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THE DOMESTIC AND INTERNATIONAL POLICY IMPLICATIONS OF "DEEP" VERSUS "BROAD" PREFERENTIAL TRADE AGREEMENTS

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The subject of "preferential trade agreements" (PTAs) has been the focus of significant discussion in recent years. Much of the attention has concerned the economic desirability of preferential trade liberalization versus multilateral trade liberalization. While the debate about the benefits and dangers of trade liberalization via PTAs is an important one, it tends to overlook or mask other, more basic questions about PTA formation, scope and membership.

This Article suggests that decisions regarding PTA formation, the precise PTA forms used, membership, and the sectoral scope of PTAs are, at their core, decisions about deepening existing economic relationships versus broadening to form new ones. That is, these and other PTA decisions operate within a larger framework in which each PTA decision is, ultimately, a choice between deepening a state's existing economic relationships to make them more fully integrative, versus broadening a state's formal international economic ties to include new ties that are less deep, in an integrative sense. This Article explores the legal and policy implications of this conceptualization of PTAs, with primary focus on U.S. PTA activity.

INTRODUCTION

The subject of regional trade agreements—or to use more recent terminology, "preferential trade agreements" (PTAs)[1]—has been the focus of

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1. The traditional term "regional trade agreement" reflects the historical tendency for such agreements to be focused on a single geographic region, such as with the North American Free Trade Agreement. This is not the case, however, with more recent trans-regional trade agreements, such as the U.S.-Singapore Free Trade Agreement. *See* Office of the United States Trade Representative, *Singapore*, http://www.ustr.gov/World_Regions/Southeast_Asia_Pacific/Singapore/Section_Index.html (last visited April, 8 2009). While some commentators continue to prefer the term "regional trade agreement," this Article employs the term "preferential trade agreement," given that much of what is discussed below focuses on trade preferential programs that are not region-specific.

significant discussion in recent years. Much of the attention has concerned the economic desirability of preferential trade liberalization versus multilateral trade liberalization. Some observers, most notably Jagdish Bhagwati, contend that "spaghetti regionalism"—the creation of inconsistent, overlapping PTAs—hinders or even prevents much-needed multilateral trade liberalization.[2] Bhagwati even has gone so far as to describe PTAs as "a pox on the world trading system."[3] In contrast, other observers, such as Jeffrey Schott, contend that PTAs lead to actual gains, and that comparing these real gains to the hypothetical, *pro forma* gains of multilateral trade liberalization is a relatively meaningless exercise.[4] Still other observers have co-opted Bhagwati's term "spaghetti regionalism" to argue that overlapping PTAs are a positive development—that they are a first step toward establishing an ultimately harmonized network of liberalized international trade.[5]

The debate about the benefits and dangers of trade liberalization via PTAs is an important one, but it tends to overlook or mask other, more basic questions. Why, for example, have preferential trade agreements grown so much in popularity recently? Why are PTAs so diverse in form and scope? How do we explain the United States' entry into PTAs with countries that offer the United States little economic benefit, while the United States forgoes PTAs with countries that offer greater economic benefits? The purpose of this Article is to bring these aspects of PTA formation and entry into greater focus.

More specifically, this Article suggests that decisions regarding PTA formation, the precise PTA forms used, PTA membership, and the sectoral scope of PTAs are, at their core, decisions about deepening existing economic relationships versus broadening to form new ones. That is, these PTA decisions operate within a larger framework in which each PTA decision is, ultimately, a choice between deepening a state's existing, formal international ties to make them more fully integrative, versus broadening a state's formal international economic ties to include new ties that are less deep, in an

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2. *See* Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas, in* JAGDISH BHAGWATI & ANNE O. KRUEGER, THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1 (1995); Jagdish Bhagwati, *PTAs: The Wrong Road*, 27 LAW & POL'Y INT'L BUS. 865 (1995). For a summary of other articles by Bhagwati in a similar vein, *see* RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 21-001 (2005).

3. JAGDISH BHAGWATI, FREE TRADE TODAY 95 (2002).

4. FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 1-4 (Jeffrey J. Schott ed., 2004); *see generally* Jeffrey Schott, *The Korea-US Free Trade Agreement: A Summary Assessment* (Peterson Institute for International Economics, Policy Brief No. PB07-7, Aug. 2007), *available at* http://www.iie.com/publications/pb/pb07-7.pdf (discussing the benefits of the U.S.-Korea trade agreement, and in doing so tacitly supporting the broadening of trade agreements rather than the deepening of existing agreements) [hereinafter Schott, *U.S.-Korea Summary Assessment*]. In Schott's view, the regional trade approach is a stable, if second-best, equilibrium for achievement of trade liberalization goals. *See infra* text accompanying note 8.

5. Caroline Freund, *Spaghetti Regionalism*, FRB INT'L FIN. DISC. PAPER 680 (2000), *available at* http://ssrn.com/abstract=244072.

integrative sense. While this perspective on regionalism is found in some literature on the European Union's expansion,[6] it is not often found in discussions of PTAs in other regions. It is submitted here that "deepening versus broadening" is a useful perspective on PTA formation in general, and that it is especially useful when applied to recent U.S. PTA activity. In an age in which regionalism is rivaling multilateralism for dominance in the international trading system, and in light of the United States' recent waning (or at least waffling) adherence to multilateral trade liberalization over regionalism, it is an important topic to explore.

This Article is organized as follows. Part II sets the stage by providing a brief overview of traditional PTA economic theory and traditional taxonomies of PTAs, which have dominated PTA analysis and discussion in many respects. Part II also discusses how traditional PTA economic theory and taxonomies can be in tension with foreign policy and national security considerations of states. Part III builds on and adds complexity to the commercial-versus-security tension in PTA literature by identifying and discussing important thematic points concerning contemporary PTAs.

Part IV then explores a more harmonized view of PTA formation and structure. Part IV begins by comparing modern U.S. PTA decision making to European Community (now European Union) decision making in the 1980s and 1990s regarding expansion of the Community's membership. The Community of that era was engaged in an intense debate over its future shape and scope, and this debate provides an excellent unifying thematic framework for analyzing and better understanding modern PTAs and the factors affecting their formation and scope. While the EU is currently in the midst of further discussions concerning deepening and broadening, the Community's decision making of the 1980s and 1990s is used here for two main reasons. First, the decisions of that earlier era set the EU on the path it is on today, with a highly liberalized internal market and nearly 30 members. Second, the dust has settled on those earlier decisions, whereas contemporary debates regarding further EU deepening and broadening are very much in flux. With this base in place, Part IV then applies the "deepening versus broadening" thematic framework to U.S. PTA activity. Part V concludes by discussing some of the implications of this conceptualization of PTAs for future PTA formation by the United States.

It must be noted at the outset that this Article consciously confines its analysis to a unitary view of state decision making. This is perhaps best thought of as a simplifying assumption. Domestic political considerations

6. *See* Roberta De Santis & Claudio Vicarelli, *The "Deeper" and the "Wider" EU Strategies of Trade Integration: An Empirical Evaluation of EU Common Commercial Policy Effects*, 7 GLOBAL ECON. J. 1 (2007) (discussing how the EU's Common Commercial Policy has instituted the implementation of deeper internal trading between member countries and broader external trading between member countries and non-member countries); *See* Charles Wyplosz, *The Challenges of a Wider and Deeper Europe*, Graduate Inst. Int'l Stud. *available at* http://www.oenb.at/de/img/wyplosz_tcm14-15240.pdf.

clearly do affect state decision making in many ways, which makes analysis of PTA formation and scope more complex, and there has been beneficial public choice theory scholarship along this vein.[7] The recent tensions over U.S. exports of beef to Korea, as part of the potential Korea-U.S. Free Trade Agreement, help to further illustrate the influence of such considerations.[8] In this Article, however, these domestic variables are held constant so that the effect of other variables can be explored.

I. PTAS AND INTERNATIONAL TRADE THEORY

PTAs are often thought of primarily in economic or commercial terms, and traditional PTA taxonomies reinforce this view. It is therefore proper to begin with PTA taxonomies in order to establish a conceptual baseline of sorts. As the following discussion illustrates, the traditional, integration-focused PTA taxonomies have acted as a limiting factor on PTA analysis and thinking, and economic or commercial explanations of PTA development remain incomplete. This Article's discussion then turns to modern PTA trends in Part III and of PTA "deepening versus broadening" in Part IV.

A. PTAs and Traditional PTA Taxonomies

Traditional PTA taxonomies focus on PTAs' levels of internal economic integration and cooperation, and thus characterize PTAs as preferential, potentially protectionist organizations. The taxonomies range from less integrated PTA forms, such as free trade agreements (FTAs) like the North American Free Trade Agreement (NAFTA)—which are characterized by internal trade liberalization but no coordination of monetary policy or a common external tariff (CET)—to more integrated forms such as customs unions with CETs, to even more integrated common markets like the EU that feature broader elimination of internal trade barriers, to monetary unions that coordinate monetary policy and share a single currency or tightly peg their

7. Studies of domestic influences in PTA decision making include, for example, David Quartner, *Public Choice Theory, Protectionism and the Case of NAFTA*, ECONOMIC AFFAIRS, March 2006, at 59-60; Paul B. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 745 (1995); Thomas M. Murray, *The U.S.-French Dispute Over GATT Treatment of Audiovisual Products and the Limits of Public Choice Theory: How an Efficient Market Solution was "Rent-Seeking"*, 21 MD. J. INT'L L. & TRADE 203, 203-05 (1997); Charles K. Rowley & William Thorbecke, *The Role of the Congress and the Executive in U.S. Trade Policy Determination: A Public Choice Analysis in National Constitutions and International Economic Law*, *in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993).

8. Schott, *U.S.-Korea Summary Assessment*, *supra* note 4; *Still Beefing*, ECONOMIST.COM, June 26, 2008, *available at* http://www.economist.com/world/asia/displaystory.cfm?story_id=11622408; Jon Herskovitz, *South Korea Parliament Starts, MPs Battle on Beef*, REUTERS, July 10, 2008, *available at* http://www.reuters.com/article/latestCrisis/idUSSEO91880.

currencies (again, like the EU).[9] The final, logical stage is complete economic integration, which also requires a degree of political integration as well.[10] While there are variations in the taxonomies employed by various scholars,[11] the main point is that PTA taxonomies are preferentialist and move from less to more integrated forms. This preferentialist view of PTAs is so well established that it is embodied in the General Agreement on Tariffs and Trade.[12]

Traditional PTA taxonomies are relatively clean and intuitive, but they have been rendered incomplete by modern PTA developments. First, all PTAs are not created equal: some are expansive in their scope, while others are limited to certain economic sectors. NAFTA and its accompanying side agreements, for example, are fairly comprehensive in their sectoral scope, whereas the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR) is more focused on the textiles sector.[13]

Second, there are agreements among states that are not traditional PTAs, but still need to be considered in any discussion of international or regional/preferential integration efforts. For example, bilateral investment treaties (BITs) establish the terms and conditions for foreign direct investment between countries.[14] Because it is generally recognized that foreign direct

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9. Joel P. Trachtman, *International Trade: Regionalism* 154, *in* RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW (Andruw T. Guzman & Alan O. Sykes eds., 2007); Helen Wallace & Alasdair R. Young, *The Single Market: A New Approach to Policy* 98, *in* POLICY-MAKING IN THE EUROPEAN UNION (Helen Wallace & William Wallace eds., 1996) [hereinafter POLICY-MAKING IN THE EUROPEAN UNION]; *see generally* BÉLA BALASSA, THE THEORY OF ECONOMIC INTEGRATION (R.D. Irwin, Inc., 1961); STEVEN M. SURANOVIC, INTERNATIONAL TRADE THEORY AND POLICY, ch. 110-2 (2006), *available at* http://internationalecon.com/Trade/Tch110/T110-2.php.

10. BALASSA, *supra* note 9, at 2. Balassa specifically states that economic integration "requires the setting up of a supra-national authority" for the countries involved. *Id.*

11. *See, e.g.*, Arvind Panagariya, *Preferential Trade Liberalization: Traditional Theory and New Developments* (Sept. 1999), *available at* http://www.columbia.edu/~ap2231/technical%20papers/SURVEY4-with-Figures.pdf (listing preferential trade arrangements, free trade areas, and customs unions); SURANOVIC, *supra* note 9, at ch. 110-2.

12. *See generally* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XXIV [hereinafter GATT]. For a discussion of recent developments concerning WTO-RTA interplay, see Youri Devuyst & Asja Serdaveric, *The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap*, 18 Duke J. Comp. & Int'l L. 1 (2007) (discussing the WTO's Transparency Mechanism for Regional Trade Agreements, which was provisionally adopted by the WTO in 2006).

13. Office of U.S. Trade Representative, *Free Trade with Central America and the Dominican Republic: Highlights of the CAFTA* (Feb. 2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file834_7179.pdf; *see* David A. Gantz, *International Legal Development: The "Complex Problem" of Customs Law and Administrative Reform in Central America*, 12 SW. J. L. & TRADE AM. 215, 228-29 (2006) (discussing CAFTA-DR's possible effect on textile exports from Central America); *see also* Office of U.S. Trade Representative, *Textiles in the CAFTA-DR* (July 2007), *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file551_7185.pdf.

14. *See* Zachary Elkins, Andrew Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, U.C. Berkeley Public Law Research

investment can serve as both a substitute for and a complement to international trade,[15] BITs can have an enormous impact on regional and global trading patterns. The same can be said for tax treaties, which can facilitate (bilateral) trade and investment through the elimination of double taxation.[16] Additionally, Trade and Investment Framework Agreements (TIFAs) serve as general trade framework agreements, and at least in some PTA contexts they are being used as precursor agreements to BITs and formal PTAs.[17] TIFAs can be thought of in one sense as memoranda of understanding that precede formal agreements (PTAs), but even a TIFA that is not followed by a formal PTA can lead to trade benefits among the parties involved.

Third, there may be informal and *de facto* trade cooperation efforts among states that significantly affect regional and even global trading patterns. For example, the United States and Canada recently began coordinating procedures for inspecting and clearing commercial shipments by truck across their common border, in order to minimize delays without unduly sacrificing the vetting of these shipments.[18] This program (called "Free and Secure Trade," or "FAST") and other efforts like it are informal, cross-border networks that are being used by countries to coordinate and harmonize regional trade policies in certain respects.[19] In some cases, such efforts have developed into

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Paper No. 578961 (2004), *available at* http://ssrn.com/abstract=578961 (stating that BITs are "agreements establishing the terms and conditions for private investment by nationals and companies of one country in the jurisdiction of another . . . covering the areas of FDI admission, treatment, expropriation, and the settlement of disputes"); Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1 (2005) (stating that BITs generally encourage foreign investment by "provid[ing] investors with rights against states and state authorities that damage investment projects"); K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments On Their Origin, Purposes and General Treatment Standards*, 4 INT'L TAX & BUS. LAW 105, 110-28 (discussing U.S. BIT legal standards on investment flow between nations).

15. *See, e.g.*, James Markusen, *Factor Movements and Commodity Trade as Complements*, J. INT'L ECON. 43 (1983); Kar-yiu Wong, *Are International Trade and Factor Mobility Substitutes?*, 21 J. INT'L ECON. 21, 25 (1986).

16. Richard L. Doernberg, *Overriding Tax Treaties: The U.S. Perspective*. 9 EMORY INT'L L. REV. 71, 71 (1995); Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 940-41 (2000) (contending that tax treaties are one way to alleviate double taxation but not the only way).

17. *See generally* Office of the U.S. Trade Representative, *United States and United Arab Emirates Sign TIFA* (Mar. 2003), *available at* http://www.sice.oas.org/TPD/USA_UAE/TIFA2004_e.pdf. Former U.S. Trade Representative Robert Zoellick asserted that a TIFA between the United States and the United Arab Emirates (UAE) would "expand bilateral trade and investment," as well as help "liberalize" and expand the UAE's economy and "promote democracy." The U.S.-UAE TIFA was part of the United States' efforts toward building a stronger relationship with the Middle East through MEFTA. *See infra* text accompanying note 44.

18. Gregory W. Bowman, *Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border*, 44 HOUS. L. REV. 189, 198-201 (2007).

19. Dunniela Kaufman, *Does Security Trump Trade?*, 13 L. & BUS. REV. AM. 619, 626-28 (2007); Mark J. Andrews et al., *International Transportation Law*, 41 INT'L LAW 511, 518 (2007); Jim Bergeron et al., *International Transportation Law*, 40 INT'L LAW 403, 410-12 (2006); *see generally* ANN-MARIE SLAUGHTER, A NEW WORLD ORDER, 65-103 (2004).

more formalized, and perhaps even more global, programs, which is exactly what happened with the FAST program. However, expansion and increased formalization is not necessary for these programs to have a significant impact on regional trade.[20] In other cases, coordination occurs through mutual recognition by states of each other's regulatory regimes in a particular area (such as securities regulation), and this in turn leads to greater economic activity, interdependency and integration among these states.[21]

Another recent regional trade development is the emergence of "open regionalism," which is contrary to traditional protectionist assumptions regarding PTAs.[22] The primary example of this approach is the Asia-Pacific Economic Cooperation Forum (APEC), which is "an open regionalism and non-discriminatory" group of "like-minded" countries that "recognize[ ] . . . diverse political, economic and social background[s] and . . . promote[ ] economic growth through intensifying regional interdependence."[23] Much of the current benefit of APEC arises out of its role as a forum for discussion—a matrix that allows and encourages the formation of formal and informal international networks among APEC states,[24] as well as the harmonization (or mutual recognition) of domestic regulatory regimes in order to promote greater regional trade and integration.[25] In other respects, APEC offers the regional trade liberalizing benefits of a PTA without the potentially exclusionary characteristic of restricted membership.[26] APEC is thus an organization with

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20. *See* Bowman, *supra* note 18, at 215-16 (discussing FAST and related programs); *see also* News Release, White House, http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020909-3.html (last visited May 15, 2009).

21. *See* Kalypso Nicolaïdis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 LAW & CONTEMP. PROBS. 263, 266-68 (2005) (discussing mutual recognition regimes); Jesse Westbrook, *SEC Set to Ease Accounting Rules for Foreign Companies*, INT'L HERALD TRIB., June 21, 2007 (stating that the U.S. Securities & Exchange Commission plans to ease accounting restrictions and allow overseas companies to use international accounting standards); Editorial, *French Deal, American Red Tape*, N.Y. TIMES, June 17, 2008 (discussing the Securities & Exchange Commission's mutual recognition of alternative regulatory regimes standards). In still other cases, regional integration and cooperation can occur more organically, with little direct governmental support or direction. *See, e.g.*, Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration for the Asian Century: An Early Look at New Approaches*, 4 TRANS. L. & CONTEMP. PROB. 187, 192-94 (1994).

22. Abbott & Bowman, *supra* note 21, at 191; *see also* NORMAN PALMER, THE NEW REGIONALISM IN ASIA AND THE PACIFIC 2-5 (1991) (noting that some regional integration efforts in Asia had openness as a defining characteristic).

23. Serbini Ali, Presentation of APEC Secretariat (December 7, 1999), *available at* http://www.apec.org/apec/news___media/1999_speeches/071299_rus_presentation.html. For more discussion and analysis of APEC's "open regionalism" approach, *see* Abbott & Bowman, *supra* note 21, at 208-25.

24. *See How APEC Operates*, http://www.apec.org/apec/about_apec/how_apec_operates.html (last visited Apr. 8, 2009); Abbott & Bowman, *supra* note 21, at 215-18.

25. Nicolaïdis & Shaffer, *supra* note 21, at 279, n.28.

26. Abbott & Bowman, *supra* note 21, at 217-18; *see also APEC: Scope of Work*, http://www.apec.org/apec/about_apec/scope_of_work.html (last visited Apr. 8, 2009).

significant potential benefit (and very little downside), but it is certainly not a traditional PTA.

Fourth, more recent "new regionalism" or "new trade theory" scholarship does not adequately explain recent PTA developments. This body of PTA scholarship appeared in the 1990s[27] and sought to explain PTA developments such as the European Community's "1992 Program"[28] and NAFTA—which were formed among countries with already low tariff barriers, and thus offered fewer conventional gains from trade liberalization.[29] New regionalism scholarship focused instead on the reduction of nontariff barriers to trade, as well as on the promotion of growth through imperfect competition and economies of scale (via establishment of a larger, more integrated regional market for businesses offering differentiated products).[30]

These were positive developments in PTA economic scholarship—and yet in important respects they were not as new as the names suggest. First and foremost, attention remained focused on formal PTAs, as opposed to any broader view of regional cooperation and coordination. PTA analysis thus often continued to be confined or constrained by its own definitions of PTA activity. Second, the shift from focusing on tariff barriers to focusing on nontariff barriers was in a large sense not substantive, but rather a shift in the form of protectionist barriers addressed.[31] For that matter, the relatively newfound focus on the gains from a larger market was also implicit in earlier PTA analyses.

The point here is not to suggest that traditional views or taxonomies of PTAs are not useful. Rather, the key point is that PTAs are more appropriately thought of as embedded in a larger matrix of sub-global economic integration activities. When thought of in this manner, it becomes easier to identify broader trends in regionalization.

B. PTAs, Redistributive Effects, and Gains from Trade

In addition to the definitional shortcomings discussed above, two

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27. *See* RICHARD POMFRET, THE ECONOMICS OF REGIONAL TRADING ARRANGEMENTS 207-08 (1997).

28. The 1992 Program was embodied in the Maastricht Treaty on European Union, which transformed the European Community into the European Union, Maastricht Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191).

29. *See id.* at 208-09.

30. *See id.* at 207-14.

31. RALPH H. FOLSOM, MICHAEL WALLACE GORDON & JOHN A. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS 434 (2d ed. 2001); Dale E. McNeil, *The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imagining A Tariffying Bargain*, 22 YALE J. INT'L L. 345, 347-48 (1997) (noting that "[t]ariff and non-tariff barriers are different forms of protectionism, but they may have equivalent economic effects"); Irwin P. Altschuler & Claudia G. Pasche, *The North American Free Trade Agreement: The Ongoing Liberalization of Trade With Mexico*, 28 WAKE FOREST L. REV. 7, 23 (1993) (noting the general trend of replacing tariff barriers with non-tariff barriers).

principal aspects of neoclassical trade theory are in tension with one another concerning PTA formation, and this tension carries important PTA policy implications. On the one hand, neoclassical international trade theory holds that PTAs cause fewer redistributive effects when the states involved have fewer economic structural disparities among them.[32] One conclusion to be drawn, therefore, is that PTAs might be more successful, or at least less politically controversial, between economically similar states. An example of this is readily found in NAFTA: the current NAFTA disputes and tensions between the United States and Mexico are based, in significant part, upon displacement of Mexican workers (and a resulting emigration surge to the United States) in the wake of greater U.S.-Mexico competition in the agricultural sector.[33] While there are significant trade disputes between the United States and Canada—such as the softwood lumber dispute—these disputes have not led to massive worker displacement and have not resulted in widespread calls for revision of (or withdrawal from) NAFTA.[34]

On the other hand, traditional international economic theory also holds that greater economic structural disparities between trading states can lead to greater gains from liberalized trade, with the amount of gain in part dependent on the percentage of the parties' domestic trade versus international trade, and international trade with each other versus third parties.[35] This has been one justification advanced for the liberalization of trade in agricultural sectors between Mexico and the United States.[36] Yet this goal is inconsistent with the previous observation that consensus and economic coordination are easier

32. Carol Wise, *Great Expectations: Mexico's Short-Lived Convergence Under NAFTA* 2-3, 11 (Centre for International Governance Innovation, Working Paper No. 15, Jan. 2007); *see also* Timothy J. Kehoe, *Assessing the Economic Impact of North American Free Trade* 3-35, *in* THE NAFTA DEBATE: GRAPPLING WITH UNCONVENTIONAL TRADE ISSUES (M. Delal Baer & Sidney Weintraub eds., 1994) (discussing the possible effects of NAFTA on the United States, Canada, and especially Mexico considering their economic disparities).

33. Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, The Treaty Gave Me . . . What, Exactly?: An Assessment of Economic, Social and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 81-89 (2007) (discussing the losses of jobs in the manufacturing and agricultural sectors in Mexico since the ratification of NAFTA); *see also* Colin L. McCarthy, *Regional Integration of Developing Countries at Different Levels of Economic Development—Problems and Prospects*, 4 TRANSNAT'L L. & CONTEMP. PROB. 1, 10 (1994) (discussing trade liberalization among developed and developing countries).

34. Office of U.S. Trade Representative, *U.S.-Canada Reach Final Agreement on Lumber Dispute* (July 1, 2006), http://www.ustr.gov/Document_Library/Press_Releases/2006/July/US,_Canada_Reach_Final_Agreement_on_Lumber_Dispute.html; *see* Joost Pauwelyn, *The U.S.-Canada Soft Wood Lumber Dispute Reaches a Climax*, AM. SOC'Y OF INT'L L. (Nov. 30, 2005), *available at* http://www.asil.org/insights/2005/11/insights051129.html (discussing differences between NAFTA and WTO dispute resolution).

35. McCarthy, *supra* note 33, at 4-5. McCarthy also discusses the challenges of regional integration among developing countries, as opposed to among industrialized countries. *Id.*

36. *See* Gary C. Hufbauer & Yee Wong, *Security and the Economy in the North American Context: The Road Ahead For NAFTA*, 29 CAN.-U.S. L.J. 53, 63-64 (2003) (noting that agricultural trade between the U.S. and Mexico nearly doubled between 1993 and 2003).

among states with structurally similar economies, or at least structurally similar sectors (if the agreements are limited to those sectors). While this tension can be partly reconciled by imperfect competition analysis and economies of scale considerations, it is not at all clear that these observations of new regionalism fully eliminate this tension.[37] As a result, there appears to be continued conflict between these primary aspects of neoclassical trade theory—with one principle suggesting that PTAs should be formed by countries with similar economic structures, and the other suggesting the opposite.

C. PTAs, National Security, and Foreign Policy

In further tension with trade liberalization considerations for PTAs are considerations of national security or foreign policy. The formation of PTAs for national security or foreign policy reasons, as opposed to commercial reasons, has been emphasized in particular by the United States since the 9/11 attacks.[38] On the one hand, formation of PTAs for such non-commercial reasons is not a new development.[39] Indeed, the United States' first PTA, the 1985 U.S.-Israel Free Trade Agreement, was entered into by the United States largely for non-commercial reasons—namely, the greater security and stability of Israel.[40] It was readily apparent then that the commercial or economic gains to the United States from a PTA with the small Israeli economy would be modest at best. What is new in recent years, however, is how frequently PTAs are being entered into by the United States (and other countries) for largely non-commercial reasons.[41] Fifteen years passed between the formation of the U.S.-Israel FTA and the United States' next small-country PTA, the U.S.-Jordan FTA. Since that time, three more U.S.-small country PTAs have entered into force,[42] and four more have been signed, although not yet

37. *See supra* text accompanying notes 27-31.

38. *See* Sidney Weintraub, *Lack of Clarity in U.S. Trade Policy*, ISSUES IN INTERNATIONAL POLITICAL ECONOMY, July 15, 2003, *available at* http://www.csis.org/media/csis/pubs/issues200307.pdf; *see generally* Brink Lindsey, *The Trade Front: Combating Terrorism With Open Markets* 1, CATO INST., Trade Policy Analysis No. 24 (Aug. 5, 2003), *available at* http://www.freetrade.org/pubs/pas/tpa-024.pdf (discussing the link between MEFTA, U.S. trade policy, and U.S. national security).

39. *See* John Coyle, *Rules of Origin as Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the U.S.-Singapore Free Trade Agreement*, 29 YALE J. INT'L L. 545 (2004); *see also* BHALA, *supra* note 2, at 21-003 ("Apparently, RTAs [PTAs] are economic mechanisms for realising fundamental political goals . . . includ[ing] cementing trade relationships.").

40. *See* Ralph Folsom, *Trading for National Security? United States Free Trade Agreements in the Middle East and North Africa*, Univ. of San Diego Legal Studies Research Paper Series, Research Paper No. 07-113 (Sept. 2007), *available at* http://ssrn.com/abstract=1013372; Howard Rosen, *Free Trade Agreements as Foreign Policy Tools: The U.S.-Israel and U.S.-Jordan FTAs*, in SCHOTT, *supra* note 4, at 51-62.

41. Folsom, *supra* note 40, at 2.

42. These FTAs are the U.S.-Singapore FTA, the U.S.-Morocco FTA, and the U.S.-Bahrain FTA. *See* United States Trade Representative, Bilateral Trade Agreements,

implemented.[43] These PTAs have been proposed by the U.S. government largely for national security and foreign policy purposes, such as achieving greater regional stability,[44] promoting or strengthening political alliances,[45] or achieving goals such as combating narcotics trafficking[46] or ensuring energy supplies.[47] The increased use of non-commercial PTAs in recent years is a key trend that plays into the "deepening versus broadening" analysis in Part IV below.

II. THEMATIC PTA TRENDS

The above observations highlight the narrowness of traditional conceptions of PTAs, as well as the three-way tension between PTA redistribution considerations, comparative advantage and gains from trade, and non-commercial considerations. This Article suggests that a "deepening versus broadening" analysis of PTAs helps resolve (or rather, meaningfully explain) these tensions. In order to place this deepening versus broadening analysis into better context, however, it is first useful to identify and discuss several

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http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Apr. 9, 2009) [hereinafter Bilateral Trade Agreements].

43. These FTAs are the U.S.-Colombia FTA, the U.S.-Panama FTA, the U.S.-Peru FTA, and the U.S.-Oman FTA. *See* United States Trade Representative, Trade Agreements, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Apr. 9, 2009); United States Bilateral Trade Agreements, *supra* note 42.

44. *See* U.S.-Middle East Free Trade Area (June 9, 2004), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040609-37.html; President's Message to Congress (June 26, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060626-4.html.

45. *See* Remarks by the President Upon Signing of H.R. 4759, the United States-Australia Free Trade Agreement Implementation Act (Aug. 3, 2004), *available at* http://usembassy-australia.state.gov/irc/us-oz/2004/08/03/wf1.html; Jeffrey Schott, *Assessing U.S. FTA Policy*, *in* SCHOTT, *supra* note 4, at 363-76 (discussing the political benefits from U.S. bilateral FTAs); *see also* Paul G. Johnson, Note, *Shoring U.S. National Security and Encouraging Economic Reform in the Middle East: Advocating Free Trade With Egypt*, 15 MINN. J. INT'L L. 457, 462-65 (2006) (stating that the possible chief consideration for U.S. FTAs in the Middle East and other countries has been for beneficial political alliances and the furtherance of "political objectives").

46. *See* Press Release, President Bush Calls On Congress To Move Forward With U.S.-Colombia Free Trade Agreement, Help Sustain Economic Growth By Expanding Trade (Mar. 12, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080312-3.html; Office of the United States Trade Representative, *Colombia FTA Briefing Materials*, http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2008/asset_upload_file854_14604.pdf.

47. *See* Office of U.S. Trade Representative, *U.S. and Bahrain Announce Intention to Negotiate Free Trade Agreement*, *available at* http://www.ustr.gov/Document_Library/Press_Releases/2003/May/US_Bahrain_Announce_Intention_to_Negotiate_a_Free_Trade_Agreement.html?ht=; *see generally* Alexander J. Black, *Economic and Environmental Regulatory Relations: United States-Canada Free-Trade in Energy*, 8 CONN. J. INT'L L. 583, 583-84 (1993) (discussing the liberalization of energy trade between the U.S. and Canada). National security in fact can be viewed as a subset of broader foreign policy concerns, but it is a driving, and arguably primary, force of foreign policy (both of the United States and other states) in the post-9/11 era. For that reason, these two terms—as well as the term "non-commercial"—are treated as generally synonymous for purposes of this Article.

important trends concerning modern PTAs.

A. PTAs Have Proliferated as Multilateral Trade Liberalization has Slowed

A common observation regarding the popularity of PTAs since the 1990s is that they have proliferated at the very point in time at which multilateral progress on trade liberalization has slowed dramatically.[48] There are now many more parties involved in global trade liberalization efforts through the World Trade Organization (WTO), which makes multilateral agreement much harder. In addition, the current topics on which WTO multilateral trade liberalization focuses—such as service sectors and agriculture—tend to be thornier topics plagued by contention.[49] The fact that less progress is currently being made on multilateral trade liberalization suggests that PTAs are indeed being used as a second-best strategy for trade liberalization—something that is bemoaned by some observers[50] and lauded by others.[51]

B. International Trade has Grown Exponentially in Recent Decades

Another trend relevant to PTA formation is that the total volume of international trade has grown dramatically in recent decades, which amplifies the effects of trade diversion and trade creation, as well as of economies of scale.[52] Multilateral trade liberalization has slowed over the same time period during which international trade has become ever more important—which has enhanced the attractiveness of other approaches to liberalizing trade, such as PTAs.

C. PTAs Reflect Changes in Political and Economic Orders

The increased use of PTAs also reflects fundamental changes in the world's political and economic orders. There has been a splintering of state interests since the Cold War: there are no overarching, bipolar considerations to centripetally point trading partners—at least Western ones—in the same

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48. *See generally* JAGDISH BHAGWATI & ANNE O. KREUGER, THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 9 (1995).

49. *See* Rafael Leal-Arcas, *The Resumption of the Doha Round and the Future of Services Trade*, 29 LOY. L.A. INT'L & COMP. L. REV. 339, 386-95 (2007); James Thuo Gathii, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361, 1364-65, 1373 (2007).

50. *See supra* text accompanying note 2.

51. *See supra* text accompanying notes 3-4.

52. U.S. international trade statistics illustrate this growth. In 1960, U.S. trade in goods represented six percent of U.S. GDP. Bureau of Economic Analysis, *Percentage Shares of Gross Domestic Product*, *available at* http://www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=14&ViewSeries=NO&Java=no&Request3Place=N&3Place=N&FromView=YES&Freq=Year&FirstYear=1960&LastYear=2003&3Place=N&Update=Update&JavaBox=no# Mid. By 2003, this figure had tripled to approximately eighteen percent of U.S. GDP (which itself had more than tripled after adjustment for inflation). *Id.*

general direction.[53] The effect is that progress in multilateral trade liberalization is reduced. Instead, states have increasingly divergent interests, based on their particular political and economic needs—and in some cases there is perhaps greater emphasis being placed on non-commercial security considerations. This is a key point that plays out starkly in the PTA context: when a state's vectors and patterns of trade, as well as its security and foreign policy interests, are concentrated on specific countries or regions, as opposed to being generally diffused across a larger, more multilateral landscape, the effect is that PTAs are more likely to be established with those countries or regions. In this sense, the "second-best" PTA approach to trade liberalization indeed may be a more stable equilibrium than multilateral liberalization.[54]

D. Both Commercially-Driven and Security-Driven PTAs are Intended to be Mutually Beneficial Exchanges among PTA Parties

While some recent PTAs appear to be driven heavily, and even primarily, by non-commercial security considerations, even non-commercially driven PTAs involve the exchange of benefits (or intended benefits) among PTA parties. That is, even in instances where policy considerations or national security concerns are paramount, the situation is characterized by the trading of one benefit for another in the classic comparative or absolute advantage context. There is, in other words, an exchange of economic benefits for non-economic benefits, of security for economic gain.[55]

The U.S.-Israel Free Trade Agreement again serves as an example. The United States entered into that free trade agreement to help stabilize Israel. Israel has gained enormously from an economic perspective[56]—it is able to consume far beyond its autarkic Production Possibility Frontier.[57] But that PTA has had only modest economic effect on the United States[58]—trade with Israel does not greatly improve U.S. production or consumption possibilities. The same analysis applies to the more recent U.S.-Jordan Free Trade

53. It is also worth noting that the Cold War also encouraged some regionalism in the West: the United States, although historically a strong proponent of multilateralization, supported Western European regional integration for containment purposes. *See* McCarthy, *supra* note 33, at 2-3.

54. Ahmed Galal & Robert Z. Lawrence, *Egypt, Morocco, and the United States*, *in* SCHOTT, *supra* note 4, at 324.

55. For a general discussion of this conception of international agreements, *see* Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 13-14 (1999).

56. Folsom, *supra* note 40, at 2-3 (stating that the United States receives about twenty-five percent of Israel's exports and about twenty percent of Israel's imports are from the United States).

57. For a discussion of production possibility frontiers, see SURANOVIC, *supra* note 9, at ch. 60-7, *available at* http://internationalecon.com/Trade/Tch60/T60-7.php, and *id.* at ch. 60-11, *available at* http://internationalecon.com/Trade/Tch60/T60-11.php.

58. Folsom, *supra* note 40, at 3.

Agreement.[59]

The most recent, and in some ways quintessential, example of a PTA effort driven primarily by policy concerns is the Middle East Free Trade Area (MEFTA) initiative announced in 2003 by U.S. President George W. Bush.[60] The Middle East countries targeted by that initiative are not large, and they offer relatively little to the United States in terms of direct commercial gains from trade. Many of these countries, however, do offer the United States access to oil and natural gas, and all could play significant political roles in the pursuit of U.S. national security and foreign policy interests in the Middle East. In contrast, greater access to the U.S. market could be highly beneficial commercially for these Middle Eastern countries. While it is questionable whether the MEFTA initiative will bear much fruit (there has been little visible progress on it in recent years[61]), and it is also questionable whether it represents the best or easiest method for ensuring U.S. access to Middle East petroleum resources or for fostering Middle East economic and political stability, the larger point is that the MEFTA initiative is an apparent attempt to exchange economic for non-economic benefits. The wisdom of that bargain is an entirely separate question.[62] This observation about bargaining among PTA members carries important considerations for this Article's "deepening versus broadening" analysis, since, as will be discussed below, deepening is generally undertaken to achieve commercial gains, while broadening may be undertaken for commercial gain or as an exchange of commercial for non-commercial benefits.

E. "Failed" Security-Driven PTA Initiatives Might be Policy "Successes"

For national security- or foreign policy-driven PTAs, it is important to bear in mind that because of these goals, PTA proposals that do not actually

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59. This phenomenon of the smaller state benefiting much more from trade liberalization than large states has been colorfully described as "the importance of being unimportant." Harvey W. Armstrong & Robert Read, *The Importance of Being Unimportant: The Political Economy of Trade and Growth in Small States*, *in* ISSUES IN POSITIVE POLITICAL ECONOMY 71 (S. Mansoob Murshed ed., 2002).

