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REGIONALISM: THE SECOND-BEST OPTION?

C. O'NEAL TAYLOR*

> "[Developing countries] need to recognize . . . that they are living in a second-best world, in which international economic integration remains incomplete due to the transaction costs . . . . [L]iving in a second-best world requires second-best strategies."
>
> Professor Dani Rodrik[1]

INTRODUCTION

The relationship between regionalism and multilateralism has entered a new phase from the perspective of developing countries. The World Trade Organization (WTO) initiated the Doha Round in 2001 with an explicit commitment in the Doha Development Agenda[2] to address the concerns of its largest group of member states—the developing and least developed countries—and redress some of the imbalances put in place during the Uruguay Round.[3] In the last five years, however, the WTO has struggled and

* Professor of Law, South Texas College of Law, A.B. Harvard-Radcliffe, J.D. University of Georgia, LL.M. Georgetown University Law Center. The author would like to thank the editorial board of the *Public Law Review* for the invitation to speak at this symposium and its assistance with this article. The author also wishes to acknowledge the invaluable insights offered by International Trade Commissioner Irving A. Williamson that helped shape the prescriptive section of the article. Finally, the author would like to express gratitude for the able research assistance by Justin Jenson (J.D., South Texas College of Law, 2009).

1. Dani Rodrik, How to Save Globalization from its Cheerleaders (Sept. 2007) (unpublished paper, Harvard University), *available at* http:ksghome.harvard.edu/~drodrik/saving %20globalization.pdf.

2. World Trade Organization (WTO), Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Ministerial Declaration], *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf. The preamble to the Ministerial Declaration launching the Doha Round notes that trade plays a major role in "the promotion of economic development and the alleviation of property" and expresses the consensus of the member states that the WTO "seek[s] to place their needs and interests at the heart of the Work Programme adopted in this Declaration." *Id.* In each section of the Work Programme, the WTO commits itself to issues of particular concern for developing countries. *Id.*

3. *See* Frank J. Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT'L & COMP. L. REV. 291, 292–98 (2004) (noting that the Uruguay Round (UR) bargain accepted by the developing countries—exchanging discipline over trade in services and intellectual property for

failed to deliver a comprehensive agreement truly focused on development issues. Instead, the negotiations were formally suspended in 2006 and, despite the continued informal meetings, have not yet resolved impasses on agricultural trade and industrial goods[4] that led to the suspension. At the same time, regionalism has continued to grow at a faster pace than ever before. Almost seventy regional agreements were notified to the WTO from 2003 to 2008.[5] There is widespread agreement that this pace has been in response to, as it has been since the 1990s, the status of, or lack of progress in, the multilateral trading system.[6] When the WTO does not deliver continued trade liberalization and growth opportunities, countries begin seeking alternative paths to trade liberalization and trade reform. A comprehensive Doha Round Agreement that opens up areas of export advantage for developing countries

market access in textiles and agriculture—was a bad bargain). Two problems had to be faced by developing countries following the UR and the creation of the WTO. First, the promised market access in developed countries failed to materialize. *Id.* at 298. Second, the UR agreements allowed transition periods to phase in implementation of obligations as the only real help for implementation. *Id.* at 297–99. Implementation has proven extremely difficult for many developing countries given the breadth of the new obligations and the drain they have taken on resources. *See also* United Nations Conference on Trade and Development (UNCTAD), *Trade and Development Report, 2006*, UNCTAD/TDR/2006 (2006) [hereinafter *Trade and Development Report, 2006*], *available at* http://www.unctad.org/en/docs/tdr2006_en.pdf. The Uruguay Round was seen as forcing developing countries to renounce the autonomy other countries had during industrialization. *Id.* at 222. Additionally the bargain of the round (TRIPS for Agriculture) has not really worked out. *Id.* *See generally* Asoke Mukerji, *Developing Countries and the WTO: Issues of Implementation*, 34 J. WORLD TRADE 33, 39–64 (2000).

4. 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 (arguing that the trouble with Doha Round is about just more than these impasses). *See* Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnet*, 39 GEO. J. INT'L L. 165, 169 (2007) (Lewis states that "[t]he impasse is in part a reflection of the fact that the United States and EC are not willing to sacrifice their own protectionist measures, and as such any statements they make regarding the importance of development assistance ring hollow.").

5. *See* WTO, Regional Trade Agreements Notified to the GATT/WTO and in Force, Aug. 10, 2008, http://www.wto.org/english/tratop_e/region_e/eif_e.xls. Statistics such as these are somewhat misleading. These regional agreements consist of new agreements as well as additional notifications to the WTO when an agreement is reactivated. *Id.* In addition, each expansion of the EC requires another notification. *Id.*

6. United Nations Conference on Trade and Development (UNCTAD), *Trade and Development Report, 2007,* U.N. Doc. UNCTAD/TDR/2007 (2007) [hereinafter *Trade and Development Report, 2007*], *available at* http://www.unctad.org/en/docs/tdr2007_en.pdf. The report quotes the 2003 statement made by then U.S. Trade Representative Robert Zoellick after the stalemate at the WTO ministerial meeting in Cancun. *Id.* at 56. It is worth quoting the language as it stands as the official position of the United States at the time. U.S. actions since 2003 have only affirmed this position. "We will not passively accept a veto over America's drive to open markets. We want to encourage reformers who favor free trade. If others do not want to move forward, the United States will move ahead with those who do." *Id.*

while still meeting the overall goals of the developed countries would offer the largest opportunities for growth for the world trading system.[7] Developing and developed countries alike, however, have been unwilling for different reasons[8] to exercise only this option. Instead, they have been pursuing regionalism as a second-best option toward trade liberalization and economic growth.

This article attempts to address and analyze two issues: (1) how well the second-best regionalism option meets the expectations, needs and capabilities of developing countries and (2) how this option could be improved to address development issues. Given the pace of regionalism and its breadth (encompassing not only North-South agreements but also South-South agreements[9]), one article cannot completely address all of the relevant issues. Consequently, this article will examine the U.S. approach to regionalism in its most recent free trade agreements (FTAs) with developing countries.[10] The

7. *See generally* Sungjoon Cho, *Doha's Development,* 25 BERKELEY J. INT'L L. 165 (2007) (reviewing the history of the Doha Round Suspension and prospects for its renewal).

8. *See infra* note 161 and accompanying text.

9. North-South refers to agreements between developed and developing countries. South-South agreements are those between developing countries. *See* Roberto V. Fiorentino, Luis Verdeja & Christelle Toqueboeuf, The Changing Landscape of Regional Trade Agreements: 2006 Update, Discussion Paper No. 12 (WTO 2007), *available at* http://www.wto.org/english/res_e/booksp_e/discussion_papers12a_e.pdf. According to this WTO review of regionalism, there are several trends and characteristics to the newest proliferation of regional trade agreements (RTAs). For most countries, RTAs have become the centerpiece of their commercial policy. RTAs show an increasing level of sophistication covering services and trade areas, reaching both multilateral disciplines. There is an increase in North-South RTAs and their "gradual replacement of long-established non-reciprocal systems and preferences." *Id.* at 2. There has also been an increase in the number of South-South RTAs. *Id.*

10. The most recent U.S. free trade agreements 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. *See* 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 (2002) [hereinafter U.S.-Jordan FTA], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf; United States-Singapore Free Trade Agreement, U.S-Sing., May 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter U.S.-Singapore FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html; United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter U.S.-Chile FTA], *available at* http://ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html; United States-Australia Free Trade Agreement, U.S.-Austl., May 19, 2004, 43 I.L.M. 1248 (2004) [hereinafter U.S.-Australia FTA], *available* at http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html; United States-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544 (2005) [hereinafter U.S.-Morocco FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text-Section_Index.html; The United States-Central America-Dominican Republic Free Trade Agreement, U.S.-CAFTA-DR, Jan. 28, 2004, 43 I.L.M. 514 (2004) [hereinafter DR-CAFTA], *available at* http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/

article will focus on a number of questions from the perspective of both the United States and its developing country partners: Why regionalism? What kind of regionalism? Does the U.S. approach to regionalism deliver what developing countries need? Can the U.S. approach be made more responsive to development issues and concerns?

These issues and questions regarding the developing countries and their needs are worth considering in light of the pattern emerging in regionalism efforts over the last half decade. The percentage of new regional agreements between developed and developing countries has grown substantially.[11] These new agreements also have largely been bilateral agreements between one developing country and one of the world's largest and most powerful developed states either, the European Community (EC) or the United States.[12]

Section_Index.html; 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., Sept. 14, 2004, 44 I.L.M. 544 (2005) [hereinafter U.S.-Bahrain FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html; United States-Oman Free Trade Agreement, U.S.-Oman, Jan. 19, 2006 [hereinafter U.S.-Oman FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html; U.S.-Peru (2007), United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006 [hereinafter U.S.-Peru FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html; United States-Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007 [hereinafter U.S.-Panama FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Final_Text/Section_Index.html; United States-Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006 [hereinafter U.S.-Colombia FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.htm; United States-Korea Free Trade Agreement, U.S.-Korea, Jun. 30, 2007 [hereinafter KORUS], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html. *See generally* OFFICE OF THE U.S. TRADE REPRESENTATIVE (USTR), EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S 2008 TRADE POLICY AGENDA AND 2007 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, 107–15 (2008) [hereinafter 2008 TRADE POLICY AGENDA], *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Trade_Policy_Agenda/asset_upload_file649_14563.pdf. This article will draw most heavily on illustrations from the most recent agreements pursued by the United States in Latin America—DR-CAFTA, Peru, Panama, and Colombia.

11. *Trade and Development Report, 2007*, *supra* note 6, at 55 (noting that agreements between developed and developing countries have grown from 14% to 27% of total regional agreements from 1995 to 2007). While most regional trade agreements are South-South agreements, it is the North-South agreements which have a greater impact on the multilateral trading system since they are capable of taking attention away from multilateral negotiations and have a greater impact on its core principle, most favored nation treatment. UNCTAD, *Globalization for Development: The International Trade Perspective*, §1.7, U.N. DOC. UNCTAD/DITC/2007/1 (2008) [hereinafter *Globalization for Development*], *available at* http://www.unctad.org/en/docs/ditc20071_en.pdf.

12. *Trade and Development Report, 2007*, *supra* note 6, at 56 n.8. The EC has also been negotiating with six regional bodies of countries in Africa, the Caribbean and the Pacific (ACP), former colonial countries with which it has had a long-standing series of preference agreements to

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Almost all of these agreements are to establish free trade areas.[13] Free trade areas have two major characteristics that have implications for developing countries. First, they allow the greatest flexibility with regard to design and content of the regional agreement due to the weak WTO/GATT institutional and rules-based discipline.[14] What this means is that free trade agreements can be and are made to cover issues going well beyond trade in goods and services. In North-South agreements, this means that the developed country is in a position to demand that subjects of interest to it are covered at levels or to standards it desires. Given the greater need of developing countries for the market access and possible investment that flow from such agreements, they have little leverage regarding the type or content of the additional disciplines sought.[15] Second, since free trade areas entail the lowest level of economic

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replace the preference agreements with free trade agreements. *Id.* at 58 n.9. The EC recently completed the first of these agreements with the Cariforum, the Caribbean Forum.

13. As of January 2008, the United States has eleven free trade agreements with seventeen countries. *See* Daniella Markheim, *Free Trade Agreements: Promoting Prosperity in 2008,* 2132 BACKGROUNDER, May 2, 2008, at 1, 3, *available at* http://www.heritage.org/research/tradeandforeignaid/upload/bg_2132.pdf. Only two of the free trade agreements the United States has pursued, have involved developed economies, Canada and Australia. The EC has entered into free trade agreements throughout the world. *See* European Commission, Overview of Bilateral Negotiations Involving Trade Agreements, http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (last visited Sept. 1, 2008). To date, the EC has seven bilateral free trade agreements with developing countries (Algeria, Chile, Egypt, Morocco, the Palestinian Authority, South Africa and Tunisia) and is conducting negotiations with countries throughout the Middle East and Africa. *Id.*

14. 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 included 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 Director-General, *World Trade Report 2007*, 306 (2007) [hereinafter *World Trade Report 2007*], *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf. See Chi C. Carmody, *Measurement and the Metrics of Regionalism: Experience with the WTO RTA Transparency Mechanism*, 28 ST. LOUIS U. PUB. L. REV. 273 (2008) for an analysis of existing WTO oversight.

Historically, the GATT/WTO has never disapproved of a regional agreement. According to the Sutherland Report on the future of the World Trade Organization: "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." Consultative Board to the Director-General, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, 22, ¶ 77 (WTO 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 *infra* at note 21.

15. Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, 10 J. INT'L ECON L. 571, 578 (2007) (The author noted that the United States offers a template of the areas it wishes to cover and developing FTA partners do not have many possibilities for amending it. Additionally, those countries which resisted the template, Brazil

integration,[16] each participating state retains more sovereign power. This factor plays out differently for developed and developing countries as well. The former have to make few, if any, major changes to their domestic policies to participate in free trade agreements.[17] By contrast, the latter not only have major implementation obligations but also need to develop and fund complementary national policies to gain the greatest benefits from the FTA.[18] Such implementation costs could be eased with economic and technical assistance from the developed partner, but it cannot be demanded.

I. U.S. APPROACH TO THE "NEW REGIONALISM"

During the last two administrations, the United States has developed a complete system of agreements for negotiating and enacting regional arrangements. The components of this system—the Trade and Investment Framework Agreements (TIFAs),[19] Bilateral Investment Treaties (BITs),[20] regional free trade initiatives[21] and bilateral free trade agreements—cover the

and Argentina in the FTAA negotiations, were left out and isolated when the United States began negotiations with other, more willing partners in Latin America.).

16. *See generally* BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION 2 (Richard D. Irwin, Inc., 1965) (1961) (defining free trade area and contrasting its limited demands with those required for the deeper forms of economic integration, customs unions and common markets).

17. The major implementation requirements for the United States are revising its tariff schedules and altering preference programs.

18. See *infra* notes 48–55 and accompanying text for a discussion of what developing country FTA partners must do to have successful FTAs with the United States.

