

Part III: Negotiating, Implementing, and Evaluating Free Trade Agreements

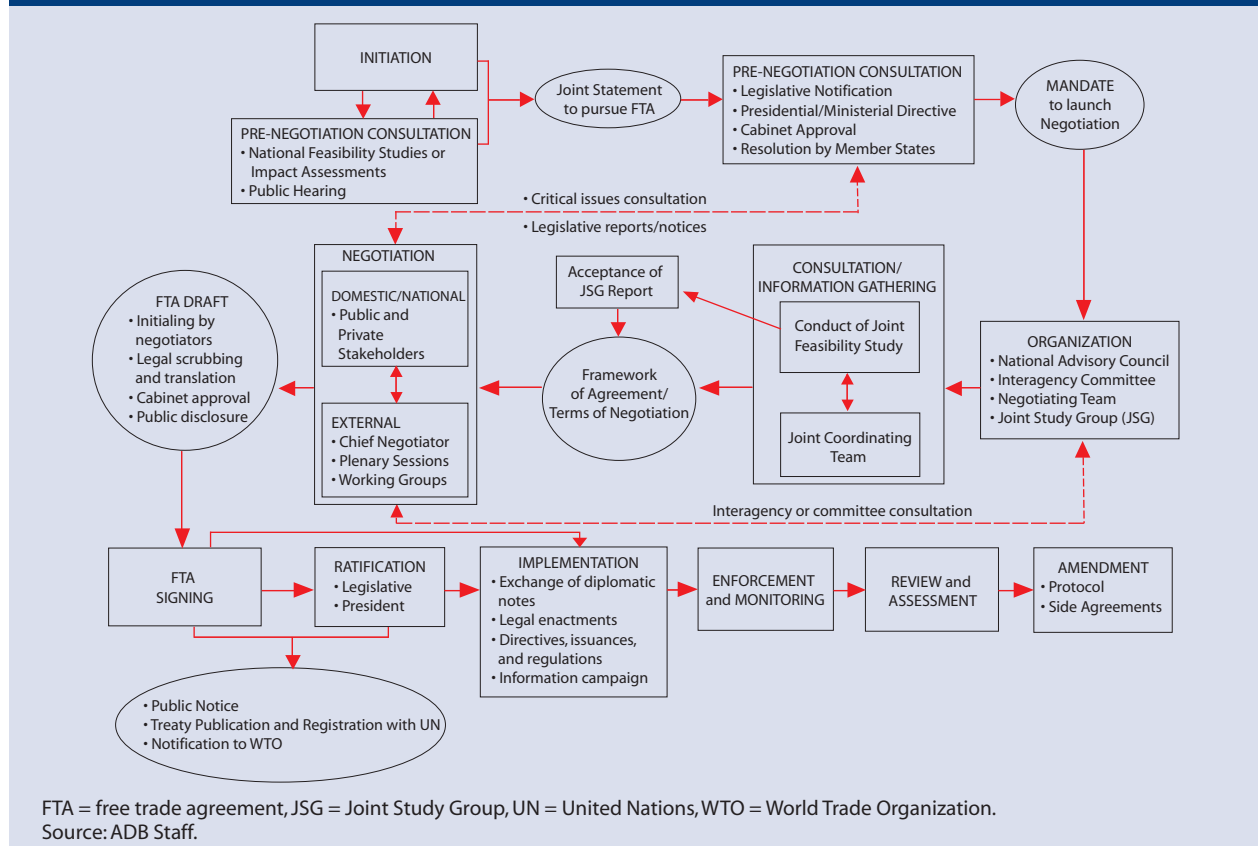
INTRODUCTION

A country's participation in a free trade agreement (FTA) does not begin and end with the actual negotiations. The FTA trail entails various pre-negotiation procedures and extends until its enforcement and evaluation. Understanding the whole process will assist the negotiators, implementers, and evaluators in effectively delivering their duties and properly coordinating their functions.

Part III¹²⁰ provides a general understanding of the entire FTA process, discusses the procedures and experiences at each step, and identifies good practices and practical approaches to the issues and challenges that face government officials and staff working on FTA and other FTA-related matters. A model FTA process is shown in Figure 3.1. Except for the substantive and procedural requirements established under the WTO framework, there is no firm sequence of events in preparing for,

¹²⁰ Part III is based on inputs from concerned ministries and agencies of ASEAN member countries, the Republic of Korea, and Australia. The authors are grateful to the ASEAN Secretariat for circulating the questionnaire to ASEAN member countries, and to the FTA training course speakers and participants for their valuable comments. Good practices and experiences especially from developed countries are incorporated.

Figure 3.1 Model FTA Process



negotiating, and implementing FTAs. The procedures, however, are usually the same and are more often dictated by national laws and practices.

The starting point of an FTA process varies between countries. While most developed countries and some newly industrialized economies (NIEs) in Asia begin with pre-negotiation consultations or exploratory works, most developing countries (e.g., member countries of the ASEAN) begin with high-level government-to-government initiatives.

At the pre-negotiation consultation stage, national feasibility studies, domestic sensitivity analysis, scoping studies, or public hearings assess the desirability and viability of the proposed FTA and identify sectoral difficulties. When the FTA is found to be appropriate

and timely, the country that conducted the feasibility studies proposes FTA negotiation. FTA initiation therefore involves an active player (the country that has determined the relevance of entering into an FTA and thereby proposes FTA negotiations with another party) and a passive player (the country that accepts the proposal from a prospective FTA partner to negotiate).

In many countries, the decision to enter into an FTA is politically motivated and is sometimes determined by the head of state. In this case, FTA initiation precedes the pre-negotiation consultations. The idea of entering into an FTA is usually introduced in bilateral meetings (such as state visits) to further the economic relations between the parties involved. ASEAN, for instance, has

typically acceded to FTA talks initiated by its external dialogue partners in the ASEAN-plus FTAs.

After the initiation or pre-negotiation consultation, the prospective FTA partners issue a joint statement declaring formally their intention to negotiate and enter into an FTA. Joint statements usually contain the rationale or significance of the FTA, its broad coverage, the target date of implementation, and sometimes a reference to the country's WTO commitments.

Some pre-negotiation procedures are then required and preliminary government-to-government contact is made. These internal government procedures are a precursor to launching FTA negotiations, which include legislative notification (especially where the parliament has a strong role in or influence on executive policies), the circulation of presidential or ministerial directives (as in most ASEAN countries), the submission of the overall FTA objectives and strategy to the cabinet for approval (as in the Republic of Korea), or formal adoption by member states (as in the case of the Australian Federal Government and the EU). In the process, the mandate to negotiate is obtained.

At the organization stage or as early as the pre-negotiation stage, several bodies may be organized or convened—national advisory committees (with representatives from the public and private sectors); legislative-executive and interagency committees (composed of public stakeholders, regulators, and policy makers); and the negotiating team (at the working and support levels). The committees (which are either decision-making or consultative bodies) will oversee and coordinate the policy aspects of the FTA and ensure that they are aligned with the national objectives of the country. The negotiating team is tasked to carry out their negotiation mandate.

A joint study group (JSG) (which will conduct the joint feasibility study) and a joint coordinating team (JCT) (which will agree on the terms of the negotiation) are organized on both sides of the negotiating table as part of the broader consultation and information-gathering stage. If the JSG report recommends entering into an FTA and this recommendation is accepted by the leaders of the prospective partner countries, a framework agreement is signed or formal negotiation ensues. The framework agreement specifies the outline or coverage of the proposed agreement, including areas for possible economic cooperation and possibly “early-harvest schemes.”¹²¹ With or without a framework agreement, the JCT agrees on the terms of the negotiation and moves on to the negotiation.

FTA negotiation (which takes 1–2 years, depending on the issues covered and the depth of the proposed agreement) occurs at two levels—*externally* with the negotiating counterparts, and *domestically* with national stakeholders. External negotiations are conducted between chief negotiators (especially on sensitive issues) and between sub-teams at plenary sessions and at working group level (for specialized or technical matters). Domestic negotiations take place with stakeholders from both the public sector (e.g., policy makers, cabinet members, and regulatory bodies) and the private sector (e.g., business or industry groups, NGOs, workers' unions, environmental lobbyists, civil society, and consumer groups). Part of the negotiator's task at this stage is therefore balancing external and domestic interests. While domestic negotiations are an integral part of the whole negotiation process in advanced

¹²¹ A term used in trade negotiations for agreeing to accept the results of a portion of the negotiations before the rest of the negotiations are completed (e.g., early implementation of tariff liberalization of selected goods).

countries, external negotiations are still at the center of the process in many developing countries.

Concurrently, coordination and consultation with the interagency committee, the national advisory council, the cabinet, and the legislative body¹²² continues. While some practical issues are addressed through meetings among the ministries concerned (at the director or director-general level depending on the level of authority needed to resolve the issues), critical issues are often elevated to the interagency committee, the national advisory council, or the cabinet. Highly critical issues that dictate the destiny of the whole negotiation are sometimes taken up at the level of the head of state, usually at the final stage of the negotiation. In some countries, regular legislative reports or notices provide an opportunity to discuss critical issues, arrive at new bargaining positions if necessary, and minimize possible conflicts or obstacles during ratification.

Sometimes the text of the agreement is based on previously signed agreements (e.g., agreements entered into by the US, Japan, and ASEAN) to which one of the countries is a party. This process, called “docking,” saves time, as negotiators no longer need to renegotiate areas that do not present any material issue to either side. Docking may even result in more consistent or harmonized FTA agreements (especially in the matter of rules), lessening the so-called “spaghetti bowl effect” of FTA proliferation.

