2011

The NeoLiberal Turn in Regional Trade Agreements

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THE NEOLIBERAL TURN IN REGIONAL TRADE AGREEMENTS

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Abstract: This Article makes two primary arguments. First, that the increased resort to bilateral and regional trade agreements has taken a neoliberal turn. As such bilateral and regional trade agreements are now a primary means through which greater investor protections, commodification of social services, guaranteed rights of investor access to investment opportunities, privatization of public service goods, and generally the diminution of sovereign control are being realized. These trade agreements make the foregoing goals possible not just in developing countries, but in industrialized economies as well. I show that these agreements provide business interests with opportunities to exercise concerted pressure to influence the adoption of neoliberal economic policies in both developed economies and developing economies.

Second, this Article argues that bilateralism and regionalism in trade are contemporary fads that are spreading neoliberal economic ideals in the periphery of the global trading system. In other words, emulation by small developing countries of neoliberal economic policies in developed countries is a significant driver of economic reform. Developing countries adopt neoliberalism not simply because it is imposed, as many accounts suggest. Rather, neoliberalism is also voluntarily adopted for a variety of reasons: (i) because there has been a convergence in the thinking of policymakers and academic thinkers in developing and developed countries in part as a result of socialization through education or professional associations and contacts; (ii) as a result of persuasion that neoliberal reforms are important preconditions for goals such as increased economic growth or the efficiency of public sector institutions, developing country officials have adopted them; (iii) public officials in developing countries are strategically adopting neoliberal reforms since they are regarded as a signaling device that their country is 'safe' for investment or because bilateral and regional trade agreements come with budget support that is otherwise unavailable to these developing country officials in their home country; (iv) officials in developing countries are passive imitators who in the absence of solid evidence as to the efficacy of neoliberal ideals on their own account or in relation to alternative reform ideas are rationally bounded actors who find it impractical to assess the efficacy of neoliberal ideals or their alternatives.

In short, this Article argues that the increased number of regional and bilateral trade agreements represents an important opportunity for the further diffusion of neoliberal economic ideals, an insight often missing in leading accounts that have emphasized how this trend conforms or departs from the norms of the World Trade Organization. This paper does so using a constructivist account of the circumstances under which neoliberalism arises in the turn towards regionalism and bilateralism. It shows how ideas about market governance and the institutions and experts that generate and perpetuate these ideas impose an incentive structure within which choices in favor of neoliberalism are more than less likely to be exercised.

INTRODUCTION

This Article argues that the increased resort to bilateral and regional trade agreements has taken a neoliberal turn. These trade agreements are now a primary means being used to realize neoliberal economic policies around the world. These neoliberal policies include trade liberalization, greater investor protections, commodification of social services, guaranteed rights of investor access to investment opportunities, privatization of public service goods, and generally the diminution of sovereign control over national economies. These trade agreements

make the spread of neoliberal policies possible not just in developing countries, but in industrialized economies as well. I show that these agreements provide business interests with opportunities to exercise concerted pressure to influence the adoption of neoliberal economic policies in both developed economies and developing economies.

As such, this Article tells a story of spreading neoliberalism, not only through the market power of developed economies, or coercion, as this story has been predominantly told, but also through constructivist influences.[1] Constructivism explains the spread of neoliberalism in regional trade agreements in a number of ways, including the increasing convergence of business interests with a largely shared set of ideas supporting market governance in developing and developed countries that form coalitions to support mutually beneficial agreements.[2] Further, top government officials in developing countries have increasingly begun mimicking developed countries' strategies, including the pursuit of regional and bilateral trade agreements.

This Article therefore differs from leading accounts of the spread of neoliberalism that primarily or exclusively focus on the role of coercion to account for the diffusion of neoliberalism.[3] It also differs from accounts put forth by realists and critics of neoliberalism.[4] Further, my approach in this Article differs from the liberal intergovernmentalist

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1. For constructivists' accounts in international law, see generally David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469 (2001) (reviewing ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY (1999)); Jutta Brunnée and Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000); Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545 (2004); Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT'L L. 673 (2000–2001).