60. Office of the U.S. Trade Representative, *Middle East Free Trade Area Initiative* (Feb. 27, 2003), *available at* http://www.ustr.gov/Trade_Agreements/Regional/MEFTA/Section_Index.html [hereinafter *MEFTA Initiative]*; Office of the U.S. Trade Representative, *Zoellick to Travel to Middle East June 18 – June 23* (June 17, 2003), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2003/June/Zoellick_to_Travel_to_Middle_East_June_18_-_June_23.html (discussing how President Bush proposed to establish a Middle East Free Trade Area by 2013).

61. One also might expect that as a second Bush administration initiative, it will be given little priority as a formal program by the Obama administration.

62. Analogizing PTA efforts to contract negotiations, the point is one of freedom of contract—the ability, or freedom, to enter into a bad bargain for a legitimate purpose. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

come to pass might not always be policy failures. Rather, in some cases these proposals actually could be considered foreign policy or national security successes of varying degree. Again, MEFTA serves as an excellent example. As noted above, the United States has made little progress recently toward the establishment of MEFTA, and one might surmise that with the change in U.S. presidential administrations it may be moribund. Total progress on the initiative is thus likely limited to the already-accomplished preliminary steps of establishing trade and investment framework agreements (TIFAs), bilateral investment treaties (BITs), and bilateral PTAs with some of the proposed MEFTA members.[63]

However, one can argue that even with the lack of a full PTA, MEFTA still may have been at least partly successful from a policy perspective, above and beyond its use as a signaling mechanism for greater U.S. focus on Middle East prosperity.[64] That is, the U.S. national security goals embodied in the MEFTA initiative may still be achieved, at least in part, because of the launch of MEFTA. The proposal to form MEFTA coincided with increased dialogue among Gulf Cooperation Council (GCC) member states:[65] these countries began discussing whether the GCC, which historically has been more of a political forum than a trading bloc, could or should be revamped to increase the GCC's economic and policy role in the Middle East.[66] GCC member states implemented a customs union in 2003,[67] and recently greater efforts have been

63. *MEFTA Initiative*, *supra* note 60.

64. Signaling occurs in the context of trade negotiations, as well as in the context of trade sanctions, which are in a sense the inverse of the promotion of trade relations. *See, e.g.*, James D. Morrow, *Assessing the Role of Trade as a Source of Costly Signals*, in ECONOMIC INTERDEPENDENCE AND INTERNATIONAL CONFLICT: NEW PERSPECTIVES ON AN ENDURING DEBATE 89-90 (Edward D. Mansfield & Brian M. Pollins eds., 2003) (discussing the interplay between trade volumes and signaling); *see also* MEGHAN L. O'SULLIVAN, SHREWD SANCTIONS 276-77 (2003) (discussing U.S. and United Nations signaling in the context of trade sanctions against Sudan).

65. Robert Z. Lawrence, *Recent U.S. Free Trade Initiative in Middle East: Opportunities but no Guarantees*, John F. Kennedy Sch. of Gov't, Working Paper Series No. RWP06-050, 2006, at 12 (noting that U.S. willingness to achieve MEFTA via bilateral negotiations with Middle Eastern states "has created a mechanism for those Gulf States that are most interested in economic reforms to place competitive pressures on those who are more reluctant to do so"); Michael Sturm et al., *The Gulf Cooperation Council Countries: Economic Structures, Recent Developments and Role in the Global Economy*, European Central Bank Occasional Paper Series, No. 92, July 2008, at 68-69 (reviewing recent GCC efforts to enter into free trade agreements).

66. *See* OFFICE OF U.S. TRADE REPRESENTATIVE, GULF COOPERATION COUNCIL 179, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/asset_upload_file226_4769.pdf; *Profile: Gulf Co-operation Council*, BBCNEWS.COM, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/4155001.stm (last visited Apr. 8, 2009); Sturm et al., *supra* note 65, at 68-69.

67. The Cooperation Council for The Arab States of The Gulf, *Implementation Procedures for the GCC Customs Union*, *available at* http://www.gcc-sg.org/eng/index.php?action=Sec-Show&ID=93.

undertaken to promote greater economic coordination and even the possible achievement of a monetary union.[68]

In economic terms, then, regional integrative competition from the United States may have resulted in greater accountability for the GCC and might encourage changes within the GCC. A stronger GCC could be beneficial to the United States in many respects. Even though the United States would not be a GCC member state (as opposed to a MEFTA member state) and would have to trade with the GCC as a third party, GCC countries, through their efforts, might achieve greater economic cooperation, integration and growth. This in turn might lead to greater economic opportunities and an improvement of stability in the region, all of which are goals the United States desires and seeks to foster through MEFTA.[69] MEFTA thus might not be successfully formed, but this initiative still might achieve some of its key objectives.

III. A THEMATICALLY UNIFIED VIEW OF PTAS: "DEEPENING" VERSUS "BROADENING"

The above discussion illustrates that the subject of PTAs is messy and complex. PTAs are characterized by significant variety in form and scope, and also by apparent tensions between their desired (and undesired) effects. The increasing growth of international trade, difficulties in WTO trade liberalization, and recent changes in the global political and economic orders, such as the end of the Cold War, have affected PTAs substantially. Each of these topics is worthy of individual attention, to be sure—but it is also particularly interesting and useful to take a broad, general view of PTA decision making, and that is this Article's purpose. Taking such a view reveals that the choices made about PTA form, membership and scope essentially boil down to one core decision—namely, the choice between "deepening" trade relationships versus "broadening" them. That is, when countries are considering how to promote or formalize their preferential trade arrangements, they essentially have two basic choices. First, the countries can deepen the relationship among themselves, so as to promote trade and integration in that manner. Second, they can broaden their trade arrangements to include other countries or regions as well, which often results in less direct economic benefit but which can be

68. Daliah Merzaban, *GCC Unified Tariff Likely From 2009*, ARABNEWS.COM, Aug. 22, 2008, http://www.arabnews.com/?page=6&section=0&article=113218&d=22&m=8&y=2008&pix=business.jpg&category=Business. More recently the timeline for monetary union has been extended, but this goal has not been abandoned. Robin Wigglesworth, *Gulf Countries Extend Currency Union Deadline*, FIN. TIMES 6, March 25, 2009, http://www.ft.com/cms/s/0/5cf265d0-18dc-11de-bec8-0000779fd2ac.html. Nonetheless, these goals remain in place. It should be noted that the goal of monetary union was first adopted by the GCC in 2001, prior to the United States' MEFTA initiative, but since the MEFTA initiative was announced significant further steps have been announced. *Dropping the Peg*, ECONOMIST.COM, July 8, 2008, *available at* http://www.economist.com/agenda/displaystory.cfm?story_id=11698612&fsrc=rss (reporting a GCC goal of monetary union by 2010).

69. *See MEFTA Initiative*, *supra* note 60.

extremely beneficial from a policy perspective.

Much of the academic literature discussing the question of "deepening" versus "broadening" in preferential trade has been focused on the European Union,[70] but the deepening versus broadening dichotomy works well in other contexts as well, and in particular with respect to current U.S. PTA activity. It is therefore useful to first review deepening versus broadening debates that have taken place in Europe, and then try to apply a deepening versus broadening analysis to the subject of U.S. PTA activity.[71]

A. European Integration and "Deepening" versus "Broadening"

In the 1980s and early 1990s, a debate raged in Europe over the future development of the European Community (now the EU).[72] In the immediate wake of the Cold War, with the pending reunification of Germany and the possibility of many former Soviet bloc states seeking admission to the Community (along with perennial applicant Turkey),[73] the question took on a new and added urgency. The Community was generally seen as an economic success, and there was general consensus that the goal of more meaningful internal economic integration should be pursued. Yet there was internal disagreement concerning the pace of integration—and perhaps more

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70. *See, e.g.*, Wyplosz, *supra* note 6; De Santis & Vicarelli, *supra* note 6, at 13; Mario A. Marconini, *The FTAA-WTO Divide: The Political Economy of Low Ambition*, *in* ECONOMIC INTEGRATION IN THE AMERICAS 50-51 (Joseph A. McKinney & H. Stephen Gardner, eds., 2008) (discussing Europe's "deepening and expanding . . . integration process" but lack of multilateral action because of its focus on internal matters); *see generally* BERNARD HOEKMAN, FREE TRADE AND DEEP INTEGRATION: ANTIDUMPING AND ANTITRUST IN REGIONAL AGREEMENTS (World Bank & CEPR, 1998) (discussing the deepening of EU integration).

71. The focus of this Article is on internal EU deepening, not on the EU's more recent external PTA efforts. The EU has undertaken those, and they are certainly important—and indeed in many ways they are like the United States' current PTA efforts. *See infra* Part IV.B. Yet there has not been much discussion of the conceptual link between internal and external broadening versus deepening efforts, and a primary purpose of this Article is to explore that gap. For discussion of recent EU PTA efforts, *see* Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, 10 J. INT'L ECON. L. 571, 572-73 (2007) (discussing the EU's expansion of trade with Africa, the Caribbean, and the Asia-Pacific Region). For a discussion that explores PTAs and deepening efforts in the narrower context of antidumping and competition (antitrust) law, *see* Hoekman, *supra* note 70.

72. Helen E. Hartnell, *Subregional Coalescence in European Regional Integration*, 16 WIS. INT'L L. J. 115, 120-49 (1997) (discussing the European Community's "controversial" agreements with Russia, Ukraine, and other Eurasian States); *see* Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 FORDHAM INT'L L. J. 1118, 1132-36 (2008). In discussing the difficulties that were involved in establishing a European monetary union and Britain's refusal to accept the Euro, Dinan notes (with interesting understatement) that public support for monetary integration in the 1990s was at best "equivocal." *Id.*

73. Editorial, *EU Leader Urges Turkey to Speed Changes*, INT'L HERALD TRIB., Apr. 9, 2008, *available at* http://www.iht.com/articles/2008/04/09/europe/union.php (discussing request that Turkey speed up reforms if it wishes to join the EU); Craig S. Smith, *European Union Formally Opens Talks on Turkey Joining*, THENEWYORKTIMES.COM, Oct. 4, 2005, http://www.nytimes.com/2005/10/04/international/europe/04turkey.html.

importantly, there was disagreement over which countries should be involved.

At the risk of oversimplification, two general schools of thought emerged. First, a number of European continental observers favored expansion of EU membership to include a modest-to-large number of new states.[74] Politically speaking, the reasoning went, the collapse of the Iron Curtain presented an unprecedented opportunity to heal Europe's East-versus-West schism. Expansion offered the prospect of bringing eastern parts of Europe into the fold, so to speak, and offered Western European countries the chance to exercise greater influence over Eastern European countries during a time of economic and political adjustment that posed risk for unrest and destabilization.[75] This was, in other words, a political and foreign policy benefit, rather than a purely commercial one. It was also argued by some observers that rapid expansion of Community membership would not cause difficulties in terms of coordination of economic policies and efforts to deepen economic and monetary coordination among existing European Community member states.[76] The assumption underlying the latter arguments was that any costs of integration with new members would be exceeded by the benefits, at least in the long term.

Second, other observers—many of whom were British Euroskeptics to begin with—generally opposed the broadening of Community membership until the economies of existing member states could be more closely integrated and coordinated, and these objections predated the end of the Cold War.[77] While a review of these objections to deepening reveals that in many respects

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74. *See* Hartnell, *supra* note 72, at 119-21; Eneko Landaburu, *The Fifth Enlargement of the European Union: The Power of Example*, 26 FORDHAM INT'L L. J. 1, 10-11 (2002). For a detailed discussion European integration developments during and after this time period, *see* Earnest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales From American Federalism*, 77 N.Y.U. L. REV. 1612, 1623-25 (2002).

75. Hartnell, *supra* note 72, at 213-14.

76. *See id.* at 182; R. BALDWIN ET AL., THE COSTS AND BENEFITS OF EASTERN ENLARGEMENT—THE IMPACT ON THE EU AND EUROPE (1997), *cited in* Graeme Leach, *EU Membership—What's the Bottom Line?* 14-15 (Institute of Directors Policy Paper, Mar. 2000), *available at* http://www.euro-know.org/articles/eumembership.pdf (discussing costs of EU enlargement, with Baldwin et al. characterizing them as "small" costs); Liesbet Hooghe & Gary Marks, *The Making of a Polity: The Struggle Over European Integration* 7-8 (European Integration Online Papers (EIOP) Vol. 1, No. 4, 1997), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=302663 (discussing strong support for a single market approach and the Single European Act by Jacques Delors); *see* McGowan, *supra* note 9, at 130-37 (discussing European countries' willingness to coordinate integration to prevent economic decline in the early 1980s due to "poor competitiveness of European firms" and large trade deficits).

77. ANTHONY FORSTER, EUROSCEPTISM IN CONTEMPORARY BRITISH POLITICS 74-75 (2002) (stating that British skeptics thought other EU member "governments were insincere about creating a Single Market" and that "imperfections in trade still remained); Hooghe & Marks, *supra* note 76, at 8-9 (discussing "neoliberal" and "nationalist" opposition in the United Kingdom, France, Germany, and the Benelux countries to "market regulation" by the EU in the 1980s and 1990s).

they were veiled (or not so veiled) concerns over sovereignty,[78] the objections also had economic bases. Skeptical observers noted that while some core members of the European Community (namely the Benelux countries) already were closely integrated by the late 1980s and early 1990s and had similar economic structures (and currencies voluntarily pegged to one another), there were still large economic disparities among Community members as a whole.[79] These observers argued (and these arguments were by no means new) that adding additional members, especially ones that were even more economically divergent than current members, would be disastrous for Community cohesion and policymaking. Rather than extending the reach and influence of the European Community by adding new members, these observers contended that expansion of Community membership would further reduce the ability of Community member states to reach consensus and make effective decisions regarding the future course of the Community.[80] There were concerns that broader integration would lead to greater emigration from lesser developed to more developed member states,[81] as well as concerns that greater

78. J.F.O. McAllister, *Closer Union or Superstate?*, TIME, Jun. 20, 2004, *available at* http://www.time.com/time/printout/0,8816,655379,00.html (discussing opposition in Britain and other EU member states to greater EU integration); John Darnton, *Tories Stake Out a Tough Stand Against a 'Monolithic' Europe*, NEW YORK TIMES, Mar. 17, 1996, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F06E0D61639F934A25750C0A960958260 (stating that many "Euro-skeptics" oppose further EU integration because they believe "a common currency [will be] the . . . acid that will corrode national sovereignty and lead inevitably to a single political bloc"); Forster, *supra* note 77, at 6, 72-73 (noting that "sovereignty and autonomy" were major British concerns); MICHAEL J. BAUN, AN IMPERFECT UNION 61 (Westview Press 1996) (stating that the "primary opponent" to the European Monetary Union was Britain, due to concerns over a deterioration of "national sovereignty"); Hooghe & Marks, *supra* note 76, at 2 (stating that many Europeans feared that a shift of authority and decision making power to a central body would threaten "the sovereignty of member states").

79. Leach, *supra* note 76, at 14-16; Loukas Tsoukalis, *Economic and Monetary Union: The Primacy of High Politics* 290-91, *in* POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 9 (discussing objections to European Monetary Union).

80. Leach, *supra* note 76, at 10; Mariya Konovalova et al., *European Union Expansion*,The Columbia Political Union, Apr. 25, 2004, *available at* http://cupolitics.org/publications/0304/euexpansion.pdf. For a general discussion of the costs to existing members of broader inclusion and integration, *see* Aristidis Bitzenis & Andreas Andronikidis, *Cost and Benefits of Integration in the European Union and in the Economic Monetary Union (EMU)*, 1 ECON., MGMT., & FIN. MARKETS 28-29 (2006), *available at* http://www.denbridgepress.com/emfm_abstract.php?a=18 (discussing costs such as integration of highly disparate economies into the Community and reduced ability of member states to maintain separate fiscal policies concerning exchange rates and monetary supply, as means to regulate inflation and unemployment levels).

81. Interestingly, some of these concerns are reflected in more recent restrictions on internal EU migration. *See Migration From Eastern Europe: Shutting the Door*, THE ECONOMIST, Oct. 26, 2006, *available at* http://www.economist.com/research/articlesbysubject/displaystory.cfm?subjectid=682266&story_id=8091309 (discussing the increased restrictions by Britain and other EU members on the migration of workers from new member states in Eastern Europe); *see also* McCarthy, *supra* note 33, at 809.

coordination—treating economically diverse states more like a single economy—would hamper economic and fiscal planning at the national level.[82] A primary focus on deepening integration among existing Community members, rather than on broadening to include new members, was therefore advocated.

On the face of it, then, both proponents and opponents of broadening generally agreed that further internal deepening of the Community could be desirable and beneficial. Yet they disagreed, in chicken-and-egg fashion, about whether deepening or broadening should come first, and which would best further the development of the other. While neoclassical economic theory generally was on the side of the skeptics—in the sense that it suggested very strongly that the commercial gains to existing members from broadening the community might be outweighed by the costs of integrating these new economies into the Community fold[83]—the European proponents of broadening before deepening nevertheless prevailed, and between 1986 and 2007 seventeen new member states were added to what is now the EU (with most of these being added after the end of the Cold War).[84] Additional new member states likely will be added in the near future.

This broadening was not costless, of course, which strongly suggests that the observations of the critics of broadening were valid in many respects. The unification of Germany was the cause of enormous internal economic and political stresses,[85] and the admission of Greece and Spain in the 1980s led to enormous costs later, as both countries struggled to coordinate their fiscal policies with other disparate EU economies such as Germany and France.[86] Yet the EU's program of extensive broadening to include new members has been seen as largely successful (although deepening-versus-broadening tensions have continued to play out in the EU's further development).[87] Does this mean

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82. Bitzenis & Andronikidis, *supra* note 80, at 28-29.

83. *See supra* Part II.B.

84. These countries were Portugal and Spain (1986); Austria, Finland, and Sweden (1995); Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia (2004); and Bulgaria and Romania (2007). Europa, *European Countries*, *available at* http://europa.eu/abc/european_countries/index_en.htm (last visited Apr. 4, 2009).

85. Robert F. Owen, *The Challenges of German Unification for EC Policymaking and Performance*, 81 THE AM. ECON. POL'Y REV., 171-74 (1991).

86. Loukas Tsoukalis, *Greece: Like Any Other European Country?*, 55 NAT INT. 65, (1999) (discussing Greece's struggle to conform to the EU); DANIEL GROS & NIELS THYGESEN, EUROPEAN MONETARY INTEGRATION 191-92, 223-24 (2nd ed. 1998); BAUN, *supra* note 78, at 72-73, 113-14 (discussing economic disparities and monetary policy tensions between Spain and other less prosperous European countries, as opposed to Germany, France and Britain).

87. For discussion of recent tensions concerning EU integration, *see* KRISTIN ARCHICK, CONG. RESEARCH SERV. REPORT FOR CONGRESS, ORDER CODE RS21618, THE EUROPEAN UNION'S REFORM PROCESS: THE LISBON TREATY (July 3, 2008), *available at* http://www.usembassy.it/pdf/other/RS21618.pdf; *see also* Gráinne De Búrca, *The Lisbon Treaty No-Vote: An Irish Problem or a European Problem?* (University College Dublin Working Papers in Law, Criminology & Socio-Legal Studies, Paper No. 03, 2009), *available at* http://ssrn.com/abstract=1359042. For a recently expressed French perspective on EU

that the (very significant) short-term economic costs of EU broadening were indeed outweighed by long-term economic gains? That is, was broadening a "loss leader" approach to PTAs, pursuant to which the costs and inconveniences of regional coordination and cooperation were frontloaded in order to achieve longer term, and ultimately beneficial, coordination of efforts? Or was this simply a case of political considerations taking precedence over economic ones?

B. Application of Deepening versus Broadening" Framework to U.S. PTAs

The deepening versus broadening conceptual framework from the EU's internal experience can be quite informative when applied to more recent PTA efforts, especially by the United States. On the one hand, the United States and EU preferential trade experiences are quite different. The United States certainly has never undertaken anything akin to the EU's internal integration efforts (at least since the Articles of Confederation), and its preferential trade efforts have been *ad hoc*. The EU, by contrast, has developed as a confederation of states embedded in an increasingly formalized legal and commercial framework. On the other hand, PTAs increasingly have been considered by the United States for significant non-economic reasons, such as the U.S.-Colombia Trade Promotion Agreement[88] and MEFTA.[89] PTAs of this sort are akin in some of their justifications, as well as their effects, to the EU members' repeated decisions to broaden the EU, rather than to focus first on deepening existing intra-EU relationships. That is, rather than concentrating on deepening existing and successful U.S. PTAs or seeking to deepen ties with countries with which the United States shares strong commercial interests and economic structural similarities, the United States instead has sought in many cases to expand its political reach and influence through the signing of new PTAs with other states, even when—and indeed especially when—these new PTAs appear to offer the United States marginal economic benefit.

It must be noted that in recent years the EU has taken to signing (as a unified bloc) external PTAs with third countries, such as Mexico (2001), Croatia (2002), Jordan (2002), Chile (2003), Lebanon (2003), and Egypt

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integration, see Pierre Moscovici, Opinion, *From Hubris to Nemesis*, THE MOSCOW TIMES.COM, MAY 27, 2009, *available at* http://www.themoscowtimes.com/article/1016/42/377461.htm (characterizing EU integration as 'moving forward' despite periodic internal opposition and dissension).

88. David Gantz, *The "Bipartisan Trade Deal," Trade Promotion Authority and Future of U.S. Free Trade Agreements* 3 (Ariz. Legal Studies, Discussion Paper No. 08-16, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186982; Office of United States Trade Representative, *United States and Colombia Sign Trade Promotion Agreement* (Nov. 22, 2006), http://www.ustr.gov/Document_Library/Press_Releases/2006/November/United_States_Colombia_Sign_Trade_Promotion_Agreement.html?ht= [hereinafter U.S.-Colombia TPA].

89. *MEFTA Initiative*, *supra* note 60; Lawrence, *supra* note 65, at 2-3; Folsom, *supra* note 40, at 8.

(2004).[90] This does not undermine the validity of the U.S.-EU comparison, however. Rather, it is an example of the EU also taking a shallower "broad" approach in recent years.

1. Deepening versus Broadening and U.S. Commercial Considerations

The deepening versus broadening dichotomy works well to explain the difference between U.S. commercially driven and non-commercially driven PTAs. With commercially-driven PTAs, there is U.S. interest in achieving greater integration with the other economies involved. NAFTA and its side agreements serve as a good example of this: there is a willingness—perhaps even a desire—to achieve closer U.S. economic integration with Canada. Even with Mexico, which has been the source of a great deal of NAFTA-related political tension in the United States, the very concerns the United States has about its trade relations with Mexico center on elements of greater economic integration—namely, labor mobility, direct investment, agriculture and trucking.[91]

With non-commercially driven PTAs, in contrast, the primary U.S. interest lies in expanding formal (or in some cases, less formal) U.S. trade relations to include new countries for a variety of other reasons. Given the structural economic disparities between the United States and many of these other countries, deeper integration might prove difficult, and in any event the economic gains to the United States from liberalized trade with those countries are marginal at best. If direct economic gains from trade were the primary factor involved, it is likely these PTAs would never come to pass. PTAs of this sort include the proposed (and to date troubled) U.S.-Colombia Free Trade Promotional Agreement[92] and the proposed (and less troubled) U.S.-Panama

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90. De Santis & Vicarelli, *supra* note 6, at 13.

91. M. ANGELES VILLARREAL, U.S.-MEXICO ECONOMIC RELATIONS: TRENDS, ISSUES, AND IMPLICATIONS 20-22 (CRS Report for Congress, July 11, 2005), *available at* http://www.fas.org/sgp/crs/row/RL32934.pdf; Gustavo Vega Canovas, *Convergence: Future Integration between Mexico and the United States*, 10 U.S.-MEX. L. J. 17, 18 (2002) (discussing strengths and weaknesses of NAFTA and NAFTA-related labor market integration); *see generally* Shiraki, *supra* note 33, at 55-56.

92. Opposition to the U.S.-Colombia Free Trade Promotional Agreement began under the second Bush administration. *See U.S.-Colombia TPA*, *supra* note 87; Steven R. Weisman, *Colombia Trade Deal Is Threatened*, NEW YORK TIMES, July 13, 2008, *available at* http://www.nytimes.com/2008/07/13/washington/13trade.html (listing opposition by American labor unions, Democratic leaders in Congress, and then-Senator Barack Obama as several reasons why Congress is unlikely to pass the legislation approving the Colombia Trade Promotion Agreement); *Bush Urges Congress to Approve Colombia Trade Pact*, REUTERS, July 22, 2008, *available at* http://www.reuters.com/article/politicsNews/idUSN2231809520080722 (observing that congressional unwillingness to bring implementing legislation to a vote has placed the pact's future in doubt). President Obama's campaign rhetoric contained anti-trade elements, but in his actions in office have been governed by a strong sense of pragmatism. To this end, President Obama has been exploring ways to perhaps bring this PTA into existence.

Trade Promotion Agreement; the latter has been proposed, not surprisingly, due to the Panama Canal and its importance to U.S. security and trade.[93]

With respect to the U.S.-Colombia Free Trade Promotional Agreement, President Bush's remarks to Congress in April 2008, when his administration was seeking congressional approval of this pact via implementing legislation, were particularly telling. The first justification given for this proposed PTA was that it would "advance America's national security interests in a critical region."[94] The second justification—closely related to the first—was the need "to strengthen a courageous ally."[95] U.S. economic interests were only listed *third*.[96] President Bush made similar statements at other times as well, as did other U.S. government officials.[97] Moreover, the commercially-focused justifications given by U.S. officials for this PTA have emphasized the large economic benefits to Colombia, not to the United States, due to the fact that the United States is Colombia's largest trading partner.[98] Similar national security statements have been made by U.S. officials about the U.S.-Panama Trade Promotion Agreement.[99]

See Low Expectations Exceeded, ECONOMIST.COM, Apr. 30, 2009, *available at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=13578834.

93. Office of U.S. Trade Representative, *United States and Panama Sign Trade Promotional Agreement* (June 28, 2007), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2007/June/United_States_Panama_Sign_Trade_Promotion_Agreement.html?ht=. Current indications are that the U.S.-Panama Trade Promotion Agreement is likely to approved by Congress. *See Low Expectations Exceeded*, *supra* note 91.

94. Press Release, White House, Office of Press Secretary, President Bush Discusses Colombia Free Trade Agreement (Apr. 7, 2008), http://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080407-1.html (last visited May 15, 2009).

95. *Id.*

96. *Id.*

97. *See, e.g.*, Dan Eggen, *Bush Backs New Trade Pact With Colombia*, WASH. POST, Apr. 8, 2008, at A3 (quoting President Bush as saying that "[a]pproving [this] free-trade agreement is one of the most important ways America can demonstrate our support for Colombia); Carlos Gutierrez, *Ask the White House*, Mar. 13, 2008, *available at* http://georgewbush-whitehouse.archives.gov/ask/20080313.html (quoting Secretary of Commerce Gutierrez) ("[T]he Colombia FTA is more than just a free trade agreement; it is way to ensure security in our hemisphere"); David Lawder, *Paulson Urges OK on Colombian and Panama Trade Pacts*, REUTERS, Apr. 7, 2008, *available at* http://www.reuters.com/article/politicsNews/idUSN0729483920080407 (reporting statements by President Bush) ("[T]he need for this [free trade] agreement [with Colombia] is too urgent, the stakes for our national security are too high, to allow this year to end without a [congressional] vote.") (quoting Treasury Secretary Paulson) ("[We] call on the U.S. Congress to show support for the Colombian people . . . by passing the Colombian trade agreement").

98. Gutierrez, *supra* note 96.

99. Lawder, *supra* note 96 (reporting statements by U.S. Treasury Secretary Henry Paulson calling for congressional approval of the Colombian and Panama trade pacts, as a means to bolster democracy in Latin America); Press Release, Department of Commerce, Office of Public Affairs, U.S. Commerce Secretary Carlos M. Gutierrez on Meeting With President of Panama Martin Torrijos (Feb. 15, 2007), http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_002795 (statements by Gutierrez) (stating that the agreement is a "comprehensive free trade pact that will enhance economic growth and prosperity for the people of the United States and Panama.").

PTA relationships that have little direct commercial benefit thus can be seen as agreements that do little to promote regional economic integration and the gains that integration can bring. In fact, if economic concerns were paramount, it is possible that the United States could achieve greater direct commercial benefits by forgoing these types of non-commercial PTA efforts entirely and instead focusing on further deepening of the U.S. *domestic* market.[100] The U.S. domestic market retains various modest barriers to trade and transaction costs that are perhaps higher than they should or could be, and the United States could seek to reduce or eliminate these as a means to promote U.S. economic growth. In addition, certain economic sectors that hold the potential for significant growth may require government support or investment, due to high startup and research costs—just as railroads have received substantial government support and the Internet began as a government defense research project.[101] Such efforts could include, for example, more active initiatives to federally preempt state laws in the name of national harmonization of disparate legal regimes; the harmonization of overlapping federal regulatory regimes; the improvement of roads and railways, including the development of new transport modes (such as mag-lev trains) to lower transportation costs and spur economic development; greater funding for renewable energy sources; and the upgrading of communications infrastructures.

In fact, the Obama administration has touted the development of renewable energy sources as a means to stimulate U.S. economic growth, and it also has proposed unified federal standards for automobile mileage as a means to regulatorily incentivize industry improvements and preempt inconsistent state standards.[102] Still, there is no readily available evidence that intra-governmental discussions or analyses of this sort have regularly occurred in the United States under current or prior administrations. It is much more likely that such choices between broadening regionally versus deepening domestically have been made by default—all the more so since U.S. governmental agencies that are heavily involved in international trade matters (such as the Office of the U.S. Trade Representative) are often different from (and have different budgets than) those involved in domestic matters (such as the Department of Transportation and Federal Communications Commission).

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100. This point can be thought of as a corollary of McCarthy's observation that (sufficiently deep) regional integration leads to a PTA's territory behaving as (or indeed, becoming) a single market. *See* McCarthy, *supra* note 33, at 5-6.

101. *See generally* UNEP SUSTAINABLE ENERGY FINANCE INITIATIVE, PUBLIC FINANCE MECHANISMS TO CATALYZE SUSTAINABLE ENERGY SECTOR GROWTH (2005); JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES 225-255 (Univ. of North Carolina Press, 2001).

102. *See* Press Release, The White House Office of Press Secretary, President Obama Highlights Vision for Clean Energy Economy (Apr. 22, 2009), http://www.whitehouse.gov/the_press_office/Clean-Energy-Economy-Fact-Sheet/ (asserting that renewable energy sector development will create jobs and lead to greater economic growth); John M. Broder, *Obama to Toughen Rules on Emissions and Mileage*, N.Y. TIMES, May 19, 2009, at A1.

It is somewhat disturbing to think that this sort of regional-broadening-versus-domestic-deepening analysis might reach a conclusion that in some cases is similar to the very sort of isolationist thinking that historically has infused U.S. policymaking on international trade. Certainly there have been (and still are) some observers who would find great appeal in this justification. Yet the conceptual point stands: every decision has an opportunity cost or gain—and if a PTA is being undertaken for non-commercial reasons, the benefits from the PTA might be less in some cases than the benefits that could be derived from domestic deepening efforts.[103]

2. Deepening versus Broadening and Choice of PTA Form

Deepening versus broadening is also a way to explain the structure or choice of PTA forms used by the United States and other countries. For example, the use of TIFAs and BITs as precursors to formal FTAs with MEFTA target countries[104] means that any initial U.S. PTA relationships with these countries are more broad and less integrative or deep than if a formal FTA were the first step in these relationships. In these cases, more limited agreements (and in the case of TIFAs, less formal agreements) have been chosen when there is an interest in broadening U.S. reach, but little or no interest in immediately deeper ties with the other countries involved. In addition, while the creation of and U.S. membership in APEC preceded the current spate of U.S. PTA activity, APEC's non-traditional approach fits well into this analysis too—and, in fact, its less formalized, less deep structure helps to explain why APEC's membership is larger than that of most PTAs—with 21 members as of April 2009.[105]

3. Balancing Considerations

Of course, deepening versus broadening is not a true dichotomy, but

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103. The Smoot-Hawley Tariff Act of 1930 was perhaps the quintessential example of American isolationist desires in international trade (notwithstanding its disastrous consequences). U.S. Department of State, *Protectionism In the Interwar Period*, http://www.state.gov/r/pa/ho/time/id/17606.htm (last visited Apr.. 8, 2009). While few now seriously entertain the notion of full isolationism, isolationism still influences modern international trade thinking (and politicking). *See* Council on Foreign Relations, *The Candidates on Trade*, July 30, 2008, http://www.cfr.org/publication/14762/ (stating that Barack Obama, Hillary Clinton, Joseph Biden, Christopher Dodd, and John Edwards all claimed to be free trade advocates, yet during the campaign expressed doubt and quite frequently opposed recent U.S. free trade initiatives); Peter T. Kilborn, *The Free Trade Accord: Labor Unions Vow to Punish Pact's Backers*, NEW YORK TIMES, Nov. 19, 1993 at A27 (stating that labor and workers' unions struck an alliance with other politicians against free trade agreements, including NAFTA). For a discussion of trade and protectionist sentiments specifically regarding PTAs in the 2008 U.S. presidential election, *see* Gantz, *supra* note 87, at 9-10.

104. *See supra* text accompanying notes 14-17.

105. *See* Asia-Pacific Economic Cooperation Forum, Member Economies, http://www.apec.org/content/apec/member_economies.html (last visited Apr. 8, 2009).

rather more of a spectrum or axis. Various PTA agreements will be located at different points along the axis, depending on the precise balance involved. In many cases, both commercial and security concerns will be important. This is certainly true for the U.S.-Singapore Free Trade Agreement. Singapore's status as one of the world's largest "megaports" for international trade means that it is critically important to the United States for cargo security purposes—although much of that concern has been addressed by the United States through separate, non-PTA programs intended to promote inbound cargo security.[106] Singapore also is a significant trading partner for the United States, far in excess of its tiny size: it was the United States' tenth-largest export market in 2007 and the United States' thirteenth-largest trading partner, with two-way trade of over US$22.5 billion.[107] It may be, then, that the commercial and security benefits to the United States from the U.S.-Singapore Free Trade Agreement are relatively evenly balanced between economic and security benefits. The Korea-U.S. FTA is another example of a proposed PTA that has clear security and commercial benefits, given both the current (and potentially much greater) volume of U.S.-Korea trade and strategic concerns regarding North Korea.[108] For example, President Obama on the one hand has suggested that U.S. access to the Korean automotive market (a commercial concern) is central to the completion of this PTA.[109] On the other hand, in the wake of North Korea's missile launch in April 2009 and resumption of its nuclear program (clearly non-commercial concerns), congressional leaders from both sides of the aisle have urged President Obama to seek completion of this agreement expeditiously.[110]

The point, again, is that deepening versus broadening is not an all-or-nothing choice. The fact that many recent U.S. PTAs have been driven by non-commercial broadening considerations is thus reflective not of the exclusive nature of deepening versus broadening considerations, but rather of recent U.S. regional trade policymaking.

CONCLUSION: U.S. FUTURE PTA ACTIVITY

As the above discussion demonstrates, taking a broadly thematic view of the tensions between PTA deepening versus PTA broadening can lead to better appreciation and understanding of PTA activity. This section concludes this

106. *See* Bowman, *supra* note 18, at 204-7.

107. *U.S. Trade With Singapore: 2007 (Jan.-June) v. 2006 (Jan.-June)*, http://singapore.usembassy.gov/uploads/images/dj4XLVFE4sljAwlSIYQ3VA/2007_H1_Trade_Data_Bullets_8_07__2_.pdf (last visited Apr. 4, 2009).

108. U.S. DEPARTMENT OF STATE, *The Case for the U.S.-Korea Free Trade Agreement*, May 2008, *available at* http://www.state.gov/e/eeb/tpp/korea/.

109. *Low Expectations Exceeded*, *supra* note 92.

110. Senators Max Baucus & Chuck Grassley, Letter to President Obama Regarding Korea FTA, April 20, 2009, *available at* http://finance.senate.gov/press/Bpress/2009press/prb042009.pdf; *Low Expectations Exceeded*, *supra* note 92.

Article by discussing potential future U.S. PTA activity and likely areas of inactivity.

First, this Article's conceptualization of PTAs suggests that PTA formation follows either economic or non-commercial national security or foreign policy interests, and that the balance of these two considerations will affect the scope, membership, and structure of each particular PTA. It also suggests that when neither type of interest is present, PTAs will not be formed, or if formed will be ineffective. On the one hand, such an observation—that PTAs will not be successfully formed when there are little benefits involved for all parties—might appear trite. On the other hand, the United States has been involved in PTA-related efforts over the past decade that satisfy neither condition—efforts that have yielded little or no direct results. This is therefore an observation worth making, any apparent obviousness notwithstanding.

For example, this conceptualization helps explain the lack of progress on PTA initiatives such as the Free Trade Agreement of the Americas (FTAA), for which there is (or at least there is perceived to be) neither strong economic benefit over current arrangements nor any grand, pressing security need. The FTAA initiative was launched in 1994,[111] but since that time several deadlines for FTAA formation have passed.[112] While FTAA discussions continue, and the United States and other potential FTAA member states officially proclaim their continued commitment to FTAA formation,[113] in truth there is little real progress currently being made toward FTAA formation. Instead, the United States has focused on bilateral PTAs with Latin American countries, such as the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR)[114] and U.S.-Chile Free Trade Agreement.[115] The U.S.-Panama

111. Christopher M. Bruner, *Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas*, U. MIAMI INTER-AM. L. REV. 1, 2 (2002); Frank J. Garcia, *"America's Agreements"—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63, 65 (1997); *see also* Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: "A Work in Progress"*, 14 J. INT'L L. & BUS. 493, 524-27 (1994) (discussing U.S. position on the FTAA initiative).

112. SARAH ANDERSON & JOHN CAVANAGH, STATE OF THE DEBATE ON THE FREE TRADE AREA OF THE AMERICAS 3-6 (2002), *available at* http://www.fntg.org/fntg/docs/stateofthedebate-FINAL4.pdf.