19. The United States currently has thirty-three Trade and Investment Framework Agreements (TIFAs) in place. USTR, Trade and Investment Framework Agreements (TIFAs), http://www.ustr.gov/Trade_Agreements/TIFA/Section_Index.html (last visited Sept. 1, 2008). TIFAs cover legal protections for investors, intellectual property issues, customs improvements, and transparency regarding government and commercial regulations. U.S. DEP'T OF STATE, 2005 INVESTMENT CLIMATE STATEMENT – UNITED ARAB EMIRATES (2005). These agreements are often used as precursors to bilateral free trade agreements for those countries that are part of a U.S. regional free trade initiative. For example, the Enterprise for ASEAN Initiative (EAI), which was aimed at the ASEAN countries of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, the United States offered free trade agreements committed to U.S. free trade goals. USTR, Enterprise for ASEAN Initiative, [hereinafter EAI Background], http://www.ustr.gov/Trade_Agreements/Regional/Enterprise_for_ASEAN_Initiative/Section_Index.html (last visited Sept. 13, 2008).

20. The United States has over thirty-nine Bilateral Investment Treaties (BITs) in place. The United States uses a model BIT when it negotiates with partner countries. *See* U.S. Department of State, U.S. Bilateral Investment Treaty Program, http://www.state.gov/www/issues/economic/7treaty.html (last visited Nov. 30, 2008).

21. The United States has been involved in six initiatives that have aimed at creating either a regional or a series of bilateral free trade agreements: EAI, the Middle East Free Trade Area Initiative (MEFTAI), South African Customs Union Initiative (SACU), the Free Trade Area of the Americas (FTAA), the North American Free Trade Agreement (NAFTA), and the Central American-Dominican Republic Free Trade Agreement (DR-CAFTA). Two of these initiatives,

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two areas of greatest U.S. interest: trade in goods and services and investment. These different components have been used sequentially to prepare a country or a region for closer economic integration with the U.S. market. TIFAs are used at the beginning of the process to set out the mutual goals of the United States and its partner countries on trade and investment. If a country is willing to make firm investment commitments, it then signs a BIT or agrees to such disciplines as part of a free trade agreement. The regional free trade initiatives, such as North American Free Trade Agreement (NAFTA),[22] Enterprise for ASEAN Initiative (EAI)[23] and the Free Trade Area of the Americas (FTAA),[24] have been used to establish the overall U.S. goals regarding important trading regions of the world. Current U.S. initiatives cover every major continent or region—Asia, Africa,[25] Middle East, Latin America—except for Europe. Some of these initiatives have produced bilateral free trade agreements that have been enacted,[26] while others provide a framework for a series of bilateral

SACU and the FTAA, have been suspended. Trade Policy Review Body, *Trade Policy Review, Report by U.S.*, WT/TPR/G/200, at 14, 15 (2008) [hereinafter US/TPR], *available at* http://www.wto.org/english/tratop_e/tpr_e/g200_e.doc. All of the other regional efforts have produced existing free trade agreements (NAFTA, DR-CAFTA) or a combination of TIFAs and bilateral free trade agreements (EAI, MEFTAI). *Id.* at 14–16.

22. 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.

23. *See* EAI Background, *supra* note 19.

24. All thirty-four leaders agreed to explore the possibility of a Free Trade Area. US/TPR, *supra* note 21, at 14. However, there was no agreement on the timing, and the FTAA negotiations remained suspended during 2006 and 2007. *Id.* According to the United States, that was because "other leaders indicated that conditions did not exist for the achievement of the FTAA." *Id.* 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 USTR webpage. USTR, Background Information on the U.S.-SACU FTA, http://www.ustr.gov/Trade_Agreements/Regional/FTAA/Section_Index.html (last visited Aug. 31, 2008).

25. The regional initiative here was with the South African Customs Union (SACU). *See generally* USTR, Background Information on the U.S., http://www.ustr.gov/Trade_Agreements/Bilateral/Southern_Africa_FTA/Background_Information_on_the_US-SACU_FTA.html (last visited Aug. 31, 2008) (presenting background Information on the U.S.-SACU FTA). These negotiations were launched in 2003, and the goal was to build on the success of the U.S. preference program for Africa, the African Growth and Opportunity Act (AGOA). *Id.* Active negotiations were suspended in 2006 but remain a "longer term objective," according to the United States. US/TPR, *supra* note 21, at 15.

26. The DR-CAFTA initiative lead to the Central American-Dominican Republic-United States Free Trade Agreement. DR-CAFTA, *supra* note 10. The agreement has entered into force for the United States, Guatemala, El Salvador, Honduras, Nicaragua and the Dominican Republic. DR-CAFTA, *supra* note 10. Costa Rica could not enact DR-CAFTA without a public referendum, which was held October 7, 2007. *ICT Chamber Outlines Benefits of FTA for IT Industry*, BUSINESS NEW AMERICAS, Oct. 17, 2007 [hereinafter Business News Americas]. The

free trade agreements.[27] Bilateral free trade agreements have come about either individually or as a part of the regional initiatives.

Once the Bush administration received Trade Promotion Authority (TPA) from Congress[28] to negotiate both multilateral and regional agreements, the United States accelerated both the pace of negotiations for and implementations of free trade agreements. All of the major regional free trade initiatives were launched in 2002 and 2003. Every year from 2003 to 2007, the United States completed, and Congress approved, at least one free trade agreement.[29] With the exception of DR-CAFTA, all of these FTAs have been bilateral agreements.[30] With the exception of Australia, all of these recent FTAs have been with developing countries.

To fully understand what is new about this U.S. approach to regionalism requires an examination of the history of U.S. regionalism. It is a relatively new history because the United States focused on multilateralism and unilateralism before the 1980s.[31] The United States entered into only two free

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FTA was approved by the slimmest of margins (51.48% in favor to 48.42% against). Costa Rica has had to request an extension of its March 2008 deadline 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 [hereinafter *Costa Rica Deadline*].

The EAI launched in 2002 produced the U.S.-Singapore Free Trade Agreement. U.S.-Singapore FTA, *supra* note 10. The United States has also entered into negotiations with Malaysia and Thailand for bilateral free trade agreements. US/TPR, *supra* note 21, at 20–22.

27. The Middle East Free Trade Area Initiative (MEFTA) launched in 2003 has produced three free trade agreements with Morocco, Bahrain and Oman. U.S.-Morocco FTA, *supra* note 10. The U.S.-Bahrain FTA was enacted in the United States in 2006. U.S.-Bahrain FTA, *supra* note 10. The U.S.-Oman FTA was enacted in the United States in 2006. U.S.-Oman FTA, *supra* note 10. The goal is to create a Middle East Free Trade Area. US/TPR, *supra* note 21, at 16.

28. Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 993, (codified as 19 U.S.C. §§3801 (2002)) [hereinafter TPA].

29. The pattern is as follows: U.S.-Singapore (2003), U.S.-Singapore FTA *supra* note 10; U.S.-Chile (2003), U.S.-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026 [hereinafter U.S.-Chile FTA], *available at* http://ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html; U.S.-Australia (2004), U.S.-Australia FTA, *supra* note 10; U.S.-Morocco (2004), U.S-Morocco FTA, *supra* note 10; U.S.-CAFTA/DR (2005), DR-CAFTA *supra* note 10; U.S.-Bahrain (2006), U.S.-Bahrain FTA *supra* note 10; U.S.-Oman (2006), U.S.-Oman FTA *supra* note 9; and U.S.-Peru (2007) [hereinafter U.S.-Peru FTA], *supra* note 10.

30. Those bilaterals are: U.S.-Singapore FTA, *supra* note 10; U.S.-Chile FTA, *supra* note 29; U.S.-Australia FTA, *supra* note 10; U.S.-Morocco FTA, *supra* note 10; U.S.-Bahrain FTA, *supra* note 10; U.S.-Oman FTA, *supra* note 10; U.S.-Peru FTA *supra* note 10.

31. *See* JAGDISH BHAGWATI, REGIONALISM AND MULTILATERALISM: AN OVERVIEW 3–26 (Jagdish Bhagwati, Pravin Krishna & Arvind Panagariya eds., MIT 1999); JAGDISH BHAGWATI, THE WIND OF THE HUNDRED DAYS: HOW WASHINGTON MISMANAGED GLOBALIZATION 245–46 (MIT 2002) (noting the long-standing U.S. preference for multilateralism); C. O'Neal Taylor, *The Limits of Economic Power: Section 302 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 209–242 (1997) (pointing out that although the United

trade agreements before the two most recent administrations: the U.S.-Israel FTA[32] (enacted in 1985) and the U.S.-Canada FTA[33] (enacted in 1988). During the Clinton administration, the United States enacted NAFTA in 1993[34] but otherwise focused its energies on negotiations for an agreement to create a hemispheric Free Trade Area of the Americas. The Clinton administration began informal bilateral talks with some of the countries[35] that approached the United States about entering into free trade agreements (Jordan, Chile, Singapore and Australia).[36] Deprived of the required negotiating authority to complete any agreements, however, the Clinton administration brought only one to fruition.

When the succeeding Bush administration obtained that authority in 2002, it broadened the U.S. approach to regionalism and began to pursue some new regional trade initiatives (DR-CAFTA,[37] Middle East Free Trade Area (MEFTA)[38] and the South African Custom Union initiative (SCAU)[39]), continued the other regional effort (the FTAA) and began bilateral agreement negotiations all at the same time. This move to expand U.S.-led regionalism

States has long been a champion of multilateralism, it has also been an aggressive unilateralist in using its section 301 statute to push the world trading system into expanding the GATT disciplines to include intellectual property and services).

32. United States-Israel Free Trade Area Agreement, U.S.-Israel, 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.

33. United States-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.

34. NAFTA, *supra* note 22.

35. Once the United States announced that it would negotiate a free trade agreement 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, 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 487–88 (MIT 1999). The United States did begin negotiations with Chile during the Clinton administration despite the lack of trade negotiating authority. Susan G. Esserman, *Proceeding of the Canada-United States Law Institute Conference on Understanding Each Other Across the Larges Undefended Boder in History, Speaker*, 31 CAN.-U.S. L.J. 11, 14 (2005). Former USTR General Counsel Esserman noted that the United States resisted overtures from some countries like Singapore and Australia due to the small size of the trading relationship. *Id*. However, despite the lack of negotiating authority, the Clinton administration moved at the end to begin negotiations with some countries because of (1) the concern about the movement towards free trade agreements around the world and (2) the paralysis of the WTO. *Id*.

36. Esserman, *supra* note 35, at 14.

37. *See* DR-CAFTA, *supra* note 10.

38. *See* US/TPR, *supra* notes 21, at 16.

39. *Id.* at 15.

was made to counter a similar focus on regionalism undertaken by the EC.[40] The first bilateral agreements completed and enacted were with those countries that had approached the Clinton administration: Jordan (2001), Chile (2003), Singapore (2003) and Australia (2004). One regional trade initiative—to negotiate with friendly countries in the Middle East (MEFTA)—was successful in producing bilateral agreements with Morocco (enacted in 2004), Bahrain (enacted in 2005) and Oman (enacted in 2006). Other regional initiatives, such as SACU and the FTAA, were not completed and have been suspended. During and following the collapse of the FTAA negotiations, the Bush administration negotiated free trade agreements with Latin American countries—DR-CAFTA (enacted in 2005), Peru (enacted in 2007), Panama (signed 2007, but not yet enacted)[41] and Colombia (signed 2007, but not yet enacted).[42] One other major bilateral FTA with South Korea, KORUS,[43] was also signed in 2007 but has not yet been approved by Congress. Although TPA expired in 2007, the Bush administration pursued passage of these completed agreements.[44]

II. WHY REGIONALISM?

What spurred the United States and its developing country FTA partners to pursue regionalism at this furious pace? Given the differences in size and economic power between the parties, it stands to reason that the motivations are quite different. For the United States, one factor is clearly not in play. The United States has not chosen FTA partners due to the amount of trade involved as compared to total U.S. trade. Aside from KORUS,[45] none of the recently

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40. Esserman, *supra* note 35, at 13–15. Following NAFTA, other countries moved to pursue regionalism while the United States was constrained due to a lack of political consensus and the "political fall out" from NAFTA. *Id.* at 13–14. The Bush administration, by contrast, made free trade agreements the "vehicle of choice" for promoting trade liberalization and began accelerating negotiations to make up lost ground. *Id.* at 15.

41. U.S.-Panama FTA, *supra* note 10.

42. U.S.-Colombia FTA, *supra* note 10.

43. KORUS, *supra* note 10.

44. Trade Promotion Authority expired in July 2007. Despite this, the Bush administration made approval of the pending FTAs with Colombia, Panama and South Korea its top priority. 2008 TRADE POLICY AGENDA, *supra* note 10, at 2–3. *See also* Statement of the U.S. Trade Representative Susan C. Schwab, Senate Fin. Comm., 110th Cong. (Mar. 6, 2008), *available at* 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).

45. The pending FTA would cover more trade any other FTA except for NAFTA. Jeffrey J. Schott, *The Korea-U.S. Free Trade Agreement: A Summary Assessment*, PETERSON INST. FOR INT'L ECONOMICS, Aug. 2007, at 1–2, *available at* http://www.petersoninstitute.org/publications/pb/pb07-7.pdf. If enacted, the agreement would account for 3% of total U.S. trade. U.S. GOVT ACCOUNTABILITY OFFICE (GAO), GAO-08-59, INTERNATIONAL TRADE: AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATION UNDER

enacted or pending FTAs have been with a major trading partner. Altogether, the existing and pending U.S. free trade agreements account for only sixteen percent of total U.S. trade and sixteen percent of total investment.[46] What matters to the United States is not having a large-market FTA partner but rather having an FTA partner with open markets. For the United States, it is far more important to continue developing its model FTA[47]—one that will satisfy its commercial and, more importantly, its trade policy goals. The United States views FTAs as laboratories for adding new subject areas and disciplines to the world trading system.[48]

Due to its market size and power, the United States has had the freedom to develop what amounts to a free trade agreement strategy. This strategy began with a careful consideration of which countries should be pursued for FTAs. By 2002, the U.S. Trade Representative employed a thirteen-factor list[49] to decide which free trade agreements to pursue. These factors centered around

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TRADE PROMOTION AUTHORITY 22 (2007) [hereinafter GAO 2007 REPORT], *available at* http://www.gao.gov/new.items/d0859.pdf (based on data from 2005/2006).

