility for one's fate into one's own hands.

256. See Sell, *supra* note 48, at 949 (explaining that WIPO receives approximately 85-90% of its operating budget from Patent Cooperation Treaty patent applications, which are mostly used by global life science corporations that advocate high intellectual property

less corruptible than government officials, particularly because NGOs lack a connection to a democratically elected constituency.²⁵⁷ Thus, even if NGOs are given a place at the negotiation ta-

protection).

257. The lack of transparency or constituency that most bureaucrat UN employees represent creates an atmosphere that is much more likely to lead to corruption. See LISA MEYERS, U.N. WORKER ACCUSED OF GENOCIDE IN RWANDA: FORMAL CHARGES WERE DROPPED, BUT QUESTIONS REMAIN (Dec. 2, 2004), <http://msnbc.msn.com/id/6637384> (last visited Feb. 21, 2005). "A U.N. worker was accused of genocide and yet was allowed to stay on the U.N. payroll. . . The decision not to prosecute him was made on the grounds of expediency, not legal grounds, however the U.N. wants to dress it up . . . He killed many, many people." See also Judith Miller & Warren Hoge, *Inquiry on Food-for-Oil Plan Cites U.N. Diplomat for Conflict*, NEW YORK TIMES, Feb. 4, 2005, at A1, available at <http://www.nytimes.com/2005/02/04/international/04food.html> (last visited Feb. 10, 2005).

Reaction to the report from Congressional investigators was mostly supportive of Mr. Volcker's work. Representative Henry J. Hyde, the Illinois Republican who is the chairman of the House International Relations Committee, said in a statement that the report painted a picture of 'mismanagement, neglect and political manipulation that resulted in significant corruption of the oil-for-food program.' 'I am reluctant to conclude that the U.N. is damaged beyond repair,' he said, 'but these revelations certainly point in this direction.' A similar, but even harsher reaction came from Senator Norm Coleman, a Minnesota Republican and chairman of the Senate Permanent Committee on Investigations, who called on Mr. Annan to lift Mr. Sevan's diplomatic immunity immediately. 'The report shows that he repeatedly lied to investigators, has misled the inquiry about the source of \$160,000 in cash deposits and unethically steered oil-for-food contracts to close associates and lied about those relationships to authorities,' he said.

Compare Ruth Gidley, *UN Says Refugee Exploitation is Serious, but not Widespread*, REUTERS ALERTNET, Oct. 25, 2002, <http://www.alertnet.org/thefacts/reliefresources/5541377.htm> (last visited Feb. 21, 2005) ("It's difficult to escape the trap of those (NGO) people; they use the food as bait to get you to sex with them"), and Joseph Loconte, *The U.N. Sex Scandal*, WEEKLY STANDARD, Jan. 10, 2005, <http://www.weeklystandard.com/Content/Public/Articles/000/000/005/081zxelz.asp?pg=1> (last visited Feb. 21, 2005) (explaining that the sexual abuses committed, or ignored, by U.N. personnel violate the institution's Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the principles enshrined in the Universal Declaration of Human Rights. A 2002 U.N. report characterized the sexual exploitation issue as 'a betrayal of trust as well as a catastrophic failure of protection.'), and Mark Steyn, *U.N. Forces? Just a Bunch of Thugs*, THE DAILY TELEGRAPH, Feb. 15, 2005, <http://www.telegraph.co.uk/opinion/main.jhtml;sessionid=EWM2C5GC5G1PQFIQMF5OAVCBQ0JVC?xml=/opinion/2005/02/15/do1502.xml&sSheet=/opinion/2005/02/15/ixopinion.html> (last visited Feb. 21, 2005) ("All this derives from a UN culture in which the free nations have met the thug states so much more than half way that they now largely share the dictators' view of their peoples - as either helpless children who need every decision made for them, or a bunch of dupes whose national wealth you can reroute to your Swiss bank account, or a never-ending source of fresh meat"), with Secretary-General, Report of the Secretary-General on Children and Armed Conflict, delivered to the Security Council and the General Assem-

ble, it is uncertain that they will have a positive influence.²⁵⁸

However, for autocratic or communist governments, such NGO involvement likely would not present the same problems because these governments are less likely to invoke policies favorable to the majority of their population. Instead, autocratic or communist governments are more likely to be corrupt and thereby advance the interest of those in power at the expense of their populations.²⁵⁹ In these instances, NGOs, particularly those focused on increasing the financial well-being and the freedoms of

bly, U.N. Doc. A/56/342-S/2001/852 (Sept. 7, 2001), <http://www.un.org/special-rep/children-armed-conflict/KeyDocuments/Printable/Report/A-56-342-S-2001-852English.html> (last visited Feb. 21, 2005) ("I sincerely hope that Member States, the United Nations system, non-governmental organizations, civil society and others will take decisive action to protect children and to actively dissuade, and seek to expose and sanction, those whose actions are beyond the pale. This is a matter of international cooperation and political will, and it is my hope that concrete commitments will be made by the Security Council and Member States such that all parties to armed conflict, and actors whose conduct indirectly fuels conflict, cannot but realize that the international community will accept nothing less than full compliance with child protection obligations and commitments in time of war and in its aftermath.").

258. See Jacob, *supra* note 9, at 297 ("NGOs exert tremendous influence over large numbers of delegates not because they are right on matters of substance, but rather because they are providing the only pro bono legal services available to delegates with no legal experience of their own. In filling this role, the NGOs certainly did not act as disinterested legal advisers, and along the way more than one delegation was hoodwinked into believing the NGOs' all-too-frequently distorted versions of the truth."); cf. STIGLITZ, *supra* note 28, at 88

[C]ountries need to consider the alternatives and, through democratic political processes, make these choices for themselves. It should be – and it should have been – the task of the international economic institutions to provide the countries the wherewithal to make these *informed* choices on their own. . . The essence of freedom is the right to make a choice – and to accept the responsibility that comes with it.