113. Ministerial Declaration, Free Trade Agreement of the Americas Eighth Ministerial Meeting (Nov. 20, 2003), *available at* http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp. In that declaration, ministers from the thirty-four countries participating in the FTAA negotiations stated that "[w]e recognize the significant contribution that economic integration, including the FTAA, will make to the attainment of the objectives established in the Summit of the Americas process: strengthening democracy, creating prosperity and realizing human potential," and that "[w]e, the Ministers, expressly reaffirm our commitment to the successful conclusion of the FTAA negotiations by January 2005, with the ultimate goal of achieving an area of free trade and regional integration." *Id.* (reservation by Venezuela omitted).

114. *See generally* Office of the United States Trade Representative, *Dominican Republic-Central America-United States Free Trade Agreement*, http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/Section_Index.html (last visited Feb. 4, 2009).

Trade Promotion Agreement is likely to be approved,[116] and while the U.S.-Colombia Free Trade Promotional Agreement[117] appeared moribund at the end of the second Bush administration, it is possible that this PTA also may be approved under the Obama administration.[118] In each of these cases, a narrower economic or foreign policy interest has justified the effort involved in negotiating and forming a PTA.

This observation also helps explain the disturbing American inaction to date concerning PTAs in sub-Saharan Africa. U.S. President Clinton signed the African Growth and Opportunity Act (AGOA) in 2000 to great fanfare,[119] and four years later President Bush signed the AGOA Acceleration Act of 2004.[120] The United States also explored the possibility of establishing a free trade agreement with the Southern African Customs Union (SACU).[121] Like some of the smaller western hemispheric PTAs the United States has recently entered into, much of the focus of any U.S.-African PTAs would necessarily be on agriculture and textiles.

Yet the United States' trade numbers with sub-Saharan Africa have remained small—the export market was worth only US$14 billion as of 2007[122] and has not increased much, if any, since then. Moreover, unlike western hemispheric countries, sub-Saharan African countries fall outside the United States' immediate geographic sphere of influence. It is not surprising, then, that the efforts of both the Clinton and second Bush administrations never matched their rhetoric.[123] For example, President Bush's 2008 visit to Africa

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115. *See generally* Office of the United States Trade Representative, *Chile Free Trade Agreement*, http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Section_Index.html (last visited Feb. 4, 2009).

116. *See generally* Office of the United States Trade Representative, *Panama Trade Promotion Agreement*, http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Section_Index.html (last visited Feb. 4, 2009); *see also supra* note 92.

117. *See U.S.-Colombia TPA*, *supra* note 88.

118. *See supra* text accompanying note 92.

119. *See generally* Trade and Development Act of 2000, 19 U.S.C. §§ 3701-3741 (2007); Robert H. Edwards Jr. et al., *International Investment, Development, and Privatization*, 35 INT'L LAW. 383, 383 (2001).

120. *See generally* AGOA Acceleration Act of 2004, H.R. 4103, 108th Cong. (2004); Raj Bhala, *Generosity and America's Trade Relations With Sub-Saharan Africa*, 18 PACE INT'L L. REV. 133, 146 (2006).

121. Members are Botswana, Lesotho, Namibia, South Africa and Swaziland. 2002 Southern African Customs Union (SACU) Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland, *available at* http://www.sacu.int/; *see also* Raj Bhala, *The Limits of American Generosity*, 29 FORDHAM INT'L L.J. 299, 343 n.148 (2006).

122. Press Release, Africa Policy, WHITEHOUSE.GOV, http://georgewbush-whitehouse.archives.gov/infocus/africa/ (last visited May 15, 2009) [hereinafter *Africa Policy*].

123. *See Clinton Visits Nigerian Village*, BBCNEWS.COM, Aug. 27, 2000, http://news.bbc.co.uk/2/hi/africa/898450.stm (reporting on the disconnect between President Clinton's "messages of support" for Nigeria and lack of offers to assist with debt relief); R.W. Apple, Jr., *Analysis: Africa Faces Hurdles, Despite Clinton's Optimism*, NEW YORK TIMES, Apr. 3, 1998, *available at* http://www.nytimes.com/library/world/040398clinton-africa-assess.html (reporting on President Clinton's 1998 trip to Africa, his optimistic rhetoric, and uncertainty of

had all the trappings of an outgoing president seeking to strengthen his legacy at home and abroad, but much of the focus was on health and individual opportunity, not development and trade *per se*.[124] During the visit, President Bush spoke repeatedly about the importance of malaria control and mosquito nets, but he said very little about fostering deeper U.S.-African economic ties or about fostering economic development and opportunity in sub-Saharan Africa.[125] Personal compassion and a focus on public health are certainly worthy and needed, but they do not themselves generate trade. Moreover, if we assume, as both the Clinton and second Bush administrations did, that greater trade can lead to greater opportunity and stability,[126] then the absence of such talk during President Bush's 2008 visit is all the more telling. Africa was simply not perceived by the U.S. government as either presenting strong economic opportunities or posing a significant security or foreign policy threat or concern that could be addressed through trade, and so it was not the focus of U.S. PTA efforts.[127]

Even under the Obama administration, it is not yet clear how much weight will be given to U.S. trade with sub-Saharan Africa. Some observers anticipate that President Obama will place greater emphasis on U.S-Africa trade

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substantive American aid); *See* Press Release, The White House, President Bush Discusses Trip to Africa at Leon H. Sullivan Foundation (Feb. 26, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080226.html (stating that during his first term President Bush "doubled" assistance to Africa and asked Congress to "double" assistance to Africa during his second term).

124. *See* Press Release, The White House, President and Mrs. Bush Discuss Africa Policy, Trip to Africa (Feb. 14, 2008), http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080214.html; *see generally Bush on Safari: Some Relief in Africa*, ECONOMIST.COM, Feb. 15, 2008, http://www.economist.com/displayStory.cfm?story_id=10711375&fsrc=RSS (describing President Bush's AIDS package to Africa, dubbed "PEPFAR" (President's Emergency Plan For AIDS Relief), which is intended to give nearly $19 billion to Africa over a 5-year period) [hereinafter *Bush on Safari*]; Peter Baker, *Bush, in Africa, Issues Warning to Kenya*, WASHINGTONPOST.COM, Feb. 17, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/16/AR2008021600323.html (describing President Bush's policies in Africa as programs that fight disease, poverty and illiteracy on the continent).

125. *See generally* Press Release, The White House, President Bush Tours Meru District Hospital, Discusses Malaria (Feb. 18, 2008), http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218.html (discussing President Bush's "Malaria Initiative," which supports anti-mosquito measures including netting and spray, medical treatment, and anti-malarial medication); *see generally Bush Begins African Trip in Benin*, BBCNEWS.COM, Feb. 16, 2008, http://news.bbc.co.uk/2/hi/americas/7247370.stm (reporting on visits by President Bush to local hospitals).

126. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 17 (2002), *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss.pdf (stating that "free trade and free markets" create stability by creating new jobs and higher incomes, as well as by advancing the prosperity and freedom that "enhance[ ] our national security");THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 25 (2006), *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/nss2006.pdf (stating that one tenet of American foreign policy is to promote "free and fair trade," because it expands economic liberty that in turn brings prosperity and eventually political liberty).

127. For a discussion of longstanding structural impediments to inter-regional trade between Africa and developed countries, see McCarthy, *supra* note 33, at 16-17.

policy, both in light of his own interest in economic development and his own African heritage, and also building on the modest efforts of his presidential predecessors.[128] Others note that President Obama's positions on trade have shifted from what some viewed as protectionist in tone (during the 2008 presidential campaign) toward more pro-free trade stances since his inauguration,[129] which perhaps suggests that more trade agreements may be seen during the Obama administration. On the other hand, U.S. Trade Representative Ron Kirk has been quoted as saying that he did not come to that job with "deal fever"—meaning that the Obama administration may have less of a penchant than the previous administration for signing new trade deals, including PTAs.[130] Consistent with this position, the Obama administration has stated that the United States will not revive PTA talks between the United States and the Southern African Customs Union (SACU), although the United States will entertain the possibility of separate PTAs with individual SACU countries. A TIFA negotiated between the United States and SACU will remain in effect.[131] Such a TIFA, of course, is a less integrative form of regional cooperation, as already discussed in this Article.

In light of this recent history of U.S. regional trade with sub-Saharan Africa, it appears that unless there is further significant destabilization in Africa, or growing support of terrorism in Southern Africa, any progress toward strengthening U.S. formal trade arrangements with sub-Saharan Africa and other regions like it will be modest at best, and perhaps even marginal. This is a disappointing conclusion, but it is a difficult one to avoid. This seems especially true in light of the global economic crisis of 2009, which has turned significant U.S. policymaking attention to domestic issues such as job losses and difficulties in the banking and automotive sectors of the U.S. economy.

On the other hand, the fact that PTA developments increasingly seem to follow perceived foreign policy goals—like MEFTA—means that we might be able to predict some future PTA developments, based on anticipated foreign policy shifts. In particular, given China's current push to secure access to natural resources and export markets in Africa[132]—and in Latin America as

128. *See* Rosa Whitaker, *Africa: Trade Talk—President Obama's Emerging Policy*, May 13, 2009, http://allafrica.com/stories/200905130703.html (anticipating greater U.S. focus on Africa trade policy); Bob Tortora, *Opinion Briefing: Achieving Gains in Africa*, January 13, 2009, http://www.gallup.com/poll/113872/Opinion-Briefing-Achieving-Gains-Africa.aspx (noting a general intent by the Obama administration to engage with African nations in various ways, including economically).

129. *See Low Expectations Exceeeded*, *supra* note 92.

130. Anthony Faiola, *U.S. to Toughen its Stance on Trade*, WASHINGTON POST, March 10, 2009, *at* A01.

131. Siseko Njobeni, *Southern Africa: U.S. Will Not Reopen SACU Trade Deal Talks*, BUSINESSDAY, May 12, 2009, *available at* http://allafrica.com/stories/200905120111.html.

132. *China's Quest for Resources: A Ravenous Dragon*, ECONOMIST.COM, Mar. 13, 2008, http://www.economist.com/specialreports/displaystory.cfm?story_id=10795714 (stating that both Angola and Sudan have benefited from Chinese investment in those countries, with Angola specifically turning down International Monetary Fund money because of an influx from

well[133]—perhaps we will see a shift in U.S. foreign policy through trade, and thus greater focus on PTA developments in sub-Saharan Africa and renewed U.S. interest in multilateral preferential trade with Latin American countries. Perhaps these efforts, if they come to pass, will succeed; perhaps they will fail; or perhaps (arguably like MEFTA) they may be policy successes even in the wake of their own technical failure. But they will not take place soon, either as deep PTA efforts or new broad PTA initiatives, unless something in the current politico-economic landscape of international trade changes.

Chinese aid and investment); *China's Quest For Resources: No Strings*, ECONOMIST.COM, Mar. 13, 2008, http://www.economist.com/specialreports/displaystory.cfm?story_id=10795763 (stating that a recent World Bank report found "strong evidence that Chinese demand was boosting Latin American exports and little indication that Chinese exports were crowding Latin American ones out of other markets").

133. Stephen Johnson, *Balancing China's Growing Influence in Latin America*, THE HERITAGE FOUNDATION, Backgrounder #1888,Oct. 24, 2005, *available at* http://www.heritage.org/research/latinamerica/bg1888.cfm (stating that China's interest in Latin America stems from the region's abundance of raw materials and lack of formalized industry, as well as an ability to make quick deals with governments in the region); *see generally* KERRY DUNBAUGH & MARK P. SULLIVAN, CHINA'S GROWING INTEREST IN LATIN AMERICA, (CRS Report for Congress, Apr. 20, 2005), *available at* http://italy.usembassy.gov/pdf/other/RS22119.pdf (reporting on China's investment and trade activities throughout Central and South America).

THE STATUS OF THE TRADE-ENVIRONMENT-SUSTAINABLE DEVELOPMENT TRIAD IN THE DOHA ROUND NEGOTIATIONS AND IN RECENT U.S. TRADE POLICY

Kevin C. Kennedy*

INTRODUCTION

Making environmental protection and sustainable development an integral part of international trade is not simply a bilateral issue. Rather, achieving the goals of environmental protection and sustainable development requires multilateral and regional approaches and solutions. Consequently, the work of intergovernmental organizations, most importantly the World Trade Organization (WTO) and the United Nations Environment Program, is crucial to the smooth functioning and proper integration of the interrelationship among trade, environment, and sustainable development. Progress at the WTO on integrating trade, environment, and sustainable development has been glacial. By default, it has fallen to bilateral and regional free trade agreements (FTAs) to take up the slack.

In the follow-up to the 1992 U.N. Conference on Environment and Development held at Rio de Janeiro (the Rio Earth Summit), the United Nations sponsored an international conference on sustainable development at Johannesburg, South Africa in 2002.[1] At the conclusion of the 2002 World Summit on Sustainable Development (the WSSD), the participants proposed an ambitious plan of action. Among the many goals of the WSSD identified in its Plan of Implementation, at least three focus on the interrelationship among investment, trade, environment, and sustainable development: (1) "[p]romote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements, consistent with sustainable development

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1. *See generally* U.N. Johannesburg World Summit 2002, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Report of the World Summit on Sustainable Development,* U.N. Doc. A/CONF.199/20 (2002), *available at* http://www.un.org/jsummit/html/documents/documents.html (follow "Report of the World Summit on Sustainable Development" hyperlink).

goals, in support of the work programme agreed through WTO, while recognizing the importance of maintaining the integrity of both sets of instruments"[2]; (2) "encourage efforts to promote cooperation on trade, environment and sustainable development... between the secretariats of WTO, UNCTAD [the United Nations Conference on Trade and Development, which assists developing and least-developed countries with integrating into the WTO multilateral trading system], UNDP [the United Nations Development Program, which assists developing countries with issues of governance and poverty reduction], UNEP [the United Nations Environment Program, which assesses global environmental conditions, develops multilateral environmental agreements, and integrates economic development and environmental protection] and other relevant international environmental and development and regional organizations"[3]; and (3) "strengthen cooperation among UNEP and other United Nations bodies and specialized agencies, the Bretton Woods institutions and WTO, within their mandates."[4]

Measured against these ambitious goals, what has been achieved at the World Trade Organization since the 2002 World Summit on Sustainable Development? Barring some unforeseen breakthrough at the WTO, the lack of any serious discussion about the interface of trade, environment, and sustainable development over the past seven years may mean that no WTO ministerial-level decision will ever be issued on this vitally important subject. The implications for the United States are that bilateral and regional free trade and investment agreements will have to carry more of the load on this score.

At the national level, what efforts has the United States undertaken to make protection of the environment and the promotion of sustainable development a reality in its bilateral free trade agreements? The second half of this paper examines parallel developments in the United States since 2002, in particular the revised environmental and sustainable development provisions that have been recently added to the FTAs negotiated with Colombia, Panama, Peru, and South Korea in 2007, and in the bilateral investment treaty (BIT) entered into with Uruguay in 2006. Briefly, for the first time in the history of the U.S. BIT program, the U.S.-Uruguay BIT includes two provisions that address the interface of investment and environmental protection. The environment and investment chapters of the four most recent FTAs (three of which are still pending congressional approval as of the date of this article) signal a modest departure from the investment and environment chapters of post-NAFTA sister FTAs. Thus, for example, consistent with the North

2. U.N. Johannesburg World Summit 2002, Johannesburg, S. Afr., *Plan of Implementation of the World Summit of Sustainable Development*, ¶ 92, (Sept. 23, 2002), www.un.org/jsummit/html/documents/undocs.html (follow "Plan of Implementation of the World Summit on Sustainable Development" hyperlink) [hereinafter WSSD Plan of Implementation].

3. *Id.* ¶ 91(c).

4. *Id.* ¶ 136.

American Free Trade Agreement (NAFTA),[5] this set of four FTAs once again gives primacy to an expanded list of seven multilateral environmental agreements (MEAs) (NAFTA listed only three MEAs), so that in the event of an inconsistency between the FTA and the MEAs, the latter will prevail. This return to NAFTA's hierarchy of MEAs over FTA provisions could prove to be a useful means of reinforcing commitments made under the covered MEAs. However, a long-range, integrated package of technical assistance, trade capacity building, and environmental cooperation needs to be initiated by the United States, and the United States needs to be prepared to financially support this package over the ten- to-fifteen-year implementation period of an FTA.

I. PROGRESS AT THE WTO SINCE THE WSSD IN PROMOTING SUSTAINABLE DEVELOPMENT

In anticipation of the WSSD, the trade ministers of the WTO Members made the following declaration regarding sustainable development at their biennial ministerial conference held in 2001 at Doha, Qatar:

> We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg,

5. North American Free Trade Agreement, U.S.-Can.-Mex, art. 1114.2, Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

South Africa, in September 2002.[6]

The one sector-specific item on the Doha Round agenda with a clear sustainable development dimension is found in paragraph 28 of the Doha Ministerial Declaration; namely, the reduction of fisheries subsidies that have encouraged over-fishing and fostered depletion of the world's fish stocks. More broadly, under paragraph 31 of the Doha Ministerial Declaration, the WTO Members agreed to negotiations on a set of three interrelated items:

> (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
>
> (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
>
> (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.[7]

In addition to the items identified in paragraph 31 that are the subject of negotiation, paragraph 51 of the Doha Ministerial Declaration directs the WTO Committees on Trade and Development and Trade and Environment "to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected."[8] Together, paragraphs 31 and 51 of the Doha Ministerial Declaration represent the "environmental package" of the Doha Round negotiations.

In the way of concrete results, very little, if anything, has actually been achieved to date at the WTO on these mandates. The explanation for the lack

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6. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 746-747 (2002), *available at* http://www.un-documents.net/doha-md.htm.

7. *Id.* at 751.

8. *Id.* at 754. At the Hong Kong Ministerial Conference held in 2005, trade ministers called upon the membership to intensify the negotiations on all parts of paragraph 31 of the Doha Declaration in order to fulfill the mandate. World Trade Organization, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC (2005), *available at* http://www.wto.org/english/theWTO_e/minist_e/min05_e/final_text_e.pdf.

of significant progress is that the topic of trade, environment, and sustainable development has taken a backseat at the WTO to the all-consuming negotiations on agricultural trade. Agricultural trade has become the obsessive focus of the Doha Round multilateral trade negotiations that were launched in November 2001, just as they were the central focus of the Uruguay Round that was launched in 1986 and finally concluded in 1994. Almost from its inception, the Doha Round has moved at a snail's pace. After nearly three years of stalemate, the WTO General Council issued a decision in August 2004 that attempted to break the logjam, outlining a work program for the remainder of the negotiations.[9] Included in the General Council's decision was a statement reaffirming "[m]embers' commitment to progress in all of these areas of the negotiations in line with the Doha mandates."[10] This reaffirmation covers the work of the Committee on Trade and Environment. Not surprisingly, the term "sustainable development" is not found in the General Council's 2004 decision, considering that the topic of agricultural subsidies and market access for agricultural products had largely eclipsed all other negotiation issues.

Despite this valiant effort to reinvigorate the stalled Doha Round negotiations, the Doha Round has limped along for another four years. In the meantime, the President's trade promotion authority (formerly known as "fast-track" authority) expired in July 2007. Without such authority, shepherding any Doha Round agreement through Congress without amendment is a virtual impossibility, thus sounding the death knell of the Doha Round. Hope lingers that if the Doha Round is successfully concluded, Congress might agree to a specific fast-track approval process for any Doha Round multilateral agreement that eventually emerges. Of course, this is piling one huge assumption – successful completion of the Doha Round – on top of an even bigger assumption – fast-track approval by a Democrat-controlled Congress. Given the current state of the Doha Round negotiations in Geneva and the political climate in Washington toward international trade, a successful conclusion of the Doha Round and subsequent approval by Congress are both distant goals.

Turning to the Doha Round negotiations at the WTO, what progress has been made within the Committee on Trade and Environment on its paragraph 31 and paragraph 51 Doha Declaration mandates? In a July 2007 status report, the chairman of the Committee on Trade and Environment (CTE) had no progress to report in connection with paragraph 51 of the Doha Ministerial Declaration.[11] With regard to paragraph 31(i) of the Doha Ministerial

9. *See* WTO GENERAL COUNCIL, DOHA WORK PROGRAMME WT/L/579 (2004), http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf.

10. *Id.* at 3.

11. *See* Comm. On Trade and Env't, *Report by the Chairman, Ambassador Mario Matus, to the Trade Negotiations Committee*, TN/TE/17 (July 25, 2007). The Chairman's report was limited to reporting on the progress of the items contained in paragraph 31 of the Doha Ministerial Declaration. *See* Comm. On Trade and Dev., *Developmental Aspects of the Doha Round of Negotiations, Note by the Secretariat*, WT/COMTD/W/143/Rev.2, ¶ 2 (June 27, 2006)

Declaration on the relationship between the WTO agreements and the specific trade obligations set out in MEAs, the CTE has attempted to develop a common understanding of the negotiating mandate. Various terms contained in the mandate, such as "specific trade obligation" and "multilateral environmental agreement," have been examined by the WTO Members.

On the meaning of the term "multilateral environmental agreement" China offered the following definition: "MEAs are international treaties designed to protect and improve environment, and properly exploit natural resources."[12] In China's view, MEAs should have five elements: (1) authoritativeness (MEAs should have been negotiated under the auspices of the United Nations system); (2) universality (an MEA should have a substantial number of contracting parties that account for a majority of WTO Members); (3) openness (the agreement should be open for accession by relevant parties); (4) impact on trade (MEAs should contain explicit trade measures, the implementation of which should have a substantial impact on trade); and (5) effectiveness (an MEA should be in force and open for accession).[13] To these five elements India has added a sixth: "there must have been effective participation in the negotiations by countries belonging to different geographical regions and by countries at different stages of economic and social development."[14]

The Committee participants generally agreed that a specific trade obligation (STO) is one that requires an MEA party to take, or refrain from taking, a particular action. Certain obligations in six MEAs have been identified as STOs by several WTO Members: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, the Cartegena Protocol on Biosafety to the Convention on Biological Diversity, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Stockholm Convention on Persistent Organic Pollutants.[15]

(reporting that no progress had been made in the Committee on Trade and Development on the paragraph 51 mandate).

12. Comm. On Trade and Env't, *Identification of Multilateral Environmental Agreements (MEAs) and Specific Trade Obligations, Submission by China*, TN/TE/W/35/Rev.1, ¶ 3 (July 3, 2003).

13. *See id.* Malaysia echoed China's views on the elements of an MEA, expressly noting that regional MEAs are not within the scope of the term. *See* Comm. On Trade and Env't., *Paragraph 31(I) of the Doha Ministerial Declaration, Submission by Malaysia*, TN/TE/W/29, ¶ 8-9 (Apr. 30, 2003).

14. Comm. On Trade and Dev., *Relationship Between Specific Trade Obligations Set Out in MEAs and WTO Rules, Submission by India*, TN/TE/W/23, ¶ 4 (Feb. 20, 2003).

15. *See* Comm. On Trade and Env't., *Sub-Paragraph 31(I) of the Doha Declaration, Submission by the United States*, TN/TE/W/20, ¶ 11 (Feb. 10, 2003); Comm. On Trade and Env't, *Proposal for an Outcome on Trade and Environment Concerning Paragraph 31(I) of the Doha Ministerial Declaration, Submission from Australia and Argentina*, TN/TE/W/72/Rev.1, ¶ 5 (May 7, 2007).

Consistent with the WSSD Plan of Implementation, several WTO Members have made proposals relating to governance principles that are aimed at ensuring mutual supportiveness of WTO-MEA regimes. The following summarizes the proposals and principles that have emerged in discussions at the CTE during the course of the Doha Round (no consensus has built around any of these submissions):

• *No Hierarchy.* MEAs and the WTO legal regime are "bodies of international law of equal standing."[16] Thus, there is no hierarchy between the WTO and MEA legal regimes.[17]

• *Deference.* MEAs and the WTO have distinct competencies within a "multilateral governance framework. Accordingly, their respective expertise in environmental and trade issues should be exploited."[18] A corollary is that multilateral environmental policy should be made within multilateral environmental fora, not within the WTO, in accordance with each body's respective expertise and mandate. When a WTO dispute settlement panel "examines issues with an environmental content, relating to a particular MEA, the panel should call for and defer . . . to the expertise of the MEA in question."[19]

• Dispute Settlement and Choice of Forum. Closely linked to the principle of deference is dispute settlement and choice of forum. As noted by Switzerland, "We should not fall into the pitfall of wanting to deal with issues in the wrong forum, just because it may be more convenient for one or the other reason (like the availability of an effective dispute settlement system)."[20] While

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16. Comm. On Trade and Env't., *Proposal for a Decision of the Ministerial Conference on Trade and Environment, Submission by the European Communities*, TN/TE/W/68, ¶ 2 (June 30, 2006)[hereinafter *Environment*]; Comm. on Trade and Env't, *The Relationship Between WTO Rules and MEAs, Submission by Switzerland*, TN/TE/W/61, ¶ 3 (Oct. 10, 2005)[hereinafter *Rules Switzerland*]. Compare the WTO Members' submissions with NAFTA Article 104, which gives primacy to three MEAs (CITES, the Montreal Protocol, and the Basel Convention) in the event of a conflict between them and any article in NAFTA.

17. In the hierarchy of international law, *jus cogens* – peremptory norms of international law – always are superior to any other inconsistent international law rule, whether it is conventional law or customary international law. According to the Vienna Convention on the Law of Treaties, *jus cogens* are norms accepted and recognized by the international community of States as a whole, from which no derogation is permitted. The prohibitions on genocide, torture, slavery, and piracy, for example, are recognized as *jus cogens*. Neither WTO law nor MEAs have the status of *jus cogens*. Second, according to the principle of *jus posterior*, newer law takes precedence over older law. This rule only applies if the countries involved in a conflict are parties to the old and new law. Third, according to the rule of *lex specialis*, more specific law take precedence over more general law. This rule only applies between countries that are both parties to the conflicting rules. *See Rules Switzerland, supra* note 16, ¶ 2.

18. *See Environment, supra* note 16, ¶ 2.

19. *Id.* ¶ 3.

20. Comm. on Trade and Env't, *The Relationship Between Existing WTO Rules and Specific Trade Obligations (STOs) Set Out in Multilateral Environmental Agreements (MEAs): A Swiss Perspective on National Experiences and Criteria used in the Negotiation and Implementation of MEAs, Submission of Switzerland*, TN/TE/W/58, ¶ 17(c) (July 6, 2005) [hereinafter *Rules and STOs*].

WTO Members have the right to bring disputes to the WTO dispute settlement mechanism, if a dispute arises between WTO Members that are also parties to an MEA over trade measures that they are applying pursuant to the MEA, then arguably they should resolve it through the dispute settlement mechanism available under the MEA.[21] This suggestion must be balanced, however, against the direction in Article 23 of the WTO Dispute Settlement Understanding that all WTO rules disputes are to be resolved within the WTO.[22]

• *Mutual Supportiveness.* The principle of mutual supportiveness, identified in paragraph 98 of the WSSD Plan of Implementation, is based on the assumption that the overall objective of both environmental and trade regimes is the same; namely, improvement of the human condition.[23] Consequently, under WTO rules, no country should be prevented from taking measures for the protection of human, animal, or plant life or health, or of the environment, thus ensuring the level of protection it considers appropriate. Efforts to safeguard the non-discriminatory multilateral trading system must go hand in hand with the commitment to sustainable development. All WTO bodies should "ensure that the interpretation and application of WTO rules takes due account of, and is mutually supportive with, provisions of MEAs."[24] In that connection, treaties should be construed so as not to create a conflict with other rules of international treaty law. Accordingly, WTO rules should be interpreted in a manner that does not conflict with MEA rules, and vice versa.[25]

Unilateral action should be avoided as far as possible. "Unilateral actions, taken without being supported by multilateral mandates, not only counteract multilateral efforts in dealing with multilateral environmental problems, but also damage the multilateral systems established for the purpose of coping with environmental problems in a collaborative way."[26]

• *Transparency.* Working hand-in-glove with the principle of mutual supportiveness is transparency. A mechanism for regular information exchange

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21. *See Environment, supra* note 16.

22. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 23.1, Legal Instruments– Results of the Uruguay Round, 33 I.L.M. 1243 (1994) ("When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."). In the view of at least one WTO Member, Article 23 is tantamount to an exclusive subject matter jurisdiction provision. *See* Comm. on Trade and Env't, *Comments by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on the Submission of the European Communities: "The Relationship Between WTO Rules and MEAs in the Context of the Global Governance System,"* TN/TE/W/41, ¶ 6 (June 18, 2004) [hereinafter *Comments by SCT*].

23. *See Rules and STOs, supra* note 20, ¶17(b).

24. *See Environment, supra* note 16, ¶ 2.

25. *See Rules Switzerland, supra* note 16, ¶ 4.

26. *See Comments by SCT, supra* note 22, ¶ 4.

between the WTO and MEAs has been proposed.[27] One of the main objectives of information exchange is the promotion of mutual supportiveness of the environmental and trading systems and the promotion of coherence between the two systems. There are numerous benefits in enhancing cooperation between the secretariats of the MEAs and the WTO, including the prevention of conflicts between MEAs and WTO rules. Information exchange at the international level is essential to achieving complementarities between trade and environmental institutions.

II. NEXT STEPS AT THE WTO

A successful completion of the Doha Round could have beneficial effects for the environment and sustainable development. Specifically, in the area of agricultural subsidies, domestic and export subsidies by developed countries – in particular, by the United States and the EU – have encouraged overproduction of field crops (corn, cotton, wheat, and soybeans, for example). Such overproduction has in turn put pressure on natural resources, including water and arable land.[28] In addition, this overproduction has caused injury to farmers in developing countries who cannot compete in domestic and international markets with subsidized agricultural products sold by farmers in developed countries in those same markets.[29] Thus, if the Doha Round is able to secure real reductions in farm subsidies, important gains for sustainable development in the agriculture sector could be achieved.

To enhance policy coordination and coherence in the WTO/MEA field, continued and increased cooperation and information flow between the WTO and MEA secretariats is important.[30] Close cooperation between these secretariats could also contribute to promoting synergies between trade and environment and ensuring consistency with regard to the competencies of the respective institutions. Lines of communication and increased information flow between the MEA secretariats and the WTO should be strengthened, for example, by institutionalizing exchange sessions, as well as by granting observer status to MEA secretariats as appropriate.[31] Taking steps toward giving observer status to MEA secretariats will improve the institutional standing of the WTO in the global community by sending a positive signal to

27. *See Environment*, *supra* note 16, ¶ 2.

28. *See, e.g.*, Comm. on Trade and Env't. and Trade and Dev., *Sustainability Impact Assessments, Communications from the European Communities, Annex III, Sustainability Impact Assessment of the WTO Negotiations in the Major Food Crops Sector*, WT/COMTD/W/99, WT/CTE/W/208, TN/TE/W/3 (June 3, 2002).

29. *See, e.g.*, Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005).

30. *See, e.g.*, Comm. on Trade and Env't, *Contribution of the United States on Paragraph 31(ii) of the Doha Ministerial Declaration*, TN/TE/W/5 (June 6, 2002).

31. *See, e.g.*, Comm. on Trade and Env't., *The Relationship between WTO Rules and MEAs in the Context of the Global Governance System, Submission of the European Communities*, TN/TE/W/39 (Mar. 24, 2004).

civil society in both developed and developing countries that the trade and environment linkage is receiving close attention at the WTO. Moreover, observer status for relevant MEAs in WTO bodies, as appropriate, can play a positive role in creating clearer appreciation of the mutually supportive role of trade and environmental policies. Not only should requests from MEAs for observer status be considered in this light, but the CTE should also consider extending invitations to appropriate MEA institutions to attend relevant discussions at the CTE. The WSSD reiterated this goal in its Plan of Implementation, stating that "measures should be taken to strengthen sustainable development institutional arrangements at all levels" in order to achieve objectives such as "integration of the economic, social and environmental dimensions of sustainable development in a balanced manner" and "enhancing participation and effective involvement of civil society and other relevant stakeholders . . . ."[32]

In the face of, or perhaps in spite of, the lack of solid progress by the two WTO Committees charged with the responsibility of advancing sustainable development on the Doha Round agenda, in early 2007, WTO Director-General Pascal Lamy called for greater attention to sustainable development at the WTO in a speech delivered to the UNEP.[33] Of course, a necessary but not sufficient condition to whether principles of sustainable development are to find their way into the WTO legal regime is the success of the Doha Round. The ambition with which those negotiations were launched in late 2001 has waned considerably over the past seven years. Today, their focus has narrowed to three topics: trade in agriculture (the reduction of subsidies and tariffs), improved market access for industrial goods, and improved market access for trade in services. Even if the Doha Round negotiations do yield some modest results – which seems doubtful considering that the negotiations are on the brink of total collapse – the absence of any serious discussion about the interface of trade, environment, and sustainable development may mean that no ministerial-level decision at the WTO will be issued on this vitally important subject. The implications for the United States are that bilateral and regional FTAs will have to carry more of the load.

In summary, to ensure mutual supportiveness between the WTO and MEAs, proper policy coordination, cooperation, and information exchange at national and international levels are essential. There are broad benefits to be gained from policy cooperation, not only in ensuring legal consistency, and thereby avoiding potential conflicts, but also in identifying synergies between international trade and environmental policies so that the international community might move closer to achieving its proclaimed overarching

32. WSSD Plan of Implementation, *supra* note 2, ¶ 121.

33. Pascal Lamy, Dir.-Gen., WTO, Address to the UNEP Global Ministerial Environment Forum: Globalization and the Environment in a Reformed UN: Charting a Sustainable Development Path, (Feb. 5, 2007) (transcript available at http://www.wto.org/english/news_e/sppl_e/sppl54_e.htm).

objective of sustainable development. In short, WTO rules should not be interpreted in "clinical isolation"[34] from other bodies of international law and without considering other complementary bodies of international law, including MEAs.

IV. PROGRESS IN THE UNITED STATES IN PROMOTING ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT IN FTAS SINCE THE WSSD

In the Trade Act of 2002,[35] the U.S. Congress identified sustainable development as one of the many goals to be achieved in any bilateral, regional, or multilateral trade and investment agreement negotiated by the United States. How well has the United States done in that regard? After a lull of nearly nine years since the United States last concluded an FTA (that being the NAFTA in 1993), the Bush Administration concluded and implemented a series of nine bilateral and regional FTAs beginning in 2001 – all but one since 2004 – with fourteen countries. Bilateral FTAs (the year of the FTA's entry into force is indicated in parentheses) were concluded and implemented with Jordan (2001), Chile (2004), Singapore (2004), Australia (2005), Morocco (2006), Bahrain (2006), Oman (2006), and Peru (2009). The one regional FTA, the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), was concluded and implemented with one Caribbean and five Central American nations: Costa Rica (2008), the Dominican Republic (2007), El Salvador (2006), Guatemala (2006), Honduras (2006), and Nicaragua (2006). FTAs were concluded with Panama, Colombia, and Korea in 2007 and await congressional approval. FTAs are being negotiated with Malaysia, Thailand, and the United Arab Emirates.

When Congress renewed the President's fast-track negotiating authority in the Trade Act of 2002,[36] it identified the following environmental and sustainable development negotiating objectives to be pursued by the United States:

> (1) ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources;

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34. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 17, WT/DS2/AB/R, (Apr. 29,1996) ("That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law" (referring to the clarification of WTO provisions in accordance with customary rules of interpretation of public international law, which the Appellate Body has been directed to apply)).

35. Trade Act of 2002, 19 U.S.C. § 3802(b)(11)(D-E) (2002).

36. *See id.*

> (2) seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade;
>
> (3) ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, while recognizing a party's right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to prioritize allocation of resources for environmental law enforcement;
>
> (4) strengthen the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development;
>
> (5) reduce or eliminate government practices or policies that unduly threaten sustainable development; and
>
> (6) seek market access, through the elimination of tariffs and non-tariff barriers, for U.S. environmental technologies, goods and services.[37]

NAFTA's environmental provisions and its environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC),[38] have served as a general baseline for all environmental provisions contained in post-NAFTA FTAs negotiated by the United States. By way of overview, first, all FTAs negotiated by the Bush Administration contain provisions on the interrelationship among trade, investment, and environment that are loosely modeled after the NAAEC. In addition, in a first-of-its-kind provision in any U.S. BIT, the 2006 BIT between the United States and Uruguay included an article on the environment that is modeled after a parallel provision in the environment chapter of DR-CAFTA, as well as a provision on indirect expropriation that is also modeled after a parallel provision in DR-CAFTA. Second, all Bush Administration FTAs have been subject to

37. *See id.* § 3802.

38. *See generally* North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

environmental review by the Office of the U.S. Trade Representative. Third, four FTAs that were negotiated with Colombia, Panama, Peru, and South Korea in 2007 contain enhanced environmental and sustainable development provisions mandated by the Bipartisan Agreement on Trade Policy that was reached between Congress and the White House in May 2007.

Against this backdrop, the balance of this paper will discuss the developments within the United States since NAFTA regarding making environmental protection and sustainable development an integral part of U.S. FTAs and BITs.

III. ENVIRONMENTAL REVIEWS OF FTAS

In 1993, environmental groups filed an action in federal court to compel the U.S. Trade Representative (USTR) to produce an environmental impact statement for NAFTA.[39] The U.S. Court of Appeals for the D.C. Circuit ruled that because the President's submission of NAFTA to Congress for approval was not "final agency action," the Administrative Procedure Act did not apply and, consequently, an environmental impact statement was not required under the National Environmental Policy Act.[40]

Undaunted by their failure in court, environmental groups pressured the Clinton Administration to subject all proposed FTAs to some type of environmental impact assessment. In 1999, the Clinton Administration obliged by instituting environmental reviews of all FTAs.[41] The Executive Order states that "[t]rade agreements should contribute to the broader goal of sustainable development," and that "[e]nvironmental reviews are an important tool to help identify potential environmental effects of trade agreements, both positive and negative, and to help facilitate consideration of appropriate responses to those effects whether in the course of negotiations, through other means, or both."[42] The Executive Order and implementing guidelines required an assessment and consideration of the environmental impacts of trade agreements, including

39. *See* Pub. Citizen v. U. S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994).

40. *Id.* at 553.