After the negotiation but before the signing of the agreement, the text of the agreement is initialled by the chief

Box 3.1: How the US Negotiates a Trade Agreement

Before negotiations, the administration notifies the Congress, consults with relevant congressional committees and the Congressional Oversight Group (COG), and complies with additional consultation and assessment requirements (for negotiations in the agriculture, textiles and apparel, and fish and shellfish sectors). The Congress then considers implementing legislation for a trade agreement under expedited procedures.

During the negotiations, the Office of the US Trade Representative (USTR) consults closely with the COG and all committees of jurisdiction.

Before signing the agreement, the President reports to the revenue committees the proposed amendments to the US’ trade remedy laws and then notifies Congress. Private sector advisory committees will thereafter submit reports to Congress, the President, and the USTR.

Within 60 days from entering into the agreement, the President submits to the Congress a list of the required amendments to US law. The International Trade Commission submits to the President and Congress an assessment of the impact of the FTA on the US economy and the industrial sectors.

Source: US Trade Representative website; Pregelj (2005).

negotiators.¹²³ The initialled text then undergoes “legal scrubbing” to ensure that it reflects or is consistent with what was agreed on and intended during the negotiations. Consistency with and adjustments of domestic laws and regulations are taken into consideration. Legal scrubbing takes time: although the main agreement may not exceed a hundred pages, the appendixes could have thousands of pages.¹²⁴ Instances of ambiguity or oversight may have to be renegotiated. Negotiators must therefore be good drafters in the legal as well as the practical sense, since careful drafting

¹²² During FTA negotiations, US negotiators are mandated to coordinate at length with congressional committees. After the negotiations, the Congress examines the draft FTA text in the light of the negotiating mandate and either approves or vetoes the text but does not propose amendments.

¹²³ Chief negotiators of Japan’s FTAs sign what is called an “agreement in principle.”

¹²⁴ For example, the draft US–Republic of Korea FTA, deemed the most voluminous FTA entered into in the region, had 1,300 pages in Korean and 1,400 pages in English, 280 pages of reference materials, and a 30-page terminology guidebook.

(coupled with skillful legitimation) makes ratification and efficient implementation more likely. The pre-signing stage may also involve translation if the official language of one country is different from the common language used by the parties.

The full text of the FTA, as well as its annexes and list of commitments, may or may not be made available to the public at this stage. However, public disclosure before signing promotes transparency and provides an opportunity to clarify the contents of the agreement to the stakeholders. In some countries (e.g., Singapore), cabinet approval is mandatory before the FTA is signed. The signing of the agreement makes the FTA internationally binding between the parties involved.

Whether or not the agreement is already in effect or enforceable depends on the domestic laws of each country. After the agreement is signed, it is made available to the public and notified to the WTO.¹²⁵ Where required in some countries, legislative ratification precedes the notification to the WTO.

Ratification may or may not follow the signing of the agreement. Some countries classify FTAs as executive agreements, and thus binding and effective once signed by the president or the trade minister. Most countries' laws, however, require ratification by the legislature or approval by the president (if the latter did not sign the FTA) for FTAs to be enforceable, particularly when they are classified as treaties. As a treaty, the FTA is also recorded, published, and deposited as an

international instrument at the United Nations.¹²⁶

A note verbale or diplomatic note, from each of the parties notifies the other party that all domestic requirements for implementation (including ratification) have been complied with.¹²⁷ The date the FTA takes effect depends on the domestic laws of the member country or the agreement of the parties.

The implementation stage consists of (i) the passage of laws or amendments to domestic laws and regulations to comply with the countries' commitments in the FTA, and (ii) the issuance of directives and rules by the implementers or regulators (e.g., agencies dealing with tariffs, customs, or tax collection). Lack of proper legal and administrative measures or their delay could undermine the effectiveness of signed FTAs.

The FTA is enforced and monitored by implementing and regulatory agencies within the country with the assistance of overseas trade promotion offices (which collect information and concerns from traders and private sector groups abroad). Reports from these agencies and offices are useful in evaluating FTAs.

Most FTAs provide for their (interim or midterm) evaluation. On the basis of the assessments made by a review committee, the FTA may be revised or amended through protocols to the agreement. The amendment may require the same procedures as those carried out when negotiating an FTA, or a simple addendum or side letters to the agreement signed by the trade ministers, depending on the nature and coverage of the proposed changes.

¹²⁵ The WTO Negotiating Group on Rules requires "Member parties to a newly signed RTA [to] convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, and any other relevant unrestricted information." [emphasis supplied, Annex 1.b]

¹²⁶ In Australia, after an agreement enters into force, it is recorded, archived, and published in the Australian Treaty Series and registered with the United Nations (UN).

¹²⁷ This notification is different from that made by a WTO member to the WTO.

PREPARING FOR FTA NEGOTIATIONS

Countries, at least in principle, have established systematic criteria for entering into an FTA and selecting an FTA partner. In most cases, the decision to enter into an FTA is primarily motivated by political rather than economic considerations. Nevertheless, each country needs a well-defined FTA strategy to maintain a consistent negotiating position and to guide its negotiators, especially where the negotiating mandate is insufficient or ambiguous.

General FTA Strategy

The need for an FTA strategy cannot be overemphasized. For active FTA players, the strategy states their primordial goal and approach to FTAs. For countries that passively enter into FTAs, it provides a framework for negotiating agreements that achieve the country's national economic development objectives, and ensures the effective management of scarce resources and skills in trade negotiation. The FTA strategy may be general (as in the case of the US, Japan, Australia, and the Republic of Korea) or specific to the FTA partner (as in the case of most developing countries).

The US puts forward its competitive liberalization strategy in its bilateral, regional, and multilateral agreements (Box 3.2). Japan's FTA approach, on the other hand, is two-track: it negotiates regionally with ASEAN as a whole, and bilaterally with individual member countries. Japan's economic partnership agreement strategy is likewise dual, providing for trade liberalization and facilitation, on one hand, and economic partnership enhancement (through cooperation and FTA-plus provisions), on the other (Box 3.3). Meanwhile, Australia pursues opportunities to negotiate better trade and investment conditions through the mutually reinforcing and complementary

Box 3.2: US Trade Strategy

Competitive liberalization is the core strategy of US trade policy. The US gives priority to the multilateral system but conducts parallel talks with global, regional, and bilateral partners to generate constructive liberalization. The main objective of negotiation is the removal of trade barriers in goods, services, and foreign investment, as well as the extension of the rules-based trading system. This broad objective is accompanied by a range of policy priorities, including the protection of intellectual property, the enhancement of transparency, support for e-commerce, and the continued incorporation of government procurement, labor, and environmental issues into US trade agreements.

While trade is not an immediate objective of some US initiatives and foreign policy considerations largely account for others, certain standards are nevertheless established. The US considers it a matter of utmost importance that its free trade agreements set the gold standard for free trade, investment, and economic reform.

Suggested Readings:

Bergsten, C. Fred. 1996. *Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century*. Working Paper 96-15. Washington, DC: Peterson International Institute for Economics.

Schott, Jeffrey J., ed. 2004. *Free Trade Agreements: US Strategies and Priorities*. Washington, DC: Peterson International Institute for Economics.

approaches of (i) negotiating globally through the WTO, (ii) cooperating with other countries in the region (e.g., the Asia Pacific Economic Cooperation), and (iii) negotiating with important trading partners including FTAs.¹²⁸

Formulation of FTA Negotiation Strategy

The creation of a viable free trade area is a complex legal and economic process that requires strategic planning. Before beginning FTA negotiations, a country should consider its economic, political, and legal objectives—its reasons for wanting to join an FTA.

Is it seeking to join an FTA because of other FTA negotiations in their region? There may be a defensive need to negotiate an FTA with a major trading

¹²⁸ www.dfat.gov.au/trade/fta/fta-guide.pdf

partner if other countries in the region (competitors) have done so already. Is it seeking to join an FTA to increase market access, perhaps to increase its market for a particular product or group of products? Is it joining to cement a political relationship or gain a preference vis-à-vis a competitor? Which market sectors will benefit from an FTA? Which market sectors may lose? What are the economic results?

To answer these questions, a country should:

- (i) Develop an economic model of the economy in its present state and project the economic results of commitments made in various sectors.
- (ii) Consult industry and trade associations, consumer groups, farmers and farm groups, NGOs, and other stakeholders, and ascertain their FTA needs, objectives, and concerns.
- (iii) Examine the objectives in terms of the country's trade relations with other countries, the needs of stakeholders, and the country's WTO obligations.
- (iv) View objectives from an economic perspective:
 - (a) Can the FTA be used to promote domestic economic reform and competition?
 - (b) Will exempting sectors from coverage (protectionism) make a domestic sector inefficient?
 - (c) Will exemptions raise the price of certain inputs and diminish competitiveness?
 - (d) Will exemptions protect infant industries? Should long transition periods be used to protect such industries?

In effect, this exercise is a cost-benefit analysis to evaluate the potential gains

and losses from the FTA, and to shape an appropriate negotiating strategy.

Determining the scope and coverage of the agreement

Consistency with WTO Rules. Almost all trading nations are either WTO members or in the accession process; hence, WTO rules also influence the choice of strategies in trade negotiations. WTO rules provide opportunities for FTA members to protect key sectors. Members can seek to exclude products from the agreement, or to liberalize the covered products through gradual or transitional arrangements. A country must, however, strike an agreement on exemptions and phase-in periods in its FTA negotiations, and must bear in mind that sectoral omissions and phase-in periods could jeopardize the success of the negotiations and could have diverse short- and long-term economic implications.