46. GAO 2007 REPORT*, supra* note 45, at 20.

47. In its review of how the Bush administration has consulted over free trade agreements 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 for the President. *Id.* at 1–2. 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 liberalization in new areas such as agriculture, services, investment, and labor standards." US/TPR, *supra* note 21, at 14.

48. USTR, THE PRESIDENT'S U.S. TRADE POLICY AGENDA FOR 2003 1 (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").

49. U.S. GOVT ACCOUNTABILITY OFFICE, PUB. NO. GAO-04-233, INTERNATIONAL TRADE: INTENSIFYING FREE TRADE NEGOTIATING AGENDA CALLS FOR BETTER ALLOCATION OF STAFF AND RESOURCES 7–9 (2004) [hereinafter GAO 2004 REPORT], *available a*t http://www.gao.gov/new.items/d04233.pdf. 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.

issues that have been pivotal ever since: domestic political support for FTA,[50] the level of commitment by target countries to trade liberalization and reform,[51] the cooperation of target countries in security and foreign policy matters,[52] and strategic plans to counter other trading nations.[53] Several

50. Factors 1–3 are on congressional guidance, business and agricultural interest and special product sensitivities. According to the GAO's interview with USTR, it "consults with the Congress before and after FTA selection to ensure support and eventual congressional approval." *Id*. Additionally, USTR officials also examine public support, particularly from business and agricultural interests, and assess how the FTA will affect certain sectors, such as textiles and sugar, that have been of interest. *Id*.

The Executive Branch rarely moves forward if there is political opposition. *See* Gantz, *supra* note 24, 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.").

51. Factors 4–6—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. GAO 2004 REPORT, *supra* note 49, at 7–8. Since USTR regards FTAs as a "development tool," it is crucial that the FTA partner be willing to put in place other economic reforms. *Id.* 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 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.

Factor 7, contribution to regional integration, is a recognition that bilateral FTAs can be an important part of U.S. regional free trade initiatives. *Id*. at 8.

52. There is a direct link between being considered for an 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 "CAFTA nations supported U.S. objectives in Iraq." *Id.* 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, Feb. 2008, at 7, *available at* http://www.latn.org.ar/archivos/documentacion/PAPER_DOCop-71.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). *Id*. He also notes that FTAs were entered into moderate Middle East States and that, of the recent FTAs (including those not yet enacted), every partner country (S. Korea, Colombia, Panama and DR-CAFTA states) was a member of the "coalition of the willing," except for Guatemala. *Id.* at 7 n.5. Chile and the DR-CAFTA countries were chosen as FTA partners in part because of their support for the U.S. positions in the FTAA negotiations. GAO 2004 REPORT, *supra* note 49, at 42–43, 52.

53. Factor 10—countering FTAs that place the U.S. commercial interests at a disadvantage—deals with one of the realities of the proliferation of regional agreements. GAO 2004 REPORT, *supra* note 49, at 8. Once competing trading nations begin to enter their own free trade agreements 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 EU), Chile had reduced its purchases of U.S.

bilateral free trade agreement negotiations and initiatives—Australia, Morocco, CAFTA and SACU—began after consideration of the thirteen-factor list.[54] Two years later, in 2004, the National Security Council[55] (NSC) shortened the list of factors to six criteria that should be used as guidelines for the interagency process led by USTR, which chooses target countries. These six factors—(1) country readiness, (2) economic and commercial benefit, (3) benefits to the broader liberalization strategy, (4) compatibility with U.S. interests, (5) congressional/private sector support and (6) U.S. government resource constraints[56]—have been used for the more recent FTA agreements.

Even the narrowed list of criteria has been drawn broadly enough to allow the U.S. administration great discretion in choosing FTA partners.[57] Nevertheless, the actual choice of FTA partners reveals that some criteria clearly have been weighed more heavily than others. Perceived and anticipated congressional and private sector support is crucial for beginning successful negotiations that will lead to the approval and implementation. Since the Executive Branch cannot make trade policy independently, this limitation actually poses a greater restraint on the United States than the negotiating leverage of any FTA partner.[58] Although Congress does not have a

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exports by almost one-third. *Id.* at 42, 44 (noting that the United States lost export market share in Chile due to its other FTAs).

54. *Id.* at 2, 11–12.

55. The NSC is on the highest tier interagency trade group that aids USTR. *Id.* at 4–5. The NSC coordinates the views of the agencies regarding FTA partner selection. *Id.* at 7.

56. *Id.* at 9–10; GAO 2007 REPORT, *supra* note 45, at 12. According to USTR, the first factor, country readiness, involves a "country's political will, trade capabilities, and rule of law systems." GAO 2004 REPORT, *supra* note 49, 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. *Id.* at 9. 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 and banking systems." *Id.*

The sixth factor, U.S. government constraints, deals primarily with the constraints at USTR, such as its ability to staff negotiations. GAO 2004 REPORT, *supra* note 49, at 10. This issue has become more pressing as the United States accelerated FTA negotiations to meet the TPA time line for submission for Congress's approval.

57. GAO 2007 REPORT, *supra* note 45, at 12.

58. Congress shares trade-making authority with the President under the Constitution. U.S. CONST. art. I, § 8 cls. 1, 3 (Congress has the 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. In the modern era, this has meant that Congress delegated its authority to the President to negotiate trade agreements and then return them for approval. The process, called "fast track," is so called because any trade agreement submitted to Congress under this delegation will be voted on quickly and without amendment. *See* C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 15–32 (1994) (providing a detailed history of the fast track and the shared power relationship between Congress and the Executive). The most recent version of fast track (renamed Trade Promotion Authority) was enacted in 2002, and it

direct voice in the selection of FTA partners, it is not in the interest of any administration to pursue a free trade agreement that will not garner the necessary votes under the TPA.[59] Congress guarantees that their approval will be a large part of any decision on FTA partners through several mechanisms either contained in the TPA or developed as standard practice. Congress dictates the negotiating objectives the Executive must pursue in any regional agreement.[60] Congress requires notification before the commencement of negotiations and consultation during the negotiations with the FTA partners,[61] as well as post-negotiation consultations on areas of interest that can result in alterations to negotiated and signed agreements.[62] Congress also shares drafting powers over the implementing legislation for each free trade agreement with the Executive.

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expired in 2007. All of the recent enacted and pending FTAs were negotiated under the terms of the TPA.

59. *See* Esserman, *supra* note 35, at 15 (noting that the most important factor in selecting which FTAs to negotiate has been the need to get the necessary votes in the House of Representatives—"the need to secure 218 votes is the overriding determinant"). Both the House and Senate vote on trade agreements, but with its power over the budget, it is the House vote that comes first, which is, therefore, crucial. This also means that a trade agreement can become a very political issue if it means potential loss of U.S. jobs through import competition. This was a major factor in NAFTA and in DR-CAFTA. *Id.* at 17.

60. In the TPA of 2002, Congress identified pages for both overall trade negotiating objectives and principal trade negotiating objectives. The principle trade negotiating objectives were (1) trade barriers and distortions; (2) trade in services; (3) foreign investment; (4) intellectual property; (5) transparency; (6) anti-corruption; (7) improvement of the WTO and multilateral trade agreements; (8) regulatory practices; (9) electronic commerce; (10) reciprocal trade in agriculture; (11) labor and the environment; (12) dispute settlement and enforcement; (13) WTO extended negotiations; (14) trade remedy laws; (15) border taxes; (16) textile negotiations; and (17) worst forms of child labor. TPA, *supra* note 28, at 994–1002.

61. Before negotiations, the President must notify Congress in writing of the intent to enter into negotiations, consult both before and after with the principal Congressional Committees with trade oversight (House Ways and Means and Senate Finance) and conduct consultations over areas of special concerns—sensitive agricultural products, the fishing industry, and textiles. TPA, *supra* note 28, at 1008–10. During negotiations and before entering into any free trade agreements, the President must also consult with Congress and submit to Congress reports of the private sector advisory committees (which review free trade agreement) and notify the International Trade Commission (ITC) so that it can conduct an assessment of the agreement. TPA, *supra* note 28, at 1010, 1012–13.

62. During this time frame, the President must submit to Congress a description of changes that would be required to existing U.S. law, a final legal text of the agreement, draft of the implementing legislation and a statement of administrative actions about the agreement. TPA, *supra* note 28, at 1013. In practice, the President and Congress work together on the implementing legislation. It is in this process that issues come up that are dealt with by side agreements and side letters. *See* CONG. RESEARCH SERVICE, TRADE PROMOTION AUTHORITY (TPA): ISSUES, OPTIONS, AND PROSPECTS FOR RENEWAL 13 (2007), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rl33743.pdf (noting that Congress insists on additions or clarifications to trade agreements by this process).

In order to meet these congressional expectations, USTR only negotiated FTAs that have each congressional negotiating objective covered by a separate standard chapter of the agreement.[63] In addition to the need for congressional support, several other major motivations underlie how the NSC criteria are used. The most important of these motivations are (1) to pursue "competitive liberalization"; (2) to satisfy particular foreign policy and objectives; (3) to convert preference trading partners into reciprocal trade partners; and (4) to push the well-developed U.S. agenda on deep integration issues.

"Competitive liberalization" is the preferred strategy for dealing with lagging multilateral efforts. The strategy was developed to deal with a multilateral system incapable of rapid movement. The WTO has a process of consensus decision making in negotiating rounds and a much larger membership (over 150 countries), including various coalitions of member states pushing difficult agendas. Although the United States plays a leading role in all negotiations, it cannot direct the agenda. Under the competitive liberalization strategy, the United States pursues multiple free trade initiatives simultaneously at the multilateral, regional and bilateral levels. Engaging fully in levels other than the multilateral allows the United States to create "models for success in areas" of trade negotiation and provides leverage with each new agreement obtained.[64] If trade liberalization proves unavailable or incomplete at the multilateral level, successful competition from another level—much easier to negotiate and complete—should spur greater progress or provide an alternative.[65] More recently, the United States has shifted to describing the strategy as "complementary liberalization," characterizing the multilateral and regional efforts as mutually reinforcing ones.[66]

A simple review of the enacted and pending U.S. FTAs illustrates the importance of the second motivation for the aggressive pursuit of regionalism—to achieve foreign policy and national security objectives.[67]

63. GAO 2007 REPORT, *supra* note 45, at 18–19.

64. "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, providing leverage to spur new negotiations and solve problems, and establishing models of success in areas such as intellectual property, e-commerce, environment and labor and anti-corruption." USTR, THE PRESIDENT'S 2005 TRADE POLICY AGENDA 1 (2005), *available at* http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/Section_Index.html.

65. GAO 2007 REPORT, *supra* note 45, at 17.

66. *Id.*

67. Of the recent FTAs, three, those with Morocco, Bahrain and Omar, were negotiated with foreign policy and national security as the dominant motivation. *Id.* at 1; GAO 2004 REPORT, *supra* note 49, at 40 (noting the reason for choosing Bahrain was that it was an "important U.S. ally in the region" and would support "U.S. security and political goals"); *id.* at 47 (describing Morocco as "a staunch ally in the war against terrorism").

Following September 11, 2001, widespread consensus existed within the Executive and Legislative Branches for pursuing closer relationships with moderate Muslim countries. The MEFTA initiative, which began in 2003, and the consequent bilaterals negotiated under it satisfy a key national security concern. More particularized foreign policy goals are met by the choice of Panama (security of the Canal Zone) and South Korea (to offset U.S. policy towards N. Korea). Another explicit foreign policy concern is to encourage countries—particularly the Andean countries overly reliant on the drug trade—to refocus their economies. Another type of foreign policy goal has been to encourage trade and governance reform in developing countries.

A third motivation has been to convert countries participating in preference programs allowing duty-free access into the U.S. market—such as the General System of Preferences (GSP), the Caribbean Basin Initiative (CBI) and the Andean Trade Preferences Act (ATPA)[68]—into countries offering the reciprocal market access required in free trade agreements. For example, all of the countries participating in DR-CAFTA as well as Peru, Panama and Colombia have already or will relinquish preference status as part of negotiated FTAs. All of these developing countries have relatively high tariff walls and many other non-tariff barriers. Since any U.S.-negotiated FTA will cover "substantially all trade,"[69] the United States stands to gain complete access in its developing partners' market more fully and more quickly.[70]

68. 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 3 (2006), *available at* http://regulations.justia.com/view/48713. The current version, which has been enacted multiple times, expired at the end of 2008. The Caribbean Basis Economic Recovery Act (CBERA), 19 U.S.C. § 2702 (2000), was first passed in 1983 and expanded in 2000 and 2002 to help countries in the area access the U.S. market. 2008 TRADE POLICY AGENDA, *supra* note 10, at 130. The Andean Trade Preference Act, Pub. L. No. 102-182, 105 Stat. 1233, 1236 (1991), was passed to aid the Andean countries in their efforts to develop and spur regional economic development "to provide economic alternatives to the illegal drug trade, promote domestic development, and thereby solidify democratic institutions." 2008 TRADE POLICY AGENDA, *supra* note 10, at 129.

69. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. XXIV(8)(b), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (1994) [hereinafter GATT 1994], *available at* http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf (According to Article XXIV of the GATT, any free trade agreement must cover "substantially all the trade.").

70. U.S. free trade agreements are designed to eliminate tariffs on almost all trade between the participating countries. By contrast, WTO members are committed in negotiating rounds only to lowering tariffs and binding them. As a result, a developing country in a U.S. FTA would have to work toward duty-free access for the United States but could keep fairly high tariffs to other WTO members. The ability to exploit this difference—raising tariffs to the outside while not doing so to an FTA partner—was used by Mexico to help it with the peso crisis that followed the

A final, but no less important, motivation informing the choice of FTA partners has been to push the U.S. agenda on deep integration issues. The United States pioneered the concept of adding new subjects and rules to free trade agreements with the U.S.-Canada FTA and NAFTA and has pursued such a model ever since. With limited exceptions, all U.S. FTAs require comprehensive trade in services coverage, extensive protection of intellectual property rights and government procurement. By including the first two areas and expanding their reach in each, the United States extends gains achieved in the Uruguay Round,[71] when both areas were placed under WTO jurisdiction. By contrast, the inclusion of government procurement as a covered FTA subject allows the United States to obtain much greater market access to a large amount of trade currently available under the WTO rules.[72] The U.S. model FTA also covers issues that have been rejected or resisted by the WTO. Almost every U.S. FTA contains chapters on investment rights (including neutral arbitration to protect such rights),[73] and most cover competition law.[74]

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adoption of NAFTA. BHAGWATI, THE WIND OF THE HUNDRED DAYS, *supra* note 31, at 231–32 (expressing skepticism about the idea that PTAs "lock in" trade reform).