41. *See* Environmental Review of Trade Agreements, Exec. Order No. 13,141, 64 Fed. Reg. 63,169 (Nov. 16, 1999) [hereinafter Environmental Review of Trade Agreements]. *See also* The Guidelines for Implementation of Exec. Order 13,141, 65 Fed. Reg. 79,442 (Dec. 19, 1999), *available at* http://www.ustr.gov/environment/environmental.shtml. The USTR and the Council on Environmental Quality jointly oversee implementation of the Order and Guidelines. The USTR, through the Trade Policy Staff Committee, is responsible for conducting the individual reviews. As described in the Guidelines, the focus of this review is on the possible effects in the United States, although transboundary and global effects may be considered as appropriate and prudent. Only one FTA was subject to an environmental review during the Clinton Administration, that being the FTA with Jordan that was negotiated by the Clinton Administration but implemented by the Bush Administration. This is not unlike the history of NAFTA that was negotiated by the elder Bush but shepherded through Congress by Clinton.

42. *See* Environmental Review of Trade Agreements, *supra* note 41.

written reviews of environmentally significant trade agreements. In 2001, the Bush Administration announced that it would continue the Clinton Administration's policy of conducting environmental reviews of trade agreements pursuant to the latter's executive order and implementing guidelines.[43]

The main focus of FTA environmental reviews is the potential environmental impacts of FTAs on the United States. However, reviews include consideration of global and transboundary effects as well. An analysis of the eight U.S. FTA final environmental reviews that have been conducted since 1999 is beyond the scope of this paper. However, the final environmental review of DR-CAFTA, the most hotly contested FTA since NAFTA, reached the following conclusions:[44]

• "[C]hanges in the pattern and magnitude of trade flows attributable to the FTA will not have any significant environmental impacts in the United States."[45]

• DR-CAFTA "will not adversely affect the ability of U.S. federal, state, local, or tribal governments to regulate to protect the U.S. environment."[46]

• Within the Dominican Republic and Central American countries that are parties to DR-CAFTA, "net changes in production and trade are expected to be relatively small because exports to the United States from these countries already face low or zero tariffs. Longer term effects, through investment and economic development, are expected to be greater but cannot currently be predicted in terms of timing, type, and environmental implications."[47]

• DR-CAFTA "may have indirect effects on the U.S. environment through transboundary transmission of pollutants (air and water), and through effects on habitat for wildlife, including migratory species. The review examined a range of possible impacts, but did not identify any specific, significant consequences for the U.S. environment."[48]

• DR-CAFTA "can have positive environmental consequences in Central America and the Dominican Republic by reinforcing efforts to effectively enforce environmental laws, accelerating economic growth and development through trade and investment, and disseminating environmentally beneficial technologies."[49] A potential negative consequence is deforestation and subsequent loss of habitat for migratory birds.

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43. *See* Delegation of Certain Authorities and Assignment of Certain Functions Under the Trade Act of 2002, Exec. Order 13,277, 67 Fed. Reg. 70,305 (Nov. 19, 2002).

44. *See* Office of the U.S. Trade Representative, *Final Environmental Review of the Dominican Republic-Central America-United States Free Trade Agreement - Executive Summary* (Feb. 2005), http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/asset_upload_file953_7901.pdf (last visited Mar. 11, 2009).

45. *Id.* at 1.

46. *Id.* at 2.

47. *Id.*

48. *Id.*

49. *Id.*

• "As a complement to DR-CAFTA, the United States and the FTA partner countries signed a [NAFTA-plus] Environmental Cooperation Agreement that will enhance the positive environmental consequences of the Agreement."[50]

Several environmental groups opposed DR-CAFTA and took issue with the USTR's environmental review.[51] Although their specific concerns with DR-CAFTA were not addressed, some of their concerns were acknowledged and given expression in the Bipartisan Agreement on Trade Policy that was reached between the Bush Administration and Congress in 2007.

IV. THE BIPARTISAN AGREEMENT ON TRADE POLICY

In May 2007, the Democrat-controlled Congress and the Bush Administration brokered a compromise understanding called the Bipartisan Agreement on Trade Policy,[52] also known as the "New Trade Policy Template."[53] The Bipartisan Agreement calls for enhanced provisions in all future U.S. bilateral and regional FTAs on: (1) intellectual property protection (striking a balance between the rights of drug companies to protect their patents and the needs of developing countries for life-saving drugs); (2) labor rights (requiring that FTA countries adopt the five basic internationally-recognized labor principles of the ILO Declaration on Fundamental Principles and Rights at Work, i.e., freedom of association, the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor and a prohibition on the worst forms of child labor, and the elimination of discrimination in respect of employment and occupation); (3) investment (ensuring that foreign investors in the United States have no greater rights than U.S. investors); (4) government procurement (requiring that labor rights protections be included in government procurement contracts); (5) port security (guaranteeing that if a country invokes the national security exception with regard to port security, such an invocation cannot be challenged in an FTA dispute settlement proceeding); and (6) environmental protection and sustainable development (discussed next).

Turning to the environmental provisions of the Bipartisan Agreement, the parties to all future FTAs (including those that had already been negotiated with Colombia, Panama, Peru, and South Korea) must adopt, maintain, and

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50. *Id.* at 3.

51. *See* Environmentalists' Letter to Congress on CAFTA, Inside U.S. Trade (Feb. 20, 2004).

52. *See generally* OFFICE OF THE U.S. TRADE REP., BIPARTISAN AGREEMENT ON TRADE POLICY (May 2007), *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file127_11319.pdf [hereinafter, BIPARTISAN AGREEMENT].

53. *See* Susan C. Schwab, Ambassador, Office of the U.S. Trade Rep., Statement on U.S. Trade Agenda (May 10, 2007) (transcript available at http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Statement_from_Ambassador_Susan_C_Schwab_on_US_trade_agenda.html).

implement laws, regulations, and all other measures to comply with the following seven MEAs: (1) the Convention on International Trade in Endangered Species; (2) the Montreal Protocol on Ozone Depleting Substances; (3) the Convention on Marine Pollution; (4) the Inter-American Tropical Tuna Convention; (5) the Ramsar Convention on Wetlands; (6) the International Whaling Convention; and (7) the Convention on Conservation of Antarctic Marine Living Resources.[54] However, as bold as this requirement may seem at first blush, it contains three significant qualifications that substantially narrow its application.[55] First, in order to establish a violation of this commitment, the complaining Party must show that the responding Party's failure to fulfill an obligation under one of the covered MEAs has been "through a sustained or recurring course of action or inaction" – language that tracks verbatim the NAAEC's definition of what constitutes a "persistent pattern of failure." Second, the sustained or recurring course of action or inaction must be "in a manner affecting trade or investment between the Parties."[56] In other words, if the violation occurs outside the trade or investment context, then it cannot be the subject of a complaint. Third, an escape clause has been added that excuses non-enforcement in the bona fide exercise of prosecutorial discretion.[57]

Next, in the environment-investment context, the Bipartisan Agreement departs from NAFTA, which provides that the Parties "should not derogate from" environmental laws to attract investment,[58] and from DR-CAFTA, which provides that "each Party shall strive to ensure that it does not waive or otherwise derogate from" environmental laws to attract investment.[59] The Bipartisan Agreement amends the non-derogation obligation for environmental laws and the covered MEAs so that NAFTA's "should not" and DR-CAFTA's "shall strive to" now reads "shall not waive" in the new FTAs, with an allowance for waivers permitted under law provided they do not violate the

54. *See, e.g.*, United States-Peru Trade Promotion Agreement, U.S.-Peru, art. 18.2, April 12, 2006, http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html [hereinafter U.S.-Peru]. Although the treaty is not yet in force, the full text of the Agreement is available at the Internet source. The environmental chapters of the FTAs with Colombia, Panama, and Korea that are pending congressional approval track the environmental chapter of the US-Peru Trade Promotion Agreement almost verbatim. Those pending agreements are available at http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html. However, Peru is further obligated to engage in sustainable forestry practices, an obligation which the other three countries have not assumed. *See* U.S.-Peru, annex 18.3.4.

55. BIPARTISAN AGREEMENT, *supra* note 52.

56. *See* U.S.-Peru, *supra* note 54, art. 18.2 n.1, art. 18.3.

57. *See, e.g., id.* at art. 18.3(1)(b)(i), which provides that "where a course of action or inaction reflects a reasonable, articulable, *bona fide* exercise of such discretion, or results from a reasonable, articulable, *bona fide* decision regarding the allocation of such resources," then a Party's failure to enforce its environmental laws and the covered MEAs is excused.

58. NAFTA, *supra* note 5.

59. Dominican Republic-Central America-United States Free Trade Agreement, art. 17.2(2), Aug. 5, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter DR-CAFTA].

covered MEAs.[60]

Third, in a departure from DR-CAFTA where MEAs are not given primacy over the terms of the FTA in the event of a conflict between the two,[61] the four pending FTAs include an article that roughly parallels NAFTA Article 104, thus creating a legal hierarchy that places MEAs above the FTA in the event of a conflict:

> In the event of any inconsistency between a Party's obligations under this Agreement and a covered [multilateral environmental] agreement, the Party shall seek to balance its obligations under both agreements, *but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement*, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.[62]

A footnote to this article states that "[f]or greater certainty, paragraph 4 is without prejudice to multilateral environmental agreements other than covered agreements."[63]

The final change introduced by the Bipartisan Agreement deals with the resolution of environmental disputes.[64] The environment chapters of the Colombia, Panama, Peru, and South Korea FTAs are largely imitative of the

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60. *See, e.g.*, U.S.-Peru, *supra* note 54, art. 18.3(2), which provides as follows:
> The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties.

61. *See* DR-CAFTA *supra* note 59, art 17.12. This Article, entitled "Relationship to Environmental Agreements," does not create a legal hierarchy between MEAs and DR-CAFTA as does NAFTA Article 104. *See* NAFTA, *supra* note 5, art. 104. Instead, it provides as follows:
> The Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. The Parties further recognize that this Chapter . . . can contribute to realizing the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party.

This article alludes to the goal in the WSSD Plan of Implementation that MEAs and trade agreements be mutually supportive. It is also consistent with the view expressed by some WTO Members regarding the legal relationship of MEAs and WTO agreements, i.e., that there is no hierarchy.

62. U.S.-Peru, *supra* note 54, art. 18.13(4) (emphasis added).

63. *Id.* at art. 18.13.4, n.11.

64. BIPARTISAN AGREEMENT, *supra* note 52.

NAAEC. [65] For example, they establish a citizen submission process, a secretariat to accept such submissions and develop factual records, and an Environmental Affairs Council to oversee the operation of the environment chapter. However, in a departure from NAAEC, disputes that cannot be resolved by the Council are referred to dispute settlement under the general government-to-government dispute settlement panel mechanism that is overseen by the agreement's Free Trade Commission (comprised of the trade ministers of the contracting states). The referral of disputes to the trade dispute panel mechanism rather than to a special environmental dispute panel is required by the Bipartisan Agreement.[66] The significance of this change is at least threefold: (1) the decision whether to request a Party-to-Party settlement of an environmental dispute now lies with the Parties' trade ministers instead of with the government minister or official responsible for environmental affairs; (2) a single trade minister may request dispute settlement panel resolution of an environmental dispute instead of a majority of the environment ministers voting to do so as is the case under the NAAEC; and (3) if a responding Party loses the dispute and fails to bring its offending measure into compliance, then trade sanctions (not merely fines as is the case under the NAAEC) may be imposed by the prevailing Party.[67] However, this change as a practical matter probably signifies little or nothing, if the NAFTA experience is any guide. An environmental dispute settlement panel has never been convened under the NAAEC, and there have been only three NAFTA government-to-government trade dispute panels convened during the 15 years that NAFTA has been in force.[68] Thus, the likelihood of a dispute settlement panel being convened to resolve an environment dispute under the most recent FTAs seems extremely remote. Nevertheless, the importance of having institutional mechanisms in place for airing complaints about a country's environmental enforcement record should not be totally dismissed. As several commentators have observed, the citizen complaint mechanism established under the NAAEC has led to changes in government behavior, even without resort to formal dispute settlement.[69]

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65. *See, e.g.*, U.S.-Peru, *supra* note 54, ch. 18.

66. BIPARTISAN AGREEMENT, *supra* note 52.

67. *See, e.g.*, U.S.-Peru, *supra* note 54, art. 18.12(6), ch. 21.

68. *See* KEVIN C. KENNEDY, INTERNATIONAL TRADE REGULATION: READINGS, CASES, NOTES, AND PROBLEMS 459-461 (2008).

69. *See, e.g.*, Jonathon G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT'L ENVTL. L. REV. 129, 129-130 (2007) ("The strength of the NAAEC procedure is its ability to shine a light on a non-compliant party and 'shame' the party into complying with domestic environmental laws. Such 'shaming' is effective at eliciting corrective action by the non-compliant party because it creates public awareness that the party is knowingly engaging in unlawful activities. While the citizen submission procedure under NAAEC is not perfect, it is a viable candidate to serve as the foundation for the next generation of citizen participation-based environmental treaties."); Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 393 (2004) (arguing that the NAAEC's citizen submission process plays "an important role in promoting treaty implementation, monitoring performance,

One noteworthy development that is not part of the Bipartisan Agreement itself is the first-ever biodiversity article in a U.S. FTA. The Trade Promotion Agreements with Colombia and Peru exhort the Parties to promote biodiversity and sustainable development in the following terms:

> 1. The Parties recognize the importance of the conservation and sustainable use of biological diversity and their role in achieving sustainable development.
>
> 2. Accordingly, the Parties remain committed to promoting and encouraging the conservation and sustainable use of biological diversity and all its components and levels, including plants, animals, and habitat, and reiterate their commitments in Article 18.1.
>
> 3. The Parties recognize the importance of respecting and preserving traditional knowledge and practices of indigenous and other communities that contribute to the conservation and sustainable use of biological diversity.
>
> 4. The Parties also recognize the importance of public participation and consultations, as provided by domestic law, on matters concerning the conservation and sustainable use of biological diversity. The Parties may make information publicly available about programs and activities, including cooperative programs, it undertakes related to the conservation and sustainable use of biological diversity.[70]

The term "sustainable use" is defined as "non-consumptive or consumptive use in a sustainable manner,"[71] a singularly unhelpful and somewhat tautological

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and ensuring that states comply with their treaty obligations."); Gustavo Vega-Cánovas, *NAFTA and the Environment*, 30 DENV. J. INT'L L. & POL'Y 55, 61 (2001) ("The NAAEC may have altered political relations between Mexico and the U.S. by providing a framework in which the EPA could more legitimately claim to examine Mexico's international governance. Also at the domestic level, it seems unlikely that the Mexican government would have responded seriously to a petition from Mexican environmental interest groups absent the internationalization of the incident."); Ignacia S. Moreno, James W. Rubin, Russell F. Smith III & Tseming Yang, *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L.J. 405, 432 (1999) ("In practice, the NAAEC has established a unique mechanism and structure for trilateral cooperation. . . . [I]t has also spurred domestic efforts to strengthen domestic environmental laws and enforcement.").

70. U.S.-Peru, *supra* note 54, art. 18.11; U.S.-Colombia Trade Promotion Agreement, U.S.-Colom., art. 18.11, Nov. 22, 2006, http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Section_Index.html [hereinafter U.S.-Colom.].

71. U.S.-Colom., *supra* note 70, art. 18.11, n.5.

definition. Although these provisions are obviously hortatory, they nevertheless represent an intriguing innovation in U.S. FTA negotiation and focus.

The four FTAs negotiated in 2007 contain the following clarifying provision in their respective investment chapters: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[72] This provision was first added to the U.S.-Chile FTA[73] in response to a concern that arbitral tribunals which were resolving NAFTA investment disputes were undermining the ability of host countries to enact and enforce rigorous and non-discriminatory environmental laws. That clarifying provision has now been carried forward.

Finally, in the area of BITs, to date, the United States has concluded forty bilateral investment treaties, all with developing countries. Until 2005, when the United States negotiated a BIT with Uruguay, no U.S. BIT contained any provisions on investment and the environment. In an about face, the Uruguay-U.S. BIT has added two provisions on investment and environment. First, Article 12 of the Uruguay-U.S. BIT provides as follows:

> 1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, *each Party shall strive to ensure that it does not waive or otherwise derogate from*, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.
>
> 2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is

72. U.S.-Peru, *supra* note 54, annex 10-B, ¶ 3(b).

73. *See* United States-Chile Free Trade Agreement, U.S.-Chile, annex 10-D, ¶ 4(b), June 6, 2003, http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html ("Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.").

> undertaken in a manner sensitive to environmental concerns.[74]

While innovative in the history of U.S. BITs, this article is largely precatory. First, the phrase "shall strive to ensure that is does not waive" is the same phrase used in the parallel provision in the DR-CAFTA environment chapter. This phrase has been turned into a mandatory obligation – "shall not waive" – in the FTAs concluded in 2007 as a result of the Bipartisan Agreement. Secondly, if there is a violation of this article, the aggrieved Party may only request consultations. In other words, a violation may not be the subject of binding Party-to-Party dispute settlement.

A second provision in the U.S.-Uruguay BIT concerns indirect or "creeping" expropriation. Following investor-host state arbitrations under NAFTA Chapter 11 that appeared to threaten the ability of a host state to enact environmental regulations without also being required to pay compensation to foreign investors for such regulation, beginning with the U.S.-Chile FTA and all other post-NAFTA FTAs, the following clarifying provision has been added:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[75]

The same provision was added *verbatim* to the U.S.-Uruguay BIT,[76] the first

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74. U.S.-Uruguay Bilateral Investment Treaty, U.S.-Uru., art.12, Nov. 4, 2005, http://www.ustr.gov/Trade_Agreements/BIT/Uruguay/Section_Index.html (follow "Text of the Agreement" hyperlink) (footnote omitted) (emphasis added) [hereinafter U.S.-Uruguay BIT].

75. *Id.*, at annex B, ¶ 4(b). A handful of U.S. BITs that were concluded after 1994 (the year in which NAFTA went into effect) contain the following preambulary language: "these objectives [to promote greater economic cooperation and investment] can be achieved without relaxing health, safety and environmental measures of general application." *See, e.g.*, Treaty between the United States and the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Geor., Mar. 4, 1994, S. TREATY DOC. NO. 104-13 (1995) (entered into force Aug. 17, 1997); Treaty between the United States and the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Bol., Apr. 17, 1998, S. TREATY DOC. NO. 106-25 (2000) (entered into force June 6, 2001); Treaty between the United States and the Republic of Croatia Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Croat., July 13, 1996, S. TREATY DOC. NO. 106-29 (2000) (entered into force June 20, 2001); Treaty between the United States and the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Azer., Aug. 1, 1997, S. TREATY DOC. NO. 106-47 (2000) (entered into force Aug. 2, 2001). However, these BITs do not obligate the contracting states to refrain from derogating from their environmental laws when approving or regulating an investment. Likewise, none of them addresses the issue of indirect expropriation through regulatory measures designed to protect public health, safety, and the environment.

76. *See* U.S.-Uruguay BIT, *supra* note 71, annex B, ¶ 4(b).

provision of its kind in any U.S. BIT.

V. NEXT STEPS WITHIN THE UNITED STATES

What should the next steps be within the United States? Arguably needed but clearly missing are: (1) incentives; and (2) a mechanism to measure the progress countries are making toward sustainable development. First, with regard to incentives, the best way to effectuate the hortatory goals described in Article 18.11 of the Peru and Colombia Trade Promotion Agreements on promoting sustainable development and protecting biological diversity is to build incentives that reward higher standards. There are many ways to structure such incentives. Examples include offering accelerated tariff reductions for countries that meet certain goals and making the availability of funds contingent on performance. A creative package of incentives for continually raising environmental and sustainable development standards needs to be developed.

Second, regarding a mechanism to measure progress toward sustainable development, having the trade lever (club?) at a country's disposal can serve as a useful tool (weapon?) to deter (punish?) non-compliance. But, in the long run, it will be more productive to encourage compliance rather than punish and make threats over non-compliance. Future FTAs with developing countries, in particular those with fragile ecosystems and rich biodiversity, should contain provisions on sustainable development action plans with periodic benchmarks to measure their progress, together with fully-funded budgets to support such plans. A monitoring program run by existing regional or international bodies should be established in order to avoid the appearance of "eco-imperialism" by the United States as the sole monitor and evaluator of what constitutes "progress." A long-range, integrated package of technical assistance, trade capacity building, and environmental cooperation needs to be initiated by the United States, and the United States needs to be prepared to financially support this package over the ten-to-fifteen years during which implementation of an FTA will take place. International organizations, other donor countries, and the private sector must also play a role and contribute to this process.

CONCLUSION

Why should sustainable development and environmental protection be a goal of multilateral trade agreements negotiated at the WTO, and why should the United States pursue that goal not only at the WTO but also in its bilateral trade agreements? The answer to these two questions is a simple but powerful one: to improve the human condition. The principle of mutual supportiveness, identified in paragraph 98 of the WSSD Plan of Implementation, is based on the assumption that the overall objective of both environmental and trade legal

regimes is the same, namely the improvement of the human condition by protecting human, animal, and plant life and health.[77]

To what extent does the 2007 Bipartisan Agreement advance this goal? Is the Bipartisan Agreement simply a case of old wine in a new bottle? Is it a legal document or a political statement? The environmental chapter of the four FTAs negotiated in 2007 does signal a departure from the environmental chapters of post-NAFTA sister FTAs. Consistent with NAFTA, they again give primacy to seven MEAs in the event of an inconsistency between the FTA and the MEAs. This return to NAFTA Article 104's hierarchy of MEAs over FTA provisions could prove to be a useful tool to reinforce commitments made under the covered MEAs.

In a departure from NAFTA and its progeny, the Bipartisan Agreement bars FTA partners from derogating from their environmental laws and the covered MEAs in order to attract foreign investment. As a result of the Bipartisan Agreement, a citizen submission process has been added to the environment chapters of the four pending FTAs with a nominally more robust dispute settlement process than the one that exists under NAFTA and other U.S. FTAs. The reality, however, is that with the qualifiers that have been placed on the obligation to enforce environmental laws and to observe the terms of the covered MEAs, it seems highly improbable that the improved dispute settlement mechanism mandated by the Bipartisan Agreement will ever be invoked. Given the experience with the environmental dispute settlement mechanism under the NAAEC -- pursuant to which no dispute settlement panel has ever been convened -- any hypothetical threat to convene a dispute settlement panel to hear an environmental complaint under the other U.S. FTAs will ring hollow. Finally, and for the first time, the U.S. FTAs with Colombia and Peru contain specific articles on biodiversity and sustainable development, provisions that were not mandated by the Bipartisan Agreement. In short, assuming that the four pending FTAs receive congressional approval, only time will tell if the modest changes introduced by the Bipartisan Agreement will help the environment and promote sustainable development.

All FTAs negotiated by the United States should ensure that their interpretation and application take account of, and are mutually supportive of, provisions of multilateral agreements on environment and sustainable development. In short, efforts within the United States to safeguard the non-discriminatory multilateral trading system must go hand-in-hand with the commitment to sustainable development. As the largest trading nation in the world, the United States is uniquely placed to influence the WTO trade, investment, and sustainable development agenda in a positive way, but it cannot do it alone. The United States is a leading advocate for prohibiting harmful fisheries subsidies. It is also committed to safeguarding the integrity of both sets of international obligations at issue – those in the WTO and those in

77. WSSD Plan of Implementation, *supra* note 2.

MEAs to which the United States is a party.[78] At the same time, unilateral action should be avoided as far as possible. Unilateral action, taken without being supported by multilateral mandates, not only undercuts multilateral efforts at dealing with multilateral environmental problems, but also damages the multilateral systems established for the purpose of coping with environmental problems in a collaborative way.

78. *See* OFFICE OF THE U.S. TRADE REP., DOHA DEVELOPMENT AGENDA POLICY BRIEF (Dec. 2005), www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file937_8545.pdf.

DISAGGREGATING THE REGIONAL-MULTILATERAL OVERLAP:

THE NAFTA LOOKING-GLASS

Elizabeth Trujillo*

INTRODUCTION

In putting together this talk, I wanted to explore regionalism in terms of how it fits into the multilateral trade regime and examine its effects on domestic policy. In this short piece, I use the North American Free Trade Agreement (NAFTA) as a looking glass through which we may understand the legal paradigm that allows the public issue of trade law to intersect with the private interests of private investors through the investment regimes. Regional and bilateral trade regimes have not only been shaped within the traditional paradigms of the General Agreement on Tariffs and Trade (GATT), but also according to their own sets of rules intended to address specific "regional" and domestic issues. NAFTA, in particular, provides us with a lens into understanding the relationship between private investment and the actors – both state and non-state – that influence and participate in trading systems in their larger contexts. The complex interplay between regional and bilateral agreements, state and non-state actors, and private investment regimes, makes us question traditional notions of what is purely domestic policy in the context of trade.

Regional trade agreements may exhibit negative impacts on the multilateral trade regime because of their exclusive, discriminatory and distortive effects.[1] However, they also have positive effects on free trade through the maximization of regional economic opportunities and increased economic integration.[2] Be that as it may, regional agreements are a reality and they are on the rise; the United States alone has entered into around ten new agreements and/or trade negotiations since 2003.[3] They are also very much

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* Associate Professor, Suffolk University Law School, etrujillo@suffolk.edu. This essay is based on an article published in 40 CHI. LOY. LAW JOUR 691 (2009) and on a talk presented at Indiana University Law School - Indianapolis, International and Comparative Law Review Conference, February 21-22, 2008. I would like to thank the other speakers at the conference and in particular, the students of the Indiana International and Comparative Law Review for putting together a wonderful symposium and for their thoughtful editing of this essay.

1. WORLD TRADE ORGANIZATION (WTO), WORLD TRADE REPORT 2007, *Foreward* (2007), *available at* www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf ("The complicated reality about regional agreements is that they are neither all good nor all bad.").

2. *Id.*

3. In the last eight years, the United has entered into or participated in trade negotiations

alive through their dispute settlement bodies. The recent failure of the Doha Round of the World Trade Organization (WTO) proves that multilateralism is at risk.[4] Still, Member States continue to bring cases before the dispute settlement bodies of the WTO, indicating that the multilateral trade system has ongoing importance in certain contexts. Moreover, private investors look to the WTO's adjudication of national treatment to bolster their own arguments that a nation's regulatory measures are "discriminatory" towards a private investment.[5] If the multilateral system of trade is to survive, the WTO should remain the focal point of that system; therefore, the WTO must be the coordinating force that balances the multi-tiered aspects of free trade agreements.

I. SUPRANATIONAL/NATIONAL OVERLAPS

By focusing on where various regimes – whether multilateral, regional, or domestic – overlap, I hope to illustrate where increased coordination among the regimes is possible and thereby increase legitimacy within the multilateral framework of the WTO. It is in unpacking these overlaps that "private" regimes emerge as key players that not only influence the formulation of domestic regulatory policy, but also link the international and domestic trade regimes.[6]

In general, two layers of adjudicatory processes exist in the context of regulatory measures: (1) the domestic processes employed by administrative bodies and state and federal courts; and (2) the supranational adjudication by WTO panels and regional tribunals. At the domestic level, it can be unclear whether areas such as environmental or health measures fall under the aegis of state or federal law. We have seen this in environmental policy, for example: states like California have passed regulations modeled after the Kyoto Accords, even though the United States has not signed onto that international agreement.[7]

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with several Latin American regions and countries, including Central America, Ecuador, Bolivia, Panama, and Peru. *See* Office of the U.S. Trade Representative (USTR), Americas, http://www.ustr.gov/World_Regions/Americas/Section_Index.html (last visited Apr. 10, 2009) (listing regional and bilateral trade agreements in the Americas that are pending or currently in force).

4. *See Beyond Doha*, ECONOMIST, Oct. 11, 2008, at 31-33.

5. *See generally* Elizabeth Trujillo, *From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law*, 40 CHI. LOY. L. J. 691 (2009).

6. *See generally id.*

7. *See e.g.*, CAL. CODE REGS. tit. 13 § 2449 (2008) (regarding fuel emission standards); AB 218 Bill (Saldaña) (phasing out the use of certain hazardous materials found in consumer electronics and being consistent with the European Union's ROHs Directive); California Global Warming Solutions Act of 2006 (AB 32), Cal. Health & Safety Code §§ 38500 *et seq.* (reducing greenhouse emissions by 25% by 2020 and 80% by 2050); *see also* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22; *see generally*, International Council for Local Environmental Initiatives, Cities for Climate Protection, http://www.iclei.org/co2/index.htm *archived at* http://www.webcitation.org/5bTHOwZNB (indicating a number of U.S. cities and nations participating in this environmental initiative).

Massachusetts, on the other hand, has tried to push the federal Environmental Protection Agency (EPA) to pass regulations dealing with fuel emissions causing global warming.[8]

More recently, contaminated pet food and unsafe toys imported from China have stirred anti-globalization sentiment among consumers in the United States and across the world.[9] If the United States were to pass regulations making it more difficult to import such products due to health concerns, which WTO and regional agreements presumably allow through the Agreement on the Application of Sanitary and Phytosanitary Measures and Agreement on Technical Barriers to Trade,[10] it could have implications for U.S. compliance with WTO national treatment requirements and any bilateral treaty between the United States and China that protects mutual most favored nation treatment.[11] For example, although the SPS and TBT Agreements allow for the passage of "legitimate" measures concerning public health and safety, international tribunals struggle with distinguishing "legitimate" measures from illegitimate ones because all such measures have some discriminatory effect on free trade.[12]

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8. Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 521 (2007). Another example of the supranational and national overlap in Massachusetts is recent legislation prohibiting the use of trans-fat in restaurants and grocery stores. Not only does this raise questions as to whether such health measures would be supported under U.S. dormant commerce clause jurisprudence, it also raises concern about whether such legislation, although seemingly legitimate, could compromise U.S. compliance with national treatment obligations under the GATT. While some health and safety measures are allowed under the WTO agreements, the scope of such permissible measures is narrow. *See* 2007 MA H. B. 2147 (MA 185th General Court (NS) (restricting the use of foods containing trans- fat). *But see*, "Obama Directs Regulators to Tighten Auto Rules" in THE NEW YORK TIMES, January 27, 2009 (describing President Obama's instructions to the EPA to begin addressing certain states' application for stricter fuel emission standards than those required by national regulations). President Obama also ordered the Department of Transportation to formulate rules for higher fuel-economy standards on cars and trucks. *See* id. *See also*, *California's EPA Waiver*, LOS ANGELES TIMES, January 29, 2009 (discussing various state initiatives by California and other states to pass regulations to reduce emissions of greenhouse gasses).

9. *See Senate Homeland Security Committee Begins Investigation of Toy Import Safety*, BNA INTERNATIONAL TRADE REPORTER, September 6, 2007; *Brazil Bans Imports of Mattel Toys on Heels of Recall, Lead Paint Issues*, BNA INTERNATIONAL TRADE REPORTER, September 20, 2007; *EU Urges Quality, Safety Assurances For Chinese Food, Consumer Exports*, BNA INTERNATIONAL TRADE REPORTER, July 26, 2007; *see also* Audra Ang, *China Defends Quality of Its Exported Goods, Problems Attributed to Differing Standards, U.S. Product Designs*, GRAND RAPIDS PRESS, August 28, 2007.

10. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Result of the Uruguay Round vol.1, 33 I.L.M. 1125 (1994) [hereinafter SPS Agreement] and the Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1145 (1994) [hereinafter TBT Agreement].

11. *See e.g.*, James Bacchus, "WTO obligations Still Apply," Special to the National Law Journal, September 10, 2007.

12. *See e.g.*, SPS Agreement and the TBT Agreement, *supra* note 11. *See also* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 296–456,

In this way, local governance can be influenced by the supranational adjudicatory processes.[13]

However, these are the overlaps occurring at the domestic level or those having transnational implications. The focus of this essay is instead on the *inter-systemic* overlaps within the trade regimes--the multilateral and the regional and the private investment regime with the public trade regime.

A. Inter-Systemic Approach

1. Multilateral/Regional Overlap

In illustrating where the private investment regime can intersect with the public trade regime, the focus will be on the private investment chapter of NAFTA, Chapter 11. Moreover, in describing the "private right of action," this essay refers to actions brought directly before the NAFTA Chapter 11 tribunal by private investors alleging national treatments violations to their investments by their host governments.[14] The use of "public rights of action" refers to those disputes brought by governments for trade matters, without regard to any private actors who may have strongly influenced their governments' decision to bring these disputes in the first place.[15] Though seemingly different, particularly in the remedies they provide to participating parties, the adjudicatory regimes that apply to private and public rights of action share in their common interests, their legal jurisdictional spaces and in their impact on domestic governments.[16] Furthermore, international tribunals in the context of both private and public rights of action depend on domestic governments to enforce their judgments.

Within this context, there are *Vertical Overlaps* in which specific trade issues at the regional level converge with those at the multi-lateral.[17] The U.S.-Canada *Softwood Lumber Dispute* demonstrates this phenomenon. The dispute

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605–800 (1993) [hereinafter NAFTA], Chapter 9 on Standard Related Measures and on Chapter 7 on Sanitary and Phytosanitary Measures.

13. *See* David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 264 (2005) (discussing limited powers of local governments). *See generally*, David J. Barron & Gerald E. Frug, *International Local Government Law*, 38 URB. LAW 1 (2006) (describing ways in which local governments use international institutions and international law to redefine their domestic legal scope).

14. *See* Alan Sykes, *Public v. Private Enforcement of International Economic Law: Of Standing and Remedy* (Univ. of Chicago John M. Olin Law & Economics Working Paper No. 235, 2005), *available at* http://ssrn.com/abstract_id=671801 (noting that investment disputes result in monetary damages for private actors whereas WTO trade disputes provide retaliatory measures as remedies for governments). This essay will borrow from Professor Sykes' use of the terms "public rights of action" as opposed to "private rights of action." *Id.*

15. *See id.* at 3 (distinguishing between public and private rights of action).

16. *See id.* at 7 (describing investment disputes as resulting in monetary damages for private actors whereas WTO trade disputes provide retaliatory measures as remedies for governments). For diagrams illustrating the overlaps described in this essay, *see* Trujillo, *supra* note 6.

17. *Id* at 21.

arose as a trade dispute regarding Canadian subsidies paid to the Canadian softwood lumber industry, which prompted the United States government to place countervailing duties on softwood lumber imports from Canada.[18] Subsequently, Canada brought the dispute before a NAFTA Chapter 19 trade panel; both nations ultimately took the problem to the WTO for resolution.[19]

The *Antidumping Investigation on Imports of High Fructose Corn Syrup Originating from the United States of America*[20] dispute between the United States and Mexico provides another example of vertical overlap between regional and multilateral trade regimes. The *HFCS Antidumping Investigation* was first resolved by a NAFTA Chapter 19 panel and then subsequently by the WTO. The two tribunals decided the issue separately and solely according to the framework provided by each respective international trade agreement. Neither tribunal looked to the other's determination for guidance; however, their outcomes did coincide. Softwood Lumber, on the other hand, has been more challenging for WTO and regional panels alike.

2. Public and Private Regimes overlap

Among other things, globalism has given rise to a plurality of legal regimes. In the context of trade, the *Softwood Lumber* and *High Fructose Corn Syrup* disputes demonstrate that similar trade issues may be resolved both by a regional tribunal and by a multilateral one. Public rights of actions may be resolved differently by different tribunals or, as in the case of the *High Fructose Corn Syrup* dispute, they may coincide. In any event, these cases exemplify the

18. *See* NAFTA Panel, In the Matter of Certain Softwood Lumber Product from Canada, U.S.-Can.-2002-1904-02, 2006 WL 4041527 (NAFTA Binational Panel 2006). Chapter 19 under NAFTA has set up a supranational panel to deal with countervailing and antidumping trade disputes. *See* NAFTA, *supra* note 13.

19. In dealing with U.S. countervailing duties placed on imports of Canadian softwood lumber, this case involved a WTO panel and NAFTA panels making determinations on countervailing duties. The NAFTA Chapter 19 panel agreed with Canada and found "no injury" to the U.S. softwood lumber industry. The extraordinary challenge committee under NAFTA also found the countervailing duties invalid. The WTO as well originally agreed with the Canadians. But, the U.S. decided not to abide by the NAFTA decision, justifying its actions under a safeguard mechanism. On August 30, 2006, the WTO upheld the U.S. choice by supporting the U.S. International Trade Commission's Section 129 "threat of injury" ruling. NAFTA panel proceedings were thereby suspended. *See* NAFTA Panel, In the Matter of Certain Softwood Lumber Product from Canada, U.S.-Can.-2002-1904-02, 2006 WL 4041527 (NAFTA Binational Panel 2006); *see also* Northern Ontario Business, "Ontario Lumber Groups Sue Over Softwood," 2006 WLNR 11191442, June 1, 2006 (stating that the Ontario Lumber Manufacturers Association and the Ontario Forest Industries Association were filing actions challenging the Canadian and U.S. decision to suspend NAFTA panel proceedings regarding softwood lumber).

20. Panel Report, *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132/R (Jan. 28, 2000) (*adopted* Feb. 25, 2000); Final Decision of Panel, Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, MEX-USA-98-1904-01 (Aug. 3, 2001)[hereinafter the *HFCS Antidumping Investigation*].

way in which globalism has led to hybridity within the legal landscape, one in which "normative conflict among multiple, overlapping legal systems is unavoidable."[21]

NAFTA also reveals another result of this hybridity: one in which government-to-government resolution of trade disputes (public rights of action) may eventually evolve into private rights of actions for private investors. To illustrate this, we can once again look to the softwood lumber dispute between Canada and the United States and the sweetener dispute between Mexico and the United States.

Pope & Talbot v. Canada,[22] is one example of a foreign investment dispute between the United States and Canada. In this case, a U.S. investor in Canadian softwood lumber brought an investor-state dispute under Chapter 11 of the NAFTA for export bans and other measures imposed by the Canadian government that allegedly had a detrimental effect on the investment. Other foreign investment disputes involving the softwood lumber issue between the United States and Canada also arose around the same time.[23] But in these early cases, the NAFTA tribunal clarified that antidumping and countervailing duty policies were not to be considered in the investor-state arena.[24] Despite the challenges international tribunals face in defining their jurisdictional scopes when dealing with similar issues that arise in both public and private rights of action, government disputes may eventually give rise to private disputes involving foreign investors. In this way, government actions regarding trade will impact foreign investment. What is interesting about the *Softwood Lumber* cases is that they show that in their early years, NAFTA investment tribunals had a perceived need to unpack the public rights of action from private ones; that is, to disconnect the overlap between trade matters from investment matters. This issue did not arise again in the context of NAFTA until 2005 with *Methanex Corporation v. United States of America*.[25] In unpacking these horizontal public/private overlaps, the proximity of interests among free traders,

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21. *See generally* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (describing international law through a pluralist lens). For more discussion on the "pluralist landscape of free trade" *see* Trujillo, *supra* note 6, Part IV.A.