The WTO rules that are applicable to free-trade areas serve as minimum requirements that all FTAs should meet, and specific WTO disciplines are a starting point for determining the scope and coverage of FTAs. The WTO Agreement permits FTAs, but subjects them to conditions designed to ensure that any free-trade area formed by the parties has substantial coverage—sufficient to justify the discrimination and trade distortion that is likely to result from the FTAs.¹²⁹

Specifically, GATT Article XXIV sets forth rules for the formation of an FTA for trade in goods. Many of the same

¹²⁹ As illustrated in Part I and II, the GATT and the Understanding provide that (i) a free trade area should facilitate trade between the constituent territories and not raise new barriers to trade with other WTO members outside the FTA; (ii) an FTA must eliminate duties and restrictive commercial regulations on “*substantially all the trade*” between its members with respect to products originating in their territories; and (iii) an interim agreement to establish an FTA must include a plan and schedule for the formation of the FTA within a reasonable length of time.

Box 3.3: Japan's FTA Strategy

Japan views free trade agreements (FTAs) as a means of broadening the scope of its economic relationships with other countries while maintaining its commitment to the World Trade Organization (WTO). It considers economic, political, and diplomatic factors when promoting FTAs, and is guided by the principle of conformity with WTO agreements. Japan aims for a comprehensive agreement, based on its first bilateral FTA with Singapore. It maintains flexibility by considering “Singapore-plus” or “Singapore-minus” options. A selective approach is also possible, for advance agreement in specific areas such as investment and services. Japan has strategic priorities in determining which FTAs to negotiate, and has established specific objectives in each case. Negotiations with ASEAN countries, for example, should offer a broad range and high degree of liberalization to ensure economic integration comparable with that of other regions. Japan also uses FTAs to promote economic development by incorporating aspects of development assistance in FTAs with developing countries.

Template of Japan's Economic Partnership Agreements

Chapters		Objective
Trade in goods Rules of origin Customs procedures Paperless trading Mutual recognition Trade in services	Investment Movement of natural persons Intellectual property Government procurement Competition	Liberalization and facilitation
Financial services cooperation ICT Energy Science and technology Human resource development	Trade and investment promotion Small and medium enterprises Broadcasting Tourism	Economic partnership and enhancement

Source: Ministry of Foreign Affairs of Japan. 2002. Japan's FTA Strategy. October. Available: www.mofa.go.jp/policy/economy/fta/strategy0210.html

rules are applicable to customs unions, and WTO decisions interpreting the rules applicable to customs unions may have relevance for the negotiation of an FTA since both forms of regional trade agreements are often couched in similar language.

GATS Article V, on the other hand, sets forth rules for the scope and coverage of an FTA for trade in services.¹³⁰ Fundamental decisions regarding the modality of service commitments must be

taken at the start of service negotiations. In particular, the parties must decide whether to use a “positive-list approach” like the WTO, or a “negative-list approach.” (See extensive discussions in Part II of this reference book.)

Complementing Economic and Development Strategy. An FTA should be viewed as part of a country's overall political, economic, and development strategy. The FTA may strengthen a political relationship. It may also secure an economic advantage vis-à-vis other WTO members, or implement a regional development strategy. For example, Mexico's membership in the NAFTA secured preferential market access for Mexican exports to both the Canadian

¹³⁰ An economic integration agreement liberalizing trade in services among its members must have substantial sectoral coverage, and eliminate substantially all discrimination between or among the parties, in the sectors covered by (i) eliminating discriminatory measures; and/or (ii) prohibiting new or more discriminatory measures, either when the agreement takes effect or within a reasonable time frame.

and US markets, and resulted in FDI in Mexico from Canadian and US investors as well as from non-member country investors.

Japan decides to enter into an FTA on the basis of (i) economic, (ii) geographic, (iii) political and diplomatic, (iv) feasibility, and (v) time-related criteria. Similarly, US key trade agencies hold discussions with potential FTA partners with six broad factors in mind: (i) country readiness, (ii) economic and commercial benefits, (iii) benefits to the broader trade liberalization strategy, (iv) compatibility with US interests, (v) congressional and private sector support, and (vi) resource constraints of the US Government. Australia's FTA policy allows the country to negotiate an FTA only if it (i) will deliver substantial economic benefits including commercial gains for Australian businesses, (ii) will deliver benefits more quickly than multilateral efforts, (iii) is comprehensive in scope, (iv) is consistent with Australia's WTO commitments and objectives, and (v) will significantly enhance the country's broader economic, foreign policy, and strategic interests.¹³¹

Awareness of Ongoing Negotiations to Clarify and Improve FTA Disciplines. The Doha Declaration mandates negotiations aimed at “clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.” The clarification and improvement of disciplines may make it more difficult to negotiate WTO-consistent FTAs (perhaps by specifying what constitutes “substantially all the trade”). Alternatively, by taking

development aspects into consideration, the negotiations may result in exceptions that are broader and more favorable to developing countries seeking to enter into FTAs.

Understanding the political and administrative process

The political and administrative process implicit in the negotiation of an FTA will differ for each country. Many countries follow the traditional route of granting power to government officials in FTA negotiation, signing, ratification, and implementation. Other political and administrative mechanisms, however, exist. For example, internal policy papers and guidelines are developed at relevant ASEAN forums to guide ASEAN-plus FTAs. In the case of the EU, the member states have granted the EC authority to negotiate FTAs, and are not directly involved in ratification (in contrast to ASEAN FTAs, where negotiations and implementation are primarily country-to-country).

Identifying the lead agency

The legislature or the constitution in many countries vests the authority for developing trade policy in the president or prime minister, subject to parliamentary approval. At the same time, the formulation of FTA negotiation strategy may be lodged with the president or executive department (e.g., in the Republic of Korea and the Philippines), a specialized body (in Brunei Darussalam), or a national or ministerial team comprising representatives of all government ministries (in Indonesia). In Australia, the Federal Government executive (the cabinet) decides the overall FTA negotiation strategy, and also sets the guidelines for each FTA negotiation.

¹³¹ See www.mofa.go.jp/policy/economy/fta/strategy0210.html, US Government Accountability Office (2004), and www.fta.gov.au

Box 3.4: Useful Information and Sources for Negotiators

<i>Economic analysis and country trade performance</i>	Multilateral institutions (such as UNCTAD, IMF, and World Bank) and regional organizations like ADB and ASEAN Secretariat; national sources like the national statistics office and trade and finance ministries; private sector data providers (e.g., JP Morgan and Bloomberg); and various research institutions
<i>Sector/Industry information, measures affecting trade, and nontariff barriers</i>	International Trade Center, UN Commodity Trade Statistics database, UN Trade Analysis and Information System, WTO Trade Policy Review Reports, EU Market Access Sectoral and Trade Barriers database, ASEAN Nontariff Measures database, and USTR National Trade Estimate Report on Foreign Trade Barriers
<i>FTA trends and useful resources</i>	ADB ARIC FTA database, UNESCAP Asia Pacific Trade and Investment Agreements database, WTO RTA gateway, Tuck Trade Agreements database
<i>Domestic and FDI policies and regulations</i>	National legislation, finance and customs regulations
<i>Domestic and trade priorities of the FTA partner</i>	National development plans, FTA strategies
<i>Sensitive issues including trade remedies filed and raised in dispute settlement mechanisms against prospective FTA partner</i>	WTO, World Trade Law website, tariff commissions

ADB = Asian Development Bank, ARIC = Asia Regional Integration Center, ASEAN = Association of Southeast Asian Nations, EU = European Union, IMF = Integrated Monetary Fund, FDI = foreign direct investment, FTA = free trade agreement, RTA = regional trade agreement, UN = United Nations, UNCTAD = United Nations Conference on Trade and Development, UNESCAP = United Nations Economic and Social Commission for Asia and the Pacific, USTR = United States Trade Representative, WTO = World Trade Organization.

Source: ADB staff.

The FTA negotiation strategy is implemented by the agency that takes the lead in trade and FTA matters.¹³² US trade agreements are negotiated and implemented by the President through the Office of the US Trade Representative (USTR). In other countries, the legislature takes a stronger role. Member states of the EU have delegated most trade policy competence to the European Commission.

The lead agency exercises general supervision and management over trade negotiations. It plays a major role from the time the FTA is initiated, when a dispute

arises during implementation, and when a change in the circumstances of the parties requires a new agreement. The lead agency also takes the role of intermediary between the regulatory agencies that administer the implementation of the FTA. These duties are performed by an FTA staff ranging in size from 10 to 15 officers (as in international trade departments of some ASEAN countries) to 100 staff (as in the FTA Bureau of the Republic of Korea). Of the staff complement of 45 in the authorized department of one of the advanced countries in the region, around 15 are involved full time in a particular FTA.

Using information as a negotiation tool

Effective negotiation depends on the availability of essential data and the quality of the impact analysis of the

¹³² The ministries or departments of foreign affairs and trade (in Australia, Brunei Darussalam, Republic of Korea, and New Zealand); the department or ministry of (international) trade and industry (in Malaysia, Philippines, Singapore, and Viet Nam); the economic, trade and industry, and foreign affairs ministries (in Japan); and the ministry of (foreign) commerce (in the PRC, Pakistan, and Thailand).

proposed FTA. Trade officials must be equipped with this information to make informed decisions in the negotiations. Negotiators are not expected to be technical experts in all FTA aspects. But they must at least have at hand the relevant information, such as economic or trade indicators and regulations not only of their country but also of the other party (see Box 3.4).¹³³

Conducting a feasibility study to assess the prospective FTA

The feasibility study assessing the prospective FTA is conducted either internally (within the ministry) or externally (with the assistance of an independent government think tank or a private consulting firm). The study is carried out at the national level in the pre-negotiation stage or jointly with the FTA counterpart through a joint study group (JSG). The JSG, which is composed of government officials, economists, and business sector representatives, is gathered to examine potential complementarities between the negotiating countries in terms of further trade and economic cooperation through the FTA. The report and recommendations of the JSG are reviewed and studied closely by a joint task force or joint coordinating team (usually composed of members of the negotiating committee) for negotiation purposes.