2. Other plausible accounts of neoliberalism in developing countries include "sincere deference to authority, a culturally appropriate action, or the response to education by the new elite." Andrew Moravcsik, *Bringing Constructivist Integration Theory Out of the Clouds: Has It Landed Yet?*, 2 EUR. POL. 219, 237 (2001).

3. Robert O. Keohane & Lisa L. Martin, *The Promise of Institutionalist Theory*, 20 INT'L SEC. 39 (1995).

4. Realists argue that international institutions and rules mitigate the anarchical nature of international society. *See generally* Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485 (1988).

approach that focuses on how economic interests, relative power, and the need for credible commitments alter actors' instrumental calculations.[5]

The claim here is not that constructivism is a superior explanatory or causal factor in the diffusion of neoliberalism to the preceding largely functionalist and rationalist approaches. Rather, the argument is that constructivism can help account for the circumstances under which neoliberalism arises in the turn towards regionalism and bilateralism in trade. It does so by taking into account how ideas about market governance generated by institutions and experts define the parameters within which choices in favor of neoliberalism are likely to be exercised. A constructivist approach therefore supplements functionalist and rationalist approaches by foregrounding the importance of ideas in the diffusion of phenomena such as neoliberalism. A constructivist approach does not focus on donor conditionality or coercion, but instead highlights that neoliberalism in bilateral and regional trade agreements may very well be the result of a tactical or strategic policy adjustment.

Proliferation of regionalism and bilateralism may also be a response to technological or market trends as a consequence of changes in ideas that were mimicked or voluntarily adopted, because the mimickers came to believe them and began changing their economic goals and policies accordingly.[6] Simply put, constructivism helps to explain how socialization into new norms and ideas influences both governmental policies and behavior.[7] The increasing use of regional trade agreements serves as a good case study of such constructivism. Finally, this Article differs from other accounts of the proliferation of bilateral and regional trade agreements by seeking to examine whether these agreements are building or stumbling blocks to multilateral trade.[8]

This Article shows that free trade agreements (FTAs) and bilateral investment agreements include treaty commitments in areas such as

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5. *See* ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT (1998).

6. In other words, the claim is not that constructivism itself is a binding constraint on policy. This is not to overstate the possibility that political behavior is not always consistent with stated principled justifications. *See* ROBERT PUTNAM, THE BELIEFS OF POLITICIANS: IDEOLOGY, CONFLICT, AND DEMOCRACY IN BRITAIN AND ITALY (1973).

7. Notably, even critics of constructivism agree that European Union (EU) integration has been linked to neoliberal ideology. *See* Moravcsik, *supra* note 2, at 230. Notably, Moravcsik approvingly quotes Checkel: "Can one really disentangle preference change driven by persuasion and socialization from strategic adaptation in the face of changed incentives, or from passive, cognitively simplifying imitation?" *Id.* at 232.

8. *See generally* James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT'L L. & COM. REG. 571 (2010) (discussing the arguments over whether regional trade agreements are building or stumbling blocks but not drawing any conclusions).

government procurement and investor protection that provide a foothold for U.S. investors in signatory countries that are otherwise unavailable in the World Trade Organization (WTO). In addition, these FTAs incorporate heightened intellectual property rights protection and financial liberalization commitments which go beyond the treaty commitments contained in the WTO's Agreement on Trade-Related Aspects of Intellectual Policy (TRIPS).

Regional and bilateral trade agreements adopt many of the elements of the Washington Consensus of economic reform for development[9] that have had several consequences. First, developing country signatory states assume enhanced obligations to protect the rights of foreign investors—a role that often creates enormous tensions with their role as guardians of their citizens.[10] By adopting many elements of the Washington Consensus, these agreements open markets in developing countries to transnational corporations that, in essence, become providers of social services, including education, health, water, electricity, garbage collection, and disposal. As a result, these agreements help to commoditize and make social services tradable opportunities for which foreign investors can compete.[11] Signatory countries to bilateral and regional trade agreements as well as bilateral investment treaties gain access to a market of tradable services. These treaties guarantee investors the non-discrimination rights of most favored nations as well as national treatment, transparency, and the right to arbitration over any dispute covered by the agreements.[12] Further,