22. Pope & Talbot, Inc. v. Canada, Interim Award, ¶ 78 (NAFTA Ch. 11 Arb. Trib. June 26, 2000) [hereinafter Pope & Talbot].

23. These were the "Softwood Lumber cases," which included the following Canadian investors: *Canfor*, *Tember* and *Terminal*. *See* NAFTA Panel, *Canada—Softwood Lumber*, US-CDA-2002-1904-02, 2006 WL 4041527 (2006), *See also*, Order for the Termination of the Arbitral Proceedings with Respect to Tembec et al. (NAFTA Ch. 11 Arb. Trib. Jan. 10, 2006), *available at* http://www.state.gov/documents/organization/68085.pdf.

24. The Softwood lumber cases decided that trade disputes could not be "transplanted" into the investor-state dispute arena. *See id. See also*, Trujillo, *supra* note 6.

25. *See* Methanex Corporation v. United States of America, 44 I.L.M. 1343 (stating that NAFTA did not intend for trade provisions to "be transported to investment provisions"); *see also* Trujillo, *supra* note 6, at 25 (discussing the "Methanex effect" as one that disaggregates the vertical/horizontal and public/private overlaps).

private investors and government intervention comes to light.[26] Trade disputes, although influenced by private actors, are brought before a trade tribunal by a government against another government. However, such disputes, like an antidumping dispute, may also eventually bring rise to an investor-state dispute which is brought by a private investor against a host government.[27]

3. Multilateral/Regional Substantive Law Overlap

Horizontal and vertical overlaps also exist in the adjudication of domestic regulatory measures, which may result in national treatment violations both at the regional and multilateral levels. Disputes regarding alleged national treatment violations are those involving regulatory, fiscal, or non-fiscal measures. Under the GATT, WTO panels adjudicate these measures under Article III of GATT.[28] NAFTA incorporates Article III when dealing with trade in goods.[29] Chapter 11 of NAFTA contains its own national treatment provision that requires host governments to "accord to investors [and their investments] of another Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[30] In dealing with matters of national treatment, the understanding of the word "like" becomes important in assessing the legitimacy of regulatory measures.[31] Moreover, NAFTA Chapter 11 tribunals tend to look to WTO interpretations of national treatment under Article III for guidance in understanding the words "like circumstances," even if they do not necessarily import Article III WTO adjudication of national treatment into their own decisions.[32]

To illustrate this substantive law overlap, it is helpful to focus on a recent investor-state dispute under Chapter 11 of NAFTA, *Corn Products International v. United Mexican States*.[33] This case, along with *ADM v.*

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26. *See* Trujillo, *supra* note 6 (discussing the horizontal public/private overlaps).

27. There seems to be a correlation between the governments bringing a trade dispute and the nationality of a private investor bringing an investor-state dispute on similar issues and against the same government. For more on this *see generally id.*

28. The first sentence of GATT Article III: 4 reads, "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

29. *See* NAFTA, *supra* note 13, at art. 301.

30. *Id.* at art. 1102 (1) & (2).

31. *See* Elizabeth Trujillo, *Mission Possible: Reciprocal Difference Between Domestic Regulatory Structures and the WTO*, 40 CORNELL INT'L L. J. 201, 262 (2007) (discussing various applications of "like products" by GATT/WTO panels throughout the years).

32. For more on the tendency of NAFTA Chapter 11 tribunals to look to Article III adjudication by WTO panels, *see generally id.*; Trujillo, *supra* note 6.

33. Request for Institution of Arbitration Proceedings, Corn Products International v.

Mexico,[34] emerged as a private right of action from the public right of action discussed earlier, the *HFCS Antidumping Investigation*. Both *Corn Products* and *ADM* dealt with U.S. investors in the Mexican sweetener business that were affected by the Mexican government's actions towards Mexican sugar and the use of high fructose corn syrup in Mexico.[35]

In *Corn Products International*, a U.S. investor brought an investor-state claim after the Mexican government passed a tax on Mexican soda bottlers using HFCS.[36] This was brought a few years after the U.S. government brought the antidumping action against the Mexican government and the WTO and NAFTA decisions finding for the United States. The U.S. investor-claimant, Corn Products International, brought the investor-state dispute against the Mexican government in response to a federal tax passed by the Mexican legislature on soda bottlers who used high fructose corn syrup as a sweetener instead of sugar. No such tax was passed for using sugar. Corn Products International had the largest market share within the Mexican high fructose corn syrup industry and alleged national treatment violations under Chapter 11 of NAFTA.[37] The decision on this dispute has not yet been made public, but reliable sources claim that the NAFTA tribunal has decided for the U.S. investor.

In 2004, the U.S. government requested that the WTO panel decide whether the tax on the use of high fructose corn syrup passed by the Mexican government was a national treatment violation under Article III of GATT, in *Mexico—Tax Measures on Soft Drinks and other Beverages*.[38] It alleged that the tax violated Article III because it treated sugar and high fructose corn syrup differently in order to benefit the Mexican sugar industry.[39] This case was decided and then taken to the WTO Appellate body, which agreed with the WTO panel's finding that the tax was a national treatment violation.

Corn Products International specifically illustrates not only a

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United Mexican States, October 28, 2003 [hereinafter Corn Products International] available at www.naftaclaims.com.

34. Archer Daniels Midland Co. v. Mexico, ICSID Case No. ARB(AF)/04/05 (2007).

35. ADM and CPI worked together with Cargill and A.E. Stately in response to the Mexican tariffs. *See e.g.*, Corn Refiners Association, http://www.corn.org (last visited Feb. 16, 2009). Corn Refiners Association is the national trade association based in Washington, D.C. that represents the U.S. corn refining industry. *Id. See generally* American Sugar Alliance, http://www.sugaralliance.org (last visited Feb. 16, 2009). The American Sugar Alliance represents sugarcane and sugarbeet farmers, processors, refiners, suppliers, workers, and others associated with the U.S. sugar industry. *Id. See* Trujillo, *supra* note 6, at Part III.B for more information on "transnational players."

36. *See* Corn Products International, *supra* note 34.

37. *See id.*

38. *See* Request for the Establishment of a Panel by the United States, *Mexico—Tax Measures on Soft Drinks and other Beverages*, WT/DS308/4 (June 11, 2004) [hereinafter *Mexico-Tax Measures*]. The claimant alleged violations under Article III:1, III:2 and III:4 of GATT. *Corn Products International* and *Mexico-Tax Measures* when discussed together will be referred to as the *High Fructose Corn Syrup Dispute*.

39. The United States claimed that "like and directly competitive or substitutable" products (sugar and high fructose corn syrup) were being treated differently. *See id.*

multilateral/regional overlap and a public/private regime overlap, but also a substantive law overlap regarding the issue of national treatment. In other words, this case demonstrates, on the one hand, a trade dispute evolving into a private investment dispute based on a fiscal measure by the Mexican government. On the other hand, it also illustrates a convergence of the multilateral WTO trade regime and the regional private investment NAFTA regime with regard to the issue of national treatment.[40] Interestingly, the same private actors that brought the Chapter 11 disputes regarding high fructose corn syrup also lobbied the U.S. government to bring the WTO action against Mexico in 2004.[41]

II. WTO, NAFTA, AND DISAGGREGATING OVERLAPS

Through the adjudicatory processes of NAFTA, we can better appreciate ways in which the public regime of trade and the private regime of investment overlap. Furthermore, the various NAFTA tribunals have provided various venues for state and non-state actors to discuss and litigate their disputes with trading partners. However, NAFTA also reveals to us that these same adjudicatory processes may be used to harness power among the various actors through forum-shopping. Investors looking for jurisprudence to give weight to their national treatment arguments look to the WTO for guidance.[42] Governments attempting to exert pressure against their counterparts in a trade dispute bring disputes before a regional tribunal and a WTO panel almost simultaneously, such as in the *Softwood Lumber* disputes. Finally, governments may indirectly aid their own private entities holding investments in countries with which the government has entered into trade agreements by bringing a trade dispute on similar substantive issues to those that are found in an investment dispute by their private entities. The *High Fructose Corn Syrup* dispute is an example of this.

For these reasons, it is important that in dealing with national treatment violations, the WTO recognize the overlaps that exist among various trade regimes and, in turn, take on a stronger adjudicatory role in this regard. To do this, WTO panels should consider the effect of their decisions on regional tribunals. Furthermore, when issues are better settled at the regional level, WTO panels can defer to regional adjudication of certain matters. For example, in *Mexico-Tax Measures*, Mexico requested that the WTO not hear the case

40. *See* Trujillo, *supra* note 6, at Part I(c).

41. *See* James P. Miller, *Sugar spat sours Mexico's taste for corn syrup Corn Products International and other corn refiners caught in trade tussle over U.S. barriers to Mexican sugar exports*, CHI. TRIB., February 5, 2004, *available at* 2004 WLNR 19911704. *See also*, Trujillo, *supra* note 6, Part III.B (discussing "transnationalism and its players").

42. *See* Trujillo, *Mission Possible*, *supra* note 32, Part III (describing various NAFTA Chapter 11 decisions where the Tribunal looked to WTO adjudication of Article III and the definition of "like products" in order to apply the "like circumstances" test under Chapter 11 and determination whether a government action violated national treatment requirements).

brought by the United States.[43] The WTO had jurisdiction to decide on matters under its Covered Agreements;[44] therefore, it could also decide on the issue of whether the Mexican tax was placed in violation of national treatment requirements of the GATT Article III. However, Mexico insisted that this tax was in response to the United States' inaction in complying with its agreements regarding market access of Mexican sugar. For some time, Mexico had tried to resolve the problem under a NAFTA Chapter 20 dispute settlement body; however, this was to no avail. The WTO panel and Appellate Body ignored this issue and proceeded to decide on the issue of national treatment. While presumably they acted correctly regarding WTO law, a question remains as to whether WTO panels should urge Member States to resolve regional disputes, such as this sugar dispute between Mexico and the United States, within regional dispute settlement bodies.[45]

Decisions regarding national treatment violations have a direct effect on domestic regulatory measures. After all, virtually all government actions are protectionist to some degree. The challenge for trade tribunals is in discerning those measures that are intended to protect domestic markets at the expense of foreign ones. This is exactly what GATT Article III strives to do. It focuses on whether products imported into a territory are "accorded treatment no less favourable than that accorded to like products of national origin."[46] Furthermore, its purpose is to determine whether a measure has been passed "so as to afford protection" to a domestic market.[47] The operative phrase in making these determinations is "like products." WTO panels must compare treatment of a foreign product to a "like" domestic product.

In a similar way, NAFTA Chapter 11, article 1102, strives to ensure that foreign investments are also afforded treatment that is no less favorable than domestic investments. The operative term within article 1102 is "like circumstances"—foreign investments are compared to those domestic investments "in like circumstances."[48]

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43. *See Mexico-Tax Measures, supra* note 39.

44. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments– Results of the Uruguay Round, app. 1, 33 I.L.M. 1125 (1994) [hereinafter DSU]. WTO panels occasionally look to other sources of international law, such as Article 31 of the Vienna Convention when dealing with issues of treaty interpretation.

45. *See e.g.*, Panel Report, Brazil – *Measures Affecting Imports of Retreaded Tires* WT/D5332/R (June 12, 2007)[hereinafter *Brazil-Retreaded Tires*] (considering an argument by respondent that it was exempted under GATT because of an exception granted under MERCOSUR which justified a Brazilian regulation favoring domestic retreaded tires); *see also* Trujillo, *supra* note 6, part II.C (discussing *Brazil Retreaded Tires*).

46. GATT, supra note 29, at art. III, para. 4; *see* Trujillo, *supra* note 6, at part II(a) (discussing GATT Article III).

47. GATT, supra note 29, at art. III, para. 1; *see* Trujillo, *supra* note 6, at part III; *see also* Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAW 619, 621-22 (1998), *available at* http://www.worldtradelaw.net/articles/hudecrequiem.pdf [hereinafter *Requiem*].

48. NAFTA, *supra* note 13, at art. 1102.

In dealing with regulatory measures, WTO panels have fluctuated from a more formalist reading of GATT Article III to a more contextualized interpretation.[49] NAFTA Chapter 11 tribunals, on the other hand, tend to be more formalized in interpreting "likeness" and in finding comparators; however, they then contextualize the regulatory measure by attempting to balance its legitimate purpose against its discriminatory effects. In applying article 1102, a NAFTA Chapter 11 tribunal may determine whether the differences in treatment of investments *in like circumstances* has a "reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[50] At times, though, NAFTA Chapter 11 tribunals may instead look more closely at the measure in question and its connection to the domestic regulatory processes in place.[51] For the most part, NAFTA tribunals take a two-step analysis in adjudicating alleged national treatment violations. On the one hand, they look to WTO interpretations of "like products" in finding its investment comparators under "like circumstances."[52] On the other hand, NAFTA tribunals are willing to delve into domestic regulatory structure and contextualize the regulatory measure in question for legitimacy purposes.

Various NAFTA investor-state decisions have looked to WTO interpretations of "like products" in order to determine the "likeness" of investments protected under NAFTA Chapter 11.[53] While NAFTA tribunals do

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49. *See* Trujillo, *Mission Possible*, *supra* note 32, at 235. In determining "likeness," WTO panels look to primarily four factors: 1) the physical characteristics of a product including its properties, nature, and quality; 2) the end-uses of a product in any given market; 3) the tastes and habits of consumers' tastes and habits, which may vary, and 4) the tariff classification of the products (also known as the Border Tax Adjustment criteria). *See* Report of the Working Party on Border Tax Adjustments, ¶ 18, L/2464 (adopted Dec. 2, 1970); *see also* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter 1996 *Japan Alcoholic Beverages Appellate Body*] However, in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* the WTO panels showed a willingness to expand the meaning of "likeness" to incorporate the regulatory measure itself. *See European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos*], *reprinted in* 40 I.L.M. 1193 (2001).

50. Pope & Talbot, para. 78. *See also* Trujillo, *Mission Possible*, *supra* note 32, at 244-245 (discussing the balancing test incorporated by *Pope and Talbot* into national treatment determinations under Chapter 11 NAFTA). It is important to note that in *Gami Investments, Inc. v. The Government of Mexico*, the NAFTA tribunal did not apply the Pope & Talbot balancing test; however, after deciding that the policy in question was legitimate, it did look closely at the administrative processes in Mexico allowing for expropriation of sugar mills that were financially troubled in order to save them from insolvency. *See Gami Investments, Inc. v. The Government of Mexico*, Final Award (Nov. 15, 2004), para. 110-115. *See also* Trujillo, *Mission Possible*, *supra* note 32, at 245-247 (comparing *Gami Investments* to *Pope & Talbot*).

51. *See e.g.*, *Gami Investments*, *supra* note 51.

52. An affirmative determination creates a presumption of a national treatment violation that may be rebutted by the balancing test laid forth in *Pope & Talbot*.

53. *See* Trujillo, *Mission Possible*, *supra* note 32, at part III.A; *see also* Trujillo, *supra* note

not necessarily defer to WTO panels in the strictest sense, they do look to WTO panel interpretations of the meaning of "like products" for guidance in understanding "likeness" under the NAFTA Chapter 11 regime. Furthermore, this tendency to "defer" is brought first by the claimants in the investor-state disputes; in this way, they give legitimacy to their arguments. However, NAFTA tribunals have shown a greater willingness to defer to the regulatory processes of the domestic governments in assessing whether measures are in fact discriminatory.[54]

Furthermore, NAFTA Chapter 11 tribunals do attempt to unpack the trade issues from the investment ones. Though there are public/private overlaps and substantive law overlaps among public and private rights of action, tribunals for cases such as *Methanex* have explicitly unpacked these overlaps in making their determinations. In this 2005 case in which a Chapter 11 tribunal had to decide whether California bans on the use of methanol for reformulated gasoline was a national treatment violation, the tribunal decided that ethanol and methanol producers were not "in like circumstances."[55] Rather, only methanol producers should be compared to each other and that the purpose for the ban, which was to avoid legitimate health and environmental hazards, was an important consideration in the determination of national treatment violations.

III. RECIPROCAL DEFERENCE AND DISAGGREGATING OVERLAPS

The tendency of NAFTA tribunals to look to WTO adjudication indicates that, despite recent challenges to the multilateral system through the failure of the Doha Round, regional tribunals and state and non-state actors look to WTO dispute settlement bodies for legitimacy. Therefore, it is within its dispute settlement bodies that the WTO may retain its relevance for trade.

The resulting hybridity of various trade regimes and their adjudicatory

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6, at part I.

54. *See* Trujillo, *Mission Possible*, *supra* note 32, at part III.A (discussing investor-state awards under NAFTA Chapter 11 that look to WTO adjudication of GATT Article III for guidance in determining "like circumstances" in alleged national treatment violations); *see also* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 71-81 (2008) (comparing WTO and NAFTA Chapter 11 adjudication of national treatment and stating that NAFTA investment regimes have a stronger concern for public policy justifications of discrimination, which the authors term "regulatory context test," rather than under the WTO adjudication of Article III which uses primarily a "competition test."); *see generally* Joel P. Trachtman, *FDI and the Right to Regulate: Lessons from Trade Law*, *in* UN CONFERENCE ON TRADE AND DEVELOPMENT, THE DEVELOPMENT DIMENSIONS OF FDI: POLICY AND RULE-MAKING PERSPECTIVES 189, UN Doc. UNCTAD/ITE/IIA/2003/4 (2003), *available at* http://www.unctad.org/en/docs/iteiia20034_en.pdf. (describing similarities and differences between investment and trade regimes and noting that the political economy of investment is different from trade). The tendency of regional tribunals to "defer" to WTO adjudication in national treatment cases arises from the fact that attorneys for the claimants defer to WTO adjudication in bringing forth their arguments before the regional tribunals.

55. *See Methanex*, 44 I.L.M. 1343, at part IV, ch. B.

processes have resulted in a "spaghetti bowl" of trade regimes,[56] or, as Professor Sunjoon Cho has stated more precisely in light of the growing importance of Asian nations in trade, an "Udon bowl."[57] Through procedural mechanisms, for example, WTO panels may "manage hybridity" among the multiple overlapping trade regimes.[58]

A procedural mechanism that I call *reciprocal deference* will not only help "manage hybridity," but also enhance coordination among the regional/bilateral regimes and the multilateral regime, and will increase transparency within domestic regulatory processes.[59] First, reciprocal deference would treat *de jure* (facially non-neutral) discriminatory measures differently from *de facto* (facially neutral) ones. In dealing with de facto discriminatory measures, reciprocal deference would be most relevant with those measures that have discriminatory effects and non-discriminatory ones that place "incidental burdens" on trade.[60] Second, reciprocal deference would unpack multilateral/regional overlap and recognize any impact it may have on a regional tribunal. It would allow for WTO panels to consider whether certain issues would be best decided regionally or bilaterally. Finally, in making a national treatment determination, it would allow a respondent to prove the legitimacy of its measures. In this way, WTO panels can learn from the NAFTA Chapter 11 investment regime: they may defer to national democratic and transparent regulatory processes and try to assess the regulatory measure in question within the context of the regulatory framework in which it was born. Though WTO panels are not in the best position to determine the legitimacy of these measures as a matter of substantive law, they may place this procedural burden on responding Member States to prove that in fact such measures are legitimate within their context.[61]

While there are similarities in a reciprocal deference model to that of an antidiscrimination model proposed by Professors McGinnis and Movsesian, they do differ in significant ways.[62] First, the antidiscrimination model focuses

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56. *See* Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO- nafta 'Spaghetti Bowl' Is Cooking*, 9 J. INT'L ECON . L. 1, 3-4 (2006) using the Spaghetti Bowl analogy to describe the multiplicity of trade regimes).

57. *See* Professor Sungjoon Cho's presentation at Indiana University School of Law - Indianapolis Symposium.

58. Berman, *Global Legal Pluralism*, *supra* note 22, at 1196 (offering legal pluralism as a way to "manage hybridity).

59. *See generally* Trujillo, *Mission Possible*, *supra* note 32, for a more detailed discussion on reciprocal deference.

60. *See id.* at 257.

61. *See id.* at 256-261.

62. *See* John O. McGinnis & Mark L. Movsesian, Commentary: *The World Trade Constitution*, 114 HARV. L. REV. 511, 517-19 (2000) (finding weaknesses in the regulatory model and comparing it to the anti-discrimination model which defers more to national governments). In the antidiscrimination model, the authors propose "determinate rules" for WTO panels to use in order to assess "covert protectionism." The rules are based on the requirements of transparency, performance orientation and consistency in order to distinguish legitimate regulations by Member States from illegitimate ones. *See id.* at 572-578; *see also*

more on risk assessment mechanisms and scientific evidence as a means to determine procedural legitimacy. In this way, this model does not take into account those regulatory measures that are passed by domestic governments through transparent, democratic processes, but are not based on precise science or perhaps do not implicate science at all. For example, a hypothetical proposal to universalize healthcare may not have concrete scientific benefits and may be,at least in the short-term, economically burdensome on a society. However, despite the possible anti-competitive effects of placing price caps on certain necessary drugs, it is feasible that a domestic government may consider these costs to be a necessary social burden in order to embrace a possible social value, such as universal healthcare.[63] A similar point could be made regarding environmental regulation with respect to a tax on gasoline. Such a measure may create economic burdens on the automobile sectors;[64] however, they may also help open up new markets for fuel-efficient cars or hybrid vehicles.[65] A cap and trade system may have similar effects on the energy sector.[66]

Second, unlike the antidiscrimination model, reciprocal deference unpacks the existing jurisdictional and substantive law overlaps. In this way, incentives on state and non-state actors to forum shop will diminish. Also, intersecting interests of state and non-state actors will surface. Third, reciprocal deference does not discount that the WTO may also have a role as a regulatory commission in setting standards for free and fair trade and in other specific areas such as intellectual property rights, labor, environment and transparency.[67] In this way, the WTO can continue to contribute to the harmonization of regulatory standards among its Member States.

Finally, reciprocal deference would increase dialogue among Member States in sorting out common regional or bilateral issues, and it would allow the WTO to be a forum where domestic administrative bodies may have the

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Trujillo, *Mission Possible*, *supra* note 32 (discussing the antidiscrimation model by Professor McGinnis and Movsesian).

63. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 801-02 (2008) (discussing Canadian's belief that universal health care is part of their identity).

64. *See Oberstar to State: Raise the Gas Tax, Congress will Help on Transportation if Minnesota Steps Up*, STAR TRIBUNE, Feb. 25, 2007, *available at* 2007 WLNR 3784312; Jonathan Marshall, *Size Of Gasoline Tax Has Many Driving In Circles It Does Lousy Job Of Pricing Social Costs Of Getting Around By Car*, S.F. CHRON. B3, May 13, 1996, *available at* 1996 WLNR 3396794. *See also*, Steven Mufson, *Talk of Raising Gas Tax Is Just That*, WASH. POST, Oct. 18, 2006, at D01. *But see*, David C. Holzman, *Driving Up the Cost of Clean Air*, 113 ENVTL. HEALTH PERSP. A246, A248 (2005) (discussing current vehicle use and the environmental and long-term costs of such use).

65. David L. Greene et al., *Fuel Economy Rebound Effect For U.S. Household Vehicles*, 20 Energy J. 1, 7 (1999). *See also*, Holzman, *supra* note 65.

66. *See*, Robert N. Stavins, *A Meaningful U.S. Cap-And-Trade System To Address Climate Change*, 32 HARV. ENVTL. L. REV. 293 (2008).

67. *See generally* McGinnis & Movesian, *supra* note 63, for more discussion on the regulatory model as opposed to the antidiscrimination model; *see also* Trujillo, *Mission Possible*, *supra* note 32.

opportunity to demonstrate the legitimacy of its measures. In this way, the WTO may also influence domestic administrative processes and encourage increased transparency within these processes.[68]

CONCLUSION

While it may seem counterproductive for WTO panels to encourage "deference" to regional tribunals when necessary and to domestic regulatory processes for assessing issues of legitimacy, such deference would allow the WTO to remain relevant as a coordinating force within multilateralism and among the plurality of trade regimes. Those institutions closest to the execution of a domestic regulatory measure are actually in the best position to judge the legitimacy of a measure, but they also have the highest incentive to further those measures for reasons other than public purpose.[69] For this reason, WTO panels and NAFTA tribunals are skeptical of the legitimate intent of domestic regulatory measures. However, the decisions of these same international tribunals are only as powerful as their ability to convince domestic governments to enforce their decisions. Therefore, WTO panels and regional tribunals cannot ignore domestic administrative processes. They must participate in the dialogue of free trade. It is within these same regulatory structures that protectionism can best be combated.

Reciprocal deference encourages transparency and accountability within domestic regulatory structures by requiring that respondents on a WTO dispute prove the legitimacy of their measures. Such a burden perhaps is least effective with respect to nations that need transparency the most, the lesser developed nations. For this reason, the international community and the WTO itself should make resources available to less developed nations that are respondents. Already emerging economies such as India, China and Brazil are gaining importance within the international trading community. In encouraging dialogue from them and enhancing transparency within those governments, they may set an example for other emerging economies to increase transparency.

An argument may be made that the WTO is not the proper forum for such dialogue because the WTO texts do not support the idea that the trade regime should be viewed as a "constitutional polity."[70] Afterall, if there are conflicting adjudicatory results among the trade regimes, this would actually stir on dialogue among the political players; and in turn, create change through diplomatic negotiations. At some level, this may be true and this essay

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68. *See* Trujillo, *supra* note 6, at part III(C).

69. *See* David Gantz, *A Post-Uruguay Round Introduction To International Trade Law In The United States*, 12 ARIZ. J. INT'L & COMP. L. 1, 9–10 (1995) (stating that U.S. trade law results from the political process which includes various special interests); *see also* Trujillo, *Mission Possible*, *supra* note 32 at 236.

70. Jeffrey L. Dunoff, The Politics of International Constitutions: The Curious Case of the World Trade Organization, in Ruling the World? Constitutionalism, International Law and Global Governance 178 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

recognizes that the WTO can not bear the burden of resolving all conflicts among domestic regulatory processes and trade. However, the adjudicatory process of the WTO does carry some clout in the international trade landscape. In incorporating procedural mechanisms that increase transparency and strategic fairness for resolution of trade disputes, the WTO only increases its legitimacy as the final adjudicatory of trade matters. In addition, the regional tribunals that look to WTO adjudication for guidance on regional adjudication also contribute to the legitimacy of the WTO.[71] At times, conflicting outcomes are unavoidable and normative change could still arise from these conflicts. However, increased coordination among the multilateral, bilateral, and regional legal spheres is important for a gloablized trading system to emerge.

Disaggregating the overlaps that exist among trade regimes and state and non-state actors will also help reduce forum-shopping, which ultimately gives the wealthier nations who can afford to forum shop a strategic advantage over lesser developed nations. The tendency of claimants and regional tribunals such as NAFTA Chapter 11 tribunals to look to WTO jurisprudence regarding the adjudication of regulatory measures ultimately solidifies the legitimacy of WTO jurisprudence in a "bottom-up coordination."[72] It is also important for the WTO to engage in a "top-down coordination" where it moves away from adjudication under the strict parameters of its Covered Agreements and defers, when necessary, to the adjudication of regional and bilateral tribunals as well as to the administrative regulatory processes of its Member States. In this way, it can be the promoter of free trade and also a forum for dialogue among various state and non-state interests with regard to regulatory measures. It can also take on a stronger adjudicatory role rather than rely solely on its role as a supranational institution issuing normative standards.

In order to preserve its power, the WTO must share its adjudicatory power and force regional and bilateral tribunals to settle matters regionally. They must also be the coordinating force of the global trade system by creating concrete linkages to its Member States and their regional concerns. Regionalism will continue to grow; however, it may expand while remaining grounded within a multilateral structure that holds the global trading system together in a cohesive web of international and domestic adjudicatory processes.

71. *See* Trujillo, *supra* note 6 (discussing the tendency of regional tribunals to look to WTO adjudication in the area of national treatment and describing this phenomenon as "bottom-up coordination.").

72. Trujillo, *supra* note 6, at part IV(b) (describing "bottom-up coordination").

OF FREE TRADE AGREEMENTS AND MODELS

C. O'Neal Taylor*

INTRODUCTION

In the last two decades, the United States has altered its focus in trade policy. This alteration sprang from the United States' attempts to mesh its long-held commitment to multilateralism with regionalism.[1] During the post-World War II negotiations for the General Agreement on Tariffs and Trade (GATT),[2] the United States championed non-discrimination as the major trading principle and sought to dismantle preferential trading relationships.[3] Even though the GATT, as negotiated, contained an exception to the Most-Favored-Nation (MFN) principle to allow Contracting States to form both customs unions and free trade areas,[4] the United States did not take advantage of it until the mid-1980s. The United States entered into two free trade

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1. *See* Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview* 29, *in* NEW DIMENSIONS IN REGIONALISM INTEGRATION (Jaime deMelo & Arvind Panagriya eds., Cambridge Univ. Press 1993).
According to Bhagwati, the U.S. shift towards regionalism was a pivotal factor in the worldwide shape of the phenomenon. "The main driving force for regionalism toady is the conversion of the United States, hereto an abstaining party, to [GATT] Article XXIV. . . . [T]he conversion of the United States is of major significance. As the key defender of multilateralism through the postwar years, its decisions now to travel the regional route (in the geographical and preferential senses simultaneously) tilts the balance of forces at the margin away from multilateralism to regionalism." *Id.*

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT], *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

3. The United States wanted to take apart the trading preferences, particularly the Commonwealth system operated by Great Britain. Central to such an effort was establishing the Most-Favored Nation (MFN) principle as the core GATT obligation. An unconditional MFN rule would require that any benefit or privilege granted to one trading partner must be offered to others. *See* KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 27 (Univ. of Chicago Press 1977) (1970); JOHN H. JACKSON, WORLD TRADE LAW AND THE LAW OF THE GATT 577 (The Bobbs-Merrill Company, Inc. 1969); JACOB VINER, THE CUSTOMS UNION ISSUE 110 (Carnegie Endowment 1950).

4. GATT, *supra* note 2, at art. XXIV.

agreements in that decade. The first, with Israel,[5] was entered into for foreign policy reasons in order to support an ally. The second, with Canada,[6] was a formal recognition of the already closely integrated economies of the two countries. It was the third U.S. free trade agreement, the North American Free Trade Agreement (NAFTA),[7] that marked the shift in U.S. trade policy towards one of multilateralism plus regionalism.

Several factors contributed to this conversion of the United States on the issue of pursuing regionalism as part of its standard trade policy. Almost all of these were related to the U.S. experience with globalization and the multilateral system rather than to any particular belief in the value or efficacy of regionalism. First, during the 1980s, the United States saw the first significant decline in living standards and wages in the post-war period.[8] Perceiving itself as a "diminished giant,"[9] the United States came to view the GATT system as one in which it gave much while other countries, such as Japan and the developing countries,[10] gave little. Second, the U.S. method of response to the inadequacies of the GATT rules[11] and its dispute settlement system[12] was to engage in aggressive unilateralism to push its own agenda in the latest round of GATT negotiations, the Uruguay Round. The United States satisfied its goals

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5. U.S.-Israel Free Trade Agreement, U.S.-Isr., Apr. 22, 1985, 24 I.L.M. 653 [hereinafter U.S.-Israel FTA], *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp.

6. U.S.-Canada Free Trade Agreement, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281 [hereinafter U.S.-Canada FTA], *available at* http://wehner.tamu.edu/mgmt.www/NAFTA/fta/complete.pdf.

7. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (containing chs. 1-9), 32 I.L.M. 605 (containing chs. 10-22) [hereinafter NAFTA], *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78.

8. *See* Jagdish Bhagwati, *The Diminished Giant Syndrome: How Declinism Drives Trade Policy*, 72 FOREIGN AFF. 22, 22 (1992-93) [hereinafter Bhagwati]; JAGDISH BHAGWATI, THE WORLD TRADING SYSTEM AT RISK 15-16 (Harvester Wheatsheaf 1991).

9. Bhagwati, *supra,* note 8 at 22-26 (comparing the United States to Great Britain, the other diminished giant faced with competition from the United States and Germany).

10. *Id.* at 22-24 (noting the United States's belief that the GATT system had provided asymmetrical benefits to the world trading system and that the Japanese economy was a "closed" one as compared to the United States). The developing countries were seen as problems because they failed to offer adequate standards of protection for intellectual property rights or openings for trade in services. *See generally* C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 214-225 (1997) (noting the U.S. dissatisfaction with developing countries over these issues and its use of Section 301 with its power to sanction trading partners to force changes by them).

11. The United States believed the GATT regime was inadequate in part because it failed to offer discipline over trade in services and rules on intellectual property rights protection. Taylor, *supra* note 10, at 220-237.

12. The GATT Article XXIII dispute settlement system required GATT adoption of any panel decision and allowed the losing party to block the adoption of the report. The United States was so concerned about the inadequacies of the GATT system that it pushed for adoption of a new dispute settlement system during the Uruguay Round. For a thorough review of the U.S. position on this issue, *see id.* at 242-250.

of adding trade and services and trade-related intellectual property rights to those negotiations. However, an impasse developed over one major area of trade – agriculture – that had to be brought under GATT discipline for the round to complete. When the European Community (EC) refused to negotiate on dismantling its barriers at a level that was considered satisfactory, the United States walked out of the negotiations. It was during this break in negotiations that the United States signaled its intent to achieve at a regional level what was being forestalled at the GATT.[13] After obtaining "fast-track" negotiating authority in 1991,[14] the Bush Administration began negotiating for NAFTA and made those negotiations its focus for the next few years. By 1992, the United States, Canada and Mexico had signed the free trade agreement. In 1993, the side agreements on labor rights and environmental cooperation were completed[15] and NAFTA entered into force the following year. The shift away from multilateralism towards regionalism by the United States helped to spark a renewed enthusiasm for the Uruguay Round negotiations, which were completed at the end of 1994.[16]

It is fair to characterize the initial U.S. foray into regionalism as a strategy designed: (1) to compel the EC to return to negotiations on agriculture and complete the Uruguay Round; and (2) to offer NAFTA as a model of what could be negotiated on new trade rules (including, most importantly, trade in

13. *See* GILBERT R. WINHAM, THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS 86-92 (Univ. of Toronto Press 1992) (discussing the impasse at the Uruguay Round negotiations which resulted in a suspension of the negotiations in December 1990); *see also* Joint Statement Announcing Canada-Mexico-United States Trilateral Free Trade Negotiations (Feb. 5, 1991), 1991 PUB. PAPERS 111, *available at* http://www.presidency.ucsb.edu/ws/?pid=19279.

14. Congress shares trade making authority with the President under the Constitution. U.S. Const. art. 1, 8 cls. 1,3 (Congress has power to "lay and collect Taxes, Duties, Imposts and Excises" and to "regulate commerce with foreign nations."). Any trade agreement negotiated by the President must be approved by Congress. President Bush had to request fast track authority to negotiate NAFTA. The effort to get fast track was complicated by Congressional distrust of the Executive. C. O'Neal Taylor, *Fast Track, Trade Policy and Free Trade Agreements: Why The NAFTA Turned Into A Battle*, 28 GW J. INT'L L. & ECON. 2, 36-50.

15. Bill Clinton campaigned against President Bush's NAFTA and promised to negotiate the labor and environmental side agreements. When he won the 1992 election, Clinton followed through with this pledge. For a short history of the final completion of NAFTA, see *id.* at 4-10.

16. The completion of the Uruguay Round of negotiations resulted in the creation of the World Trade Organization (WTO) and the adoption of an expanded list of agreements that each Member State was required to adopt. Given the United States' agenda and its use of aggressive unilateralism to start the Uruguay Round, the most important of these agreements were the General Agreement on Trade in Services, The Agreement on Trade-Related Intellectual Property Rights, and the Dispute Settlement Understanding. General Agreement on Trade in Services, Jan. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA, Annex 1B, *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1125-1226 (1994), *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm [hereinafter TRIPs].

services and trade-related intellectual property rights). It was not clear at the time that the United States would become a proponent of regionalism in order to continue pushing the U.S trade agenda. What has happened since, however, suggests otherwise. The United States has been engaged in free trade negotiations with groups or individual countries since 1994,[17] even as it participated actively in the new World Trade Organization (WTO) and its latest round of negotiations, the Doha Round.[18] From 2001 to 2008, the United States entered into nine free trade agreements (FTAs),[19] and completed and signed three more FTAs[20] and several ongoing initiatives[21] aimed at producing more bilateral FTAs. Why has the United States come to embrace this shift to multilateralism plus regionalism? To answer that question fully, it is necessary to examine the contours and content of U.S. regionalism. This Article will do that by examining and analyzing (1) how the United States has developed its model for FTAs, and (2) the implications of the United States' decision to

17. The first set of negotiations was convened to create a Free Trade of the Americas (FTAA). The goal of the Free Trade of the Americas initiative was to create a free trade area uniting all of the 34 democracies of the Western Hemisphere. The negotiating process produced eight ministerial meetings (between 1995-2003), four Summits of the Americas (1994, 1998, 2001 and 2005) and draft texts before it was suspended. According to the United States, that was because "other leaders indicated that conditions did not exist for the achievement of the FTAA." WTO, *Trade Policy Review, Report by United States*, WT/TPR/G200, at 14 (2008) [hereinafter US/TPR], *available at* www.wto.org/english/tratop_e/tpr_e/g200_e.doc.
For a review of the issues that led to the suspension of the FTAA, see David A. Gantz, *The Free Trade Area of the Americas: An Idea Whose Time Has Come—and Gone?*, 1 LOY. INT'L L. REV. 179 (2004). For official materials on the FTAA, see the United States Trade Representative webpage, http://www.ustr.gov/Trade_Agreements/Regional/FTAA/Section_Index.html.

18. The Doha Round was launched in 2001 and was focused, for the first time in GATT/WTO history, on issues of concern to the majority of WTO Member States—the developing countries.