The tariffs in a free trade agreement are phased out over time in U.S. agreements from immediate elimination up to twenty years. The United States, however, always negotiates agreements so that as large a proportion possible of trade is duty-free prior to ten years. For example, the United States was able to set that 85% of all trade be freed up immediately and 90% of all trade within four years of the entry into force of the U.S.-Chile FTA. U.S. INT'L TRADE COMMISSION (ITC), PUB. NO. 3780, THE IMPACT OF TRADE AGREEMENTS IMPLEMENTED UNDER TRADE PROMOTION AUTHORITY 2–12 (2005) [hereinafter ITC IMPACT REPORT].

By contrast, recent WTO negotiating rounds take years to complete. The Uruguay Round took from eight years (1986–1994), while the Doha Round is in year seven (2001–present) without any indication of an end date.

71. The United States led the push to get trade services and intellectual property onto the Uruguay Round agenda against the opposition of developing countries. *See* Taylor, *supra* note 31, at 220–37. When the Uruguay Round ended, the World Trade Organization had been created and the General Agreement on Trade in Services (GATS) and Trade-Related Intellectual Property Rights (TRIPS) were made part of the obligations of all members. General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 108 Stat. 4809, 1869 U.N.T.S. 183, *reprinted* in 33 I.L.M. 1167 (1994) [hereinafter GATS], *available* at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C , 108 Stat. 4809, 1869 U.N.T.S. 269, *reprinted in* 33 I.L.M. 1125 (1994) [hereinafter TRIPS]; *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

72. The Agreement on Government Procurement is a plurilateral agreement of the WTO. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 19 U.N.T.S. 103, *reprinted in* 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf. Member states can choose whether or not to accede to the agreement. As a result, it has a much smaller membership, approximately 40 countries as opposed to the 150 Members of the WTO.

73. Every recent U.S. FTA, except for those with Jordan, Australia and Bahrain, cover investment. *See* U.S.-Jordan FTA, *supra* note 10. The United States and Jordan concluded a

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Each of these FTA chapters cover the areas of greatest U.S. comparative advantage (trade in services, creation of intellectual property thus benefiting from IP rights, investment capacity), is built around U.S.-level standards (IP rights,[75] investment rights, government procurement procedures), or both.

Why do developing countries pursue regional agreements with the United States? In the last two decades, it has become clear that regionalism accounts for a growing portion of world trade.[76] No developing country seeking economic growth and development can stay outside this major pattern of world trade. Virtually every member of the WTO is a member of one or more regional agreements.[77] Consequently, the first rationale for seeking a regional agreement is to avoid isolation and to enter or ease entry problems with globalization.[78]

The second major rationale is more obvious but no less important. Many of the agreements developing countries pursue are truly within their own geographic region and constitute a necessary attempt to build on and increase traditional trade and investment flows. If the closest countries are other developing countries, they enter South-South agreements to build greater strength and efficiency as a group. If the major market of the developing country is a developed market such as the United States, however, that country becomes the logical FTA partner. Most of the developing countries that have completed an FTA already have the United States as their major export market.[79] Each of these countries, therefore, has had the chance to analyze the actual benefits and costs of a U.S. FTA entered into by a country with similar

Bilateral Investment Treaty (BIT) in 1997 that entered into force in 2003. Bahrain had entered into a BIT with the United States prior to the FTA. The U.S.-Australia FTA lacks mandatory investor-state arbitration but does contain standards for the treatment of investors. *See* U.S.-Australia FTA, *supra* note 10.

74. Competition law chapters have not been included in all recent agreements. There are no chapters on this subject area in the FTAs with Jordan, Morocco, DR-CAFTA, Bahrain, Oman and Panama.

75. *See infra* notes 128–135 and accompanying text for a discussion on how the United States pushes for an intellectual property chapter built on U.S. standards.

76. Regionalism now accounts for over 50% of world trade. UNCTAD, MULTILATERALISM AND REGIONALISM: THE NEW INTERFACE, UNCTAD/DITC/TNCD/2004/7, at 3 (2005), *available at* http://www.unctad.org/en/docs/ditctncd20047_en.pdf.

77. According to the WTO, every member state except Mongolia is a member of a regional trade arrangement. *World Trade Report 2007*, *supra* note 14, at 34.

78. *Trade and Development Report, 2007*, *supra* note 6, at 38.

79. This is true for all of the U.S. FTAs with countries in Latin America. These countries send a far greater proportion of their exports to the United States than to one another—only 13.2% of Latin exports went to other Latin American countries. Nathalie Aminican, K.C. Fung & Francis Ng, *Integration of Markets vs. Integration by Agreements* 19–21 (The World Bank Development Research Group Trade Team Policy Research, Working Paper No. 4546 , 2008), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2008/03/04/000158349_20080304084358/Rendered/PDF/wps4546.pdf.

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goals and constraints. In this sense, Mexico's experience with the United States in NAFTA has provided a model for other developing countries to study.[80]

The United States is the world's largest market. Most developing countries already have what appears to be access to this market through relatively low tariffs and highly developed preference programs. But this market access is neither complete—not every export of interest to all developing countries are covered by low tariffs or preference programs—nor secure since all preference programs have to be renewed periodically and are always altered upon renewal. By entering into a permanent FTA with the United States,[81] the developing countries gain secure and true duty-free access. In its most recent FTAs, the United States has front-loaded its own tariff phase-outs in industrial goods and many agricultural goods as well to put developing countries in a position to benefit early from signing on to an FTA.[82] Developing countries that act early to form an FTA with a developed country may also obtain first-mover benefits.[83] In the case of U.S. FTAs, this means

80. Mexico does provide a model of what can happen to a developing country entering into a free trade agreement with a major developed trading nation. Mexico has clearly seen increase in trade and investment flows. Without NAFTA, Mexico's global exports would have been 25% lower and investment levels would have been 40% lower. DANIEL LEDERMAN, WILLIAM F. MALONEY & LUIS SERVEN, LESSONS FROM NAFTA FOR LATIN AMERICA AND THE CARRIBBEAN COUNTRIES 5 (The International Bank for Reconstruction and Development/The World Bank, eds., Stanford University Press 2005) [hereinafter LESSONS FROM NAFTA], *available at* http://ctrc.sice.oas.org/geograph/north/lessonsNAFTA_e.pdf. Nevertheless, it is clear that Mexico has not shown the economic growth expected from NAFTA nor as fast as other Latin American Countries without an FTA. *Id.* at vi. See *infra* at notes 84–91 and accompanying text for a more complete discussion of issues related to Mexico's experience under NAFTA. *See also* Ranko Shakri Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me . . . What, Exactly?: An Assessment of the Economic, Social and Political Development in Mexico Since 1994 and their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV 53, 57 (2007) (pointing out the need to study NAFTA and its effects on Mexico because it is the prototype for other agreements within countries in the Western Hemisphere at a similar level of development).

81. Every U.S. FTA provides the parties with the right to withdraw from the agreement within six months if it provides notice of withdraw to the other parties. *See* NAFTA, *supra* note 22, art. 2205. However, it would be quite costly for parties to withdrawal, and that option has never been seriously considered by any FTA partner.

82. For illustrations, see the recent FTA with DR-CAFTA—more than 90% of trade in consumer and industrial goods and half of the agricultural trade were liberalized early. DR-CAFTA, *supra* note 10.

83. This was widely perceived to be the case of Mexico in NAFTA. *See Global Economic Prospects, Trade, Regionalism and Development* (The World Bank, Washington, D.C. 2005), *available at* http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf. In the case of DR-CAFTA, the countries negotiated over the rules of origin to set the most flexible market access conditions available in the textiles sector,one that is still relatively restricted. Central America Dept. and Office of the Chief Economist Latin America and Carribbean Region, *DR-*

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negotiating special rules of origin for products of interest to the developing country or group that will give it a preferential position over other developing countries trying to enter the U.S. market.

The third major objective of the developing country is to attract more foreign direct investment. Signing on to major investment rights and providing the assurance of neutral arbitration regarding any infringement of those rights signals to investors that a country is a credible and secure investment target. One of the major consequences of NAFTA for Mexico was a great increase in investment flows.[84] Developing countries looking to attract a greater share of investment hope to duplicate this pattern by acceding to a U.S.-style FTA, just as they have by signing BITs with the United States, the EC and Japan.[85] One aspect of the investment chapters in the U.S. FTAs provides an additional incentive for developing countries to pursue the agreement. In each chapter, "investment" is defined to cover all investments made in the FTA party regardless of the country of origin of the investor. Although barred from benefits under trade provisions of the FTA, non-member country firms can take advantage of the investment protections and investment arbitration by investing in a party to the free trade agreement.

The fourth motivation for negotiating and implementing an FTA is to "lock in" domestic reforms in the areas of trade and investment policy and governance.[86] Many countries that are developing have undertaken unilateral or regional trade investment liberalization before entering into an FTA with the United States. A clear example is the reform efforts undertaken throughout Latin America in the last fifteen years.[87] Such reforms, however, may not be permanent. Succeeding political regimes sometimes have overturned reform

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CAFTA: Challenges and Opportunities for Central America 39–41 [hereinafter *DR-CAFTA Report*], *available at* http://siteresources.worldbank.org/LACEXT/Resources/258553-11196487 63980/DR_CAFTA_Challenges_Opport_Final_en.pdf.

84. *See infra* at note 159 and accompanying text.

85. *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 & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67, 77 (2005) (describing the bargain as "a promise of protection in return for the prospect of more capital in the future" and explaining that the study reveals the bargain has worked).

86. One of the major motivations for Mexico entering NAFTA was to "lock in" domestic reforms it had made in the investment and intellectual property rights. In DR-CAFTA, the countries were seeking that same benefit. *DR-CAFTA Report*, *supra* note 83, at 29–32 ("For many 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.").

87. All of the DR-CAFTA countries engaged in trade reform during this period, lowering tariffs and some developed a maquila industry aimed at the United States. One of the goals of the FTA was to build on the reform because it would guarantee long-term market access to the United States and lock in its reforms. *Id*.

legislation and have withdrawn from regional arrangements.[88] Withdrawal from a U.S. FTA is possible but unlikely. The benefits from the agreement, as well the close contact established with the United States to consolidate those benefits, make withdrawal too costly.[89] If negotiations last long enough, the developing country might have time to adapt its domestic legislation in certain regulatory areas to correspond to FTA requirements—thus easing the adjustment process—before the FTA enters into force. Mexico, for instance, used the NAFTA negotiations process to not only lock in pro-market reforms but to pass major legislation reforming its investment and intellectual property laws.[90]

A final motivation for entering an FTA with the United States is that it may spur or assist with other integration efforts. Organizing a regional integration movement among developing countries may be a crucial step in aiding a country's economic growth. However, such South-South agreements frequently fail, due to difficulties in implementation, to provide as much liberalization or opportunity for growth as expected.[91] By entering into a U.S. FTA, the developing country and its group have a target for the group's trade expansion that would make efforts worthwhile.

III. WHAT KIND OF REGIONALISM?

The U.S. answer to the question of what type of regionalism is easy to explain. The United States only enters into free trade agreements that satisfy its model. The free trade agreement is the U.S.-favored form of regionalism for three reasons. First, there are only limited multilateral requirements for free trade agreements, and these are relatively easy to satisfy. Second, setting up a free trade area requires only the most limited level of integration with FTA partners. Third, the combination of the limited legal rules and the limited

88. Most recently, the Andean Community, a customs union, broke apart after two members, Peru and Colombia, negotiated FTAs with the United States. Under the terms of the regional arrangement, these countries had the right to negotiate independently with third-party countries, regions or international organizations. Nevertheless, when the two countries went ahead with the negotiations, Venezuela withdrew from the group and joined MERCOSUR. *See* Chris Brummer, *The Ties that Bind? Regionalism, Commercial Treaties, and the Future of Global Economic Integration*, 60 VAND. L. REV. 1349, 1380–81, 1384–86 (2007).

89. Every U.S. FTA sets up a committee structure for the operation of the agreement. The FTA committees meet on a regular basis to resolve issues regarding implementation of the tariff phase-outs, standards issues and, in recent FTAs, trade capacity building.

90. Mexico's investment law was revised in 1993. Its revised intellectual property law was enacted in 1991—both prior to the entry into force of NAFTA.

91. *See Trade and Development Report, 2007*, *supra* note 6, at 110–11 for a discussion of South-South agreements and how they should be used. *See also Globalization for Development*, *supra* note 11, at 8.

level of required integration allows the United States the greatest flexibility and control in designing the agreement and its contents.

In order to comply with the WTO, members should enter into only those free trade agreements that satisfy the requirements under GATT Article XXIV: (1) to eliminate duties and other restrictive regulations on substantially all trade between constituent territories originating in those territories; (2) not to 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 period of time.[92] There are similar requirements regarding agreements on trade in services under GATS Article V.[93] The requirements under both legal rules

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92. GATT 1994, *supra* note 69, art. XXIV, ¶ 5(b).

> With respect to a free-trade area . . . the duties and other regulations of commerce maintained in each of 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.

Id.

> (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. art. XXIV, ¶ 8(b). Article XXIV, thus, intended to allow regional arrangements "as long as they satisfied three requirements: transparency, commitment to deep—intra regional liberalization, and neutrality vis-à-vis third parties." *World Trade Report 2007*, supra note 14, at 305.

93. GATS, *supra* note 71, art. V:

> 1. 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:
>   (a) has substantial sectoral coverage(1), and
>   (b) provides for the presence 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:
>   (i) elimination of existing discriminatory measures, and/or
>   (ii) 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 and XIV.

> 2. 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.
>   (a) 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.