Feasibility studies are conducted by government, members of the academe, or groups of eminent persons endorsed by the government. In most countries, research institutions, law firms, and scholars are selected through private tendering to perform feasibility or econometric studies including CGE model analysis based on Global Trade

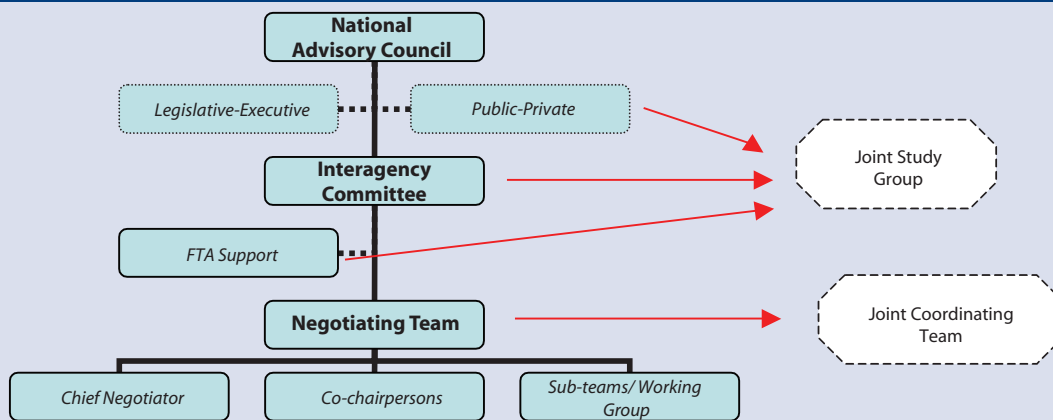
Analysis Project (GTAP) simulations. To supplement the quantitative analysis of the impact of FTAs, some type of qualitative evaluation may be required. In some countries, a domestic sensitivity analysis is performed to assess the likely impact of the FTA on producers, consumers, and regulators before going through negotiation. Other types of studies are sectoral impact studies, political and social impact analyses, environmental impact assessments, and review of laws and regulations that are related to or that may be affected by the FTA. Econometric modeling may be commissioned by the government through external consultants, along with other qualitative assessments of the costs and benefits of the proposed FTA.

The breadth and relevance of the feasibility study, which takes from 6 months to a year to complete for bilateral FTAs (1–2 years for ASEAN-plus FTAs), depend on the scope and coverage of the proposed FTA and the length of its negotiation. The feasibility study may be conducted once at the pre-negotiation or joint feasibility study stage, and again during the negotiation process to gauge the impact of the scenario presented at the negotiation table.

The results of the feasibility studies are useful but sometimes do not provide the depth of sectoral or industry analysis and detailed information required during the negotiations. In this regard, the in-house capacity of the trade teams or FTA units to deliver up-to-date information at various stages of negotiations is crucial in coming up with appropriate bargaining positions. The trade negotiators may also tap the resources of other government agencies (through interagency cooperation) and industry and consumer groups (through public-private partnership) on specific issues and technical matters. The negotiating team, however, must have sustained competence and diligence to arrive at an independent and credible

¹³³ Also to avoid being surprised or embarrassed at having to face a counterpart negotiator who knows more about the laws and regulations of a particular country than the country's own negotiators.

Figure 3.2: Three Levels of FTA Committees



FTA = free trade agreement.
Source: ADB.

negotiating position based on their own assessment of facts and in accordance with their mandate.

STRUCTURING THE NEGOTIATING TEAM

Organizing a negotiating team involves not only enlisting those who will be at the negotiating table but also forming an advisory committee, an interagency committee, and other committees to guide and give technical support to the negotiators. The negotiators must be equipped with appropriate skills and information to be effective as mediators rather than mere messengers in the negotiation. A clear reporting line is also important for effective decision making during the negotiations.

Organizational Structure

Most countries establish committees at three levels when entering into an FTA (Figure 3.2). At the highest level is the national advisory council,¹³⁴ where policy

and national priority issues related to FTAs are discussed. The council may comprise public-private representatives, a legislative-executive committee, or a combination of the two. At the second level is the interagency committee, which is composed of the cabinet members and agencies affected by and involved in the FTA negotiations. Other countries may provide for a subcommittee (for example, the FTA support committee in Thailand) to oversee FTA implementation, economic adjustment, and restructuring. Wide consultation is managed or conducted at these first two levels. Some members of these committees (together with distinguished members of the academe) are assigned or appointed to the JSG to identify the benefits and losses from the proposed FTA, and recommend the type and coverage of the agreement, if deemed desirable.

At the third level is the negotiating team, composed of the chief negotiator, co-chairpersons, and several sub-teams or working groups to negotiate with their government counterparts. In some countries, a task force for each FTA negotiation is created, to conduct all aspects of research, analysis, and consultation and even actual negotiations. Key members of each party's negotiating team together compose the JCT. Before

¹³⁴ Steering committee on international trade negotiations (Thailand) or ministerial or national team (Indonesia).

Box 3.5: Typical Composition of Working Groups in the Negotiating Team

Chapter/Provision	Ministry/Agency (as chair)
Goods (other than agriculture)	Trade and industry/Foreign affairs/Tariff commission
Rules of origin	Trade and industry/Customs
Agriculture and sanitary and phytosanitary measures	Agriculture
Services and investment	Finance/Economic affairs/Investment
Competition policy	Competition bureau/Fair trade commission
Technical barriers to trade	Standards, industry regulators
Trade rules and facilitation	Trade/Customs
Government procurement	Finance
Cooperation and development	Foreign affairs
Dispute settlement, institutional provisions, and intellectual property	Attorney general/Justice department/ International law/Intellectual property bureau

Source: Authors' compilation.

the negotiations, the JCT presents the negotiating foci, discusses the items for negotiation, and agrees on an indicative timetable for the negotiation.

The chief negotiator or head of delegation usually comes from the lead FTA agency (e.g., USTR in the US, the Ministry of Foreign Affairs and Trade in the Republic of Korea, and the Ministry of Foreign Affairs in Japan). In ASEAN-plus FTA negotiations, the organization structure is similar, with at least one lead negotiator from each member country assigned to each dialogue partner.

The chief negotiator is assisted by the co-chairpersons (director level), who head the sub-teams or working groups. The co-chairpersons usually come from ministries and regulatory agencies with responsibility for each chapter of the FTA, and may also be technical government experts (see Box 3.5, for example). In the case of Japan, the co-chairpersons come from the Ministry of Foreign Affairs, to ensure a unified and consistent perspective during the negotiations. In federal governments like the Australian

Government, representatives of the state governments are also part of the negotiating team. Similarly, if negotiations are held abroad the negotiating team is supported by ambassadors and trade attachés assigned thereto.

The sub-teams or working groups hold specific and focused negotiations on each chapter or sector of the proposed FTA before these provisions are considered by the joint negotiating committee at the plenary. The members of each working group and their number vary depending on the resources of the negotiating governments (in size, most negotiating teams from developing countries stand in a 1:2 to 1:4 ratio vis-à-vis their counterparts from developed countries).

Government officials in the legal departments undoubtedly play a crucial role in the negotiating team. Aside from handling or co-chairing working groups on dispute settlements, competition policies, intellectual property rights, and institutional provisions, lawyers or the legal team warrant that the mandate to negotiate and the conduct of negotiation

is sanctioned by their constitution and is consistent with domestic laws; ensure that FTA provisions are carefully drafted (consistent with the agreement and flexible enough for situations that are not or could not have been reasonably foreseen during the negotiations); undertake proper and legal scrutiny of the complete draft; and classify the agreement and render a legal opinion on the need to have it ratified.

The Negotiators' Mandate

After the pre-negotiation consultations, a mandate in the form of directives or negotiating instructions is issued. In some countries, government departments prepare a submission to the cabinet, and the cabinet, after considering the options and recommendations, decides to negotiate. In the US, the Bipartisan Trade Promotion Authority Act of 2002 serves as the President's official mandate to negotiate FTAs. The negotiation mandate contains government approval to proceed with the formal negotiations, grants authority to represent the government, and delimits the negotiating team's authority (in terms of coverage of the agreement, negotiating position, and so on). The negotiators' mandate may change from time to time. Negotiators need a clear mandate from their ministries or at least a channel through which they can obtain the mandate promptly. In some cases, the lack of authority of negotiators drags out the negotiation process. Regular meetings involving all sectoral bodies may be conducted to guide the negotiating team and clarify or strengthen their mandate.

Quantity and Quality of the Negotiating Team

In a negotiation between a developed and a developing country, the latter is faced with negotiating constraints. For

instance, while the Republic of Korea or Japan may assign a team of around 50 persons to each FTA negotiation, the developing country negotiating team is often less than half that number. Moreover, negotiators from developing countries handle more than one important area of negotiation or even several FTA negotiations, thereby causing conflicts and problems of overlapping sessions.

Although the size of the negotiating team could prove valuable in the negotiations, the quality of the negotiators (i.e., the appointment of the right persons) and the consistency of the core team members are much more important concerns. First, the negotiators in each working group must be capable of aligning the sectoral (or their agency's) position with the national negotiating position by interacting regularly with other working groups and consulting with the interagency committee through the co-chairpersons or the chief negotiator. The core negotiating team must be retained as much as possible for consistency and faster resolution of outstanding issues. This will make the negotiation process more efficient and serve the national interest. Lastly, the members of the negotiating team must have adequate technical, communication, and negotiating skills¹³⁵ to be effective negotiators and not mere emissaries every time a negotiating issue is presented at the table. Access to information and support from various sectors are also essential.