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9. Washington Consensus refers to the summation of reforms summarized by John Williamson in 1989 that came to be widely accepted at the time and were being undertaken in Latin America before being adopted elsewhere. *See* John Williamson, Peterson Inst. for Int'l Econ., Outline of Speech at the Center for Strategic & International Studies: Did the Washington Consensus Fail? (Nov. 6, 2002), http://www.iie.com/publications/papers/paper.cfm?researchid=488. The three overarching ideas were: macro-economic discipline, a market economy, and openness to the world in respect to trade and foreign direct investment. *Id.* Williamson also presented a list of ten specific policy prescriptions: fiscal discipline, particularly by reducing large deficits and balance of payments as high inflation; reordering public expenditure policies; tax reform; liberalizing interest rates; a competitive exchange rate; trade liberalization; liberalization of inward foreign direct investment; privatization; deregulation; and strong property rights regimes. *Id.*

10. *See generally* Joel Ngugi, *Making New Wine for Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?*, 8 U.C. DAVIS J. INT'L L. & POL'Y 73 (2002).

11. *See* Poverty Reduction and Econ. Mgmt. Afr. Region, *Africa's Trade in Services and Economic Partnership Agreements Report No. 55747-AFR*, WORLD BANK (July 20, 2010), http://siteresources.worldbank.org/INTAFRREGTOPTRADE/Resources/AfricaTradeinServicesandEPAsNEW.pdf.

12. *See* JAMES THUO GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW 191–200 (2009) (discussing conflict over tradable resources resulting in privatized war because of market access for

because services are provided through the market rather than through the state, the public becomes less able to hold governments accountable when they do not provide quality, affordable, and accessible services. As a consequence, these agreements reach "deep behind the border[s of developing countries], guaranteeing rights of entry and commercial operation to foreign services firms and imposing market disciplines on the policy and regulatory choices of national governments."[13]

The turn to regional FTAs also makes it much easier to bully smaller groups of countries to commit to the objectives of the Washington Consensus or neoliberal economic restructuring than it would be through arduous multilateral trade negotiations at the WTO. Notably, however, the aggressive unilateralism of bilateral and regional trade agreements has not always assured victory for big countries.[14] This Article shows in Part III that the United States has been unable to conclude a full-fledged free trade agreement with the Southern African Customs Union (SACU), which objected to many of the commitments the United States proposed. In addition, as already noted above, many developing countries committed themselves to pursuing bilateral and regional trade agreements to promote their interests in very much the same way that developed economies have. In so doing, they have mimicked the turn to bilateralism and regionalism pursued by the major trading partners by changing their policies and preferences in trade among themselves as well as with major trading partners.

Part I outlines the standard justifications in favor of bilateralism and regionalism in trade and the long litany of such agreements entered into by the United States and the European Union (EU). This Part will also discuss the Model Agreements used by the United States and the EU and the type of commitments contained in them.

Part II examines the primarily rationalist reasons for the unmistakable spike in bilateralism and regionalism in the recent past, including forum shifting,[15] and describes how the turn to regionalism has affected

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the goods).

13. Jane Kelsey, *Confronting Trade-Related Human Rights in a GATS-Compatible World*, L. SOC. JUST. & GLOBAL DEV., 1, 3 Dec. 6, 2007), *available at* http://www.go.warwick.ac.uk/elj/lgd/2007_1/kelsey.

14. In fact, statistical evidence suggests as much. *See* Ka Zeng, *Trade Structure and the Effectiveness of America's "Aggressively Unilateral" Trade Policy*, 46 INT'L STUD. Q. 93 (2002) (explaining possible reasons for the United States' "uneven success" in gaining concessions from bargaining partner).

15. *See* Peter Drahos, *Four Lessons for Developing Countries From the Trade Negotiations Over Access to Medicines*, 28 LIVERPOOL L. REV. 11, 33 (2007) ("Essentially it allows [a country] to increase its opportunities to play for a win by not confining the pursuit of its negotiating agenda to

developing countries' abilities to build coalitions around trade negotiations. This Part also examines another important reason for the spread of bilateralism and regionalism—constructivism. It discusses diffusion, mimicry, and competition for resources and markets as other reasons for the spread of bilateralism.