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have proven relatively easy to satisfy in part because of the WTO's failure to provide interpretations to the meaning of such crucial terms as "duties and other restrictive regulations" and "substantially all trade" in Article XXIV and "substantially all discrimination" in GATS Art. V.[94] All U.S. FTAs aim to eliminate restrictions on all trade[95] and to cover as many service sectors possible. The second requirement only demands that the parties not raise barriers to non-members when the free trade agreement is formed and is, therefore, easily satisfied. The third requirement of compliance within a "reasonable time" was interpreted by the WTO to mean that any free trade agreement be implemented no more than ten years except for "exceptional cases."[96] U.S. FTAs with developing countries probably satisfy the ten-year requirement since most restrictions are phased out by that time.[97] Should there ever be true scrutiny of free trade agreements by the WTO, however, the much longer time frames for the FTAs could be justified as offering consideration for the needs of developing countries. Given the GATT/WTO history of not disapproving regional arrangements,[98] it has been easy for the United States to comply with the structure of free trade areas demanded by Article XXIV and GATS V.

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 14, at 307.

94. See *id.* 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.

95. *See* DR-CAFTA, *supra* note 10, ch. 3, Annex 3.3. *See also* USTR, DR-CAFTA FACTS: FREE TRADE WITH CENTRAL AMERICA AND THE DOMINICAN REPUBLIC HIGHLIGHTS OF THE CAFTA, CAFTA POLICY BRIEF (Feb. 2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file74_7284.pdf. *See also* U.S.-Peru FTA, *supra* note 10, at ch. 2, Annex 2.3.

96. Understanding on the Interpretation of Article XXIV of the General Agreement Tariffs and Trade 1994 provides: "The 'reasonable length of time' referred to in paragraph 5(c) of Art. XXIV should exceed 10 years only in exceptional cases." There is no clear consensus in the WTO about what constitutes an "exceptional case." *World Trade Report 2007*, *supra* note 14, at 310. There is a similar lack of consensus on what a "reasonable time-frame" for complying with GATS V means. U.S.-Peru FTA, *supra* note 10, ch. 2, Annex 2.3.

97. The recent U.S. FTAs with developing countries have tariff phase outs that go on for 15, 17 or 20 years. The long time frames are reserved for import sensitive products, usually agricultural goods. Industrial goods are always phased out by year ten of each agreement.

NAFTA was negotiated before the Art. XXIV Understanding and phases out tariff elimination over fifteen years. *See* NAFTA, *supra* note 22, art. 302. In this respect, the U.S. FTAs match many other FTAs, where the common pattern is for 90% of most imports to be duty-free by the tenth year of implementation. *World Trade Report 2007*, *supra* note 14, at 309.

98. See *supra* text accompanying note 13 for a discussion of the GATT/WTO oversight of this issue.

In order to establish a free trade area, the parties concentrate on eliminating barriers to each other. This requires designing rules to ensure that only the FTA parties actually benefit from the removal of those barriers—the crucial Rules of Origin.[99] These rules can easily be negotiated as part of the agreement. Unlike the customs union, in which parties must create a common external tariff and therefore trade policy, FTA partners do not need to establish a legislative institution within the FTA to achieve this goal. Rather, each country can implement its FTA obligations while largely retaining its own respective trade policymaking regime. This aspect of free trade areas meets the U.S. preference for limited institutionalism and retention of as much sovereignty as possible. During the U.S.-Canada negotiating process, for example, the United States completely resisted a push for the possibility of achieving common legislation in unfair trade rules and pushed instead for a dispute settlement mechanism that would review each country's appreciation of its own law.

The third reason the United States prefers free trade areas is the flexibility allowed by the form. One preference has been to, if possible, accommodate regionalism with the long-held U.S. commitment to multilateralism as the best form for trade liberalization. All U.S. FTAs are, therefore, built around GATT compliance and core GATT concepts. The other preference—unilateral in nature—has been to use regionalism to keep pushing the U.S. agenda on legal disciplines even if the multilateralism system is not ready or unwilling to accommodate those rules.[100]

The U.S. model FTA reflects all of these U.S. goals—GATT compliance and consistency, limited institutionalism and moving the rules agenda forward. The development of the model began with the U.S.-Canada Free Trade Agreement, the first free trade agreement to include trade in services and investment. However, all of the major components of the basic model really came together in NAFTA. The continued use of the model can be traced to

99. Rules of Origin are crucial for a free trade area because they specify which products are entitled to duty-free treatment. NAFTA established the set of basic rules of origin still used in U.S. trade FTAs. These rules are widely regarded as complex. See Jorge Alberto Ramirez, *Rules of Origin: NAFTA's Heart, But FTAA's Heartburn*, 29 BROOK. J. INT'L L. 617, 641–42 (2004) for a short description of how the rules operate. The rules, which are negotiated specifically for many products, actually comprise the greatest part of any U.S. FTA. The NAFTA model provides for a high degree of variation across product categories. This type of variation is what allows sectoral interest groups (i.e., industry groups) to shape the rules to protect certain areas of trade.

100. One example of an area of U.S. interest is extending multilateral discipline over investment. Although investment was part of the Doha Agenda, the WTO General Council withdrew the topic from the negotiations agenda in 2004. *Trade and Development Report 2007*, *supra* note 6, at 11. Free trade agreement negotiations, however, remain a way for the United States to keep the issue alive.

several factors. The first and most obvious is the issue of power. Apart from Canada, the United States has never had to negotiate with a trading partner of close or equal bargaining power. All of the post-NAFTA FTAs, except for Australia, have been with developing countries. The resulting asymmetry in bargaining power allows the United States not only to offer the model as a template for negotiations, but also to insist on adherence to most of its components.

Power dynamics, however, are not only the factor in play. The model has proven its utility. The flexibility of the form allows the United States to go beyond trade in goods and services to include investment and other issues, such as intellectual property rights, or add new chapters on trade areas that developed after NAFTA. The format also leaves room for particularized negotiations with partners over including or excluding some subject matter areas, how to treat special sectors or products, regulatory limitations and capacity constraints.[101] At the same time, use of the model allows for freezing the language on key concepts because the United States and other FTA partners know what they mean. Meanwhile, actual working experience under the FTAs, developed through the subject matters committees established in NAFTA,[102] as well as dispute settlement interpretations[103] has led the United States and other FTA partners to renegotiate and rework the standard text.[104]

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101. Particularized negotiations are always required in trade for goods on special rules of origin and tariff phase-outs. For an analysis of those in DR-CAFTA, see *DR-CAFTA Report*, *supra* note 83, at 34–41. In U.S. FTAs, there are always several chapters on services because liberalization in those chapters is not just about eliminating barriers, but also about dealing with regulatory structures. Each FTA partner must retain as much regulatory oversight as necessary to guarantee services to its population. As a result, the services chapters make explicit government powers to regulate. For an illustration of the importance of regulatory oversight, see DR-CAFTA, *supra* note 10, art. 12.10.

102. All U.S. FTAs create a Free Trade Commission comprised of the trade ministers of the participating parties. The actual work of the agreements is done in sub-committees and working groups established for various subject matter area commitments. For an illustration, see DR-CAFTA, *supra* note 10, 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 10, ch. 20.1.

103. 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, 106–112 (2005). *See also* David A. Gantz, *The Evolution of FTA Investment Provisions from NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 683 (2004).

104. Core provisions of Chapter 11 have been renegotiated and redrafted to clarify the meaning of concepts. *Compare* NAFTA, *supra* note 22, ch. 11 (arts. 1105, 1110), *with* U.S.-Peru FTA, *supra* note 10, at ch. 11 (arts. 1105, 1110, Annexes 10-A, 10-B).

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The use of the model also allows the United States to negotiate more efficiently. By using the same template of issues to cover and the same agreement, the United States does not have to expend negotiating resources on designing an agreement with each FTA partner from the ground up. Instead, the United States can concentrate on negotiating areas of each FTA that require alteration or compromise.

The United States has employed two models in its FTAs: the NAFTA model and the WTO-plus model. The shift to the WTO-plus model, characterized by requiring its FTA partners to make additional commitments on several key subject matter areas, occurred after the United States encountered difficulties in the FTAA negotiations and in the Doha Round. Although it expands on some requirements, the WTO-plus model shares the same basic design and core substantive obligations as the NAFTA model.

The design of the FTAs is one of the most consistent aspects of U.S. FTAs. With the notable exception of the U.S.-Jordan FTA,[105] all of the U.S. FTAs are heavily drafted documents comprised of approximately sixteen subject areas and chapters (with others devoted to institutional matters)[106] that run for hundreds of pages.

The first chapter of the FTA is devoted to the objectives of the agreement and general definitions. The first article in the model always declares the intention of the parties—consistent with GATT Article XXIV—to establish a free trade area.[107] All of the subject matter chapters exhibit the same structure by beginning with either definitions or general obligations regarding the subject and ending with detailed annexes containing exceptions and

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Investor-state arbitrations may also have been one of the reasons why some recent FTAs do not contain competition chapters. 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, 274 (2008). There are no competition chapters in the recent DR-CAFTA, Morocco or Bahrain FTAs. According to Sokol, the United States is not the country pushing for such chapters. "The United States position may be best described as one that does not oppose competition policy chapters as long as the chapters remain non-binding and the FTA counter-party finds the inclusion of such a chapter to be important." *Id.* at 258–59.

105. The U.S.-Jordan FTA is the only FTA that is not heavily drafted—it is only twenty pages long. *See* U.S.-Jordan FTA, *supra* note 10.

106. The 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-four 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. ITC IMPACT REPORT, *supra* note 70, at 2-2 tbl. 2.1 (comparing the structure/contents Singapore, Chile and Morocco agreements on a grid).

107. For an illustration, see KORUS, *supra* note 10, art. 1.1 ("Consistent with Article XXIV of GATT 1994 and Article V of GATS, the Parties hereby establish a free trade area in accordance with the provisions of this Agreement.")

reservations, or special forms of implementation for the general rules.[108] The FTAs also tend to have side letters that are considered to be part of the text.[109] These letters have been developed, unlike the reservations and exceptions, in response to congressional demands made during the implementation process.

The model adopts core GATT trade concepts—most favored nation and national treatment—in the chapters on trade in goods and services. Rather than simply borrowing the language of the relevant GATT article, the model requires the parties to follow the GATT or GATS concept itself, including later interpretations.[110] The General Exceptions chapter uses GATT similarly, requiring the parties to incorporate Article XI.[111] This drafting decision serves several purposes. It acts to signal general adherence to GATT discipline by underscoring NAFTA's consistency with its major agreements. The adoption of GATT/GATS rules also aids in the later interpretation of the relevant FTA provision. Since GATT (and, where applicable, GATS) is incorporated, each FTA partner has the option of pursuing an FTA violation based on the provision in the WTO or the FTA itself.[112] Consequently, whichever forum is chosen, there should be consistent interpretation of the concept.[113] The choice

108. Chapters are built around general obligations. In order to understand what a partner country has agreed to, the annexes are the place to look.

109. 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 70, at 2–6.

110. In NAFTA, this technique was used with key GATT concepts—national treatment and the prohibition on quantitative restrictions. With respect to national treatment, for example, NAFTA 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, or any equivalent provision of a successor agreement to which all Parties are a party, are incorporated into and made part of this Agreement.

NAFTA, *supra* note 22, 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 22, art. 301 *with* DR-CAFTA, *supra* note 10, on National Treatment:

> Each party shall accord national treatment to the goods of another Party in accordance with Article 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.

DR-CAFTA, supra note 10, art 3.2.

111. *Compare* DR-CAFTA, *supra* note 10, art. 3.8 *with* NAFTA, *supra* note 22, art. 309(1).

112. All FTAs have a choice of forum provision in the chapter on dispute settlement. *Compare* DR-CAFTA, *supra* note 10, art. 20.3 *with* NAFTA, *supra* note 22, art. 2005(1). In DR-CAFTA, the choice of forum extends to yet another regional agreement dispute settlement system to cover disputes arising between two of the DR-CAFTA members which are members of another regional agreement.

113. There is no concept of precedent in international law. However, both NAFTA panels and WTO panels have relied greatly on earlier interpretations by dispute settlement panels.

of forum provision was actually inserted into NAFTA when it was drafted, even though at the time the Uruguay Round had not yet finished and the WTO's Dispute Settlement Understanding (DSU) had not been adopted. Had the Uruguay Round failed, NAFTA parties would have had only the choice of the old GATT Article XXIII dispute settlement system[114] or the non-binding arbitration provided for in NAFTA Chapter 20.[115] The later availability of the DSU, with its enforcement mechanism,[116] has resulted in both the United States and its FTA partners in frequently choosing the WTO for resolving disputes.[117]

Other notable recurring aspects in the commitment chapters are those dealing with certain substantive obligations. The Trade in Goods part of the model FTA is built around three main features.[118] Tariff elimination is always phased in, going from the date of enactment to five years, ten years or beyond. The percentage of trade covered by the phase-outs is adjusted for each FTA partner according to its market strength or competitiveness.[119] The most

114. 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 Taylor, *supra* note 31, at 242–250.

115. 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 22, at art. 2018(1). *Cf.* U.S.-Peru FTA, *supra* note 10, art. 21.15 (which simplifies the language but has the same non-binding effect).

116. Understanding on Rules and Procedures Governing the Settlement of Disputes, 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/dispu_e/dsu_e.htm.

117. The United States has pursued most of its major trade complaints against Canada in the WTO's DSU system: Certain Measures Concerning Periodicals (DS 31), Measures Affecting the Importation of Milk and the Exportation of Dairy Products (DS 103). Canada has done the same with major complaints: Certain Measures Affecting the Import of Cattle, Swine and Grain (DS 144), Continued Dumping and Subsidy Offset Act of 2000 (DS 234), Dispute with Respect to Certain Softwood Lumber (DS 236, 247, 257, 264, 277, 311), Subsidies and Other Domestic Support for Corn and Other Agricultural Products (357). The same pattern has been true for the United States and Mexico. WTO, Dispute Settlement: Disputes by Country, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

118. 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 the part are also special provisions related to sensitive sectors of trade. *See* NAFTA, *supra* note 22, pt. 2. In later agreements, there are often breakouts of some of these provisions for separate chapters. *See* U.S.-Peru FTA, *supra* note 10, chs. 2, 3.

119. The United States first encountered the issue of how to balance 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

sensitive products for both parties are always back-loaded in this phase-out, thereby giving each partner the opportunity to obtain the best possible adjustment for the affected industry. A separate chapter is usually reserved for agriculture, the least-disciplined area of trade. The agricultural trade chapter allows the parties to retain trade policies eliminated in the other trade-in-goods chapters tariffs, quotas and tariff-rate quotas.