¹³⁵ Training and capacity building in the following areas would be useful to negotiators: (i) formulation of international trade negotiation positions and strategy; (ii) trade regimes and negotiation of international trade agreements; (iii) trade diplomacy and advocacy; (iv) policy and research analysis; (v) rules of WTO and other international agreements; and (vi) the art of managing political pressure and stakeholders' agenda(s).

Box 3.6: ASEAN Approaches to Negotiation

Association of Southeast Asian Nations (ASEAN) free trade agreement (FTA) negotiations are characterized by a sectoral approach to negotiations—first, agreement is reached on trade in goods, followed by trade in services and investment liberalization. Even though the dialogue partners are supposed to negotiate with ASEAN as a whole, negotiating with ASEAN involves bilateral negotiations between each ASEAN member country and the dialogue partner. This type of negotiation is crucial in cases of modalities and coverage of FTAs, particularly provisions on sensitive sectors. The process, however, tends to drag out the negotiation because the negotiators, having to weigh national versus regional objectives, find it difficult to reach consensus.

Source: ADB staff.

THE NEGOTIATION PROCESS**Laying Out the Negotiation Rules and Timetable**

Unlike multilateral negotiations (i.e., within the WTO framework), FTA negotiations follow no established or internationally accepted procedure. They differ from country to country and may be deduced from past practices, protocol, or prior agreements entered into by the negotiating countries. At the very least, the JCT must agree on the rules of proceeding with the negotiations. In terms of sequencing, the negotiators may adopt a sectoral approach (see ASEAN example in Box 3.6), a dual approach (i.e., the modalities-and-rules approach in the GATS, Box 3.7), or a gradualist approach (from simpler to more complex issues). These are not the only options—negotiators sometimes agree to adopt a template FTA (another FTA previously signed by a party to the negotiation) and no longer negotiate items that are acceptable to both parties or are not otherwise disputed.

The sequence of negotiations logically affects the preparation of the indicative timetable for negotiations. The timetable must be flexible enough

Box 3.7: Negotiation Approach under the GATS

Trade in services under the World Trade Organization (WTO) has quite different negotiation dynamics in terms of commitments and rules. On one side is the bilateral negotiation of specific national commitments, which takes the form of a bilateral bargaining process based on requests and offers, and on the other the multilateral (i.e., collective) negotiation of the governing rules, which involves an effort to build consensus on broad principles among member countries.

The steps in negotiating a proposal under the General Agreement on Trade in Services (GATS) are as follows:

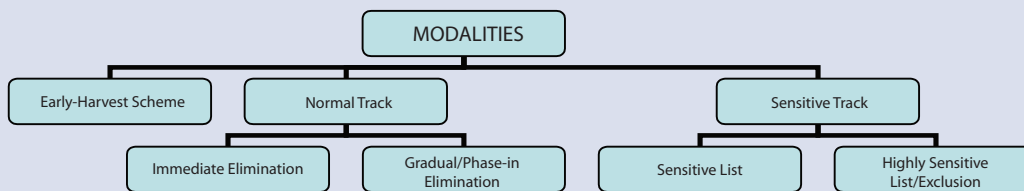
- (i) Develop requests under the request or offer procedure in the WTO.
- (ii) Formulate negotiating proposals on rules in the GATS negotiation.
- (iii) Negotiate sectoral and functional agreements.

Source: Monning and Feketekuty (2003).

to take delays into account, especially in the negotiation of modalities (where the number of tariff lines is negotiated separately from the list of products; see Figure 3.3 and discussions under trade in goods in Part II), sensitive sectors, and exclusions. It must also provide for adequate consultation with domestic stakeholders and significant committees when critical issues are considered. There is no universal deadline for negotiation of FTAs. However, in the US the time limit set for the trade promotion authority serves as deadline for its FTA negotiation. The election cycle in many countries may also be a deadline for FTA negotiations. Negotiators are likewise faced with resource constraints (especially when some agencies are unable to attend negotiation meetings) and strong pressure to conclude the negotiations quickly.

Interagency Coordination

Aside from providing a venue for government departments to balance national interests and industry- and sector-specific concerns, interagency

Figure 3.3: **Tariff Elimination Modalities for Negotiating FTAs**

Source: Author's compilation from various free trade agreements (FTAs).

coordination facilitates at least two significant processes that are useful in negotiating and implementing FTAs. First, interagency coordination enables the consolidation of all the sectoral consultations of the different departments or agencies. Formal hearings are sometimes selective and infrequent, so the national advisory council or trade negotiation team can base its assessment only on sectoral information provided by the ministries or agencies.

Second, interagency coordination provides the necessary link in FTA enforcement and monitoring. For instance, the effective implementation of the trade facilitation provisions of an FTA requires interconnectivity and coordination among all cross-border agencies (customs, sanitary and phytosanitary, inspection, and quarantine agencies). In most cases, interagency coordination is required before FTA implementation (to itemize the products to be included in each modality of tariff liberalization). The interagency committee may be ad hoc and organized for each negotiation or may already be embedded in the government structure (see Boxes 3.8 and 3.9 for an overview of the interagency mechanisms in the US and the Republic of Korea).

Negotiation Techniques, Habits, and Role of the Chief Negotiator

There are various negotiation techniques, most of which can be learned through practice. Simulation exercises have been

proven to be practicable and effective. In some countries, junior trade officers learn by observing actual negotiations. Exposure to FTA issues and involvement in actual FTA negotiations are effective ways of developing negotiation skills. Whatever the strategy or approach adopted by a negotiating team, certain guidelines and protocols must be followed to achieve smooth and successful negotiations (see Box 3.10). The chief negotiators on both sides must ensure this.

Most countries appoint a separate chief negotiator for each FTA rather than endorsing one for several FTAs. The chief negotiator must be clear about the country's national trade interests, maintain a strategic and holistic framework in the negotiations, and ensure that the country's negotiating position is clearly understood by the counterpart. However, simply sticking to a predetermined negotiating position may drive the negotiating process to an impasse; hence, negotiators are quite often advised to focus more on interest than on standing positions.¹³⁶ Unlike negotiations for private issues, FTA negotiations bind government officials more strongly to their mandates. Given that the ultimate goal of FTA negotiations is to maximize national interests, however, positions need to be properly adapted to changing negotiating conditions to best serve the national interest. The chief negotiator must, among others, possess credibility, patience, and sincere commitment to negotiate and arrive at an

¹³⁶ Fisher and Ury (1988).

Box 3.8: US Interagency Structure

The Office of the US Trade Representative (USTR) is the lead agency in formulating and coordinating US trade policy, negotiating trade agreements such as free trade agreements, and enforcing these agreements. It consists of three tiers of committees—the National Security Council (NSC) and the National Economic Council (NEC), the Trade Policy Review Group (TPRG), and the Trade Policy Staff Committee (TPSC). The presence of the NSC shows that security issues are considered in US trade policy.

The Office of the USTR consults with other government agencies on trade policy matters through the TPRG and the TPSC. These groups, administered and chaired by the Office of the USTR and composed of 19 federal agencies and offices, make up the sub-cabinet-level mechanism for developing and coordinating US government positions on international trade and trade-related investment issues.

If agreement is not reached in the TPSC, or if significant policy questions are being considered, then issues are taken up by the TPRG (deputy USTR and undersecretary level). The final tier of the interagency trade policy mechanism is the NEC, chaired by the President. The NEC deputies committee considers memorandums from the TPRG, as well as important or controversial trade-related issues.

Sources: US Trade Representative website; US Government Accountability Office Report (2005).

Box 3.9: Interagency Coordination Mechanism in the Republic of Korea

Interagency coordination is either managed by an ad hoc or permanent centralized interdepartmental committee, led in many cases by the ministry of foreign affairs. Some countries (e.g., the Republic of Korea) have a committee consisting of the ministers for international economic affairs and chaired by the finance minister. Sub-teams or back-office members working on different aspects of the free trade agreement meet when necessary with colleagues in other relevant agencies. While certain issues are discussed bilaterally between the lead agency and the agencies concerned, most issues are dealt with in committee meetings. The committees effectively coordinate different agency positions, although critics decry the frequent use of the process to share responsibility for certain sensitive issues among agencies.

Source: ADB staff.

(BATNA) and considering the partner's BATNA are also very important in strengthening bargaining power during negotiation and strategizing the options available.¹³⁸

agreement; maintain a good working relationship with the counterpart chief negotiator; have the ability to manage conflicting interest and views; employ sound judgment on the pace and rhythm of the negotiation; be able to effectively coordinate the team; and have the ability to energize domestic processes. The chief negotiator should also be able to communicate with the media since progress briefings are frequent. If the parties cannot reach a mutually beneficial agreement and the negotiations fail, it is crucial for the chief negotiator to be prepared with a best alternative to an agreement.¹³⁷ Developing one's best alternative to a negotiated agreement

¹³⁷ Using a "cost-benefit" analysis of the negotiating team's options, strategy, or plan for solving the trade problem.

MANAGING CONSULTATIONS

Building domestic consensus in FTAs is always difficult. A common issue raised against FTA negotiators is their failure to consult all stakeholders. Getting stakeholders to participate in consultation meetings may also be difficult. Managing consultations involves providing a venue for discussing the stakeholders' concerns and issues and sustaining such a mechanism.

Subjects and Types of Consultation

The overall objective of consultation is to consolidate varied interests, assess the country's FTA objectives, and build national consensus on the proposed FTA.