259. See Pavol Stracansky, *Corruption in Eastern Europe: Communism Leaves a Long Hangover*, Nov. 4, 2004, <http://www.worldrevolution.org/article/1625> (last visited Feb. 21, 2005); Peter Eigen, *Corruption Perception Index 2004*, (Oct. 20, 2004), http://www.transparency.org/cpi/2004/cpi2004.pe_statement_en.html (last visited Feb. 21, 2005)

Corruption robs countries of their potential. As the Transparency International Corruption Perceptions Index shows, oil-rich Angola, Azerbaijan, Chad, Ecuador, Indonesia, Iran, Iraq, Kazakhstan, Libya, Nigeria, Russia, Sudan, Venezuela and Yemen all have extremely low scores. In these countries, the oil sector is plagued by revenues vanishing into the pockets of western oil executives, middlemen and local officials.

Cf. Press Release, Transparency International, Public Outrage is Calling Governments to Account and Forcing Corrupt Leaders out of Office, 1 (Oct. 15, 2001), http://www.globalcorruptionreport.org/download/gcr2001/press_release.pdf (last visited Feb. 21, 2005) ("Corruption deepens poverty around the globe by distorting political, economic and social life.").

the unrepresented, could provide the necessary voice during negotiations between democratic countries in a bilateral setting, in order to negotiate with tyrannical or communist countries.²⁶⁰ Even if a NGO was corrupt or corruptible, its presence during negotiations would not create a substantial departure from current negotiation processes with a communist or tyrannical government.²⁶¹

Unfortunately, NGO involvement in such circumstances may also result in a net negative impact on the very people NGOs are trying to help.²⁶² For example, many academics have found that NGOs and intergovernmental efforts specializing in providing foreign aid have failed miserably in achieving their goals.²⁶³ Some economists have even determined that such groups, despite their good intentions, have exacerbated some countries' economic problems.²⁶⁴ For instance, one study discovered that when NGOs and developed countries provided a 1% increase to these countries' GDP, the result was a 3.6% decrease in real GDP per capita income in that country.²⁶⁵ Moreover, aid provided to countries with respectable governments did not improve the effectiveness of the aid.²⁶⁶ Consequently, it seems that NGO involvement in any bilat-

260. This would also apply to "democracies" that are highly suspect like Venezuela, Egypt, or Russia, where their current leaders have been elected with dubiously high majorities. These countries are slightly more democratic than China, Cuba, Iran, or North Korea. For an example of this type of "democracy," see Mortimer B. Zuckerman, *Cracking Down on Caracas*, U.S. NEWS & WORLD REP., Feb. 14, 2005, at 72 (explaining the strong likelihood of fraud and coercion used by the Chavez government in the last Venezuelan election. MIT and Harvard professors issued a report estimating that there was at least a 99% chance the election in Venezuela was a fraud.).

261. See Stracansky, *supra* note 259; but see Donald J. Boudreux, *Faulty Band-Aid*, PITTSBURGH TRIB. REV., June 18, 2005, at A9, available at http://www.pittsburghlive.com/x/tribune-review/opinion/s_345188.html (last visited June 18, 2005) ("Aid money naively paid by Westerners to alleviate Third World poverty is stolen or misspent by the thugs who control the governments there. Nothing is done to foster the rule of law and private property rights that alone are the foundation for widespread prosperity.").

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* ("[M]any studies find that aid harms economies. For example, University of Regina economist Tomi Ovaska, writing in the Cato Journal, finds that 'a one percent increase in aid as a percent of GDP (gross domestic product) decreased annual real GDP per capita growth by 3.65 percent.'"); see also Tomi Ovaska, *The Failure of Development Aid*, 23 CATO JOURNAL, 175, 186 (2003), available at <http://catoinstitute.com/pubs/journal/cj23n2/cj23n2-2.pdf> (last visited June 24, 2005).

266. *Id.* (explaining that the failure of aid in the well run countries could be a result from the "negative effects of aid on work effort and from the stipulated end uses of aid,

eral or multilateral setting may have unintended negative effects that warrant, at the least, a skeptical view of any asserted benefits their involvement could create.²⁶⁷

VI. CONCLUSION

As this case study illustrates, less developed countries are not as unsophisticated as many claim when negotiating FTAs that may provide for stronger IPRs. Instead, each country's internal political capacity and stability help to determine whether a country is capable of adequately representing itself in such negotiations. It appears that even where such capacity and stability are quite low, a country is as likely to adequately represent itself as it is with the help of NGOs. Thus, the willingness and likelihood of a less developed country with a democratic government entering an FTA providing stronger IPRs is likely to be directly related to the substantial interests of each country's constituency.²⁶⁸

which may lead to misallocation of scarce resources in the recipient country.”); *see also* James Soemijantoro Wilson, Note, *Why Foreign Aid Fails: Lessons From Indonesia's Economic Collapse*, 33 LAW & POL'Y IN INT'L BUS., 145, 146 (2001), available at http://www.findarticles.com/p/articles/mi_qa3791/is_200110/ai_n8982932 (last visited June 24, 2005).

267. *See* Boudreux, *supra* note 261, at A9.

268. *See* Carranza, *supra* note 8, at 1051-52; *cf.* STIGLITZ, *supra* note 28, at 32 (explaining how Ethiopia rejected IMF funding due to its concerns with the negative impacts the IMF demands would have on their farming industry).