Core chapters are also included on Rules of Origin and on Customs Administration. Both chapters cover key aspects of the actual operation of a free trade area, and each chapter addresses obligations placed not only on the parties but also on citizens. The Rules of Origin specify which goods are entitled to duty-free treatment. The Customs Administration obligations require implementation obligations for the FTA partner about how to provide assistance to traders and enforcement with regard to the rules of origin. The NAFTA model established the pattern of having general, quite restrictive rules of origin as well as special rules of origin for selected sectors of interest to the FTA partners.[120] Of particular relevance to developing countries are the special rules of origin for textiles and clothing.[121]

In the chapter(s) on trade in services, the NAFTA model uses the negative list approach. This means that the overall obligations to liberalize and to provide non-discriminatory treatment with regard to regulations apply to all service sectors except those reserved at the time of negotiations and reflected in the annexes.[122]

status as a developing country and the adjustments it would have to make. HERMANN VON BERTRAB, NEOGIATING NAFTA: A MEXICAN ENVOY'S ACCOUNT 46 (1997).

120. These restrictive Rules of Origin are a well-recognized and entrenched aspect of the U.S. model.

121. In recent U.S. 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 that will allow the greatest market access possible. The textile rules receive extended treatment in DR-CAFTA. In DR-CAFTA, the United States did agree to phase out all remaining multilateral quotas but obtained a special safeguards measure for textile imports. The parties also agreed to special customs cooperation procedures to aid in dealing with rule of origin issues. *See* DR-CAFTA, *supra* note 10, arts. 3.22, 3.23 and 3.24.

122. This is completely different from the GATS "positive list" approach, in which a service sector is not covered unless clearly specified. Use of the negative list approach does force greater liberalization of services and locks in prior liberalization by an FTA partner. The use of the negative list approach also means that any new service will automatically be covered by the agreement. Finally, even though an FTA partner can take exceptions (keep non-conforming measures) by designating them as such and including them in the agreement, if they later liberalize a non-conforming measure, that measure becomes "bound" and must be continued. ITC IMPACT REPORT, *supra* note 70, at 2–14. The non-conforming measures or exceptions taken by each FTA party are attached as Annexes to the FTA.

The other standard commitment chapters are on investment,[123] intellectual property rights,[124] government procurement,[125] competition policy, standards (sanitary and phytosanitary and technical barriers to trade),[126] labor rights and environmental cooperation.[127] Not all of these standard chapters originated in the same way. The investment chapter entered the model from the U.S.-Canada FTA but took its final form in NAFTA with the addition of investor/host state arbitration. The services, intellectual property and standards chapters were drafted before completion of the WTO's corresponding chapters. Undoubtedly, the Uruguay Round drafts were used as models for each. At the time they were completed and NAFTA went into force, it was not clear that the Uruguay Round would complete and so each chapter became important as an illustration of how agreements on these issues could be reached between developed and developing countries. The labor and environmental chapters, which began in NAFTA as side agreements, were negotiated in response to a new political regime in the United States—with the election of President Clinton—and by the need to obtain the approval of a Congress that had shifted in composition from the start of negotiations.

The evolution to the WTO-plus model is easy to trace in several of these commitment chapters. The chapter on intellectual property offers the best illustration of the shift. The structure of the NAFTA model has been retained. Each IP chapter begins with general obligations: to adhere to specified multilateral IP agreements and the right to offer more extensive protection than that specified in the agreement.[128] Consequently, the FTA provisions on

123. The U.S. FTA chapters on investment cover investor rights and protections in Part A and provide for binding investor-state arbitration in Part B. The investor rights and protections are the same in each (National Treatment, MFN Treatment, Minimum Standard of Treatment, Expropriation and Compensation, Transfers, Performance Requirements, Senior Management of Boards and Directors). Recently enacted FTAs, DR-CAFTA and Peru, also contain provisions for non-discriminatory treatment of investors, including restitution and/or compensation for any investment losses coming from armed conflict or civil strife. *See* U.S.-Peru FTA, *supra* note 10, at art. 10.6; DR-CAFTA, *supra* note 10, art. 10.6.

124. See *infra* at note 128 for a discussion of IP chapters.

125. All U.S. FTAs cover government procurement. The FTAs on this topic open up more trade than commitments under the Agreement on Government Procurement. *See*, *e.g.*, U.S.-Peru FTA, *supra* note 10, ch. 9.

126. All of the U.S. FTAs have chapters on sanitary and phyto-sanitary standards and technical barriers to trade. Standards pose perhaps the most significant non-tariff barrier to trade because developing country FTA partners facing the United States—with its high standards—must make sure their products are compatible in order to access the market. *See*, *e.g.*, U.S.-Peru FTA, *supra* note 10, ch. 6.

127. The labor and environmental chapters of U.S. FTAs have been controversial since NAFTA. Nevertheless, the need to obtain congressional approval has meant that they have been included in all U.S. FTAs.

128. NAFTA also had provisions devoted to protection for trade secrets, industrial design and the lay-out design of integrated circuits. NAFTA, *supra* note 22, arts. 1710, 1713. The recent

intellectual property rights constitute the minimum protections a party must provide. The core of the text is comprised of the obligations that must be assumed with respect to the major forms of intellectual property recognized in NAFTA: patent, copyright and geographical indications first covered in NAFTA.[129] The final section of the chapters contains all of the civil and criminal enforcement obligations required by FTA parties.[130]

During the course of all FTA negotiations, USTR has developed what it considers to be a "model FTA intellectual property text" that forms the basis for other agreements.[131] Technological developments since NAFTA account for part of why the model text has evolved.[132] However, the text also has developed around general explicit concerns of the USTR, its advisory committee on intellectual property (ITAC-15) and U.S. industry about the status of global intellectual property protection. IPR-based industries have turned principally toward FTAs to push their agenda on higher standards of protection and the need to keep up with enforcement procedures to protect those rights through the FTA process.[133] The evolved model text reveals the U.S. goal of expanding the scope of substantive protections. All recent FTAs go well beyond TRIPS obligations.[134] FTA partners must sign on to an

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FTAs have followed the same template of covering trademarks, geographical indications, domain names on the internet, copyrights and patent, in that order. *See* U.S.-Peru FTA, *supra* note 10, ch. 16; DR-CAFTA, *supra* note 10, ch. 15; U.S.-Chile FTA, *supra* note 10, ch.17.

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

130. The enforcement chapters have grown in length and complexity. *Compare* U.S.-Peru FTA, *supra* note 10, art. 16.11 *with* NAFTA, *supra* note 22, arts. 1714–18.

131. *See* PERU ITAC REPORT, *supra* note 129, at 3; *see also* PANAMA ITAC REPORT, *supra* note 129, at 3. (The ITAC reports even follow a model of the IP issues discussed).

132. PERU ITAC REPORT, *supra* note 129, at 5, states:

> "[T]he PTPA takes into account the significant legal and technological developments that have occurred since the TRIPs and NAFTA agreements entered into force and mirrors, and, in many areas, improves upon the Singapore, Chile, and CAFTA-DR in order to establish clear precedents in most key areas of IP protection for future FTA negotiations, many of which precedents were also followed in the FTAs with Morocco, Bahrain, and Oman."

Id.

133. *Id.* at 4.

134. 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

increasing number of major multilateral IP treaties. The model text requires extension of the term of protection in two major forms of IP rights—patent and copyright.[135] New FTA agreements are considered successful based on how closely the extended protection term procured in a particular FTA comes to U.S. standards.[136]

The model IP text also emphasizes the growing importance of the enforcement of IP rights. The U.S. position is that enforcement has lagged well behind the adoption of IP legislation on standards and that new technologies, such as the Internet, have made enforcement problems greater. To date, however, the United States has not been able to obtain its preference for solving the problem—that FTA partners bind themselves to "specific performance standards in the area of enforcement."[137] The model text advances in this area have focused instead on making statutory damages available for piracy and counterfeiting and extending some of the other civil remedies made discretionary under the TRIPS Agreement, as well as

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testament to the principle that high levels of protection benefits indigenous creators and inventors in the same manner as they do in developed countries." *Id.* at 5.

135. In recent FTAs, the United States has pushed for the extension of copyright term closer to 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 of seventy years. PANAMA ITAC REPORT, *supra* note 129, at 12; PERU ITAC REPORT, *supra* note 129, at 12. This goes well beyond the TRIPS minimum standard of fifty years. TRIPS, *supra* note 71, 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 10, art. 16.9(6)(b). Since developing countries frequently take longer to issue patents than developed countries, this 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 129, 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 FTA also prohibits the marketing approval of generic drugs during the term of the drug patent. This provision effectively extends the life of the patent since competing countries must wait until after the patent has run to produce a competing product.

136. *See* PERU ITAC REPORT, *supra* note 129, at 5 (urging the USTR to obtain a U.S.-level standard, as was done in several of the MEFTA bilateral FTAs in future agreements).

137. *Id.* at 18–19. 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, but significantly more difficult to enforce those obligations because of the implementation costs involved, and TRIPS does not provide assistance regarding this issue. *See* J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round* 8–12 (Asian Dev. Bank, ERD Working Paper No. 21, 2002), *available at* http://www.adb.org/Documents/ERD/Working_Papers/wp021.pdf (describing the implementation costs of IP rights obligations).

expanding provisional and criminal remedies to tackle wide-scale infringements.[138] A review of the types of provisions the United States would prefer in the criminal remedies context would require an FTA partner to have its courts adopt sentencing guidelines and widen its conception of search orders.[139] It is clear that the United States would like to import its concepts on such issues into FTA partners' legal systems.[140]

In the WTO-plus evolution of the model, other chapters have now become standard: electronic commerce,[141] transparency/anti-corruption[142] and trade capacity building.[143] When the NAFTA model was established, electronic

138. PERU ITAC REPORT, *supra* note 129, at 19–20. *See* U.S.-Peru FTA, *supra* note 10, at art. 16.11(11–17) (civil remedies), art. 16.11(18–25) (provisional remedies), art. 16.11(26–28) (criminal remedies).

139. PERU ITAC REPORT, *supra* note 129, at 22–23.

140. *Id.*

141. 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 10, ch. 15; U.S.-Singapore FTA, *supra* note 10, ch. 14; U.S.-Australia FTA, *supra* note 10, ch. 16; U.S.-Morocco FTA, *supra* note 10, ch. 14.

142. The chapters on transparency and corruption provisions first appeared in the FTA with Morocco. *See* U.S.-Morocco FTA, *supra* note 10, ch. 18(18.1–18.4) (transparency requiring the publication of all rules, regulations, and the due process rights allowed citizens concerning notification, administrative proceedings and review and appeal of administrative or judicial proceedings); ch. 18(18.5) (measures criminalizing corrupt payments). The other two FTAs negotiated and enacted at around the same time, with Chile and Australia, have the transparency obligations but no provision on anti-corruption. U.S.-Chile FTA, *supra* note 10, ch. 20; U.S.-Australia FTA, *supra* note 10, ch. 20; U.S.-Morocco FTA, *supra* note 10, ch. 14. All of the recent FTAs (DR-CAFTA, Peru and the pending FTAs with Panama, Colombia and KORUS) have a slightly expanded section on anti-corruption. DR-CAFTA, *supra* note 10, ch. 18, sec. B; U.S.-Peru FTA, *supra* note 10, ch. 19, sec. B; U.S.-Panama FTA, *supra* note 10, ch. 18, sec. B; U.S.-Colombia FTA, *supra* note 10, ch. 19, sec. B; KORUS, *supra* note 10, ch. 21, art. 21.6.

Transparency has always been a core principle of U.S. FTAs. *See* NAFTA, *supra* note 22, art. 102(1) (stating that one of the objectives of NAFTA is transparency). By placing the transparency obligations in a separate chapter, the WTO-plus model underscores the connection between good governance and strong economics. Anti-corruption is now widely regarded as one of the biggest constraints facing developing countries as they pursue economic growth. Omar Azfar, Young Lee & Anand Swamy, *The Causes and Consequences of Corruption*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 43–44 (2001). The World Bank, with its mission of eradicating poverty, for example, has made anti-corruption a priority, aiming its efforts at World Bank projects. The link between corruption and development has attracted a great deal of attention. *See generally id.* at 50–53 (noting studies that have found corruption negatively impacts both the rate of investment and GDP growth, and that better institutional quality is linked to economic growth).

143. Trade Capacity Building was first added to U.S. FTAs in the DR-CAFTA. *See* DR-CAFTA, *supra* note 10, ch. 19, sec. B. *See generally* U.S.-Peru FTA, *supra* note 10, ch. 20; U.S.-Panama FTA, *supra* note 10, ch. 19; U.S.-Colombia FTA, *supra* note 10, ch. 20 (containing similar provisions). Befitting its level of economic development, KORUS lacks any trade capacity building provisions. KORUS, *supra* note 10. The United States coordinates trade

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commerce was non-existent (though it later became an issue of concern). The transparency/anti-corruption and trade capacity building chapters were added in response to the shift in FTAs partners that occurred over time. Some recent FTA partners—particularly those in Latin America—are at much lower levels of development than previous partners.[144] Areas of particular concern to these countries are the need to improve governance (hence the inclusion of a transparency/anti-corruption chapter) and to build up the capacity to benefit from trade agreements (which lead to the addition of the trade capacity building chapter).

Other issues have deliberately been kept out of either U.S. model. The United States will not subject the entire area of agriculture to the FTA process, and it takes the position that this can only be dealt with at the multilateral level.[145] Two other issues are also off the table in U.S. FTA negotiations:

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." U.S. GOVT ACCOUNTABILITY OFFICE, U.S. TRADE CAPACITY BUILDING EXTENSIVE BUT ITS EFFECTIVENESS HAS YET TO BE EVALUATED 3, GAO-05-150 (2005), http://www.gao.gov/new.items/d05150.pdf [hereinafter GAO 2005 REPORT]. 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 DR-CAFTA. *Id.* at 3–4. Congress began to appropriate funds for trade capacity building programs in 2003. *Id.* at 6–7. The largest proportion of projects funded out of trade capacity building was for trade facilitation, which includes customs operation and administration as well as 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.

Trade Capacity Building (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 sanitary and phytosanitary standards with regard to exports of fruits and vegetables. *Id*. at 13–14. The USAID approach to regional economic growth in Central America has been done by "taking stock 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, the USTR led a working group on trade capacity building to help the countries implement the FTAs. *Id*. at 26. The 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 promoting innovation and providing participating countries "with trade capacity building to develop negotiating skills promoting investment, job creation and higher business standards." US/TPR, *supra* note 21, at 17.