¹³⁸ See Fisher and Ury (1988).

Box 3.10: Negotiating Skills and Good Negotiating Habits

Listen Actively

Place information provided by other negotiators in the proper context. When in doubt, confirm what you thought you heard.

Ask Questions

The negotiation setting is an opportunity to learn about counterpart interests and determine where trade-offs or compromise might be appropriate.

Tactical and Timely Use of Silence

Information or compromise may be provided to fill the vacuum.

Take Breaks from the Negotiating Table

“Going to the balcony” to review an oral or written proposal, develop or formulate a response, and regain your composure is important.

Organize Brainstorming Sessions

Brainstorm to elicit reactions, ideas, and counterproposals. “What if” questions give the team or counterparts the power of choice and make acceptance of the proposal more likely.

Use Objective Criteria

Introduce fair standards and persuade the other party to support an argument or proposal by submitting evidence from independent experts.

Practice Role Reversal

Discuss what would work for the other party and why, to understand that party’s bargaining position.

Listen to and Record All Proposed Options

Preserve the proposal for ongoing review and comment by creating a record of the session.

Be Sensitive to Cross-Cultural Dynamics, Gender, and Language

Diplomacy and careful use of language will determine the success or failure of the negotiation process.

Build a Reputation

Rapport and good working relationships with counterparts will generate long-term benefits.

Create a Win-Win Mentality

Aim to arrive at a mutually acceptable agreement such that both sides feel they have won.

Source: Monning and Feketekuty (2003).

Consultation involves two types of subjects. Public stakeholders who define national policies, implement government programs and measures in all sectors, and deliver services to the public are subjects of the first type. They are the members of the parliament, the cabinet, and regulatory agencies. In the second group are the private stakeholders, comprising chambers of commerce, trade groups, sector or industry representatives, consumers, labor groups, NGOs, and the general public. The level of participation of these groups varies (and existing mechanisms tend to be biased in favor of big pressure groups). At the very least, all of these sectors should be well represented during the negotiations.

Consultation mechanisms may be formal or informal. Formal consultations are institutionalized and involve the membership and participation of public and private stakeholders in the advisory council as well as in the interagency committee’s FTA policy debates. Some countries convene public hearings before the official negotiation. Informal consultation is done through sectoral public hearings, opinion surveys, outreach and regional seminars, and other means (e.g., through invitations for comments on government websites).

Contrary to common perception, consultation is not a stumbling block but rather a building block (by providing inputs and outputs) in the negotiation process. In terms of inputs, consultation serves as a venue for discussing the issues and concerns of various sectors, identifying the key sensitive sectors, and managing conflict arising from the resistance posed by civil society and other vested groups. In some cases, strong opposition from interest groups is a defensive tool used to protect certain industries during the negotiation.

In terms of outputs, consultation becomes an instrument of advocacy for

the negotiators, not only in disseminating information on the FTA at various stages, but also in soliciting stakeholder support (thereby assisting in the legitimation of the FTA), understanding technical information, and drafting effective and non-trade-restricting measures to implement the FTA.

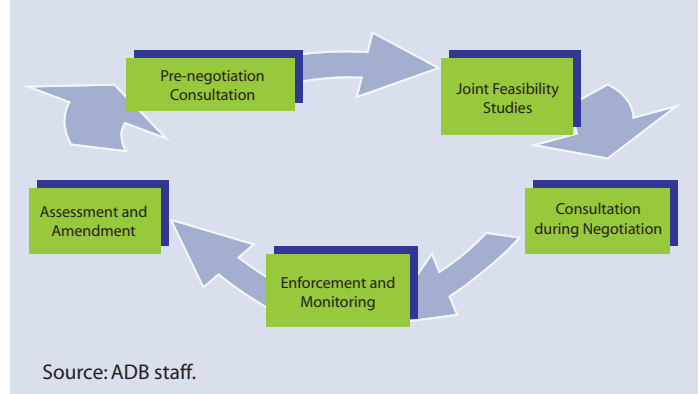
Although the type of consultation may vary in the stage of the FTA process, it should nonetheless be conducted from pre-negotiation to amendment (Figure 3.4). During pre-negotiation, public hearings are conducted to make a general assessment of the impact of the FTA. When feasibility studies are conducted, economic scholars, technical experts, and the business sector provide specific and quantitative analyses of the FTA. Politically sensitive items and other critical issues are discussed with the various stakeholders through available channels during the negotiation. Consultations during the implementation of the FTA assist the regulators as well as end users of government and trade services in improving the FTA-established mechanisms and in assessing whether or not the objectives of the FTA have been achieved.

The resources needed and the manner of consultation depends on the value accorded to the process by a country. To attain the expected effects described above, the consultation should be sufficient to help the stakeholders understand what is being presented at the negotiation and consult with their constituencies on the pros and cons of the proposals from their own perspective. This guarantees representation of all interests in policy debate and formulation.

Consultation Mechanisms

There are various models and ways of managing consultations on FTAs and trade-related issues (refer to Box 3.11). Most developing countries adopt a top-

Figure 3.4: When Consultation Should Be Conducted



down approach, where those at the higher levels (e.g., ministries, chief executive officers) steer the flow of consultation and, ultimately, decision making. Developed countries, however, have established a bottom-up approach to consultation (beginning broadly with the general public and concerned sectors). Various stakeholders' views are constantly obtained through submissions and industry feedback (e.g., the Australia, New Zealand, and Singapore FTA websites elicit such feedback). The choice of the system usually takes into account the political, economic, and institutional circumstances of the country as well as the time and resources available. In any case, the design of the consultation mechanism should be systematic, continuous, and transparent. The amount and quality of information provided by the negotiators will determine and sustain the stakeholders' active participation in the consultation.

IMPLEMENTING AN FTA

After an FTA is signed, it undergoes several internal pre-implementation procedures such as ratification and legislative enactment to ensure that the

Box 3.1.1: Examples of Consultation Mechanisms

Agency-Led Consultations

The Republic of Korea (through the Ministry of Foreign Affairs and Trade) consults all private and public stakeholders before and during negotiation, thus giving them ample opportunity to voice their concerns and opinions. Consultations are conducted through public hearings, private sector advisory meetings, and online channels to gather industry views.

National Trade Consultations

Australia's national trade consultations provide a forum for consultation, coordination, and collaboration on trade and investment issues between the federal and state and territory governments. Once or twice a year, the trade minister chairs a meeting with state and territory ministers who are responsible for trade issues. Additional issue-specific meetings are arranged as necessary. Explicit consultation guidelines have been issued by the Council of Australian Governments, the agency that facilitates consultation, cooperation, and policy coordination.

Industry-Based Consultations

In India, extensive consultation is conducted by at least two major industry associations—the Confederation of Indian Industry (with over 4,800 company members) and the Federation of Indian Chambers of Commerce and Industry. These associations play an active role in delivering industry views and providing critical inputs to the Government on trade issues.

Public-Private Advisory Consultations

Established in 1974, the private sector advisory committee system in the US is aimed at providing information and advice with respect to negotiating objectives and bargaining positions before trade agreements are negotiated. Under the Trade Act of 2002, each advisory committee is required to

prepare a report on proposed trade agreements for the Administration and Congress and make it public on the website of the Office of the US Trade Representative (USTR). The USTR's Office of Intergovernmental Affairs and Public Liaison administers the federal trade advisory committee system and provides outreach to, and facilitates dialogue on trade policy issues with, state and local governments, the business and agricultural communities, and labor, environmental, consumer, and other domestic groups.

Evaluation and Advisory Consultations

Australia's Productivity Commission (PC) is the Government's principal evaluation and advisory body on microeconomic policy and regulation. Once authorized to conduct an inquiry, the PC collects public opinions through hearings, submissions, and feedback on draft reports. Final findings and recommendations are based on extensive public input and feedback, which, in some cases, differ substantially from initial positions. This open process helps reduce the possibility of unexpected responses, which could lead to policy reversals.

Technology-Based Consultations

International Enterprise Singapore is an agency under the Ministry of Trade and Industry that is spearheading the development of Singapore's external economy. It maintains a free trade agreement portal providing information to Singapore-based companies exporting to Singapore's FTA partner countries, and collects industry feedback (through online surveys) to help the government negotiate FTA provisions that cater to the needs and interests of business.

Sources: Australian Trade Commission; FTA and Commonwealth-State Consultation on Treaties websites; International Enterprise Singapore website; Office of the US Trade Representative website; and Gallagher (2006).

signed FTA is within the mandate of the government.¹³⁹ These procedures, however, often unduly delay the FTA's implementation and, hence, also the attainment of its expected benefits. The implementation stage requires the active involvement of all government agencies

¹³⁹ This presupposes that the agreement is in accord with the country's constitution or requires no constitutional change.

concerned, if only to comply with the country's FTA commitments and gain from new market opportunities.

Pre-implementation

The effectivity of an FTA depends on (i) the "entry into force" provision in the FTA, and (ii) the internal or domestic procedures of the signatories. Depending

on the nature of the agreement, the FTA may take effect on the date it is signed, or on the date one party gives notice to the other party that it has complied with all the legal requirements such as ratification (or the number of days after that notice is received by the other party), or on the date the FTA becomes effective and binding as domestic law.¹⁴⁰ The date of effectivity may also be agreed upon by the signing parties.

In the case of AFTA, member countries have different procedures for the FTA to be effective. While the act of signing by authorized officials (which could be the president or the trade minister as the president's alter ego) would make the AFTA effective in Brunei Darussalam, Malaysia, and Viet Nam, other ASEAN countries have additional requirements: a letter of acceptance signed by the President in the Philippines and Indonesia, and ratification by the legislature in Thailand. In Singapore, all necessary approval is obtained before signing; hence, no ratification is needed.