19. The most recent U.S. free trade agreements (FTAs) are those negotiated or enacted under the Bush Administration. The following represents a chronological list of the agreements and their enactment in the United States as of 2008: U.S.-Jordan (2001); U.S.-Singapore (2003); U.S.-Chile (2003); U.S.-Australia (2004); U.S.-Morocco (2004); U.S.-CAFTA-DR (2005); U.S.-Bahrain (2006); U.S.-Oman (2006); U.S.-Peru (2007). *See* UNITED STATES TRADE REPRESENTATIVE (USTR), THE PRESIDENT'S 2008 TRADE POLICY AGENDA 107-15 (2008), *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Trade_Policy_Agenda/asset_upload_file649_14563.pdf.

20. The signed FTAs pending Congressional approval are with Panama, Colombia and South Korea. *See* U.S.-Panama Free Trade Agreement, U.S.-Pan., Jun. 28, 2007, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Final_Text/Section_Index.html [hereinafter U.S.-Panama FTA]; U.S.-Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html [hereinafter U.S.-Colombia FTA]; U.S.-Korea Free Trade Agreement, U.S.-Kor., Jun. 30, 2007, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html [hereinafter KORUS].

21. The regional initiatives, all launched in 2002-2003, were with the South African Customs Union (SACU), the Enterprise for ASEAN Initiative (EAI), the CAFTA Initiative, and the Middle East Free Trade Area Initiative (MEFTAI). *See generally* US/TPR, *supra* note 17, at 15-16.

embrace this model-based approach to regionalism for the United States, its FTA partners, and the world trading system.

I. A SHORT HISTORY OF U.S. POST-NAFTA REGIONALISM

Following the enactment of NAFTA in 1994, the United States committed itself to negotiating a Free Trade Agreement of the Americas (FTAA). Since the FTAA was by nature and intent aimed at achieving comprehensive regionalism for the Western Hemisphere, the thirty-four negotiating countries set up a long time-table for negotiating the completion of the free trade area by 2005.[22] During the remainder of the Clinton Administration (1994-2000), the United States made only limited efforts to pursue bilateral free trade agreements due to a lack of political consensus on such agreements, the fallout from NAFTA,[23] and the expiration of fast track authority and congressional unwillingness to renew this authority.[24] The Clinton Administration did begin negotiations with some countries that approached fast track authority (Jordan, Chile, and Singapore).[25] However, it only did so after becoming concerned about the burgeoning of the FTA movement worldwide[26] and another slowdown in multilateral negotiations at the WTO.[27] The Clinton Administration completed one free trade agreement with Jordan, which was enacted in 2001 during the Bush Administration.[28]

Under President G. W. Bush, the United States has extended the developing system for negotiating and enacting regional arrangements. President Bush had a singular advantage denied President Clinton: early in his

22. *See generally* DILIP K. DAS, *Regionalism in the Western Hemisphere in* REGIONALISM IN GLOBAL TRADE 192-199 (2004) (discussing the plan behind the FTAA, its time frame and its goal to go beyond the WTO in legal rules).

23. Susan G. Esserman, *Proceeding of the Canada-United States Law Institute Conference on Understanding Each Other Across the Largest Undefended Border in History*, 31 CAN.-U.S. L. J. 11, 14 (2005) (noting these as the reasons why the United States did not pursue bilateral FTAs).

24. The Clinton Administration was without fast track authority from April 16, 1994 until its end in 2000. Congress did not pass a trade negotiating authorization until 2002.

25. Esserman, *supra* note 23, at 14.

26. *Id.* Following NAFTA, Mexico and Canada began to negotiate FTAs with Chile. These agreements were explicitly modeled after NAFTA. *See* DAS, *supra* note 22, at 181 ("[T]he Chile-Mexico and Chile-Canada agreements were based exactly on the innovative NAFTA model, as were the new bilateral FTAs between Chile and Mexico on the one side and countries throughout Latin America on the other."). The EC was also active in negotiating FTAs during this time period. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TRADE AND DEVELOPMENT REPORT 2007, at 56 (2007), *available at* http://www.unctad.org/en/docs/tdr2007_en.pdf [hereinafter TRADE AND DEVELOPMENT REPORT 2007].

27. Esserman, *supra* note 23, at 14.

28. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf [hereinafter U.S.-Jordan FTA].

first term in 2002, he was able to obtain trade negotiating authority.[29] This led the Bush Administration to further develop the components of the U.S. system for regionalism begun earlier—Trade and Investment Framework Agreements (TIFAs),[30] Bilateral Investment Treaties (BITs),[31] regional free trade initiatives, and bilateral FTAs. While some of these components for dealing with its goals on trade in terms of goods, services and investment had existed before,[32] they then became part of a process for preparing a region or a country for a closer relationship with the United States. The focus of the system became pursuing trade agreements through regional initiatives and bilateral FTAs. The United States aimed its regional initiatives to cover every major continent or region—Asia,[33] Africa,[34] the Middle East,[35] Latin America[36]—other than Europe, its

29. Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 993, 19 U.S.C. §§3804-3013 (2002) [hereinafter TPA].

30. *See* USTR, Background on the Enterprise for ASEAN Initiative, http://www.ustr.gov/Trade_Agreements/Regional/Enterprise_for_ASEAN_Initiative/Section_Index.html (last visited July 12, 2008) [hereinafter EAI Background].

31. The United States has over 40 BITs in place. The United States uses a model BIT when it negotiates with partner countries. U.S. Bilateral Investment Treaty Program Fact Sheet, http://www.state.gov/e/eeb/rls/fs/2008/22422.htm (last visited Mar. 3, 2008).

32. The United States entered into its first BIT in 1980.

33. The EAI was launched in 2002 and produced the U.S.-Singapore Free Trade Agreement. United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html [hereinafter U.S.-Singapore FTA]. The United States has also entered into negotiations with Malaysia and Thailand for bilateral FTAs. US/TPR, *supra* note 17, at 114-115.

34. The regional initiative here was with the Southern African Customs Union (SACU). These FTA negotiations were launched in 2002, and the goal was to build on the success of the U.S. preference program for Africa, the African Growth and Opportunity Act (AGOA). USTR, BACKGROUND INFORMATION ON THE U.S.-SACU FTA, June 2, 2003, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Southern_Africa_FTA/Background_Information_on_the_US-SACU_FTA.html. Active negotiations were suspended in 2006 but remain a "long term objective" according to the U.S. US/TPR, *supra* note 17, at 15.

35. The Middle East Free Trade Area Initiative (MEFTAI) launched in 2003 has produced three FTAs with Morocco, Bahrain and Oman. The U.S.-Morocco FTA was enacted in the U.S. in 2004. U.S.-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Fnal_Text/Section_Index.html [hereinafter U.S.-Morocco FTA], The U.S.-Bahrain FTA was enacted in the U.S. in 2006. Agreement between the Government of the United States and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Agreement, U.S.-Bahr., 44 I.L.M 544, Sept. 14, 2004, *available at* http:///www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/Final_Text/Section_Index.html [hereinafter U.S.-Bahrain FTA]. The U.S. Oman FTA was also enacted in the U.S. in 2006. U.S.-Oman Free Trade Agreement, U.S.-Oman, Jan. 18, 2006, *available at* http://ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html [hereinafter U.S.-Oman FTA]. The goal is to create a Middle East Free Trade Area.

36. The CAFTA initiative lead to Central American-Dominican Republic-United States Free Trade Agreement, 43 I. L.M. 514, Aug. 5, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA-DR]. The agreement has entered into force for the United States, Guatemala, El Salvador, Honduras, Nicaragua and the Dominican Republic. Costa Rica could not enact

main competitor in regionalism. The history of the regional initiatives to date has been mixed. Some initiatives, the FTAA and the South African Customs Union Initiative (SACU), have failed or been suspended.[37] Other regional initiatives have produced or consolidated FTAs (CAFTA and the Enterprise for ASEAN Initiative (EAI)), while another one provides a framework for a series of bilateral FTAs (Middle East Free Trade Initiative (MEFTAI)).

In addition to introducing these initiatives, the Bush Administration accelerated both the pace of bilateral FTA negotiations and the process for their implementation. Every year from 2003 to 2007, the Office of the United States Trade Representative (USTR) completed and Congress approved at least one FTA.[38] All of those agreements, with the exception of CAFTA-DR, have been bilateral agreements. Only one of those bilateral FTAs was formed with a developed country.[39] By the time trade-negotiating authority expired in 2007, the Bush Administration had completed and signed FTAs with three other developing countries – Colombia, Panama, and South Korea – which it promised to pursue before Congress.[40]

CAFTA-DR without a public referendum, which was held on October 7, 2007. The FTA was approved by the slimmest of margins (51.48% in favor to 48.42% against). *ICT Chamber Outlines Benefits of FTA for IT Industry*, BUSINESS NEW AMERICAS, Oct. 17, 2007. Costa Rica had to request an extension of its March 2008 deadline in order to pass all of the implementing legislation needed to enact its free trade agreement obligations. *Costa Rica To Request Extension for Deadline To Enter CAFTA*, INSIDE U.S. TRADE, Vol. 26, No. 5, Feb. 1, 2008.

37. The FTAA process failed some of the negotiating countries, notably Brazil and Mexico, which resisted the comprehensive WTO-plus agreement being pushed by the United States. *See* Frederick M. Abbott, *A New Dominant Trade Species: Is Bilateralism a Threat?*, 10 I.E. L. J. 571, 578 (2007) (Abbot notes that the U.S. offers a template of the areas it wishes to cover, and that developing FTA partners do not have many possibilities for amending it. Additionally, those countries which resisted the template, Brazil and Argentina in the FTAA negotiations, were left out and isolated when the U.S. began negotiations with other more willing partners in Latin America.).

38. The pattern is as follows: U.S.-Singapore (2003); U.S.-Chile (2003); U.S.-Australia (2004); U.S.-Morocco (2004); U.S.-CAFTA-DR (2004); U.S.-Bahrain (2006); U.S.-Oman (2006); and U.S.-Peru (2007). U.S.-Singapore FTA, *supra* note 33; U.S.-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026, *available at* http://ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter U.S.-Chile FTA]; U.S.-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248, *available at* http://ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html [hereinafter U.S.-Australia FTA]; U.S.-Morocco FTA, *supra* note 35; CAFTA-DR, *supra* note 36; U.S.-Bahrain FTA, *supra* note 35; U.S.-Oman FTA *supra* note 35; U.S.-Peru Trade Promotion Agreement, U.S.-Peru, April 12, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html [hereinafter U.S.-Peru FTA].

39. Apart from Canada, the United States has only entered into one other FTA with a developed country, Australia.

40. Trade Promotion Authority expired in July 2007. Despite this, the Bush Administration has made approval of the pending FTAs with Colombia, Panama, and South Korea its top priority. THE PRESIDENT'S 2008 TRADE POLICY AGENDA, *supra* note 19, at 2; *see also* Statement of the U.S. Trade Representative Susan C. Schwab, Senate Fin. Comm. 1 (March 6, 2008), http://finance.senate.gov/hearings/testimony/2008test/030608sstest.pdf (setting out the goal of passing the pending FTAs before reaching a conclusion in the Doha Round of the WTO).

Regional and bilateral FTAs became the "vehicle of choice"[41] for promoting trade liberalization during the Bush Administration. The primary reasons for this refocus on regionalism were two-fold. First, the United States again found that it could not achieve multilateral liberalization that satisfied all of its goals. The Doha Round at the WTO struggled and was eventually suspended over another impasse involving agricultural trade.[42] Additionally, the United States proved unable to gain its preferred result of a comprehensive agreement that went beyond WTO standards with the developing countries in the Western Hemisphere.[43] In response, the United States developed the theory and approach of "competitive liberalization"[44]—moving forward towards liberalization on the multilateral, regional, and bilateral levels simultaneously. The theory was that regional and bilateral efforts would reenergize and focus WTO negotiations. The approach was to pursue like-minded FTA partners[45] or those countries that satisfied another major U.S. goal in security and/or foreign policy.[46] Second, the United States developed a model FTA that it wanted to

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41. Esserman, *supra* note 23, at 14.

42. Sungjoon Cho, *Doha's Development,* 25 BERKELEY J. INT'L L. 165, 170 (2007) (reviewing the history of the Doha Round Suspension and prospects for its renewal); *see also* Press Release, WTO, Lamy Says New Negotiating Texts Set Stage for Crucial July Talks (July 10, 2008), http://www.wto.org/english/news_e/pres08_e/pr536_e.htm. Director-General Lamy argues that the trouble with Doha Round is about more than just these impasses. *Id.*

43. This happened with the failure of the FTAA negotiations.

44. "Competitive liberalization" is the terminology adopted by former U.S. Trade Representative Zoellick to describe the U.S. strategy: "By pursuing multiple free trade initiatives, the United States has created a 'competition for liberalization,' launching new global trade negotiations." POL. & SOC'Y 1, 3-4,8 (2005) (noting that the United States pursues FTAs with countries willing to undertake economic reforms with regard to domestic regulatory practices).

45. Chile and the CAFTA countries, for example, were chosen as FTA partners because of their support for the U.S. positions in the FTAA negotiations. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), INTENSIFYING FREE TRADE NEGOTIATING AGENDA CALLS FOR BETTER ALLOCATION OF STAFF AND RESOURCES, GAO-04-233, at 42-43, 52 (2004), *available at* http://www.gao.gov/new.items/d04233.pdf [hereinafter GAO 2004 REPORT]; *see also* Nicola Phillips, *US Power and the Politics of Economic Governance in the Americas*, 47 LATIN AM. POL. & SOC'Y 1, 3-4,8 (2005) (noting that the United States pursues FTAs with countries willing to undertake economic reforms with regard to domestic regulatory practices).

46. There is a direct link between being considered for a FTA and a country's support for U.S. security and foreign policy goals. USTR noted that the countries selected for bilaterals under MEFTAI were supporters of the U.S. objectives in the Middle East, and that the "CAFTA nations supported U.S. objectives in Iraq." GAO 2004 REPORT, *supra* note 46, at 8; *see also* CRAIG VAN GRASSTEK, U.S. TRADE POLICY AND DEVELOPING COUNTRIES: FREE TRADE AGREEMENTS, TRADE PREFERENCES, AND THE DOHA ROUND, INT'L CENTRE FOR SUSTAINABLE TRADE AND DEVELOPMENT, INFORMATION NOTE 4, at 7 (2008), *available at* http://www.ictsd.org/pubs/US_Trade_Policy_and_Developing_Countries.pdf. Van Grasstek points out that the Bush Administration has a narrow set of foreign policy goals—largely, supporting the U.S. policy in the Middle East, cooperating in anti-narcotic activity and agreeing to leave the developing country coalition at the WTO (the Group of 21). He also notes that FTAs were entered into with moderate Middle East States and that, of the recent FTAs (including those not yet enacted), every partner country (S. Korea, Colombia, Panama and CAFTA States) was a member of the "coalition of the willing," except for Guatemala. *Id.*

keep pushing.[47] Getting partners to agree to the model FTA was paramount because the model covered all U.S. interests and stood as an illustration of and best hope for pushing U.S. preferences of worldwide trade discipline. What the United States wanted to offer was a true model—an example for imitation or emulation—for the WTO. Should the United States prove unable to move the WTO completely towards its agenda, the FTAs would guarantee achievement on a regional level and, if successful, provide additional credibility for the U.S. positions they embody.[48]

The use of a model approach was even extended to how the United States chose its FTA partners. In its recent FTAs—those negotiated after 2002 under the TPA—USTR developed a list of factors for determining which countries should be U.S. FTA partners. The thirteen-factor list of 2002[49] was reduced in recent years to six.[50] A review of both sets of factors reveals what motivated the United States to enter into model FTAs. The factors center upon issues that always resonate in U.S. trade policy—the level of domestic support for an FTA,[51] the level of commitment by target countries to trade liberalization and

47. In its review of how the Bush Administration has consulted over FTAs entered into under Trade Promotion Authority, the GAO interviewed the officials responsible for trade policy and negotiations at USTR and the Departments of Agriculture, Commerce, Labor, State and Treasury, the agencies which, along with USTR, form an interagency group to propose potential FTA partners to the President. GAO, AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATION UNDER TRADE PROMOTION AUTHORITY, GAO-08-59, at 1-2 (2007), *available at* http://www.gao.gov/new.items/d0859.pdf [hereinafter GAO 2007 REPORT]. As part of its analysis of the U.S. FTAs, the GAO examined the U.S. strategy for pursuing FTAs and found it had two major elements—using the theory of competitive liberalization and seeking comprehensive or "gold standard" bilateral and regional FTAs. *Id.* at 17-18. According to the GAO, the recent U.S. FTAs "have a number of absolute requirements, based on the model USTR seeks to use." *Id.* at 18. In its Trade Policy Review Report to the WTO, the United States also noted that its regional trade agreements could "become models for future multilateral liberalization in new areas such as agriculture, services, investment and environmental and labor standards." US/TPR, *supra* note 17, at 14.

48. USTR, THE PRESIDENT'S 2003 TRADE POLICY AGENDA 10 (2003) *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_Trade_Policy_Agenda/asset_upload_file666_6142.pdf (stating that the regional and bilateral FTAs promote the broader trade agenda by "serving as models, breaking new negotiating ground, and setting high standards."); *see also* GAO 2004 REPORT, *supra* note 46, at 17.

49. GAO 2004 REPORT, *supra* note 46, at 7-10. The thirteen factors were: (1) Congressional guidance; (2) business and agricultural interest; (3) special product sensitivities; (4) serious political will of the prospective partner to undertake needed trade reforms; (5) willingness to implement other reforms; (6) commitment to WTO and other trade agreements; (7) contribution to regional integration; (8) support of civil society groups; (9) cooperation in security and foreign policy; (10) need to counter FTAs that place U.S. commercial interests at a disadvantage; (11) need to do FTAs in each of the world's major regions; (12) need to ensure a mix of developed and developing countries; and (13) demand on USTR resources. According to USTR, these factors did not have relative weights. *Id.* at 7.

50. The six factors were: (1) country readiness; (2) economic/commercial benefit; (3) benefits to the broader trade liberalization strategy; (4) compatibility with U.S. interests; (5) Congressional/Private-sector support; and (6) U.S. government resource constraints. *Id.* at 9-10.

51. Factors 1-3 of the earlier list are on Congressional guidance, business and agricultural

reform,[52] the cooperation of target countries in security and foreign policy matters, and strategic plans to counter other trading nations.[53]

II. ELEMENTS OF THE U.S. MODEL FTA

The United States only enters into FTAs and each one must satisfy its model. The FTA is the chosen form of regionalism because it is subject to only limited multilateral discipline—under GATT Article XXIV and the General Agreement on Trade in Services (GATS) Article V—and limited WTO oversight.[54] In order to satisfy GATT Article XXIV, the parties to an FTA must agree: (1) to eliminate duties and other restrictive regulations on

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interest and special product sensitivities. *Id.* at 7. According to the GAO's interviews with USTR, it consults with Congress before and after FTA partner selection "to ensure support and eventual congressional approval." *Id.* at 7. Additionally, USTR officials also examine public support, particularly from business and agricultural interests, and assess how the FTA will affect certain sectors that have always been of interest, textiles and sugar. *Id.*at 7.
The Executive Branch rarely moves forward if there is political opposition. *See* Gantz, *supra* note 17, at 187 ("Even the most free trade oriented administrations . . . are not likely to brave domestic political opposition unless there is enormous pressure from the business community to move forward and some semblance of bipartisan support in Congress.").

52. Factors 4 through 6 of the earlier list—the political will of potential FTA partners to implement trade reform and other reforms—deal with whether the FTA partner is willing to undertake obligations inherent in a U.S.-led FTA. In judging these factors, USTR examines the target country's "trade capabilities" and its "track record in meeting current trade obligations." GAO 2004 REPORT, *supra* note 46, at 7. Since USTR regards FTAs as a "development tool," it is crucial that the FTA partner be willing to put in place other economic reforms. In choosing an FTA partner, USTR tries to make sure that the country understands "1) how important it is to make this commitment to reform and 2) the extent of the obligations that a comprehensive FTA with the U.S. involves." *Id.* at 7-8.
An example of the type of other reforms undertaken by FTA partners were those taken by Chile to eliminate price controls and privatize state-owned enterprises. *Id.* at 42.
According to USTR, the first factor of the new six factor list, country readiness, involves a "country's political will, trade capabilities, and rule of law systems." *Id.* at 9. The interagency review done to review FTA partners means that different U.S. agencies examine different issues when evaluating a partner under this factor. USTR examines trade policy issues while the Treasury Department looks at a potential FTA partner's "overall macroeconomic stability and the strength of its financial or banking systems." *Id.* at 9.

53. Factor 10 of the earlier list—countering FTAs that place the U.S. commercial interests at a disadvantage—deals with one of the realities of the proliferation of regional agreements. Once competing trading nations begin to enter their own FTAs with a potential partner, the United States would be at a disadvantage. This was the primary reason the United States entered into the U.S.-Chile FTA. USTR noted that given Chile's other FTAs (with Canada, Mexico and the EC), Chile had reduced its purchases of U.S. exports by almost one-third. *Id.* at 8, 42 (noting that the United States lost export market share in Chile due to its other FTAs).

54. GATT, *supra* note 2, at art. XXIV.; GATS, *supra* note 16, at art. V. The WTO requires Member States which enter regional trade agreements to notify these to the organization. The Committee on Regional Trade Agreements (CRTA) has jurisdiction over these agreements. The WTO agreed in 2006 to establish a review process for these agreements that would include a factual report about the operation of each regional trade agreement. To date, the CRTA has made only limited progress on finalizing its reports. WTO, WORLD TRADE REPORT 2007, at 306 (2007), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf [hereinafter WORLD TRADE REPORT 2007].

substantially all trade between constituent territories originating in those territories; (2) to not raise duties or other restrictive regulations against non-members upon formation of the free trade area; and (3) to achieve these objectives within a reasonable time.[55] There are similar requirements under GATS Article V.[56]

As long as the United States and its partners aim for eliminating duties and other restrictions on almost all trade, avoid accompanying this liberalization with a raising of barriers to non-members, and do so within a relatively short

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55. GATT, *supra* note 2, at art. XXIV(5)(b), 8(b).

> 5(b) With respect to a free-trade area . . . the duties and other regulations of commerce maintained in each [o]f the constituent territories and applicable at the formation of such free-trade area . . . shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area.
>
> . . .
>
> (8) For purposes of this Agreement:
>
> . . .
>
> (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Id. at art. XXIV(5)(b), 8(b).

Thus, Article XXIV, intended to allow regional arrangements "as long as they satisfied three requirements: transparency, commitment to deep—intraregional liberalization, and neutrality vis-à-vis third parties." WORLD TRADE REPORT 2007, *supra* note 55, at 305.

56. GATS, *supra* note 16, at art. V.

> This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement: has substantial sectoral coverage, and provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through: elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.
>
> In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.
>
> Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

Id. at Art. V(1), (2) (footnote omitted).

The major elements of GATS art. V are: 1) "substantial sectoral coverage" of the trade services among the parties; 2) that "substantially all discrimination" has to be eliminated either at entry into force or on a "reasonable time-frame"; and 3) that the agreement area not raise the overall level of barriers compared to before the formation of the economic integration area. WORLD TRADE REPORT 2007, *supra* note 55, at 307.

time period, they have met the requirements of GATT Article XXIV.[57] All U.S. FTAs have aimed for eliminating most, if not all, duties and restrictions on all trade (as opposed to "substantially all").[58] In addition, although U.S. FTAs do result in trade diversion, whereby non-members lose out on market access to FTA parties,[59] the United States has never and would not negotiate any formal restrictions against other trading nations as part of entering into an FTA. With regard to the time it takes to complete the liberalization, U.S. FTAs aim to eliminate most duties and restrictions within ten years of enactment of the agreement.[60] Similarly, once GATS art. V went into effect, all U.S. FTAs were focused on eliminating existing discriminatory measures (and prohibiting new or more discriminatory measures) on trade in services covering almost all service sectors within a similar time frame. Given the GATT/WTO history of not disapproving of regional arrangements,[61] it has been easy for the United States to align its regionalism goals with its multilateral obligations.

Other reasons why the FTA has been the favored form are the flexibility it allows and the limited integration it demands. There are no requirements under the GATT/WTO as to either the subject areas or the respective depth of those areas that can be embraced by an FTA. Consequently, the United States has used this freedom to include a significant number of issues—those covering

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57. The requirements under GATT Article XXIV and GATS Article V have proven easy to satisfy in part because of the WTO failure to reach consensus on the interpretation of such crucial aspects of the definitions as duties and "other restrictive regulations" and "substantially all trade" in Article XXIV and "substantially all discrimination" in GATS Article V. *See* WORLD TRADE REPORT 2007, *supra* note 55, at 308-312 for a discussion of the GATT art. XXIV and GATS art. V elements, which have not been fully defined, and how they might be interpreted.

58. For illustrations, see CAFTA-DR, *supra* note 36, at Ch. 3, Annex 3.3; *see also* Summary of the U.S.-Peru FTA, *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file585_13067.pdf; U.S.-Peru FTA, *supra* note 38, at Ch. 2, Annex 2, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html; Short Summary of the CAFTA-DR, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file834_7179.pdf.

59. After NAFTA, trade increased between the three parties, some of it at the expense of non-members. GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES, RECOMMENDATIONS FOR NORTH AMERICAN INTEGRATION 18-19 (Inst. Int'l Economics 2005).

60. The GATT art. XXIV requirement that an FTA must be completed within a "reasonable period of time" has been interpreted by the WTO to mean that an FTA should be implemented in no more than ten years except for "exceptional cases." WORLD TRADE REPORT 2007, *supra* note 55, at 310.

61. Historically, the GATT/WTO have never disapproved of a regional agreement. According to the Sutherland Report on the future of the WTO: "In practice there are now just too many WTO Members with interests in their own regional or bilateral arrangements for a critical review of PTA terms to take place and for consensus on their conformity to be found." Peter Sutherland et al., *The Future of the WTO: Addressing Institutional Challenges in the New Millenium*, 22, 77 (2004), *available at* http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf. For a discussion of the rules regarding regionalism see WORLD TRADE REPORT 2007, *supra*, notes 55-58.

trade in services and trade-linked issues—into its FTAs. Moreover, since the creation of an FTA consists largely of eliminating barriers, rather than crafting common legislation (as required by the customs union, the other form of regionalism under the GATT[62]), the FTA parties do not have to create a supranational institution to achieve their goals.[63]

The limited multilateral discipline and the resulting flexibility combined to allow the United States to develop a model FTA. There is widespread agreement by the U.S. government itself[64] and observers that the United States has been developing a model for FTAs.[65] What it has pursued over the last fifteen years has been FTAs based on two models: the NAFTA model and an adaptation of it, the WTO-plus model. As would be expected, the major aspects of the NAFTA model have remained the same in the later model.

Consequently, this analysis will begin with the common aspects of the models—aspects of the model which have been retained. One obvious feature of the NAFTA model is its design which consists of sixteen subject matter areas,[66] with five other chapters devoted to institutional arrangements and dispute settlements. The treaty text itself, not including the lengthy tariff schedules, is heavily drafted and runs more than three hundred pages. Each chapter is structured the same way—with general definitions appearing at the beginning or end, followed by a section on general obligations and ending with detailed annexes that contain either exceptions and reservations to or special implementation aspects of the general obligations.[67] NAFTA ended up with

62. Under the terms of GATT art. XXIV, countries forming a customs union must adopt a common external tariff. In effect, this means that the countries must adopt a common trade policy towards non-members. GATT, *supra* note 2, at art. XXIV(8)(a).

63. A distinction has been suggested for different types of integration efforts. Negative integration by countries involves the removal of discrimination in national economic rules and policies under joint and authoritative surveillance. This would be a free trade area. By contrast, positive integration involves the transfer "of public-market-rule-making and policy making powers from the participating politics to the union level." This would be a customs union. Jacques Pelkmans, *The Institutional Economics of European Integration*, *in* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 318, 321, 340-41 (Mauro Capelliti, Monica Seccombe & Joseph Weiller eds., Walter de Gruyter & Co., 1986).

64. *See* GAO 2007 REPORT, *supra* note 48, at 9 (based on data from 2005/2006); THE PRESIDENT'S 2003 TRADE POLICY AGENDA, *supra* note 49, at 2; US/TPR, *supra* note 17, at 16-25.

65. *See* Abbott, *supra* note 37, at 578; *see* Hufbauer & Schott, *supra* note 59, at 56-57.

66. The International Trade Commission (ITC) reviewed the first comprehensive FTAs based on the NAFTA model in a report in 2005. According to its analysis, the model FTA consists of twenty to twenty-five chapters, all organized in the same order in all of the agreements, with annexes (to address non-conforming measures with regard to services), sometimes containing separate chapters on specific industry sectors or regulatory issues. U.S. INT'L TRADE COMMISSION (ITC), THE IMPACT OF TRADE AGREEMENTS IMPLEMENTED UNDER TRADE PROMOTION AUTHORITY, INV. NO. TA-2103-1, USITC PUB. 3780, at 2-2, Table 2.1 (2005), *available at* http://hotdocs.usitc.gov/docs/pubs/332/pub3780.pdf [hereinafter ITC IMPACT REPORT] (comparing the structure/contents Singapore, Chile and Morocco agreements on a grid).

67. In order to understand which general obligations a party has undertaken in any

two side agreements (on labor rights and environment cooperation) that were added to the legal obligations of the parties. All of the later FTAs follow the same design, even the same basic ordering of subject matter chapters.[68] Instead of side agreements, however, the later FTAs have side letters that are considered to be part of the text.[69]

The major elements of the NAFTA model are its focus on the GATT, its scope and coverage, its limited institutionalism, and its diffuse dispute settlement system. Each of these elements satisfies deeply-held multilateral and domestic trade policy preferences. These can best be illustrated by examining each major element of the NAFTA model.

The NAFTA model embraces the GATT in several ways—through GATT compliance, GATT modeling and GATT adoption. The GATT compliance can be seen in the first Article of the agreement. According to Article 101, NAFTA parties "consistent with Article XXIV of the *General Agreement on Tariffs and Trade*, hereby establish a free trade area."[70] All U.S. FTAs begin the same way.[71] The only alteration has been to add compliance with GATS Article V to this commitment.[72] Not only do the Parties announce GATT compliance as the goal under the NAFTA model, but they also commit themselves to respecting their respective rights and obligations under the GATT.[73] This announcement of the FTA's compliance with the GATT and the parties' adherence to the multilateral rules signals the desire of the United States (and its partners) to keep regionalism in its place.[74] An FTA may compromise non-discrimination but only within the parameters established by the multilateral system.

The NAFTA model reinforces this GATT commitment by modeling the language of core obligations regarding trade in goods after GATT provisions. This is done in two ways: either the NAFTA provision adopts the GATT obligation as the standard for the FTA, or it models the language of the

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substantive area, for example, trade in goods or trade in services, you have to examine the reservations it has taken. The annexes, therefore, are where the deals are struck.

68. Compare the design of the U.S.-Chile FTA, *supra* note 38, with the design of the U.S.-Peru FTA, *supra* note, 38.

69. Recent U.S. FTAs have large numbers of side letters. These are negotiated and drafted in response to the Congressional/Executive Branch cooperation over implementing legislation for FTAs. *See* J.F. HORNBECK AND WILLIAM H. COOPER, CONG. RESEARCH SERVICE, TRADE PROMOTION AUTHORITY (TPA): ISSUES, OPTIONS, AND PROSPECTS FOR RENEWAL, CRS - 13 (2007), *available at* http://fpc.state.gov/documents/organization/78415.pdf (noting that Congress insists on additions or clarifications to trade agreements by this process).
All U.S. FTAs have side letters, but not all side letters are the same. Some are "records of understanding while others can amount to agreed upon interpretations that can add to or make effective changes." ITC IMPACT REPORT, *supra* note 67, at 2-6.

70. NAFTA, *supra* note 7, at art. 101.

71. The provision stating that the intent of the parties to establish a GATT-compliant FTA is always the first provision in a U.S. FTA.

72. *Compare* NAFTA, *supra* note 7, at art. 101, *with* U.S.-Peru FTA, *supra* note 38, at art. 101.

73. NAFTA, *supra* note 7, at art. 103.

74. *See* US/TPR, *supra* note 17, at X.

NAFTA rule on the corresponding GATT rule. For example, the core obligation in NAFTA is to apply national treatment to the goods of another party. In Article 301, the provision does not repeat the GATT language on the concept[75] but instead states that the parties "shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretive notes."[76] Article 301 concludes by incorporating Article III of GATT, its interpretive notes and any equivalent provision of a successor agreement into NAFTA.[77] By contrast, Article 309 on Import and Export Restrictions adopts its general obligations using most of the same language of the corresponding GATT provision in Article XI,[78] and it also incorporates the GATT provision.

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75. GATT, *supra* note 2, art. III(4) provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Id. at art. III(4).

76. NAFTA, *supra* note 7, at art. 301(1).

77. Article 301 of NAFTA on National Treatment provides:

> Each party shall accord national treatment to goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretive notes, and to this end Article III of the GATT and its interpretive notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.

Id. at art. 301.

After the completion of the Uruguay Round, which adopted GATT in 1994, the language was changed for all later FTAs. *Compare* NAFTA, *supra* note 7, at art. 301, *with* CAFTA-DR, *supra* note 36, at art. 3.2:

Each party shall accord national treatment to the goods of another Party in accordance with Art. III of the GATT 1994, including its interpretive notes, and to this end Article III of GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement, *mutatis mutandis*.

CAFTA-DR, *supra* note 36, at art. 3.2.

78. NAFTA Article 309(1) provides:

> Except as otherwise provided in this Agreement, no Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT, including its interpretative notes, and to this end Article XI of the GATT and its interpretative notes, and to this end Article XI of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made a part of this Agreement.

Id. at art. 309(1). *Compare* NAFTA, *supra* note 7, at art. 309(1), *with* GATT, *supra* note 2, at art. XI, which provides:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall

NAFTA displays the same technique of GATT modeling with regard to trade in services. In this instance, however, the language of NAFTA Article 1202[79] on National Treatment mirrors the language of what became GATS Article II.[80] The United States and its partners borrowed the language from the draft of the GATS text that was under consideration during the Uruguay Round negotiations. At the time NAFTA was being completed it was clear that the regional FTA would extend trade discipline to trade in services. By contrast, it was not yet clear that the GATT would complete the Uruguay Round and adopt GATS. Subsequent U.S. FTAs simply follow the NAFTA model on this.[81] This same practice is extended even to the General Exceptions allowed under the FTA. Rather than negotiate freely over what should constitute an excuse for violations of core obligations (such as national treatment and the prohibition on quantitative restrictions), NAFTA adopts[82] the limited exceptions allowed

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> be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 2, at art. XI(1).

79. NAFTA art. 1203 provides that "[e]ach Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to service providers of any other Party or of a non-Party." NAFTA, *supra* note 7, at art. 1203.

80. GATS art. II provides that "[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country." GATS, *supra* note 16, at art. II(1).
The NAFTA parties also adopted the same language as GATS on National Treatment. *Compare* NAFTA, *supra* note 7, at art. 1202, *with* GATS, *supra* note 16, at art. XVII(2). The GATS language, in turn, was patterned after the GATT language on MFN and National Treatment.

81. *See* U.S.-Chile FTA, *supra* note 38, at art. 11.2. The only difference in the language from NAFTA is that it uses the words "service suppliers" instead of "service providers." The provision also has an interpretive note which states that "[t]he Parties understand that 'service suppliers' has the same meaning as 'services and service suppliers' in Article II:1 of GATS." *Id.* at art.11.3 n.3.

82. GATT, *supra* note 2, at art. XX.

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> necessary to protect public morals; necessary to protect human, animal or plant life or health; (c) relating to the importations or exportations of gold or silver; (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; relating to the products of prison labour; imposed for the protection of national treasures of artistic, historic or archaeological value; relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . .

Id. at art. XX.

under Article XX of the GATT.[83]

Two consequences flow from this drafting decision. First, the NAFTA conceptions of national treatment and general exceptions will always be informed by the years of experience with the concepts at the multilateral level, including all later interpretations, thus ensuring legal coherence. Second, by adopting the GATT concepts, the drafters could offer the NAFTA parties a choice of forum option for the settlement disputes. With limited exceptions, if a NAFTA party encounters discrimination with regard to trade in goods, it can seek relief not just in the NAFTA dispute settlement system but also in the multilateral system.[84] Article 2005 allows such a choice of forum, subject to limitations, on disputes regarding "any matter" arising under both NAFTA and the GATT, and "any agreement negotiated thereunder, or any successor agreement."[85]

The NAFTA model established the scope and coverage of all later U.S. FTAs. The subject matter topics go beyond tariff and non-tariff barriers to trade in goods to cover other areas of interest to U.S. firms and traders—trade in services, investment, competition policy and intellectual property rights. The subjects covered in the first part are those related to Trade in Goods[86]—General Obligations,[87] Rules of Origin and special Rules of Origin,[88] Customs

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83. NAFTA, *supra* note 7, at art. 2101(1).

> 1. For purposes of:
> Part Two (Trade in Goods), except to the extent that a provision of that Part applies to services or investment, and
> Part Three (Technical Barriers to Trade), except to the extent that a provision of that Part applies to services, GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.
> The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

Id. at art. 2101(1).

84. NAFTA does allow the complaining party the choice of forum. However, it gives any third party the right to force a dispute to NAFTA. NAFTA, *supra* note 7, at art. 2005(2). The NAFTA dispute settlement system is also designated as the forum if the respondent requests such an option in writing, in disputes involving Article 104 (Relation to Environmental and Conservation Agreements) and the standards measures in NAFTA (Sanitary and Phyto-sanitary standards and Technical Barriers to Trade). *Id.* at art. 2005(2-4), (6).

85. *Id.* at art. 2005(1). All U.S. FTAs have the same general choice of forum option. *Compare* NAFTA, *supra* note 7, at art. 2005, *with* CAFTA-DR, *supra* note 36, at art. 20.3.

86. In NAFTA, the part on trade in goods (Part II) always covers both Market Access and National Treatment. This is true for all later U.S. FTAs as well. Included in this part are also special provisions related to sensitive sectors of trade. *See* NAFTA, *supra* note 7, at ch. 2. In later agreements, there are often breakouts of some of these provisions for separate chapters. *See* U.S.-Peru FTA, *supra* note 38, at chs. 2,3.