144. Honduras and Nicaragua are the least-developed countries.

145. The United States refused to negotiate over the major agricultural barriers facing developing countries (tariff peaks and escalation and production subsidies) even in hemispheric FTAA negotiations. It has never been on the table in any bilateral FTA.

unfair trade statutes[146] and labor mobility.[147] The reasons for their exclusion are not based on a perceived lack of importance; to the contrary, both issues have great impact on trade in goods (unfair trade statutes) and trade in services (labor mobility). Both unfair trade statutes and labor mobility, however, are so controversial and politically charged that any inclusion would probably kill a U.S. FTA.[148]

In the case of unfair trade statutes, they play several vital roles in design of U.S. trade policy. First, the historical roots of both the anti-dumping and countervailing duty laws are quite deep. Second, the United States has long been committed to relative openness. Without the safety value of unfair trade statutes for ailing/uncompetitive industries, the United States would face far greater cries of protectionism. In the U.S.-Canada FTA and NAFTA, the United States resisted arguments for abolishing or reforming the legislation and instead substituted dispute resolution in its place.[149] For later FTAs, the subject has not been covered at all.

In the case of labor mobility, although greater openness in this area would be of great interest and advantage to developing country FTA partners, it is also unlikely to join the model.[150] Allowing true mobility, particularly of unskilled labor, would involve major changes to U.S. domestic immigration policy. For the first time an FTA would entail major domestic implementation problems, something that is routine for its developing country FTA partners. Since labor mobility would not be an area of U.S. comparative advantage, there is no incentive for the United States to engage on this issue.

146. U.S. FTAs do have rules on safeguards but not on the anti-dumping and countervailing duty rules of the parties. This is true even though neither of the U.S. trade partners in NAFTA wanted antidumping in that free trade agreement. *See* Sokol, *supra* note 104, at 278. This poses a problem for developing countries because the United States aggressively uses its anti-dumping statute.

147. The only labor-mobility issue in U.S. FTAs is over temporary entry for business visitors, traders and investors, intra-company transferees and professionals. NAFTA, *supra* note 22, ch. 16, annex 1603 (spelling out in detail the people who fall into each group).

148. Under the recently expired TPA, the President was required to report to Congress within 180 days before the acceptance of any agreement if such an agreement could impact existing antidumping laws. *See* TPA, *supra* note 28, § 3804(d)(3)(A). It is unlikely that the next Congress to renew TPA would see the issue differently. One view is that it is the absence of anti-dumping that makes it possible for key sectors of industry in countries to support trade agreements. *See generally* SAFEGUARDS & ANTIDUMPING IN LATIN AMERICAN TRADE LIBERALIZATION: FIGHTING FIRE WITH FIRE (J. Michael Finger & Julio J. Nogués eds., The World Bank and Palgrave Macmillan 2006).

149. Sokol, *supra* note 104, at 278.

150. *See generally* Karen E. Bravo, *Regional Trade Agreements and Labor Liberalization: (Lost) Opportunities for Experimentation?* 28 ST. LOUIS U. PUB. L. REV. 71 (forthcoming 2009) (giving a complete introduction to the issue of labor mobility).

IV. DOES THE U.S. FTA APPROACH DELIVER WHAT DEVELOPING COUNTRIES SEEK?

Developing countries enter into U.S. FTAs to spur economic growth and development. The major goals a developing country must achieve for an agreement to have the desired effects are secure market access, increased foreign direct investment and extensive services sector liberalization. A developing country also needs to enhance its reputation for good economic governance in the world community. Making significant progress with respect to all of these goals should allow a developing country to increase wealth, competition, employment and productivity.

How useful is a U.S. FTA in delivering these goals to developing countries? The answer varies based upon how the developing country negotiates and then implements the FTA. With regard to the first issue, the developing country must negotiate well on issues where it has voice. This requires the country to have figured out its biggest needs from the FTA and constraints it will face in attempting to benefit from the agreement prior to entering talks. Diagnostic work has been done on such issues for developing countries but often only after the agreements have been negotiated.[151]

Given the reality of trade reciprocity with the United States, the developing country partner must make sure to open up trade early only in products where it is relatively competitive. The developing country, therefore, must have negotiated tariff phase-outs carefully or sought exceptions on particular products from less competitive, rural parts of the country. Some evidence indicates that the Mexican experience on this point might be a useful illustration. Mexico suffered significant job loss in rural and poor sections of the country following NAFTA because its maize sector was uncompetitive.[152] In DR-CAFTA, an exception was made for countries facing the same problem with maize and other food staple products.[153]

When considering the effects of investment and competition, the developing country also must make wise choices regarding which service

151. The World Bank has conducted studies on Mexico's experience under NAFTA to offer Latin American countries insight LESSONS FROM NAFTA, *supra* note 80. By the time the study was out, DR-CAFTA had already been negotiated. Another example is a report done about DR-CAFTA after the agreement. *See DR-CAFTA Report*, *supra* note 83. Of course, FTA negotiations are confidential and therefore exact repercussions of key provisions (on tariffs for example) could not be analyzed prior to completion of an agreement. Nevertheless, given the model nature of U.S. FTAs, these studies should help developing countries understand that trade agreements alone are not enough for economic growth and development.

152. *See* Oliver, *supra* note 80, at 85–89 (noting the significant loss of agricultural jobs in Mexico after it opened up to the more efficient and subsidized U.S. imports).

153. *DR-CAFTA Report*, *supra* note 83, at 34.

sectors to liberalize and which to leave off the table.[154] In the area of intellectual property rights, the developing country must assess its ability to absorb U.S. levels of protection given the inevitable tension between IP rights and competition, along with the other goals of development.[155] For most

154. This issue can be a difficult one for a developing country. In the DR-CAFTA negotiations, Costa Rica agreed to open up two service sectors, telecommunications and insurance, both state-owned monopolies that it had not liberalized earlier in the 1990s. The decision by the government not to open earlier was due to strong public opposition to the idea. *DR-CAFTA Report*, *supra* note 83, at 44. Under DR-CAFTA, Costa Rica agreed to a partial opening in three areas (private network services, internet services and wireless services) over a phase-in period. On the eve of the referendum vote, one of the issues pushed by anti-DR-CAFTA forces was that it would damage such state-run companies. Marla Dickerson, *Costa Rica Appears to Seal CAFTA*, L.A. TIMES, Oct. 8, 2007, at C1; *ICT Chamber Outlines Benefits of FTA for IT Industry*, BUSINESS NEWS AMERICAS, Oct. 17, 2007, http://www.bnamericas.com/story.xsql?id_sector=1&id_noticia=410399&Tx_idioma=I&source= (noting that the main sticking point in the referendum was "the obligation to partially liberalize the telecommunication market").

Telecommunications providers play a critical role in globalization. Without the best support for this crucial area of infrastructure, it is harder for domestic firms to enter into the real way business is done—through global production chains. *See* Grant Aldonas, *Keynote Address: What Would We Bargain for if Development Mattered?*, 24 ARIZ. J. INT'L & COMP. L. 29, 36–37 (2007) (The author noted that what the world trading system really needed to negotiate for in a development round would be agriculture, health care, complete liberalization of trade in telecommunications—both goods and services—as well as finance and transportation. According to Aldonas the revolution in communications is part of what makes the global supply chain possible.) *See also Trade and Development Report, 2007*, *supra* note 6, at 45 (noting that to aid in development the provision of physical infrastructure, "particularly transport and communications networks, can be as if not more important than the reduction of tariff barriers and formal quantitative restrictions").

155. *See generally* Peter M. Gerhart, *The Tragedy of TRIPs*, 2007 MICH. ST. L. REV. 143, 172 (pointing out that the WTO is not the appropriate forum for negotiating IP law because "the decision of intellectual property systems requires very careful attention to distributive issue, and those distributive issues are difficult to address when law is made by exchanges between nation states").

The U.S. FTA negotiating process also does not allow for negotiations over distributive issues. What is tabled for discussion is the model text which aims to expand rights as closely as possible to the U.S. standard. Consequently, issues that could be of great import to developing countries, such as legal protection of traditional knowledge, is not really a part of the dialogue. Currently, there is no multilateral treatment of the issue at the WTO level. In recent U.S. FTAs, there is only an understanding between the United States and Peru regarding biodiversity and traditional knowledge. The understanding is limited to the two governments acknowledging the importance of the issue and a pledge "to share information that may have a bearing on patentability of inventions based on traditional knowledge or genetic resources" by making accessible to each other (1) publicly available databases of relevant information and (2) the opportunity to cite to patent examining authorities prior art that may have a bearing on patentability. U.S.-Peru FTA, *supra* note 10, Understanding Regarding Biodiversity and Traditional Knowledge, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file719_9535.pdf.

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developing country partners, this will mean resisting the arguments for most, if not all, the extensions pushed by the United States.

The other major consequence of dealing with the U.S. model FTA is that the developing partner inevitably faces significant implementation obligations. Every area of a model FTA requires implementation legislation and the dedication of resources.[156] For example, to meet trade-in-goods obligations, a developing country must update its customs administration.[157] The FTA trade-in-services obligations require altering investment and regulatory legislation for newly liberalized sectors. The commitment to expanded IP rights and greater enforcement often requires a complete revision—or, at the very least, an updating intellectual property legislation. Additionally, every developing country would have to increase resources for both issuing those IP rights and making them actionable.[158]

Assuming the developing country has negotiated well and can satisfy its implementation obligations, will a U.S. FTA meet its needs? On the issue of secure market access, the U.S. FTA delivers. The U.S. market will be

In the pending U.S.-Panama FTA, there is a side letter on traditional knowledge whereby the two governments acknowledge the importance of traditional knowledge folklore and pledge to work together in the World Intellectual Property Organization on the issue. Most importantly for Panama, however, the letter contains a most favored nation pledge to consult over whether to include any provisions relating to traditional knowledge if "the United States and another government sign a free trade agreement that contains provisions addressing traditional knowledge of folklore." *See generally* POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES (J. Michael Finger & Philip Schuler eds., The World Bank and Oxford University Press) (2004).

156. Costa Rica, for example, has passed three pieces of implementing legislation and will have to pass eight further measures in order for DR-CAFTA to enter into force in that country. *See Costa Rica Deadline*, *supra* note 26.

157. Customs administration is a major aspect of having a workable and effective free trade agreement. A country cannot access the benefits coming from a free trade agreement if customs barriers are too high. In the case of DR-CAFTA customs performance "has been traditionally considered deficient by international standards and customs procedures have often been considered a major obstacle for business operation in the region." DR-CAFTA Report, *supra* note 83, at 190. In order to deal with these issues, the CAFTA counties will have to deploy a modernization strategy.

158. A key to dealing with U.S. FTA intellectual property obligations is drafting implementing legislation that covers all of the issues. The United States 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) has 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 129, at 3.

The United States has also encountered implementation (through enforcement) of almost every recent FTA. *See* PERU ITAC REPORT, *supra* note 129, at 6 (noting implementation problems that U.S. industry has encountered in Jordan, Chile, Australia, Singapore and some of the DR-CAFTA countries, including the Dominican Republic, and Bahrain).

relatively open, and that will not change. Empirical evidence from the Mexican experience suggests that trade volumes will grow and that the United States will absorb an even greater proportion of the FTA partner's trade.[159] The developing country may, as Mexico has done, find that its business cycle even comes to correspond to that of the United States.[160] What a developing country needs, however, for the FTA to be successful, is effective market access. There are constraints on such access. The FTA partner must have the ability to exploit the U.S. market by having exports of value and be able to satisfy U.S. standards.[161] Additionally, the developing country must be able to export even in the face of regular U.S. use of unfair trade statutes.

With regard to the issue of foreign direct investment, a U.S. FTA can be very valuable. Returning to the Mexican illustration, Mexico saw growth in investment following NAFTA.[162] Additionally, it has continued to be one of the top developing country recipients of Foreign Directive Investment (FDI). Higher levels of investment, however, are not guaranteed and are not the only measure of the success of an FTA. Mexico's experience with NAFTA provides a valuable measuring rod and comparison. As the first move toward

159. 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* Oliver, *supra* note 80, at 74. Mexico is also more important trading partner of the U.S.—the second most important market for U.S. agriculture exports. Press Release, USTR, U.S.-Mexican Officials Meet to Discuss NAFTA (Jan. 11, 2008), http://www.ustr.gov/Document_Library/Press_Releases/2008/January/US_Mexican_Officials_Meet_to_Discuss_NAFTA.html. *See also Trade and Development Report, 2007*, *supra* note 6, 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").

160. *Trade and Development Report, 2007*, *supra* note 6, at 66.

161. U.S. standards pose greater compliance costs for developing countries trying to enter a developed country's market since they are "mainly standard-takers not standard makers." *Globalization for Development*, *supra* note 11, at 6. The costs for compliance are estimated to cause a 10% decrease on potential export earnings. *Globalization for Development*, *supra* note 11, at 6. The United States did make efforts during the DR-CAFTA negotiating process to begin working with the Central American countries on how to satisfy U.S. standards for particular products of major export interest to those countries. *DR-CAFTA Report*, *supra* note 83, at 35. The negotiations also discussed support for technical assistance on standards issues and commitments were made for a continuation of such assistance from the U.S. and Sanitary and agricultural agencies. *DR-CAFTA Report*, *supra* note 83, at 35 n.7.

162. *Trade and Development Report, 2007*, *supra* note 6, at 74 (investment levels almost quadrupled from the period before NAFTA (1990–94) when they averaged $5 per year to 2000–2004 when they were $19 billion per year). The United States has been the largest source of FDI—contributing sixty-four percent of Mexico's FDI in 2006. *See* Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies for Development: Some Views From Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 109 (2003) (Investment law plays a minor role in the decision to enter a market and other factors play a role—access to new materials, size/scope of the market, geographic position of the country compared to others.).

an open investment environment and as a geographically contiguous trading partner, Mexico was in a privileged position to gain additional investment. The other developing countries in Latin America—DR-CAFTA, Colombia, Peru, Panama—will not share either of Mexico's advantages. It is fairly clear that having a pro-investment legal regime is one of the reasons investment flows increase. However, other factors are now widely recognized as being crucial, if not exactly equal, determinants of where investments are made.[163] The recent U.S. developing country FTA partners have preconditions—underdeveloped infrastructure (particularly transport, telecommunications and ports),[164] underdeveloped workforce (relatively low levels of education and skills),[165] weak macroeconomic policy[166] and governance problems (security and corruption)[167]—that could limit relatively high investment levels until these issues are addressed. The U.S. FTA will provide some assistance through trade capacity building[168] and the implementation of services

163. Countries have to make investments in the things that are necessary to attract investment—physical infrastructure (transport), telecommunications, institutional and regulatory reforms. *See DR-CAFTA Report*, *supra* note 83, at 2.