In the US, after an agreement is concluded, the US President is required to submit its final text to Congress together with the draft implementing bill, a statement of any administrative action proposed to implement the agreement, and other supporting information. Failure to comply with this submission requirement would prevent the agreement from entering into force.¹⁴¹

Ratification

The AFTA requirements, however, do not apply to ASEAN-plus agreements or bilateral FTAs entered into by individual

member countries. Indonesia considers FTAs and all other international agreements (e.g., the WTO Agreement) as presidential decrees, thereby requiring in most cases, only the signature of the President. The Philippines, on the other hand, makes a distinction: agreements that primarily involve the reduction of tariffs are executive agreements and need not go through legislative ratification, but FTAs that are comprehensive in scope (covering items that could be subject to legal enactments or are constitutionally mandated) require legislative concurrence. Still, even if legislative ratification is not required, strong political pressure would necessitate "prior endorsement" of the legislature if only to legitimize the FTA (as in the case of the New Zealand–Singapore FTA).¹⁴²

In Japan, executive agreements can be concluded by the executive under its power to manage foreign affairs. However, treaties that require the maintenance or adoption of legislative measures for their implementation or deal with financial matters require the approval of the Diet.¹⁴³ In the same vein, other Asian countries like Georgia have made it obligatory to ratify international treaties and agreements that require a change in domestic legislation or the adoption of laws and acts with the force of law to honor the international obligations undertaken.¹⁴⁴ If an agreement requires no change in domestic legislation, it may be accepted without parliamentary ratification.

In the US, Congress has delegated the tariff-negotiating authority to the President and authorized the latter to suspend existing duty-free treatment. By virtue of this delegation and the doctrine

¹⁴⁰ For example, when the FTA has provisions affecting the rights and obligations of citizens or imposes penalties, due process requires notice or publication. The FTA takes effect only after the publication requirements have been complied with. In this case international agreements have the standing of domestic law.

¹⁴¹ Pregelj (2005).

¹⁴² The New Zealand Constitution provides that the Parliament has no power to delay or alter an international agreement or ratify one. The Parliament only takes into consideration the FTA to identify and provide for necessary changes to law.

¹⁴³ Japan's two-house Parliament.

¹⁴⁴ Article 65, Constitution of Georgia.

Box 3.12: Australia's Treaty Approval Process

The Australian treaty approval process involves the following steps for all treaty actions (negotiating a new treaty, amending an existing one, or abrogating a treaty):

- (i) The preparation of a national interest analysis (NIA), which sets out the advantages and disadvantages to Australia of becoming, or not becoming, a party to the treaty, including the significant quantifiable and foreseeable economic and environmental effects of the treaty. Among several other points, the NIA must detail the consultations that have taken place with the states and territories, and with community and other interested partners.
- (ii) The preparation of a regulatory impact statement, including an assessment of the impact of the proposed regulation (i.e., the treaty) and its alternatives on different groups and the community as a whole.
- (iii) The tabling of the treaty before Parliament for 20 sitting days and consideration of the proposed treaty action by the Joint Standing Committee on Treaties.
- (iv) The preparation and passage of the enabling legislation.

Source: Goode (2005).

of political agency, negotiators (with the approval of the President and designated political appointees of the President) can commit to an executive agreement without the approval of the Congress, but not to a treaty or an agreement that changes US law. An agreement classified as a treaty must be ratified by two thirds of the US Senate, while an agreement that changes US law must be approved by a majority of both houses of Congress.¹⁴⁵

FTAs are considered as treaties in Australia, so the FTA must undergo treaty approval (see Box 3.12). After treaty approval and when the agreement enters into force it is recorded, archived, and published in the Australian Treaty Series and registered with the UN.

¹⁴⁵ Monning and Feketekuty (2003). See also Grimmer (2004) and Pregelj (2005).

WTO notification

A mandatory action for WTO members signing an FTA is to notify the agreement to the WTO. The following rules govern the notification procedure:

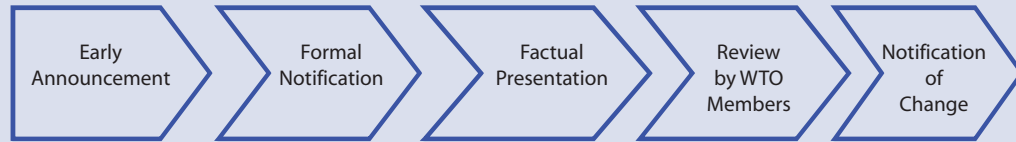
- (i) The Decision on the Transparency Mechanism for Regional Trade Agreements, which calls for an early announcement by members participating in FTA negotiations;¹⁴⁶ and
- (ii) GATT Article XXIV:7; the Understanding; and GATS Article V:7, which provides that a member must notify the WTO and submit details to the WTO regarding FTAs and interim agreements that the member is joining or intends to join.

Notification under the WTO may be under the Enabling Clause, GATT Article XXIV, or GATS Article V,¹⁴⁷ and may be made to the WTO's Committee on Regional Trade Agreements (those FTAs falling under GATT Article XXIV and GATS Article V) or to its Committee on Trade and Development (FTAs falling under the Enabling Clause). The types of agreements notified are preferential arrangements, free-trade agreements, customs unions, service agreements, and accession to any of these agreements. After the required notification, a working

¹⁴⁶ It also requires parties to specify the provision(s) of the WTO Agreement under which the FTA is notified, and to provide the full text of the FTA and any related schedules, annexes, and protocols, in one of the WTO official languages (English, French, and Spanish).

¹⁴⁷ WTO rules for trade in goods are found in Article XXIV of the GATT; and for trade in services, in Article V of the GATS. The Enabling Clause allows developed countries to accord more favorable treatment to developing countries without according such treatment to other countries. It also applies to preferential trade arrangements (PTAs) or FTAs between developing countries but not PTAs and FTAs between developed and developing countries. See Fiorentino et al. (2007).

Figure 3.5: New RTA Transparency Mechanism



RTA = regional trade agreement.
Source: World Trade Organization (WTO) website. Available: www.wto.org.

party is convened to examine the notified FTA, verify consistency with the WTO Agreement, and make appropriate recommendations. Furthermore, periodic reports on the operation of the FTAs, including significant changes and developments in the agreements, are required. A new regional trade agreement (RTA) transparency mechanism was adopted on a provisional basis in 2006. This refers to the early announcement of RTA and notification to WTO (see Figure 3.5 for the major steps involved).

Implementation

Legislative enactments and amendments

Most countries pass new legislation or amend existing laws to comply with their FTA commitments or to extend preferential treatment to traders from FTA countries. These procedures are necessary for FTAs to be effective as domestic laws and to fill the gaps left by the general provisions and even the implementation arrangements provided in the FTAs.

The legislative enactment presupposes that the FTA is consistent with the constitution and has passed the ratification stage. It is worth noting that the procedure and voting requirement when ratifying an FTA may be different from the requirement for passing legislation to implement the FTA. In some countries where the president has legislative powers, the requisite legislative

enactment or amendment of laws may be made by the president's office.

The laws to be passed or amended are those covered by the FTAs that affect the rights and obligations of the citizens of the FTA member country. These laws either translate the international agreement into domestic law or clarify the issues presented in the new arrangement. This is especially the case where some restrictions are lifted or foreign entities are given preferential treatment by the FTA (see Box 3.13 for an example of legal changes adopted as a result of entering into an FTA). These new or amended laws are complemented by implementing rules and regulations, as discussed in the next section.

Directives, issuances, and regulations

Even after an FTA takes effect (and the requisite laws are passed or amended), some administrative procedures still need to be carried out to fulfill the requirements of the FTA. Some FTAs draw out uniform operational guidelines in implementing the customs procedure and rules of origin mechanism. In the Philippines, the executive order from the President is followed by issuances from the finance department and guidelines from the customs bureau. In Malaysia, a directive from the finance ministry would suffice. Meanwhile, in Indonesia, a decree from the finance ministry and an issuance from the customs agency on the procedures are mandatory. These

Box 3.13: Legal Changes Made in Singapore

Singapore has entered into a number of free trade agreements (FTAs) with its trading partners. As a result, Singapore laws have been amended to reflect commitments made under the various FTAs. Customs legislation has been amended to accord preferential tariff treatment and provide procedures for the issuance of preferential certificates of origin. Following the US-Singapore FTA (USSFTA), Singapore legislation has permitted the importation of chewing gum “with therapeutic value.” Likewise, under the new Singapore import/export law, where any part of the manufacture of textiles and clothing products covered under the USSFTA is carried out or procured by any person in Singapore, to be exported to the US, that person must be registered.

As a result of Singapore’s FTA commitments (namely, USSFTA, the Republic of Korea–Singapore FTA, and the Transpacific Strategic Economic Partnership concluded by Singapore with Brunei Darussalam, Chile, and New Zealand), it now offers its FTA partners a more attractive procurement environment, particularly in relation to the threshold values of procurement contracts. Singapore passed the Competition Act of 2004 and established the Competition Commission in 2005. Changes have been made as well in the regulation of entry into and activities in various service sectors such as banking and legal practice. The Trade Marks Act, the Patent Act, and the Copyright Act have been amended to reflect Singapore’s FTA commitments.

Source: Hsu (2006).

are common steps in implementing tariff reduction schemes. The procedures are more complex (where implementing rules and regulations follow a law that has been passed or amended) to implement the nontariff provisions of the FTA (e.g., services or investment liberalization provisions).