87. The key general obligations are tariff elimination (art. 302) and national treatment (art. 301). NAFTA, *supra* note 7, at 301, 302.

88. The Rules of Origin chapters are key to the operation of any FTA. The rules define which goods "originate in" a Party and, therefore, qualify for duty-free treatment. Countries

Procedures,[89] Agriculture,[90] Sanitary and Phyto-sanitary Standards and Technical Barriers to Trade[91] and Safeguard rules.[92] The Trade in Goods part of the NAFTA model is built around two main themes—flexibility and accommodation of special interests. That is achieved by several drafting techniques. First, the tariff elimination required to actually open up a market is phased-in for products and can run from the date of enactment to ten years or beyond.[93] This flexibility was built in to allow the FTA partners to negotiate for time—since all openings for sensitive products are back-loaded[94]—to adjust for products that will not be competitive when the FTA goes into force. A similar product-based accommodation is provided for by the design of the rules of origin.

The NAFTA rules are widely regarded as generally restrictive (to limit the trade benefits of the agreement to parties) and highly variable across product categories.[95] These features allow the FTA parties to shape specialized rules of origin that will protect certain sectors from competition.

A separate chapter exists to cover obligations by the Parties to liberalize

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negotiating an FTA are concerned that, without a strict rule of origin, non-member countries will exploit the FTA party with the lowest external tariff as a point of entry into the free area (thereby creating trade deflection) in order to benefit from the duty-free system. *See* JOHN LAMBRINIDIS, THE STRUCTURE, FUNCTION AND LAW OF A FREE TRADE AREA: THE EUROPEAN FREE TRADE ASSOCIATION 91-92 (Frederick A. Praeger, London Institute of World Affairs 1965).

Chapter Four of NAFTA contains the general rules of origin for the agreement. *See* NAFTA, *supra* note 7, at art. 401 (originating Goods). NAFTA, however, does have special rules of origin requiring a specified level of regional value for automobiles and another special rule for textiles.

89. NAFTA, *supra* note 7, at ch. 5.

90. *Id.* at ch. 7(A).

91. *Id.* at chs. 7(B) & 9.

92. *Id.* at ch.8 (entitled Emergency Action).

93. *Id.* at Annex 302.2. NAFTA phased out tariff elimination gradually with some tariffs on some goods being dropped immediately while others were eliminated at five, ten, and fifteen year intervals.

94. By pushing out the time frame for eliminating tariffs on sensitive products, the parties to a FTA gain adjustment time.

The United States first encountered the issue of how to balance out obligations on tariff elimination—the single biggest factor towards opening up trade in goods—when it negotiated with Mexico during NAFTA. Mexico took great efforts to make the United States understand its status as a developing country and the adjustments it would have to make. HERMAN VON BERTRAB, NEGOTIATING NAFTA: A MEXICAN ENVOY'S ACCOUNT 46 (The Ctr. For Strategic and Int'l Studies 1997).

95. This product-specific aspect of the rules of origin is used to shield products and industries. *See generally* HUFBAUER & SCHOTT, *supra* note 59, at 474-476 on how the NAFTA rules could be improved to avoid the protectionist aspects. In addition, restrictive and product specific rules are more difficult for traders to apply (and require extensive record-keeping) customs officials to enforce. This has been found by one study to offset the advantage of duty-free status granted under NAFTA. Bolormea Tumanchandra, Oliver Cadot, Antoni Estevadeordal, Jaime deMelo, Akiko Suwa-Eisenman & Jose Anson, *Rules of Origin in North-South Preferential Trading Arrangements with an application to NAFTA*, 13 REV. INT'L ECON. 612-629 (2005).

and open competition for Government Procurement.[96] This chapter also contains tendering procedures that the parties are to follow in this area.[97] By adding a chapter in this area, the United States was attempting to gain access to a relatively closed-off market for goods and services that was relatively undisciplined at the WTO.[98]

There are several chapters covering trade in services—Cross Border Trade in Services[99] and specialized chapters on heavily regulated services, Telecommunications and Financial Services.[100] In the chapter on trade in services, the NAFTA model seeks liberalization well beyond that which was ultimately obtained in GATS.[101] The technique was to use the negative list approach for negotiating offers in this area. Unless a NAFTA party expressly reserved a services sector from liberalization, it was to be opened to the general obligations on non-discrimination and market access.[102] The use of the negative list approach has three consequences—it forces greater liberalization, locks in prior liberalization, and guarantees that any new service will be automatically covered by the agreement.[103] The chapter on investment included not only rights for investors but also neutral, binding investor/state arbitration to resolve disputes on these issues.[104] The final substantive sections in the NAFTA model are on Competition policy,[105] Temporary Entry for Business Persons[106] and Intellectual Property.[107] The Intellectual Property chapter covers

96. NAFTA, *supra* note 7, at ch. 10. The chapter is built around providing national treatment to NAFTA firms that want to bid for government procurements. Many governments limit access to this form of trade to national firms, so obtaining a market access commitment here was significant since "government spending on goods and services can amount to 10 percent of GDP or more." *See* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 26, at 60. All U.S. FTAs cover government procurement. The FTAs on this topic open up more trade than similar commitments made under the WTO's Agreement on Government Procurement (AGP) since only the U.S. and Canada are members of the AGP whereas each developing country FTA partner must agree to a Government Procurement chapter.

97. NAFTA, *supra* note 7, at ch. 10(B).

98. The Agreement on Government Procurement is a plurilateral agreement of the WTO. Agreement on Government Procurement, Apr. 15, 1994, 33 I.L.M. 1125-1226 (1994), at Annex 4(b). Member States can choose whether or not to accede to the agreement. As a result, it has a much smaller membership, with approximately 40 countries as opposed to the 150 Members of the WTO. *Id.*

99. NAFTA, *supra* note 7, at ch. 12.

100. *Id.* at chs. 13, 14.

101. GATS used the "positive list" approach to scheduling commitments on trade in services. This means a country must liberalize only in those areas and to the extent specified in the list. With regard to any service sector left off a GATS schedule, a WTO member retains complete control over market access and regulation. *See* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 26, at 60.

102. NAFTA, *supra* note 7, at arts. 1202, 1203. The non-conforming measures or exceptions taken by each Party are attached as an Annex. *Id.* at Annex I.

103. ITC IMPACT REPORT, *supra* note 67, at 2-14.

104. The NAFTA Chapter 11 on investment covers investor rights and protections in Part A, and provides for binding investor/state arbitration in Part B. NAFTA, *supra* note 7, at ch. 11.

105. *Id.* at ch. 15.

106. *Id.* at ch. 16.

not only IP rights but also enforcement obligations which must be undertaken by the parties to give them effect. In the NAFTA model, side agreements were added, in response to a new President and Congress, on the impacts of trade in the areas of labor rights and environmental cooperation.[108] The labor and environmental agreements do not create substantive obligations in each area. Instead, in each, the parties are obligated to enforce its labor laws and its laws on environmental protection.[109]

The NAFTA model is notable for what it omits from the scope of substantive obligations. Labor mobility is limited solely to temporary entry. There are no rules on the content of the unfair trade statutes (anti-dumping and countervailing duty law).[110] Agriculture, although covered, does not eliminate many of the practices (particularly production subsidies)[111] that limit liberalization. None of these issues were considered possible from the U.S. perspective. None of the later U.S. FTAs have altered this assessment.

The final major element of the NAFTA model is its insistence on limited institutionalism and multiple dispute settlement systems. The two matters are connected. The United States was not interested in creating any supranational institution with legislation-creating or adjudicative authority with Canada and Mexico. Consequently, NAFTA established the most skeletal form of administration.[112] The power rests in a Free Trade Commission (comprised of the trade ministers of each nation) that has limited meetings and issues statements. The actual work of administering the rules falls to advisory-only Working Groups[113] established for each major subject matter area. The

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NAFTA provides just what the title of the chapter suggests, the right to enter another Party's territory for purposes under the free trade agreement. *See id.* at art. 1603, Annex 1603 (allowing temporary entry for business visitors, traders and investors, intra-company transferees and professionals and spelling out in detail who qualifies for each group).

107. *Id.* at ch. 17.

108. North American Agreement on Labor Cooperation, Can.-Mex.-U.S., 39 I.L.M. 1499, Sept. 14, 1993, *available at* http://www.dol.gov/ILAB/regs/naalc/main.htm [hereinafter NAALC]; North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., 32 I.L.M. 1480, Sept. 14, 1993, *available at* http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm [hereinafter NAAEC].

109. *See* NAAEC, *supra* note 111, at art. 3 (requiring each Party to "ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations").

110. NAFTA does have a chapter on Safeguards (Ch. 8), but not one on the anti-dumping and countervailing duty laws of the parties. This is true even though neither Canada nor Mexico wanted anti-dumping in the agreement. *See* D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 278 (2008).

111. The United States refused to negotiate over the major agricultural barriers facing developing countries (production subsidies and tariff peaks on escalations) even in the hemispheric FTAA negotiations. It has never been on the table in any other U.S. FTA. *See* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 26, at 59 (noting that developed countries fail to offer increased market access for agriculture goods because they would face hostile and well organized industry lobbying efforts against such a move).

112. *See* HUFBAUER & SCHOTT, *supra* note 59, at 488.

113. This has changed somewhat in recent U.S. FTAs. The actual work of the agreements

NAFTA Secretariat, with a mandate to oversee dispute settlement and assist the Working Groups, was actually split into three national sections. All of the later U.S. FTAs share this limited governance aspect.[114]

With respect to dispute settlement, the NAFTA model also tried to limit administration. Instead of establishing a central dispute settlement authority, the NAFTA parties created three separate dispute systems.[115] These systems handle the major substantive issues covered by the agreement and controversial issues between the parties[116]—Chapter 11B for Investor/State arbitration,[117] Chapter 19 for bi-national review of Antidumping/Countervailing Duty determinations[118] and Chapter 20 for resolving claims of violations of the FTA's obligations.[119] The systems differ as to standing,[120] type of legal review[121] and the remedies/relief available.[122] Tailoring each dispute settlement system to these subjects allowed the NAFTA parties to deal with particular problems

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is done in sub-committees and working groups established for various subject matter area commitments. For an illustration, see CAFTA-DR, *supra* note 36, at art. 19.1(3) (giving the Free Trade Commission authority to delegate subcommittees and working groups power to modify the tariff phase-out schedule, common guidelines on tariffs and government procurement matters); *see also* U.S.-Peru FTA, *supra* note 38, at ch. 20.1.

114. *Compare* NAFTA, *supra* note 7, at ch. 20, *with* U.S.-Chile FTA, *supra* note 38, at ch. 21.

115. There are actually four systems for dispute settlement inside the original NAFTA text. The fourth one is a specialized dispute system for disputes in the financial sector. NAFTA, *supra* note 7, at ch. 19. NAFTA borrowed this idea from the U.S.-Canada FTA. It has not been used by the NAFTA parties.

In addition, there are dispute settlement mechanisms attached to both the NAALC and NAAEC. *See* NAALC, *supra* note 111, at arts. 27-41; NAAEC, *supra* note 111, at arts. 22-36.

116. In the U.S.-Canada FTA, Canada pushed for some solution to its belief that the United States was aggressive and unfair in its administration of its anti-dumping and countervailing duty laws. Rather than accept Canada's offer to harmonize legislation, the United States agreed to a bi-national review of final AD and CVD administrative determinations. Canada insisted that the system be carried over into NAFTA. *See* HUFBAUER & SCHOTT, *supra* note 59, at 199-200.

117. NAFTA, *supra* note 7, at ch. 11B.

118. *Id.* at ch. 19.

119. *Id.* at ch. 20.

120. In Chapter 11, a NAFTA investor/investment is allowed to bring suit against the host state which has failed to follow its investment obligations under NAFTA. In Chapter 19, a NAFTA firm facing an adverse AD or CVD determination by another NAFTA party gets its government to invoke bi-national review. In Chapter 20, one NAFTA Party may bring a claim against another Party. For a thorough review of these issues, see C. O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR*, 17 NW. J. INT'L L. & BUS. 850, 875-895 (1996/97).

121. In the Chapter 11 mechanism, an arbitral panel interprets Chapter 11A obligations based upon a claim of violation. In the Chapter 19 mechanism, an arbitral tribunal reviews the AD/CVD determination for whether it is consistent with the law of the administering country. In Chapter 20, the arbitral tribunal examines claims that there has been a nullification or impairment of benefits expected under NAFTA.

122. The Chapter 11 mechanism produces a binding arbitral award that can be enforced (for money damages) in court. In the Chapter 19 mechanism, the panel can affirm or reverse and remand the administrative determination. In the case of Chapter 20, the arbitral panel issues a report which can form the basis of a negotiated solution. *See* NAFTA, *supra* note 7, at chs. 11, 19, 20.

caused by each: in the case of Chapter 11, how to make investment rights credible for investors; for Chapter 19, how to counter the beliefs of Canada and Mexico and bias in the administration of U.S. unfair trade statutes; and for Chapter 20, how to allow for dispute resolution without compelling a solution.[123] The later U.S. FTAs have retained the separate dispute settlement feature with one large exception: no FTA after NAFTA contains the Chapter 19 bi-national review process.

The WTO-plus model retains every major element of the NAFTA model. What has changed is the focus of the model. In all recent FTAs, the United States has tried to expand the gains made in the Uruguay Round and NAFTA in the areas of trade in services, IP rights[124] and government procurement, or to include subjects that have resisted GATT/WTO discipline.[125] These changes were dictated by the desire of the United States to use FTAs as "models for success" for the WTO system.[126] The theory is that by including them in all regional agreements, the United States will be able to shift WTO Member States towards adopting these issues as a part of its future agenda. At the same time, other subjects have either been expanded or added to the WTO-plus model, notably Transparency/Anti-corruption,[127] Electronic Commerce,[128] and

123. Under NAFTA Article 2018, the parties to the dispute actually determine its outcome. Article 2018 provides: "On receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel, and shall notify their Sections of the Secretariat of any agreed resolution of any dispute." NAFTA, *supra* note 7, at art. 2018(1).

124. This had led to arguments that the U.S. approach with regard to some subjects, particularly intellectual property, is to seek more than the minimum standards negotiated for under the TRIPs Agreement in FTAs, producing an effect whereby: "[e]ach wave of bilateral free trade agreements contains more extensive intellectual property protections than the TRIPs Agreement . . . [a]nd, each subsequent bilateral agreement creates a new minimum standard for intellectual property rights." Rahul Rajkumar, *The Central American Free Trade Agreement: An End Run Around the Doha Declaration on Trips and Public Health*, 15 ALB. L.J. SCI. & TECH. 433, 448 (2005); *see also* PETER DRAHOS, UNITED KINGDOM COMM'N ON INTELLECTUAL PROP. RIGHTS, STUDY PAPER 8: DEVELOPING COUNTRIES AND INTERNATIONAL INTELLECTUAL PROPERTY STANDARD-SETTING 2 (2002, *available at* http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf.

125. Negotiations on investment rights were part of the Doha Agenda in 2001 but were withdrawn from the agenda by the WTO in the 2004 General Council after strong opposition at the 2003 Cancun Ministerial meeting. TRADE AND DEVELOPMENT REPORT 2007, *supra* note 26, at 61.

126. THE PRESIDENT'S TRADE POLICY AGENDA 2005, *supra* note 45, at 1.

127. The chapters on transparency and corruption provisions first appeared in the FTAs with Morocco. *See* U.S.-Morocco FTA, *supra* note 35, at ch. 18.1-18.4 (dealing with the traditional transparency issues of publishing all rules, regulations and the due process rights allowed citizens concerning notification, administrative proceedings and review and appeal of administrative or judicial proceedings), 18.5 (dealing with the anti-corruption obligation to adopt measures to criminalize corrupt payments). The other two FTAs negotiated and enacted at around the same time, the U.S.-Chile FTA and the U.S.-Australia FTA, have transparency obligations but no provision on anti-corruption. All of the recent FTAs (CAFTA-DR, the U.S.-Peru FTA and the pending FTAs with Panama, Colombia and KORUS) have a slightly expanded section on anti-corruption. *Compare* U.S.-Morocco FTA, *supra* note 35, *with* U.S.-

Trade Capacity Building.[129]

The reasons for the model's evolution and expansion are worth examining. In the case of two areas—investment and intellectual property rights—the model was changed to reflect experiences gained under NAFTA (investment) and to satisfy a powerful domestic interest group (intellectual property). Investment was always a crucial chapter for any U.S. FTA. The goal was two-fold—to encourage intra-regional investment flows by making them more secure,[130] and to encourage tariff-jumping investment by non-member country firms.[131] The drafting of Chapter 11 itself was closely based

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Peru FTA, *supra* note 38, at ch. 19B; U.S._Colombia FTA, *supra* note 20, at ch. 19B; U.S.-Panama FTA, *supra* note 20, at ch. 18B. The provision on anti-corruption in the KORUS FTA is closer to that in the U.S.-Morocco FTA. *See* KORUS, *supra* note 20, at Art. 21.6.
Transparency has always been a core principal of U.S. FTAs. *See* NAFTA, *supra* note 7, at art. 102(1) (transparency is listed as one of the principles of the agreement in Article 102, which sets out the objectives of NAFTA).

128. The chapters on electronic commerce were first added to the model in the agreements with Chile, Singapore, Australia and Morocco. *See* U.S.-Chile FTA, *supra* note 38, at ch. 15; U.S.-Singapore FTA, *supra* note 33, at ch. 14, U.S.-Australia FTA, *supra* note 38, at ch. 16; U.S.-Morocco FTA, *supra* note 35, at ch. 14.

129. Trade Capacity Building was first added to U.S. FTAs in the CAFTA-DR. *See* CAFTA-DR, *supra* note 36, at ch. 19 (entitled Administration of the Agreement and Trade Capacity Building). Similar provisions are in the U.S.-Peru FTA (ch. 20), U.S.- Panama FTA (ch. 19) and Colombia-U.S. FTA (ch. 20). *See* U.S.-Peru FTA, *supra* note 38, at ch. 20; U.S.-Panama FTA, *supra* note 20, at ch. 19, Columbia-U.S. FTA, *supra* note 20, at ch. 20. Befitting South Korea's level of economic development, KORUS lacks any trade capacity building provisions.
The United States coordinates trade capacity building assistance through the U.S. Agency for International Development (USAID). Trade capacity building was aimed at assisting countries with accession to and implementation of WTO agreements, and to "build the physical, human, and institutional capacity to benefit more broadly from a rules-based trading system." GAO, FOREIGN ASSISTANCE: U.S. TRADE CAPACITY BUILDING EXTENSIVE BUT ITS EFFECTIVENESS HAS YET TO BE EVALUATED, GAO-05-150, at 3 (2005)[hereinafter GAO 2005 REPORT], *available at* http://www.gao.gov/new.items/d05150.pdf. The connection to U.S. FTAs is the existence of a USAID/USTR interagency group formed to assist countries involved in free trade negotiations. Such efforts were made with regard to CAFTA. *Id.* at 3-4. Congress began to appropriate funds for trade capacity building programs in 2003 and 2004. *Id.* at 6-7. The largest proportion projects funded out of TCB were for trade facilitation—which includes, among other things, customs operation and administration and regional trade agreement capacity (defined as "to increase the ability of regional trade agreements and individual countries to facilitate trade and help potential regional trade agreement members.") *Id.* at 9, Tbl. 1.
TCB Projects aimed at the Latin American FTA partners of the United States include a project in Central America to improve labor law compliance and a project in El Salvador to help Salvadoran food producers meet SPS standards regarding exports of fruits and vegetables. *Id.* at 13-14. The USAID approach to regional economic growth in Central America has been done by "taking stocks of each government's capabilities through diagnostic tools." *Id.* at 22.

130. This motivation was quite strong in the case of NAFTA given Mexico's history of strict regulation of investment and its embrace of the Calvo Doctrine. *See generally* HUFBAUER & SCHOTT, *supra* note 59, at 201-02.

131. NAFTA achieves this by granting the Chapter 11A rights to NAFTA investors/investments which allows non-party state firms to take advantage of them. *See* NAFTA, *supra* note 7, at art. 1101(1).

on the U.S. model Bilateral Investment Treaty (BIT).[132] Chapter 11A on investment rights covers all of the same rights in the model BIT—national treatment, most-favored-nation treatment, minimum standard of treatment, expropriation and compensation, transfers, performance requirements, and hiring of Senior Management and Board of Directors. Given the experience of the U.S. under the BIT regime, which began in 1980, it was believed that the core obligations and their reach were well understood. NAFTA also borrowed the idea that the rights had to be made effective through neutral investor/state arbitration from the model BIT.

The WTO-plus model version of the investment chapter differs largely in its treatment of two of the core rights—minimum standard of treatment and expropriation/compensation. Aggrieved NAFTA investors have made heavy use of the Chapter 11B system to challenge government measures in all three NAFTA states. In almost every arbitration, claims were made based on the Minimum Standard of Treatment (Article 1105) and/or Expropriation (Article 1110). Expansive readings of both of these provisions by multiple arbitral tribunals[133] inspired the NAFTA parties to issue interpretations of these provisions and the United States to alter its model BIT and future FTA investment chapters.[134] With regard to both provisions, the governments were concerned by arbitral interpretations that limited government regulatory power. The revisions to the chapter, therefore, return power to the state and

132. The first model BIT was done in 1981, revised in 1994 and 2004 and is now undergoing a revision process started by the Obama Administration. *See* Joel C. Beauvais, *Regulatory Expropriations Under NAFTA: Emerging Principles and Lingering Doubts*, 10 N.Y.U. ENVTL L.J. 245, 252-53 (2002) (on the initial history); U.S. DEPARTMENT OF STATE, Bilateral Investment Treaties and Related Agreements, *available at* www.state.gov/e/eeb/ifd/bit (for a discussion of the 1994 revision and a copy of the 2004 Model BIT); Damon Vis-Dunbar, *United States reviews its model bilateral investment treaty*, INVESTMENT TREATY NEWS, June 5, 2009, *available at* www.investmenttreatynews.org/cms/news/archive/2009/06/05/united-states-reviews-its-model-bilateral-investment-treaty.aspx (for a discussion of the goals behind the revision process).

133. The U.S. experience with investor-state arbitration has led to a significant revision of two major provisions of Chapter 11, Minimum Standard of Treatment (Art. 1105) and Expropriation (Art. 1110). For an analysis of how the results in Chapter 11 arbitrations altered the investment chapter model FTA, see Meg Kinnear & Robin Hansen, *The Influence of Chapter 11 in the BIT Landscape*, 12 U.C. DAVIS INT'L L. & POL'Y 101, 106-12 (2005); David A. Gantz, *The Evolution of FTA Investment Provisions from NAFTA to the United States-Chile Free Trade Agreement*, 10 AM. U. INT'L L. REV. 679 (2004).

134. Core provisions of Chapter 11 have been renegotiated and redrafted to clarify the meaning of concepts. *Compare* NAFTA, *supra* note 7, at arts. 1105, 1110, *with* U.S.-Peru FTA, *supra* note 38, at arts. 1105, 1110, Annexes 10-A, 10-B.

Investor-state arbitrations may also have been one of the reasons why some recent FTAs do not contain dispute settlement provisions in competition policy chapters. Sokol, *supra* note 113, at 274. There are not even any competition chapters in the recent CAFTA-DR, Morocco, or Bahrain FTAs. *Id.* at 258. According to Sokol, the United States is not the country pushing for such chapters. *Id.* at 258-59. "The United States' position may be best described as one that does not oppose competition policy chapters so long as the chapters remain non-binding and the PTA counter-party finds the inclusion of such a chapter to be important." *Id.*

correspondingly limit the types of complaints that can be made under the system.

In the case of IP rights, the WTO-plus model has gone in the opposite direction. In response to a coordinated effort by industry, the United States Trade Representative (USTR), working in conjunction with industry and the IP advisory group for FTAs, has developed a "model FTA intellectual property text," which greatly expands the rights of IP holders[135] beyond those required by the Trade-Related Intellectual Property Rights Agreement (TRIPs) of the WTO and NAFTA. The WTO-plus approach has been to go beyond the TRIPs/NAFTA emphasis on establishing minimum standards to imposing the intellectual property standards of a developed country.[136] This has been achieved by limiting what is non-patentable,[137] limiting government regulatory power[138] and expanding the terms of the two major forms of IP rights—patent and copyright.[139] FTA negotiations are judged as successful based on how

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135. REPORT OF THE INDUSTRY TRADE ADVISORY COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS (ITAC 15), THE U.S.-PERU TRADE PROMOTION AGREEMENT (TPA): THE INTELLECTUAL PROPERTY PROVISIONS 3 (2006), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Reports/asset_upload_file473_8978.pdf [hereinafter PERU ITAC REPORT]. The exact same language is used in the ITAC-15 report for the pending U.S.-Panama FTA. *See* REPORT OF THE INDUSTRY TRADE ADVISORY COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS (ITAC 15), THE U.S.-PANAMA TRADE PROMOTION AGREEMENT (TPA): THE INTELLECTUAL PROPERTY PROVISIONS 3 (2007), *available at* http://ustr.gov/assets/Trade_Agreements/Bilateral/Panama_FTA/Reports/asset_upload_file960_11234.pdf [hereinafter PANAMA ITAC REPORT].

136. The ITAC-15 report on the U.S.-Peru FTA states that "the fact that Peru found it in its own interest to significantly increase its levels of IPR protection beyond that required by TRIPs is testament to the principle that high levels of protection benefits indigenous creators and inventors in the same manner as they do in developed countries." PERU ITAC REPORT, *supra* note 138, at 5.

137. In recent FTAs, U.S. partners have agreed to patent plants—an area that was left as one a country could consider non-patentable under TRIPs. *See* TRIPs, *supra* note 16, at art. 27(3)(b) (for the Trips exclusion) and compare with U.S.-Chile FTA, *supra* note 38, at art. 17.9 (providing for no exclusions). In the most recently adopted U.S. FTA with Peru the language on this issue has shifted again. *See* U.S.-Peru FTA, *supra* note 38, at art. 16.9 (2)(noting that "Nothing in this chapter shall be construed to prevent a Party from excluding inventions from patentability as set out in Articles 27.2 and 27.3 of the TRIPS Agreement. Notwithstanding the foregoing, a Party that does not provide patent protection for plants by the date of entry into force of this Agreement shall undertake all reasonable efforts to make such patent protection available consistent with paragraph 1.").

138. There has been a push by USTR to negotiate for a provision that would limit an FTA partner's ability to use compulsory licensing. *See generally* Rajkumar, *supra* note 127, at 441-43, 474, for what TRIPs allows on the issue in recent FTAs.

139. In recent FTAs, the United States has pushed for the extension of the copyright term closer to the U.S. levels of 'life of the author' plus ninety-five years. It has only achieved that commitment with Oman. In the Peru and Panama agreements, the countries would only agree to what ITAC-15 calls the compromise seventy years. PERU ITAC REPORT, *supra* note 139, at 12. This goes well beyond the TRIPs minimum standard of fifty years. TRIPs, *supra* note 16, at art. 12.

With regard to patents, the protection offered would be extended if the issuance of the patent was subject to "unreasonable delay." U.S.-Peru FTA, *supra* note 38, at art. 16.9(6)(b). Since developing countries frequently take longer to issue patents than developed countries, this

closely these extensions of IP rights come to U.S.-level standards.[140] The WTO-plus IP chapter also emphasizes the importance of the enforcement obligations that FTA partner governments must undertake,[141] and it greatly expands all of the types of remedies that must be made available.[142] The overall effect of these IP additions is to limit the ability of FTA partners to make their own decisions about how to regulate intellectual property.[143]

The additions of the chapters on electronic commerce, transparency/anti-corruption and trade capacity building have come in response to changes in the nature of trade (electronic commerce) and the shift in FTA partners (transparency/anti-corruption and trade capacity building). The largest proportion of recent FTAs has been entered into with developing countries.[144] In order to aid these Latin American FTA partners, there has been a dedicated attempt to help improve governance and adherence to the rule of law through

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provision will ensure a patent holder the full enjoyment of the patent term. In the U.S.-Peru FTA, "unreasonable delay" was the later of five years from filing or three years after an examination request. PERU ITAC REPORT, *supra* note 139, at 15. In earlier FTAs, USTR had negotiated even better terms—the later of four years from filing or two years from examination. *Id.*

On patents, the FTAs also prohibit the marketing approval of generic drugs during the term of the drug patent. This provision effectively extends the life of the patent since competing companies must often wait until after the patent has run to produce a competing product. *See generally* Rajkumar, *supra* note 127, at 461-468 (discussing this issue in light of the CAFTA-DR FTA provisions).

140. *Id.* at 5. The industry advisory committee urges USTR to obtain U.S. level standard—as was done in several of the MEFTAI bilateral FTAs in future agreements.

141. *Id.* at 19. The United States wants its FTA partners to accept such standards because despite long term success at obtaining multilateral discipline through rulemaking, the United States still continues "to suffer billions of dollars in losses due to global piracy, counterfeiting and other infringements of rights provided in TRIPs (and in the various FTAs)—primarily due to ineffective enforcement by these trading partners." *Id.* at 18.

It is relatively easy for a developing country to legislate new IP rights protection. It is significantly more difficult to enforce those obligations. The implementation costs are significant and no FTA provides assistance regarding this issue. For a review of the implementation cost point, see J. MICHAEL FINGER, THE DOHA AGENDA AND DEVELOPMENT: A VIEW FROM THE URUGUAY ROUND 8-12 (Asian Development Bank 2002) (describing the implementation costs for IP rights obligations).

142. *See* U.S.-Peru FTA, *supra* note 38, at art.16.11 (11-17) (civil remedies), art. 16.11 (18-25) (provisional remedies), art. 16.11 (26-28) (criminal remedies); PERU ITAC REPORT, *supra* note 139, at 19-20.

143. *See* Kenneth C. Shadlen, *Globalisation, Power and Integration: The Political Economy of Regional and Bilateral Trade Agreements in the Americas*, 44 J. DEV. STUDIES, 1, 11 (2008) (noting that the government limitations on the monopoly given by patents—"how easy or difficult it is to obtain a patent, how long the exclusive rights last, and the extent to which the holder can exclude others from freely using the idea"—are those developing countries use to get access to foreign innovations). It is in exactly these areas that the WTO-plus model IP chapter limits those regulatory powers by developing countries.

144. For example, in the case of the CAFTA-DR FTA all of the participating Central American countries, except for Costa Rica, were classified as lower income or lower middle income countries by the World Bank in 2005 (the year CAFTA-DR entered into force). *See* World Bank, World Development Report 2005: A Better Investment Climate for Everyone 254-255.

the expansion of transparency obligations throughout the FTA text and in the adoption of anti-corruption provisions.[145] The addition of trade capacity building to the WTO-plus model was also inspired by realizations that some FTA partners needed basic assistance to benefit from and adjust to the integration of free trade disciplines.[146]

III. WHAT DOES IT MEAN TO DEVELOP AND USE A MODEL?

Given the model-driven nature of U.S. regionalism, it is important to analyze the consequences of a model-based system for participating countries. What follows, therefore, is an analysis of the benefits and disadvantages inherent in the use of models. This analysis will begin with the effects of the model on the country producing it—the United States. The benefits to the United States will be examined in order of their importance. The paramount benefit of the use of the model, and one that is enhanced as long as it is used as a baseline and subjected to review and reworking, is that it allows the United States to focus on pushing its agenda on areas of major interest—trade in services, IP rights, investment and government procurement. The United States has succeeded in getting FTAs that cover issues or extend coverage on issues rejected by the multilateral system. Each FTA either covers the areas of greatest comparative advantage (trade in services, creation of intellectual property, and investment capacity), or is built around an attempt to achieve

145. By placing the transparency obligations in a separate chapter, the WTO-plus model attempts to underscore the connection between good governance and strong economics. Anti-corruption is now also widely regarded as one of the biggest constraints facing developing countries as they pursue economic growth. The World Bank with its mission of eradicating poverty, for example, has made anti-corruption one of its key priorities—aiming its efforts at World Bank projects. At the same time the topic has attracted a great deal of attention on the issue of the link between corruption and development. For a summary of the issues involved see Omar Azfar, Young Lee & Anand Swamy, *The Consequences of Corruption*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 50-53 (2001) (noting that the studies which have examined the link between corruption have found corruption has a negative impact on both the rate of investment and GDP growth of countries and that better institutional quality is linked to economic growth).

146. TCB Projects aimed at the Latin American FTA partners of the United States include: a project in Central America to improve labor law compliance and in El Salvador a project to help Salvadoran food producers meet SPS standards with regard to exports of fruits and vegetables. GAO 2005 REPORT, *supra* note 132, at 13-14. The USAID approach to regional economic growth in Central America has been "taking stocks of each government's capabilities through diagnostic tools." *Id.* at 22.

During negotiations for recent FTAs, particularly those in Central America and the Andean region, there has been a TCB working group led by USTR aimed at helping the countries deal with implementing the FTAs. *Id.* at 26. USTR suggests trade capacity building initiatives, but actual projects are worked out later. *Id.*

In its most recent self-report to the WTO, the United States described FTAs as capable of contributing to the multilateral system by "introducing innovation and strengthened disciplines" and that TCB is a "critical part of the United States' strategy to help developing countries to implement and take advantage of market-opening and reform-oriented trade agreements." US/TPR, *supra* note 17, at 14, 22.

U.S.-level standards (IP rights[147] and government procurement procedures), or both. The flexibility of the model also allows the United States to emphasize issues (such as transparency) or add new items (anti-corruption and capacity building) that may help the FTA work more effectively.

Another benefit of the use of the model relates to the efficiency and leverage capacity of negotiations themselves. The negotiations begin with the model being offered as the starting point and, on many issues, the ending point. This allows the negotiations for a complex agreement to be achieved within a few years and at a lower cost in human and financial resources.[148] No major derogation is allowed by any developing country FTA partner.[149] Since the United States does not have to start from scratch each time it negotiates a FTA, politically sensitive issues that have already been dealt with via inclusion in the model in a particular manner[150] or exclusion[151] from the model will remain under control. This, in turn, allows the USTR to focus U.S. leverage in negotiations on specific barriers or problems it has with an FTA partner or particular gains it hopes to make. For example, in the case of South Korea, the United States wanted to address long-standing concerns regarding Korean standards that limited U.S. market access. The United States wanted to open up the relatively closed automobile sector in that country.[152] In the case of Panama, the United States was anxious to secure the best possible access to government procurement in order to benefit from the forthcoming major

147. *See generally* PERU ITAC REPORT, *supra* note 139, for a discussion of this issue.

148. One of the factors the USTR considers in evaluating FTA partners and its regionalism agenda is the issue of government constraints. GAO 2004 REPORT, *supra* note 46, at 10. According to the USTR, this issue of U.S. constraints deals primarily with its ability to staff negotiations. *Id.*

149. In the case of the U.S.-Australia FTA, the United States did agree that the investment chapter did not have to include the investor-state dispute settlement mechanism. Two other FTAs are also without this feature. In the case of the U.S.-Jordan FTA, that agreement was drafted before the model was set. The United States later closed the gap by entering into a BIT with Jordan. In the case of the U.S.-Bahrain FTA, the United States had already entered into a BIT with that country and so had access to invest disputes through that treaty. *See* U.S.-Bahrain, Bilateral Investment Treaty, May 31, 2001, *available at* http://tcc.exprt.gov/trade_Agreements/All_TradeAgreements/exp_002777.asp. The U.S.- Bahrain BIT went into force in 2001 while the U.S.-Bahrain FTA did not go into effect until 2006.

150. For example, despite the critiques aimed at the rules of origins used in the model FTA, the rules have not really been altered. Undoubtedly this is because of the effective pressure of industry groups seeking protection. *See generally* Hufbauer & Schott, *supra* note 59, at 474-475.

151. The obvious areas here are labor mobility and the unfair trade statutes.

152. Press Release, USTR, United States and the Republic of Korea Sign Landmark Free Trade Agreement (June 30, 2007), *available at* www.ustr.gov/Documents_Library/Press_Releases/2007/June/United_States_the_Republic_of_Korea_Sign_Landmark_Free_Trade_Agreement.html (noting that "KORUS FTA marks an unprecedented step in eliminating the tariffs and non-tariff barriers that U.S. automakers have identified as the impediments to their success in Korea's large market"); *see also* JEFFREY J. SCHOTT, PETERSON INST. FOR INT'L ECONOMICS, THE KOREA-U.S. FREE TRADE AGREEMENT: A SUMMARY ASSESSMENT (2007), *available at* http://www.petersoninstitute.org/publications/pb/pb07-7.pdf.

expansion of the Panama Canal.[153]

The United States also satisfies foreign policy goals with relatively little cost through the use of the model FTA. With its relatively open markets (in both trade in goods and services as well as government procurement) and its highly developed standards, the United States does not have to devote major resources or efforts to implementing its model FTA. However, the same cannot be said of any of its developing country FTA partners.[154] Through the process of negotiating and assisting in implementation of the agreement with its partner, the United States solidifies its access to the existing and future governments of the partner. Even the shallow economic integration with the United States achieved by a free trade agreement makes it difficult, if not impossible,[155] for an FTA partner to withdraw from the agreement. In turn, having common economic goals with the United States makes it harder for an FTA partner to ignore U.S. input or counsel with regard to domestic policymaking and at the multilateral level.[156]

Finally, there is the benefit of increased market access that comes from the use of a model FTA aimed at developing countries. Although an FTA deals with economic integration, the actual U.S. gains here are not significant given overall U.S. market size. The developing country partner, however, inevitably has higher tariffs, tariff-rate quotas and standards barriers that have made market access more difficult. Even if the developing country negotiated well, by protecting sensitive sectors of trade for as long as possible, U.S. market access will improve over the long run. The United States also obtains what USTR describes as a "level playing field" with a developing country FTA partner. Since most of the U.S. FTA partners receive some, and often high levels of, duty free access to the U.S. market, the FTA replaces such preferences with reciprocity.[157]

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153. Press Release, USTR, U.S. and Panama Complete Trade Promotion Agreement Negotiations (Dec. 19, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/December/US_Panama_Complete_Trade_Promotion_Agreement_Negotiations.html?ht= (noting that the agreement would provide significant opportunities "to participate in the $5.25 billion expansion plan" for the Canal).