164. *See id.* (specifying that all of the Central American countries have to work on transportation issues (road quality and diversity) and ports).

165. *See id.* at 11–12 (noting that all of the Central American countries need to work on secondary education and some—Guatemala, Honduras and Nicaragua—on primary education).

166. The decisions countries make on these issues can be crucial to what happens to a country's economic growth and development. It is difficult to assess exactly how NAFTA has impacted Mexico in part because of the effects of Mexico's use of capital inflows before NAFTA and its approach to inflation (anchoring the peso to the U.S. dollar). Going into NAFTA, Mexico had an overvalued currency and a significant current account deficit. *Trade and Development Report, 2007*, *supra* note 6, at 74.

167. *DR-CAFTA Report*, *supra* note 83, at 11–12 (noting the work that several Central American countries must do on governance issues).

168. The U.S. commitment to trade capacity in the model FTAs is to create a committee on Trade Capacity Building for each agreement. The developing country partners are expected to periodically update and provide the Committee its national trade capacity building 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.

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 trade capacity building aimed at all trading partners. *See infra* note 184. The fact that a developing country is a free trade agreement partner, however, does not necessarily guarantee it more assistance or more timely assistance.

The United States provided $7.1 billion in trade capacity building assistance from 2001–2007. Latin America and the Caribbean area have received $1.9 billion during that time frame and $554 million in 2007. *US/TPR*, *supra* note 21, at 23. The Central American countries have

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liberalization for infrastructure issues.[169] The other constraints, however, fall largely outside the parameters of the FTA. Investment also cannot be dictated. The developing country may not get investment of the type that will facilitate technology transfer and help the country move up the industrial policy chain.[170] Lesser-developed countries in a regional country grouping, such as Honduras and Nicaragua in DR-CAFTA, will undoubtedly find themselves less preferred investment targets than their more developed partners.[171]

Extensive service sector liberalization will probably create more efficient and competitive services.[172] Developing countries stand to gain particularly

received $650 million in trade-related assistance since 2003, and it has focused on rural and poverty reduction. CAFTA-DR FACTS, *supra* note 95.

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. *Id.*

Not all of the DR-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. *Id.*

169. For example, the FTA opening services sectors, such as telecommunications, should attract outside investment, which will result in the upgrading of this type of infrastructure.

170. Mexico offers an illustration of this phenomenon. Mexican producers have become part of a regional industrial bloc. Thus far, however, Mexico has not been able to move significantly up the production chain into full-scale production of skill- and technology-intensive goods. Instead, Mexican companies have been "involved mainly in the low-skill, assembly stages of the production of such goods. *Trade and Development Report, 2007*, *supra* note 6, at 72. *See also* Oliver, *supra* note 80, at 83 (noting that export manufacturing "tends to be based on a production model in which component parts are imported to Mexico for processing or assembly and then re-exported[,]" and that Mexico would need to shift more to a model in which domestic firms constituted a larger part of the chain of production to have spill over effects on other parts of the economy).

171. Costa Rica is the most developed of the DR-CAFTA countries. It has already become a center for computer-related industries in Latin America. Leading U.S. producers Cisco Systems, Oracle, Hewlett-Packard and Intel all have major operations in the country. Business News Americas, *supra* note 26. Costa Rica has been better at attracting such investments because "higher quality of its research institutions and collaboration with private firms." *DR-CAFTA Report*, *supra* note 83, at 92.

Even so, Costa Rica still has much work to do on its own investments in research and development, which are low compared to countries of the same size, labor force and exports to the United States. *DR-CAFTA Report*, *supra* note 83, at 192–94. According to the World Bank, this is linked to deficiencies in "the area of financial depth, the production of intellectual property rights, the ability to mobilize government resources, and the quality of research institutions." *Id.* at 194.

172. Increased services can generate "significant development gains"—far more than from increasing exports of primary commodities and manufacturers alone. *See Globalization For Development*, *supra* note 11, at 39. In order to achieve development—enhancing liberalization—

from liberalizing financial services and traditional utility monopolies. One consequence, however, may be the loss of ownership by local service providers without necessarily improving credit availability for the developing country.[173]

Recent economics scholarship[174] and analyses of the impact of U.S. free trade agreements on developing country partners[175] point to similar conclusions. Trade liberalization and financial openness alone are not enough to create economic growth and development. To benefit from undertaking trade-linked reforms, the developing country needs to cultivate a complementary domestic policy agenda.[176] In the case of a developing country entering into a U.S. FTA, the development strategy must cover not only the implementation demands of the FTA but also industrial policy as well as institutional and governance reform.[177] To be effective, this domestic agenda must confront the binding constraints a particular country faces in its integration into the global economy.[178] This prescription for a developing

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a development country has to emphasize the role of regulation and a national services strategy. *Id.* at 40, 44.

173. *See Trade and Development Report, 2007*, *supra* note 6, at 76–77 (noting that while foreign ownership of the banking system in Mexico has risen to approximately 80% this has not led to improved credit access for Mexican firms).

174. *See generally* Ricardo Hausmann, Dani Rodrik & Andres Velasco, *Growth Diagnostics in* THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE (Narcis Serra & Joseph E. Stiglitz eds., Oxford 2008). *See also* Dani Rodrik, The New Development Economics: We Shall Experiment, But How Shall We Learn? 24–28 (May 21, 2008) (unpublished paper, Harvard University), *available at* http://ksghome.harvard.edu/~drodrik/The%20New%20Development%20Economics.pdf (discussing the new development economics approach as one based on developing country-specific growth strategic and innovations in industrial policy); Yong Shik Lee, *Foreign Direct Investment and Regional Trade Liberalization: A Viable Answer for Economic Development*, 39 J. WORLD TRADE 701 (2003); U.N. Conference on Trade and Development, *Swimming in the Spaghetti Bowl: Challenges for Developing Countries Under The "New Regionalism,"* (2004) (*prepared by* Luis Abugattas Majluf), *available at* http://unctad.org/en/docs/itcdtab28_en.pdf.

175. *See* LESSONS FROM NAFTA, *supra* note 80; *DR-CAFTA Report*, *supra* note 83.

176. Institutional and regulatory reforms are necessary for firms and workers in developing countries to seek out the opportunities that come from an FTA. DR-CAFTA, *supra* note 83, at 174. The Central American countries suffer from an excessive regulation (which slows down start up times for firms) and relatively high levels of administrative corruption which can also impose costs on FTA opportunities. *Id.* at 174, 185–88.

177. WORLD BANK, ECONOMIC GROWTH IN THE 1990S: LEARNING FROM A DECADE OF REFORMS 147–48 (The International Bank for Reconstruction and Development/The World Bank 2005), *available at* http://www1.worldbank.org/prem/lessons1990s/chaps/05-Ch05_kl.pdf (evaluating what actually happened to developing countries pursuing globalization and also notes that signing regional agreements "will not generate positive export and growth responses unless the countries themselves also pursue other necessary economic, political, and social reforms").

178. *DR-CAFTA Report*, *supra* note 83, at 2, 174–201 (analyzing what the DR-CAFTA countries will have to work on with regard to trade facilitations, institutional reform (including

country—that it focus on the particular constraints it faces—is a difficult one for a country entering into a U.S. FTA. One effect of the model FTA is that it dictates many crucial decisions for a developing country concerning the pace and extent of trade and investment liberalization and the content of its regulatory approach to services, intellectual property and standards. It can be fairly characterized as a "one size fits all" prescription for how to develop. Accepting this model results in a loss of policy space for a country to deal with its particular limitations.[179] Some of the suggested policy approaches that might aid a developing country—caution in embracing import liberalization, subsidizing exports and controlling how to deal with intellectual property rights—are taken off the table by a U.S. FTA.[180]

Policy space, however, is never infinite in a globalized world. No country, particularly a small developing country, has the freedom to develop undisturbed. One feature of the world a developing country faces is a global legal system that pushes for goals sought by developed countries. If it appears the advantages to be gained from joining a U.S. FTA or the risks of isolation by staying out are too high, a developing country will pursue the free trade agreement. Consequently, what a developing country must figure out is how to create a national development strategy that complements the free trade directives. What remains available are investments in infrastructure and human capital constraints and subsidies for regional development within the country. Mexico has made some steps in these directions but, even after fifteen years, has not gone far enough to reach some of the development goals of NAFTA.[181]

V. WHAT IF THE UNITED STATES COMMITTED TO ALTERING THE MODEL TO EMBRACE DEVELOPMENT?

If the United States wants to aid in the development of its closest developing trading partners, it needs to reconfigure the model FTA. What would it take to achieve such a reconfiguration? The first requirement would be for the United States to embrace its role in leading developmental assistance. One way to do this would be to use the laboratory of its recent bilateral FTAs to figure out what would help its developing country partners

anti-corruption efforts) and commitments to education and the research and development needed for innovation).

179. *See generally Trade and Development Report, 2007*, *supra* note 6, at 57–65 (providing a complete analysis of all of the ways in which a developing country entering into a North-South FTA can lose policy space).

180. *See Trade and Development Report, 2007*, *supra* note 6, at 65; Dani Rodrik, How to Save Globalization from its Cheerleaders 13–15 (Sept. 2007) (unpublished paper, Harvard University); Lee, *supra* note 174, at 706–11.

181. *Trade and Development Report, 2007, supra* note 6, at 65–81.

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adjust to the globalized world. Such a reconfiguration would be valuable at a time when the EC is also making moves in this direction.[182]

In order to achieve such a reconfiguration, a shift by both Congress and the Executive Branch would be required. Congress has used its trade promotion authority in the past to constrain the President and to focus largely on domestic impacts that occur when the United States makes trade policy. Large changes would therefore be needed for Congress to shift. Adding development assistance as a negotiating objective and gaining a greater voice over FTA partner selection[183]—with potential developmental success as a key rationale—would change U.S. policy. The forthcoming debate on TPA authority that awaits President Obama would offer the opportunity for such a shift by Congress.

There would also have to be a shift by the executive branch. The President would have to put multilateralism first and focus executive energies and commitments on breaking through the recent impasses at the WTO. By completing a Doha Round that offers enough discipline over agriculture to aid developing countries, the United States would achieve a true breakthrough for developing countries. Such a shift would require the United States to abandon the "competitive liberalization" approach and substitute it with a focus on making its laboratory of FTAs models of good development policy. Instead,

182. The EC has also been pursuing regionalism during the slow down period at the WTO. *See id*. The most recent effort of the EC is its negotiating of Economic Partnership Agreements (EPA). *See id.* at 56. These agreements—replacing the long-standing preference programs with the ACP countries—place an overt focus on development. *Id.* These agreements are with countries that closely resemble recent U.S. FTA partners. In the EPA the EC completed late in 2007 with the CARIFORUM states, the parties "reaffirm the objective of sustainable development[,]" recognize that "development cooperation is a crucial element of their Partnership" and that this cooperation can take financial and non-financial forms." Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the European Community and its Member States of the Other Part 13, 16, Dec. 17, 2007, *available at* http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf. The EC commits itself to the financing pertaining to development cooperation out of its general budget. *Id.* at 17.

The EPA also contains cooperation priorities aimed at the biggest adjustment problems the CARIFORUM states will face by entering into a free trade agreement with the EC—assistance for capacity/institution building for tax administration assist with the loss of revenues from tariffs; support for the private sector and enterprise development and the diversifying exports through new investment and the development of new sectors; assist with development of and compliance with standards; and support for the development of infrastructure. *Id.* at 18–19.

183. In an earlier version of "fast track" (the Tariff and Trade Act of 1974) there was a requirement that the President notify Congress of the intent to begin trade negotiations at least sixty days in advance. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 401(a), 98 Stat. 2948 (1984). This "gatekeeper" provision allows either the House of the Senate the option of denying fast track treatment by voting to disapprove of the negotiations. GAO 2007 REPORT, *supra* note 45, at 48, app. II. The TPA did not include this provision. *Id.* According to the GAO, the former USTR negotiators it interviewed were opposed to the reinclusion of the provision. *Id.*

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the President should alter the model FTA and shape any new agreements into laboratories for good development policy. One part of this shift would have to include restraint on pushing for any more U.S.-level commitments by FTA partners.

In order to achieve its new goal, the United States would have to make a full-scale commitment to more effective trade capacity building.[184] In this reconfiguration, trade capacity building would play a central role in the model FTA. The United States would need to continue using a TCB working committee during negotiations to isolate the key constraints its trading partner would face in accepting and implementing an FTA. It would have to do this in conjunction with the national development strategy put forward by the FTA partner. The United States would then have to work with that country to gear up TCB projects that would start as soon as the FTA is enacted in the United States—as opposed to the later entry into force for its partner—so that a developing country partner would have immediate help to adjust during the implementation period. The contents of the TCB program would have to require not only financial resources, but also technical assistance (expertise and training) in each area noted by the national development strategy.

Every trade capacity project would then have to be assessed (for completion and success) and adopted in response to experiences learned. Developing country FTA partners would benefit from such a reconfiguration of the model. However, the United States would also gain. Trading partners achieving higher levels of growth and convergence with developed countries' standards would export fewer of their problems[185] to the United States. More importantly, the United States could establish a reputation as the true leader of developed-focused multilateralism.

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184. 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 143, 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.*

To improve how it does trade capacity building, 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.

185. The most obvious export is illegal immigration caused by the structural problems of the Mexican economy brought on in part by its adjustments to NAFTA (particularly the loss of jobs in the agriculture sector). *See Trade and Development Report, 2007*, *supra* note 6, at 77–78 (estimating that the number of Mexicans living in the United States without legal resident permits was approximately six million in 2005). *See also* Oliver, *supra* note 80, at 117–30 (providing a complete discussion of the reasons for the emigration of Mexican citizens).

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