The directives, issuances, or regulations should serve as essential guides for regulators as well as traders/individuals especially in availing themselves of the preferences given under the FTA. They should not be too stringent or complicated so as to restrict or discourage the business sector from taking advantage of what the FTA has to offer.

Box 3.14: Examples of FTA Websites

Australia	www.fta.gov.au/
Japan	www.mofa.go.jp/policy/economy/fta/index.html
Singapore	www.iesingapore.gov.sg/wps/portal/FTA
Thailand	www.thaifta.com/english/index_eng.html
United States	www.ustr.gov/Trade_Agreements/Section_Index.html

Source: Author’s compilation.

Public information

Information dissemination has always been crucial in the implementation of an agreement. For instance, many observers have attributed the low utilization of preferential tariff rates to the lack of information on the AFTA tariff scheme.¹⁴⁸ The fact that the newly signed FTA will not impose any undue burden on exporters who value the reduction or elimination of nontariff barriers more than differential tariff rates should also be highlighted.

Information dissemination is traditionally conducted through brochures, newspapers and other publications, seminars, road shows, and trade discussions. However, there are modern approaches to introducing FTA to the public, including disseminating information through FTA websites (see Box 3.14 for a list of FTA websites). These sites are useful not only in providing one-stop online resource sites on the FTAs entered into by the country but also in soliciting feedback or conducting public consultation on proposed FTAs. FTA sites may also provide additional assistance by publishing the names of those who

¹⁴⁸ Other reasons given for the low utilization rate are the minimal margin between WTO or MFN rates and common effective preferential tariff (CEPT) rates, and the additional procedures required.

can render expert advice to exporters (e.g., in Singapore and Australia). In Australia, an FTA export advisory panel has been established to promote the benefits of FTAs, by offering advice on implementation and market access issues, and by identifying specific trade and investment opportunities created by such agreements. The panel is made up of senior representatives from a range of industry groups and includes input from a cross-section of specialists, business organizations, and community groups.

EVALUATING AN FTA

The review clauses of FTAs provide an opportunity to identify areas where the agreements can be further improved. This stage, however, requires proper mechanisms for monitoring and evaluation to assess whether the objectives of the FTA have been met in the first place and whether the scope of the agreement can be expanded and its terms improved.

Monitoring and Enforcement

Compliance monitoring requires resources and intensive effort not only from the lead agency but especially from the implementers and regulators. In the US, monitoring is primarily done by the same agency that negotiates FTA, although several other agencies, both domestic and overseas, are likewise involved (see Box 3.15).

In most countries, monitoring is lodged with the implementing agencies. Coordination among agencies is essential especially between those agencies that will put into operation the provisions of the agreements and those that will eventually review the agreements and provide for the necessary amendments.

For example, although valuable, data on the actual utilization of the FTA are not always readily available. The directive to be issued by the customs or tariff agency could require traders that avail themselves of preferential rates under the FTA to report such use on the specified form directly to a specific unit or agency, to facilitate recording and monitoring. Such information will be handy in evaluating the impact of FTAs on traders.

Other possible mechanisms for monitoring and compliance are regular consultations with the private sector and full use of the technology (such as the internet and available mobile services) to gather comments from other sectors including consumers.

Assessment and Evaluation

Some FTAs provide review clauses to analyze the impact or progress of their implementation. Most countries use general indicators to assess the economic impact of FTAs, from macroeconomic indicators (in the Republic of Korea) to industry utilization indicators (in Singapore). The review, however, is often limited to analyzing whether tariff cuts have been made or whether the FTA has resulted in an increase in trade volume or growth in market shares between the FTA partners. The use of these indicators should be approached with caution since trade expansion need not be a direct result of the tariff liberalization and may be caused by other factors beyond what is covered by the FTA. There is also a growing interest in assessing FTAs by examining the existence or nonexistence of nontariff barriers to trade.

Another important aspect is identifying the proper agency to evaluate the FTAs. While some countries designate a specialized body, in others trade-related institutes or other organizations conduct annual studies on the economic effects of

Box 3.15: US Monitoring and Enforcement System

The monitoring and enforcement of trade agreements of the US involves four agencies and several units within each agency. Each agency has both domestic and overseas components, as well as several geographic, industry, and issue-specific units involved in monitoring and enforcement. The agencies coordinate monitoring and enforcement activities through an interagency network for trade policy development led by the Office of the US Trade Representative and involving at least 17 federal agencies. To improve interagency coordination, a regular forum is provided to allow federal agencies to share and discuss information, set priorities, assign responsibilities, and design and implement strategies. Trade agencies take advantage of technology (through e-mail and videoconferencing) to communicate information on trade compliance issues.

Agency	Main Unit at Headquarters	Overseas and Other Units Involved
US Trade Representative	Monitoring and Enforcement Unit	US Mission to the World Trade Organizations (WTO); trade policy officers; WTO and multilateral affairs; region-specific offices
Commerce	Market Access and Compliance Office	Trade promotion agencies; Foreign Commercial Service; market access and compliance officers overseas; Manufacturing Services; Import Administration; Patent and Trademark Office
State	Trade Policy and Programs	Economic section of embassies; country desk staff; issue-specific task forces
Agriculture	Foreign Agricultural Service	Animal and Plant Health Inspection Service; Food Safety and Inspection Service

Source: US Government Accountability Office (2005).

FTAs. Often the foreign affairs ministry is responsible for both implementing and evaluating FTAs. The frequency of reviews depends on each specific FTA. For example, the joint committee under the Australia-US FTA is supposed to meet annually to supervise the overall implementation of the agreement.

Even if the importance of this stage is well recognized among the countries, manpower and other resources are often limited. With this constraint, it is important to remember that there should be an independent assessment of the FTAs. At the very least, those who were directly involved in the negotiations should not be the ones who evaluate the FTAs.

Amendment Procedures

Like the review clauses, most FTAs have sections on amendments and modification. These amendments may take the form of exchanges of notes and protocol agreements. Where no substantial change is introduced, these protocols require only the endorsement of the parties (i.e., the signature of the trade ministers). There are countries that require cabinet approval, depending on the changes to be introduced. Some FTA amendments undergo the same domestic procedure as treaty amendments. In certain cases, amending FTAs involves ministerial approval and legislative change.

Appendix to Part III: Sample Questionnaire on the Negotiation, Implementation, and Evaluation of Free Trade Agreements

Preparing for FTA Negotiations

- (1) Please choose the kind of FTA negotiation strategy that you use and identify its main components:

Type		Main Components	
General FTA negotiation strategy		Economic objective	
		Political consideration	
		Coverage of FTA	
Different strategy per FTA/partner		Sensitive sectors to be protected	
		Sequencing of negotiation*	
		Others (please specify)	

* E.g., trade in goods first, then trade in services and investment.

- (2) Who is responsible for formulating your trade (or FTA) negotiation strategy?

Legislature	
President/Executive department	
Specialized body (such as trade representative office)	
Others (please specify)	

- (3) Do you have written laws, directives, guidelines, or policies regarding your FTA negotiation strategy? Please enumerate:
-
-

- (4) In your previous/current and prospective FTA negotiations, please rank in descending order the factors

that most affect—or would affect—your country’s choice of FTA partner and arrangement, with the factor ranked “1” being the most significant and the factor ranked “4” the least significant.

Factor	Previous/Current FTA	Future FTA
FTA Partner		
Type of FTA (regional or bilateral)		
Scope and Coverage of FTA		
Time Frame of FTA		

- (5) Is there an agency designated to conduct feasibility studies on your prospective FTAs? If so, please identify the agency and the type of feasibility studies conducted (for example, CGE modeling, sectoral impact studies).
-
-

- (6) Please describe your general FTA negotiation cycle,* including the sequencing of political or administrative procedures for initiating and implementing FTA negotiations, and the usual time spent on each step.
-
-

* E.g., feasibility study, public hearing, cabinet decision, consultation with the legislature, organization of the negotiation team, consultation with stakeholders (interest groups), drafting of laws, legislative approval, implementation and review procedures.

Organizing the negotiating team

(7) Which ministry/agency is the lead agency in FTA negotiations in your country? _____ Please identify the lead department/office in that ministry and the total number of staff of that department. _____

(8) Please describe the composition of your trade negotiating team in previous FTA negotiations (name, actual number of members, and composition of each sub-team or committee, and actual tasks performed).

Sub-team/Committee	Number and Composition of Members	Tasks

(9) Please enumerate the strengths and weaknesses of interagency coordination in the negotiation process.

(10) Please describe the constraints on your negotiating team in previous/current FTA negotiations.

(11) Do you have one chief negotiator for all FTA negotiations? _____ What do you think are the most important characteristics and roles of the chief negotiator?

Managing Consultations and FTA Implementation and Monitoring

(12) To what extent and at what stage do public/private stakeholders participate in the negotiation process?

Stakeholders/Sectors	Stage of Negotiation	Major Input
Trade groups		
Business sector		
Consumer groups		
Sensitive industries (please specify)		
Marginalized sectors		
Others (please specify)		

(13) What are the advantages (or limitations) of your current system of managing consultations?

(14) Please describe the procedures after the FTA is signed (including legislative approval) and before it takes effective.

Mandatory Procedures	Optional Procedures
(i)	(i)
(ii)	(ii)

(15) What are the mechanisms used in disseminating information on the signed FTAs? Please tick all the applicable mechanisms.

FTA webpage	
Government websites	
Newspapers or other publications	
Brochures and FTA guides	
Seminars and trade discussions	
TV and radio	
Others (please specify)	

(16) Who is responsible for evaluating the implemented FTA? How often are the reviews conducted?

Legislature	
President/Executive department	
Specialized body (e.g., trade representative office)	
Others (please specify)	

(17) What indicators do you use in assessing FTAs?