154. Developing country FTA partners must devote significant resources to not only passing and implementing legislation but also to enforcement, particularly with regard to IP rights.

155. Every U.S. FTA provides the parties with the right to withdraw from the agreement within six months if it provides notice of withdrawal to the other parties. *See* NAFTA, *supra* note 7, at art. 2205. However, it would be quite costly for parties to withdraw, and that option has never been seriously considered by any FTA partner.

156. The United States has used the regionalism process to form alliances with developing countries that otherwise might belong to a WTO group adverse to its interests. *See* GAO 2004 Report, *supra* note 46, at 10, 52.

157. The Generalized System of Preferences is the largest U.S. preference program—it allows developing countries duty free access to the U.S. market GSP for thousands of products from over 100 designated, beneficiary countries. USTR, A GUIDE TO THE U.S. GENERALIZED SYSTEM OF PREFERENCES: GUIDEBOOK 3 (2006), *available at* http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/General_GSP_Program_Information/Section_Index.html (select "U.S. Generalized System of Preferences Guidebook"). The current version, which

There are disadvantages to the United States from the use of the model. These can be categorized as those having primarily domestic consequences and those affecting U.S. multilateral interests. On the domestic side, the use of the model tightly links the U.S trade agenda to the political agenda of the Executive and his party. The power sharing over trade between Congress and the Executive has not been well managed since before NAFTA.[158] There is a split between the parties[159] over the shape and content of FTAs, as evidenced by the close votes on almost every recent FTA and the divide over how and when to extend Trade Promotion Authority (TPA). For example, in 2007, the Bush Administration was forced to accept a Bi-Partisan Trade Deal that required the USTR to alter the model and renegotiate all of the pending FTAs with Panama, Peru and South Korea to reflect demands by the Democrats.[160] At one level, this reworking of the model signifies the reality of power sharing. At another level, it demonstrates that the Executive Branch can push its particular agenda into the model FTA so effectively that it loses touch with Congress.

Another disadvantage of the model with domestic and multilateral ramifications is that the use of a model freezes thinking. The United States has not revisited the basic premises of the NAFTA and the WTO-plus models over the last fifteen years. Is the model—most noted for pushing the U.S. agenda on deep integration issues—a good model? Undoubtedly, the use of the WTO-plus model satisfies all U.S commercial goals and builds up some support for its agenda on deep integration issues. However, the focus on "competitive liberalization" has undercut irreplaceable U.S. leadership at the WTO, the better and more just forum for trade liberalization. Even with the efficiency gains achieved through the use of the model, this U.S. brand of "aggressive regionalism" has diverted attention and negotiating resources from multilateral negotiations. Moreover, the insistence on the model has also alienated countries that have resisted the U.S. approach.

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has been enacted multiple times, expires at the end of 2008. The Caribbean Basin Initiative (CBI), 19 U.S.C. § 2702 (2004), was first passed in 1983 and expanded in 2000 and 2002 in order to help countries in the area access the U.S. market. THE PRESIDENT'S 2008 TRADE POLICY AGENDA, *supra* note 19, at 130. The Andean Trade Preference Act, Pub. L. No. 102182, 105 Stat. 1233 (1991), was passed to aid the Andean countries in their efforts to develop spur regional economic development to provide "economic alternatives to the illegal drug trade promote domestic development, and thereby solidify democratic institutions." THE PRESIDENT'S 2008 TRADE POLICY AGENDA, *supra* note 19, at 129.

158. See generally Taylor, *supra* note 15, at 15-23, for a discussion of the reasons why it is difficult for Congress and the Executive Branch to share trade policy power.

159. *See* VAN GRASSTEK, *supra* note 47, at 7 (noting the difference between the Republicans and Democrats on FTAs and providing a complete breakdown of all trade votes illustrating the differences).

160. USTR, Peru and Panama FTA Changes (May 10, 2007), *available at* http://www.bilaterals.org/IMG/pdf/05_14_07.pdf. The deal required the changes to the three pending FTAs (Panama, Colombia, South Korea) with regard to labor rights and environmental issues—including placing all disputes on the obligations in those chapters into the regular dispute settlement mechanisms of each FTA—and with regard to IP rights. The IP rights provisions were notable for pulling back from the model IP text on issues related to pharmaceutical patents.

A final disadvantage to the United States from the use of the model FTA comes from the very thing that makes it successful. The market size and wealth of the United States give it great leverage over its FTA partners. By insisting upon the model FTA, the U.S. approach is, and is seen as, an expression of power. This raises the issue of whether an imposed model of economic growth and development can be a successful "legal transplant." As noted by Alan Watson, legal transplants are a common and fertile source of legal development.[161] However, one way to judge a "successful legal transplant" is to assess whether it continues to grow and develop in its new setting.[162] The model FTA offers a "one size fits all" prescription (largely based on developed country standards) for countries at different stages of development and facing different constraints. If the transplanted legal FTA regime fails to assist with economic growth and development, not only will the FTA partner suffer, but the credibility of U.S.-led trade lawmaking will also be undermined.The benefits of the model FTA for developing countries are easier to delineate. The chance to obtain secure access to the large U.S. market and increased foreign direct investment (FDI) motivate developing countries to seek out or accept FTAs with the United States. Entering a reciprocal FTA frees a developing country from having to count on the more limited and uncertain world of preference programs. Moreover, the experience of Mexico under NAFTA suggests that increased market access will occur.[163] As for investment, developing countries—at least those chosen as U.S. FTA partners—need capital infusions. It is the search for investment that has led many of these

161. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (Univ. of Ga. Press 1993) (1974).

162. *Id.* at 27.

163. Mexico does provide a model of what can happen to a developing country entering into an FTA with a major developed trading nation. Mexico has clearly seen an increase in trade and investment flows. Without NAFTA, Mexico's global exports would have been twenty-five percent lower and investment levels would have been forty percent lower. WORLD BANK, LESSONS FROM NAFTA FOR LATIN AMERICAN AND THE CARIBBEAN COUNTRIES 5 (2005), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:20393778~pagePK:146736~piPK:146830~theSitePK:258554,00.html.
Before NAFTA, Mexico faced a trade deficit with the United States. Ten years after its entry into force it was running a trade surplus of $28.9 billion. *See* Ranko Shakri Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me . . . What, Exactly: An Assessment of the Economic, Social and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 74 (2007). Mexico is also a more important trading partner of the United States—the second most important market for U.S. agriculture exports. Press Release, USTR, U.S.-Mexican Officials Meet to Discuss NAFTA (Jan. 11, 2008), *available at* http://www.ustr.gov/Document_Library/PressReleases/2008/January/U.S_Mexican_Officials_Meet_to_Discuss_NAFTA.html; *see also* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 26, at 70 (noting the increase in intraregional trade for Mexico as a result of NAFTA and the focus of those exports on the United States, so that Mexico is "the developing country with the highest concentration of exports to a single destination and the one with the largest increase in export opportunities from world import demand growth").

same countries to sign BITs.[164] The chances for obtaining more FDI are measurably increased by a U.S. model FTA.[165] U.S. investors have tended to follow its commitments under FTAs. It is true that to obtain the benefits, the developing country will have to participate, and potentially lose, in investment arbitrations. However, the revised investment chapter of the WTO-plus model does offer more clarity to a partner about its exposure and arguably more regulatory power.

Two other benefits from U.S. FTAs have been recognized. First, there is a "lock in" effect achieved by entering into and implementing FTAs.[166] Second, by adopting the U.S. FTA, the developing country avoids isolation. No developing country facing the decision of whether to enter into a FTA with the United States acts without considering its position in relation to other countries.[167] All U.S. trading partners face competition from Asia,[168] particularly the Latin American developing countries, and all have significant export relationships with the United States.[169] These partners were put at a

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164. *See generally* Andeas Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 126 (2003) (discussing the rationales for entering BITs); Jeswald W. Salacuse, *Do Bits Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67, 77-111 (2005) (describing the bargain as "a promise of protection in return for the prospect of more capital in the future" and explaining that his study reveals that the bargain has worked).

165. If Mexico is used as a model, this appears to be the case. TRADE AND DEVELOPMENT REPORT 2007, *supra* note 26, at 74 (investment levels almost quadrupled from the period before NAFTA (1990-94), when they averaged $5 billion per year, to 2000-2004, when they averaged $19 billion per year).

166. What countries try to "lock in" are trade reforms. *See generally* Robert E. Hudec, *GATT's Influence on Regional Arrangements*, *in* NEW DIMENSIONS IN REGIONAL INTEGRATION 151, 153 (Jaime de Melo & Arvind Panagariya eds., Cambridge Univ. Press 1993). Hudec notes that: "Many of the developing countries responsible for the current wave of [regional arrangement] negotiations are often hoping to use [regional arrangement] negotiations to 'lock in' recently adopted trade policies—an objective that will be served by the greatest possible compliance with Article XXIV. Thus, this time around, we may well see a strong pressure for compliance with Article XXIV from the member developing countries themselves." *Id.*; *see also* WORLD BANK, DR/CAFTA: CHALLENGES AND OPPORTUNITIES FOR CENTRAL AMERICA 29-32 (2005) [hereinafter DR-CAFTA REPORT] ("For Central American nations, locking many of the reforms of recent years with an FTA that is costly to violate should generate a credibility effect that could boost investment levels.").

167. Once the United States announced that it would negotiate an FTA with Mexico, there was a shift in the "status quo of trade relations" in the Americas. Other countries in the region, which were also heavily trade dependent on the United States, were faced with trade diversion. Many of these, such as Chile, Brazil, Argentina, Uruguay and Paraguay, approached the United States about free trade negotiations. The United States encouraged the last four to form a regional group. Richard E. Baldwin, *A Domino Theory of Regionalism*, *in* TRADING BLOCS 487-88 (MIT Press 1999); *see also* Shadlen, *supra* note 146, at 12-14.

168. *See generally* Enrique Dussel Peters, *What Does China's Integration to the Global Economy Mean for Latin America? The Mexican Experience*, *in* THE POLITICAL ECONOMY OF HEMISPHERIC INTEGRATION: RESPONDING TO GLOBALIZATION IN THE AMERICAS 58-81 (Diego Sanchez-Ancochea & Kenneth C. Shadlen eds., Palgrave Macmillan 2008).

169. The United States is the major market for all of the recent Latin American FTA partners. *See generally* Shadlen, *supra* note 146, at 3-8. These countries send a greater

disadvantage once Mexico entered into NAFTA. This drove Central American countries and the Dominican Republic to move ahead, even the less enthusiastic ones like Costa Rica.[170] A similar concern faced Peru once Colombia began FTA negotiations.[171] There is also evidence that developing countries agree to U.S. FTAs because the domestic interest groups (exporting firms operating in export-processing zones) are more influential than other groups regarding the shape and direction of trade.[172]

The disadvantages for the developing countries from the model FTA are significant and challenging. The developing country FTA partner lacks any leverage to get market access breakthroughs that would provide it with the greatest trade benefits. The U.S. refuses to negotiate on issues that would open up the agriculture market in FTAs. The model FTA, with its restrictive rules of origin, also keeps the textiles/clothing market more closed off than any other area of trade, except for agriculture.[173] Moreover, if the rules of origin are complex enough, developing country firms face onerous compliance and record-keeping costs that can lead to under-utilization of market access benefits. If the developing country has negotiated tariff phase-outs well, it may be able to handle the inevitable adjustment that comes from a reciprocal FTA. If not, the developing country could face significant unemployment in sectors, such as agriculture, where it faces highly competitive[174] U.S. import competition.

By adopting a U.S. model FTA, a developing country takes on not only legal rules[175] but also substantial enforcement costs (in an area such as

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proportion of their exports to the United States than to one another. Only 13.2% of Latin American exports were intra-regional. NATHALIE AMINIAN, K.C. FUNG & FRANCIS NG, WORLD BANK, POLICY RESEARCH WORKING PAPER NO. 4546, INTEGRATION OF MARKETS VS. INTEGRATION BY AGREEMENTS (2008), *available at* http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2008/03/04/000158349_20080304084358/Rendered/PDF/wps4546.pdf.

170. *See* Shadlen, *supra* note 146, at 12-13. Costa Rica could not enact CAFTA-DR without a public referendum, which was held on October 7, 2007. The FTA was approved by the slimmest of margins (51.48% in favor to 48.42% against). *ICT Chamber Outlines Benefits of FTA for IT Industry*, *supra* note 36. Costa Rica has had to request an extension of its March 2008 deadline in order to pass all of the implementing legislation needed to enact its FTA obligations. *Costa Rica To Request Extension for Deadline To Enter CAFTA*, *supra* note 36.

171. Shadlen, *supra* note 146, at 13.

172. *Id.* at 14.

173. In recent FTAs with Latin American countries, these chapters are crucial. Since the textile sector is still relatively undisciplined, like agriculture, a U.S. FTA partner must try to negotiate provisions which will allow the greatest market access possible. The textile rules receive extended treatment in CAFTA-DR. In CAFTA-DR, the United States did agree to phase out all remaining multilateral quotas, but it obtained a special safeguard measure for textile imports. The parties also agreed to special customs cooperation procedures to aid in dealing with rule of origin issues. *See* CAFTA-DR, *supra* note 36, at arts. 3.22, 3.23 and 3.24.

174. U.S. agriculture is not only highly efficient but subsidized. A developing country facing such imports can be severely disadvantaged. *See* Oliver, *supra* note 166, at 76-89; DR-CAFTA REPORT, *supra* note 169, at 34.

175. Even drafting the implementing legislation can be a complicated process for a developing country. For example, a key to dealing with U.S. FTA intellectual property obligations is drafting implementing legislation that covers all of the issues. The United States

intellectual property).[176] Scarce resources must be allocated to achieve FTA goals or the developing country will fail to derive the benefits of the agreement and face U.S. displeasure or disputes. Even more importantly, a developing country loses policy space when it accepts a U.S. FTA.[177] Some of the possible government interventions that might aid a domestic industry, such as investment restrictions, government procurement set-asides, the limitation of IP rights and subsidizing exports, for example, are foreclosed by the model FTA.[178] The final disadvantage of the U.S. model is its failure to confront its subjects. The status of the FTA partners as developing countries facing almost every type of resource constraint is largely unacknowledged. Transition periods for phasing in obligations that might assist with adjustment exist only in the trade in goods part of the FTA.[179] In contrast, the model FTA has strictly limited phase-in for undertaking intellectual property rights obligations. In recent FTAs, these average only two to three years.[180]

There has been more of an effort to offer adjustment and implementation assistance through trade capacity building. The WTO-plus model FTA has provisions that establish a Trade Capacity Building (TCB) Committee for each agreement.[181] There is no textual commitment, however, for financial resources

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has discovered in dealing with FTA partners that even this first step is difficult. In its report on the U.S.-Panama FTA, the ITAC-15 advisory group noted that at least one FTA partner (Bahrain) had implemented non-compliant legislation and urged USTR to carefully "review all implementing legislation after it has been adopted to ensure that no FTA enters into force until compliance is achieved." PANAMA ITAC REPORT, *supra* note 138, at 3.

176. One of the reasons why developing country FTA partners have a difficult time with the U.S. model IP requirements is that enforcement costs can be steep.

177. *See generally* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 26, at 57-65, for a complete analysis of all of the ways in which a developing country entering into a North-South FTA can lose policy space. *See also* Luis Abugattus & Eva Paus, *Policy Space for a Capability-Centered Development Strategy for Latin America* 113-43, *in* THE POLITICAL ECONOMY OF HEMISPHERIC INTEGRATION, *supra* note 169 (Abugattus and Paus discuss not only the loss of policy space as a general issue but also particular ways this is experienced by the Latin American FTA partners); DANI RODRIK, THE NEW DEVELOPMENT ECONOMICS: WE SHALL EXPERIMENT, BUT HOW SHALL WE LEARN? 24-28, *available at* http://kgshome.harvard.edu/~drodrik/the%20New%Development%20Economics.pdf.

178. *See* Dani Rodrik, *How To Save Globalization from its Cheerleaders* 13-15 (Sept. 2007) http:ksghome.harvard.edu/~drodrik/saving%20globalization.pdf; Yong Shik Lee, *Foreign Direct Investment and Regional Trade Liberalization: A Viable Answer for Economic Development*, 39 J. WORLD TRADE 701, 706-11 (2005).

179. These are the tariff elimination phase-in periods and can extend for up to twenty years for sensitive products. However, under NAFTA, the parties frequently met to speed up tariff eliminations.

180. *See* U.S-Peru FTA, *supra* note 38, at Annex 16.1; U.S.-Panama FTA, *supra* note 20, at art 15.3.

181. The U.S. commitment to trade capacity building in the model FTAs is to create a TCB Committee for each agreement. The developing country partners are expected to periodically update and provide the Committee its national TCB strategy. In turn, the Committee will seek to: (1) prioritize projects at a national or regional level, or both; (2) invite donor institutions and other groups to assist in developing and implementing the projects; (3) assist with the implementation of projects; and (4) monitor and assess progress in implementing progress. The TCB Committee is required to meet at least twice a year during the transition period.

to fund actual projects. The U.S. implementing legislation for the FTAs does not contain earmarked funding for TCB projects. Instead, the U.S. approach is to coordinate trade capacity building projects for FTA partners through its overall program. While adjustment projects aimed at major constraints (such as weak or non-existent physical infrastructure) have been funded and are underway, not all developing country FTA partners have yet benefited.[182] Moreover, the United States has yet to monitor or assess existing projects for success and effectiveness.[183]

IV. AFTERWORD: A NEW MODEL?

The abandonment of model-driven regionalism is difficult to imagine. The U.S. experience with free trade agreements (as well as with Bilateral Investment Treaties[184]) proved that the United States can largely dictate the terms of agreements with its chosen partners.[185] Moreover the combined benefits from the use of the model – the ability to push the U.S. agenda on deep integration issues, efficiency gains in negotiations, locking in foreign policy

182. The TCB Chapter is notable for what it lacks. There is no textual commitment to financial assistance by the United States for these projects. The United States does provide such assistance through a general TCB program aimed at all trading partners. *See* Taylor, *supra* note 129. The fact that a developing country is an FTA partner, however, does not necessarily guarantee it more assistance or more timely assistance.

The United States provided $7.1 billion in TCB assistance from 2001-2007. Latin America and the Caribbean area have received $1.9 billion during that time frame, $554 million of that figure in 2007. US/TPR, *supra* note 17, at 23. The Central American countries have received $650 million in trade-related assistance since 2003 (which has focused on rural development and poverty reduction). *See* USTR, CAFTA POLICY BRIEF, CAFTA-DR-TRADE CAPACITY BUILDING PROGRAMS 1 (July 2007), *http*://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file544_13195.pdf.

The largest recent contributions come from the Millennium Challenge Corporation (MCC) and focus on infrastructure development agricultural issues. These include a $215 million dollar compact with Honduras to upgrade roads and promote agricultural development (June 2005); a $175 million dollar compact with Nicaragua (July 2005) to improve highways to link producers to regional marketing, and a $461 million compact with El Salvador to deal with promoting education, enterprise development, and transport infrastructure (November 2006). *See Id.*

Not all of the CAFTA countries have benefitted from the MCC program. Although they are eligible for assistance, Guatemala and the Dominican Republic have not yet satisfied the eligibility requirements for an MCC compact.

183. The current TCB program lacks systematic monitoring of TCB projects and has not developed performance indicators or compiled performance data about projects. GAO 2005 REPORT, *supra* note 132, at 29. Despite making substantial financial commitments to TCB programs, the U.S. agencies involved have not "specifically conducted program evaluations to assess the effectiveness of their trade capacity building efforts." *Id.* at 31.

184. *See Id.* at 27, & *supra* note 135 for a detailed discussion of the model BIT and the plan of the Obama Administration to revise that model. *See also* United States Trade Representative, Notice of Bilateral Investment Treaty Program Review (July 14, 2009), *available at* http://www.ustr.gov/about-us/press-office/blog/notice-bilateral-investment-treaty-program-review.

185. *Id.* at 7, 9-11, 31-32.

goals at low domestic costs and achieving increased access in FTA partner markets[186] – are significant and unlikely to disappear. At the same time it is equally difficult to imagine that the model will remain unchanged. The confluence of three events will alter the use and potentially the content of the FTA model – the worldwide recession, the election of a new President and the shift in the makeup of Congress[187] and the need for new trade promotion authority for future trade agreements.

Senator Obama campaigned against the approach of earlier administrations to free trade agreements – from NAFTA itself[188] to the more recent and pending FTAs.[189] President Obama must now shape a coherent approach to trade policy, one that will require a rebalancing of multilateralism and regionalism. It seems unlikely that the United States can continue to pursue regionalism as a top priority. In fact, trade policy must now contend for legislative space in a country deeply enmeshed in a financial crisis and a lingering recession. These events require the passage of major domestic legislation aimed at unraveling the financial crisis, stimulating the economy and gaining control over health care and energy policy.[190] Early indications are that trade policy will not be in the forefront of legislative efforts. Nevertheless since most recent economic growth has come from exports,[191] the Obama Administration has set out some basic approaches. The top priority will be to focus on multilateralism and the completion of the Doha Round.[192] Meanwhile

186. *Id.* at 31-34.

187. In 2008 the Democrats regained true control of both the House and the Senate. With the election of a Democrat as President, it becomes more likely that FTA policy will be altered to reflect traditional Democrat concerns. *See Id.* at 37 & *supra* notes 162-163.

188. *See generally* Gary Clyde Hufbauer & Jeffrey J. Schott, *NAFTA's Bad Rap*, INT'L ECON. (Summer 2008), *available at* http://www.piie.com/publications/papers/hufbauer-schott0808.pdf.

189. *See* Rossella Brevetti & Amy Tsui, *2009 Outlook: Free Trade Agreements*, 26 INT'L TRADE REP. 123 (Jan. 22, 2009)[hereinafter Free Trade Agreements].

190. *See generally* United States Trade Representative (USTR), The President's Trade Policy Agenda 2009 at 1-5 (Feb. 27, 2009), *available at* http://www.utsr.gov/sites/default/files/uploads/reports/2009/asset_upload_file810_15401.pdf [hereinafter President's Trade Policy Agenda 2009]. *See also* Memorandum from the Trade Policy Study Group on a New Trade Policy for the United States to the President-Elect and the 111th Congress (December 2008), *available at* http://www.iie.com/publications/papers/20081217presidentmemo.pdf [hereinafter TPSG Memo]. The Trade Policy Study Group is a bi-partisan group of former U.S. trade officials (including 3 former USTR heads), lawyers and economists. The membership of the TPSG is listed at the end of the memorandum. *Id.* at 13-14.
Even six months into the new administration it is clear that trade policy is not at the forefront of policy-making. *See* Rossella Brevetti, *Bilateral Agreements: Grassley Says Obama Sidetracked From Trade by Political Considerations*, 26 INT'L TRADE REP. 854 (June 25, 2009)(Senator Grassley noted that the Obama Administration had stated in hearings on the U.S.-Panama FTA that the trade agenda is on hold until the administration determines how international trade fits within the domestic agenda.).

191. TPSG Memo, *supra* note 190, at 9 (noting that "[o]ver the past year, increases in net exports have accounted for all U.S. growth.").

192. President's Trade Policy Agenda 2009, *supra* note 190, at 3.

all aspects of the U.S. policy regarding regionalism will be reconsidered and will move slowly.[193] NAFTA will not be reopened[194] but will be expected to cover labor and environmental concerns in the same way as recent FTAs. The pending FTAs with Panama, Colombia and South Korea will be examined for effects on the U.S. and carefully worked through with Congress before any decision to move forward.[195] Recent meetings with the leaders of these FTA partners have led the Obama Administration to believe that substantive issues of concern on each must be resolved before the FTAs can be sent to Congress for a vote.[196] What has yet to be addressed, however, is the approach the administration plans for future trade agreements. This is hardly a surprise since planning for future trade endeavors (whether the completion of the Doha Round or future FTAs) will require the Obama Administration to seek trade promotion authority.[197]

As the Executive Branch rethinks regionalism some in Congress are pushing for a complete reworking of how trade policy is formed. This turn of events is also not surprising. Since the creation of the fast track process the President has discovered that seeking trade negotiating authority reopens the debate about the proper balance of power sharing over trade policy.[198] The first legislation introduced on this topic by the 111th Congress is the Trade Reform, Accountability, Development and Employment (TRADE) Act of 2009.[199] The TRADE Act of 2009 would require: 1) the General Accountability Office to conduct a review of existing FTAs based on the current model,[200] 2) the use of

193. *Id.* at 4.

194. *See Kirk: NAFTA Problems Can be Fixed Without Reopening the Trade Agreement*, 27 INSIDE U.S. TRADE No. 16 (April 24, 2009); Rossella Brevetti, *Kirk Says USTR to Review Colombia FTA, Reopening of NAFTA May Not be Necessary*, 26 INT'L TRADE REP. 534 (Apr. 23, 2009).

195. President's Trade Policy Agenda 2009, *supra* note 190, at 4; *See also* Amy Tsui, *USTR Nominee Kirk Tells Senate Finance Enforcement Top Priority of Administration*, 26 INT'L TRADE Rep. 341 (Mar. 12, 2009); *See also* Rossella Brevetti, *Bilateral Agreements: Obama Says Administration Developing Action Plan for FTAs*, 26 INT'L TRADE REP. 636 (May 14, 2009).

196. *See* Rossella Brevetti & Heather M. Rothman, *Bilateral Agreements: President Obama to Lay Out New Framework for Trade, Panel Told at Panama FTA Hearing*, 26 INT'L TRADE REP. 73 (May 28, 2009); *Obama, Uribe Cover Pending FTA As Part Of Range Of Issues*, 27 INSIDE U.S. TRADE No. 26 (July 3, 2009); *Obama shows Tentative support for Korea FTA After Summit with Lee*, 27 INSIDE U.S. TRADE No. 24 (June 19, 2009).

197. *See* President's Trade Policy Agenda 2009, *supra* note 190, at 1 (noting that one of the tools the President will need to address the economic crisis is trade promotion authority). President Obama has taken the position that trade promotion authority is something it will ask for "after engaging in extensive consultation with Congress to establish the proper constraints on that authority and after we have assessed our priorities and made clear to this body and the American people what we intend to do with it.") *Id.*

198. *See* C. O'Neal Taylor, *supra* note 120, at 22-55.

199. H.R. 3012, 111th Cong., 1st Sess. (June 24, 2009), *available at* http://thomas.loc.gov/cgi-bin/query/F?c111:1:./temp/~c111aGk89A:e2989:.

200. *Id.* at Sec. 3.

specific FTA provisions in fifteen different subject matter areas,[201] and 3) the submission by the President of a plan to renegotiate existing FTAs in accordance with the act's specifications.[202] The TRADE Act of 2009 would further shift power towards Congress by having that body set the readiness criteria for FTA partners,[203] mandate the negotiating objectives for agreements,[204] and require its approval of any FTA before it is signed by the President.[205] Whether this legislation ever proceeds to a vote,[206] its introduction suggests that the Obama Administration must carefully calibrate its approach on trade policy to bring Congress along.

At least two paths appear open to the Obama Administration. First, it can focus on multilateralism and limit attempts at regionalism. This would mean completing the Doha Round and securing passage only of the pending FTAs which have critical Congressional support. It would also mean the indefinite postponement of any future FTAs until there is greater consensus on the proper goals of regionalism.[207] Second, the Obama Administration could work out how to accommodate both a commitment to true multilateralism with regionalism. Such an approach would also require taking a leadership role in the completion of the Doha Round[208] and on most, if not all, of the pending

201. *Id.* at Sec. 4.

202. *Id.* at Sec. 5.

203. *Id.* at Sec. 7(1).

204. *Id.* at Sec. 7(4).

205. *Id.* at Sec. 7(7).

206. *See* Kiera McCaffrey, *100 House Dems Want New Trade Rules*, THE HILL, June 24, 2009, *available at* http://thehill.com/leading-the-news/100-house-dems-want-new-trade-rules-2009-06-24.html (noting that H.R. 3012 had on that day 100 co-sponsors while similar legislation introduced in 2008 attracted only 74 co-sponsors and indicating that the larger number for this version "reflects both the larger Democratic majority in the House and increasing skepticism about trade amid a global recession."). *See also* Rossella Brevetti, *Trade Policy: Over 100 House Members Endorse Reform Bill charting New Direction on Trade*, 26 INT'L TRADE REP. 876 (July 2, 2009)(describing the outlines of the TRADE Act of 2009).

207. *See* Paul Blustein, REIMAGINING GLOBAL TRADE, *available at* http://www.brookings.edu/reports/2008/~/media/Files/rc/reports/2008/10_global_economic_top_ten/200810_trade.pdf. [hereinafter Blustein]. This article is part of a series done by the Brookings Institute entitled "The Top 10 Global Economic Challenges Facing America's 44th President." In this chapter Blustein suggests that one way to revitalize trade policy would be for the President to "propose a moratorium on bilateral trade agreements, a step that would be welcomed by many poor countries, which fear being marginalized in an increasingly splintered world of trade." *Id.* at 14.

208. *See* UNITED STATES TRADE REPRESENTATIVE, *Remarks by Ambassador Ron Kirk at the U.S. Chamber of Commerce, Next Steps on the Trade Agenda*, May 18, 2009, *available at* http://www.ustr.gov/about-us/press-office/speeches/transcripts/2009/may/remarks-ambassador-ron-kirk-us-chamber-commerce (Amb. Kirk notes that the U.S. "economy is in trouble, and the steep decline in global trade is only exacerbating the crisis here and abroad" and states that he and President Obama are "committed to a successful conclusion of the Doha Round, to revive confidence in global trade and lay the framework for the robust trading system of tomorrow." Amb. Kirk notes that part of that effort involved his meeting with meeting with representatives of more than half the membership of the WTO)[hereinafter Kirk Speech]. The United States reaffirmed its goal of leading the Doha Round revival by signing on to the G-8 Summit

FTAs.[209] What would differ from the other path is that the administration would have to develop a new paradigm for future regionalism. Following this path would require the U.S. to answer several questions. Should the United States continue to push its ideal trade agenda through FTAs? It might be possible for the U.S. to force its agenda on a WTO worried about losing relevance[210] and on struggling developing countries suffering in the current recession.[211] Or should the United States use FTAs to grow U.S. export markets and see them largely as complements to multilateralism? Adopting this set of goals would require the U.S. to abandon several aspects of the existing model FTA[212] as well as its factors and method for choosing FTA partners.[213]

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commitment to complete the Doha Round by 2010. *See* George Parker, Guy Dinmore & Alan Beattie, *Leaders Seek to Agree Trade Deal by 2010* (July 10, 2009), *available at* http://www.ft.com/cms/s/0/6a804150-6ce6-11de-af56-00144feabdc0.html.

209. *See* Kirk Speech, *supra* note 208 (describing the efforts USTR is making to determine the ways in which each pending FTA must be studied and improved to move forward while also detailing the benefits to the U.S. from each).

210. *See* Blustein, *supra* note 207, at 14 (noting the importance of "breathing life into the Doha Round" since the woes of the struggling talks in 2008 had raised "profound concerns about the World Trade Organization's ability to continue as the main rule writer for global trade."); *see also* WORLD TRADE ORGANIZATION, *Introductory Remarks by Director General Pascal Lamy, Global Crisis Requires Global Solutions* (July 13, 2009), *available at* http://www.wto.org/english/news_e/news09_e/tpr_13jul09_e.htm. Introducing a report on recent trade and trade-related developments associated with the financial and economic crisis Director General Lamy noted that it is the WTO's multilateral trade rules that provide a "valuable insurance policy against protectionism spiraling out of control" but also warning that "as long as we continue failing to pay the premiums on that insurance policy, by delaying the conclusion of the Doha Round, we are leaving ourselves no room for complacency about the future." *Id. See also* TPSG Memo, supra note 190, at 10-11 on the importance of completing the Doha Round and on needed improvements to the WTO).

211. *See* Daniel Pruzin, *Balance of Trade: WTO Chief Sees Drop in Global Trade for 2009, Down 10%*, 26 INT'L TRADE REP. 910 (July 9, 2009)(noting WTO Director General Lamy's reporting of the overall drop off in trade for both developed and developing countries and his statement that while the volumes of lost trade are higher for the developed countries the impact is more significant for the developing countries because they are "more dependent on trade and as a consequence are harder hit by the current crisis." Lamy is also quoted as explaining that developing countries are also exposed because "they do not have the kind of social safety nets that will help amortize the impact of the crisis.").
It is this vulnerability to the world-wide recession and its effects that would make a developing country accept a U.S.-dictated FTA in order to have access to the U.S. market for goods that could otherwise face protectionism. Many developing countries thought that bargain was a good one even before the current crisis. *See supra* notes 35-38 (outlining the benefits developing countries receive from the current WTO-plus model FTA).

212. For example, there would be little reason to push developing countries currently struggling to accept U.S.-level protections for intellectual property rights. *See supra* notes 28-30 for a discussion of the ratcheting up of U.S. demands on IPRs in the recent FTAs and the consequences for developing countries.

213. The Obama Administration would undoubtedly have to confer more closely with Congress on which countries to approach for a possible FTA. It is difficult to imagine that given the recession and the need to achieve a Doha Round break through to ease the trade crisis facing the United States that USTR will have the freedom to create and employ a list of factors like that developed by the Bush Administration. *See supra* notes 9-11 for a discussion of the current process.

Instead the United States would have to devise a more flexible, less U.S.-dictated model that would allow for FTAs with major developed country trading partners (such as the EC or Japan[214]) or the emerging developing country powers (the BRIC countries[215]) or for completing stalled regional efforts such as the FTAA or initiatives in Asia.[216] Other options for revising the model would be for the U.S. to add other subject matter areas such as infrastructure services, energy and the environment.[217]

Proceeding on this path would mean that the United States would eliminate most of the disadvantages of using the current model – the disconnect between the President and Congress over the goals of trade policy, the frozen thinking and the use of FTAs as tools of power.[218] No new model of this type could be achieved without closer cooperation between the Executive Branch and Congress and without educating the public on the gains from such agreements while assisting it with the effects.[219] All of these efforts would

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214. *See* TPSG Memo, *supra* note 190, at 11-12.

215. The BRIC countries are Brazil, Russia, India and China. *See* TPSG Memo, *supra* note 190, at 12 suggesting that future FTA efforts might involve three of the BRIC countries – Brazil, China and India.

216. *Id.* at 11. The Trade Policy Study Group suggests these goals as a part of its endorsement of the idea of "harmonizing existing pacts in the Western Hemisphere and across the Asia-Pacific region." *Id. See supra* notes 4-6 and 8 for a discussion of the FTAA and the fact that it was ultimately suspended because of the unwillingness of major participants such as Brazil and Argentina to accept the terms of U.S.-model driven FTAA. *See* Kirk Speech, supra note 208, for a discussion of Amb. Kirk's interest in taking "a robust look at US trade policy towards Asia." and promising that "[e]ven more effective engagement with Asia will be a key component of the Obama administration's outlook on trade."

217. *Id.* at 12. This also would appear to fit with the Obama Administration's commitment to "make trade an important tool for achieving progress on national energy and environmental goals." President's Trade Policy Agenda 2009, *supra* note 190, at 3.

218. *See supra* notes 34-35 for a discussion of the disadvantages incurred by the use of the current WTO-plus model.

219. This issue is crucial because Congress reacts directly to the views of the public on trade. One of the legacies of the debate over NAFTA has been the belief that trade agreements cost U.S. jobs. The Obama Administration recognized this by insisting that a crucial part of its trade policy be accompanied by an expansion of the Trade Adjustment Assistance (TAA) – the program aimed at aiding workers displaced by the implementation of trade agreements. President's Trade Policy Agenda 2009, *supra* note 190, at 3; Kirk Speech, *supra* note 208. Amb Kirk stated that "[i]n the first weeks of this administration, President Obama also acknowledged some of the realities of trade and supported Congress's efforts to dramatically expand access to Trade Adjustment Assistance." *Id.*

For a thorough description of the TAA program and its many limits before this recent expansion see William J. Mateikis, *The Fair Track to Expanded Free Trade: Making TAA Benefits More Accessible to American Workers*, 30 HOUS. J. INT'L L. 1 (2007). *See also* TPSG Memo, *supra* note 190, at 7-9 for a discussion of how the TAA program must be altered to offer true access to benefits and play a useful role in a sound U.S. trade policy. It is not enough to assist U.S. workers impacted by trade agreements. The administration is unlikely to develop a successful trade policy without conveying the message that the U.S. stands to gain much from the continued expansion of trade. The Obama Administration is attempting such an effort. *See* Kirk Speech, *supra* note 208 (Amb. Kirk noted that one quarter of a million U.S. firms export goods and that almost all of them are small and medium-sized firms "who particularly need our help

require a thorough revisiting of U.S. views on the strategic as well as economic goals of trade policy. Crafting a new FTA model with a development focus, however, might achieve both types of goals.[220] When it chooses to negotiate with a developing country partner the U.S. could expand its Trade Capacity Building[221] efforts to ease and assist with the negotiation as well as the implementation burdens imposed by an FTA. Should it take such an approach the United States would address one of the major disadvantages currently faced by its developing country FTA partners.[222] Adapting the FTA model into a development tool would also signal the existence of a true U.S. commitment to the advancement of the interests of developing countries. At the current time it is impossible to measure the value of such a commitment to the world trading system and U.S. credibility.[223]

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accessing global markets" and that "[e]xporting firms tend to increase employment more rapidly, have higher productivity, and can pay as much as 13 to 18 percent more than the national average.").

220. *See* TPSG Memo, *supra* note 190, at 1 ("Trade is so central to most other countries, especially poor countries that depend on it for development, that trade policy is tantamount to foreign policy for many of them.).

221. *See id.* at 31, 39-40 for a discussion of what the U.S. currently does and fails to do with Trade Capacity Building (TCB).

222. In order to improve how it does TCB, the United States needs to think through what role it wants for the program. A systematic diagnosis of the adjustment issues faced by developing country partners (available from work conducted by the World Bank) would be a starting point. Then, if the goal is to demonstrate how the FTA can complement development, TCB projects would need to be driven by the national development strategy of the developing country partner.

223. Ambassador Kirk expresses it best when he notes that "as the current economic crisis has shown us, in the interconnected global community in which we live—we sail or sink together." Kirk Speech, *supra* note 208.