Finally, Part III examines how the types of commitments being included in bilateral and regional trade agreements fortify the agenda of the Washington Consensus with specific examples from the Economic Partnership Agreement (EPA) between the Caribbean Forum (CARIFORUM) and the European Community (EC),[16] as well as the U.S.–Morocco FTA of 2003. This Part also contrasts the failure of the U.S.–SACU FTA with the recently concluded and ratified U.S.–South Korea FTA.

I. THE TREND TOWARD TRADE REGIONALISM AND BILATERALISM

This section traces the trend towards regional and bilateral trade agreements. It shows this trend demonstrates a marked change—with more emphasis placed on regional and bilateral trade agreements than on multilateral trade negotiations through the WTO. As the graphic illustration from the WTO shows, this trend started accelerating in the early 1990s. In the early part of the twenty-first century as WTO negotiations faltered, this upward trend in bilateral and regional trade agreements continued.

A. The Long Litany of U.S. Regional and Bilateral Trade and Investment Agreements

One of the first bipartisan standing ovations that President Obama received in his 2010 State of the Union address was for his declaration that the United States was committed to pursuing trade agreements with other countries.[17] Such agreements, he noted, would create jobs for

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one international forum.").

16. The sixteen members are Antigua and Barbuda, the Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago. List of Caribbean Community (CARICOM) Member States, OFF. OF TRADE NEGOTIATIONS, http://www.crnm.org/index.php?option=com_simplelists&view=simplelist&layout=basic&category_id=81&Itemid=141 (last visited Aug. 11, 2011).

17. *See* Barack Obama, President of the U.S., State of the Union Address (Jan. 27, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address [hereinafter 2010 State of the Union Address].

Americans and opportunities for U.S. exporters.[18] Similarly, in the 2011 State of the Union address, President Obama urged Congress to pass trade deals his administration had signed with India, China, and South Korea.[19] He said, to further bipartisan applause, that he was determined to continue pursuing trade agreements with Panama, Colombia, and with the Asia-Pacific region.[20] President Obama, like many former presidents, has made it a goal to export more American goods—which the President wants to double in the next five years—as a central pillar of his job creation strategy.[21] In fact, trade agreements are part of President Obama's plan to create two million jobs under a National Export Initiative to "help farmers and small businesses increase their exports and reform export controls consistent with national security."[22]

Related to this, the President also announced that the United States must "seek new markets aggressively," just as its competitors are doing.[23] As he put it, "[i]f America sits on the sidelines while other nations sign trade deals, we will lose the chance to create jobs on our shores."[24] President Obama further argued in favor of "enforcing those [trade] agreements so our trading partners play by the rules."[25] He argued that the administration was continuing to "shape a Doha trade agreement that opens global markets," as well as to "strengthen our trade relations in Asia and with key partners like South Korea and Panama and

18. *See id.* President Obama outlined this strategy in an address to his Export Council. *See* Remarks Prior to a Meeting with the President's Export Council, 2010 DAILY COMP. PRES. DOC. (Dec. 9, 2010), *available at* http://origin.www.gpo.gov/fdsys/pkg/DCPD-201001055/pdf/DCPD-201001055.pdf (where the President referred back to his 2010 State of the Union address promising to open foreign markets for U.S. products and to create jobs for U.S. workers). The Export Council had outlined a strategy for improving U.S. exports that included entering into more trade agreements that would open foreign markets. *See* EXPORT PROMOTION CABINET, REPORT TO THE PRESIDENT ON THE NATIONAL EXPORT INITIATIVE: THE EXPORT PROMOTION CABINET'S PLAN FOR DOUBLING U.S. EXPORTS IN FIVE YEARS (Sept. 10, 2010), *available at* http://www.whitehouse.gov/sites/default/files/nei_report_9-16-10_full.pdf.

19. *See* Barack Obama, President of the U.S., State of the Union Address (Jan. 25, 2011), http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

20. *Id.*

21. *See* 2010 State of the Union Address, *supra* note 18.

22. *Id.*

23. *Id.*

24. *Id; see also* Richard E. Baldwin, *A Domino Theory of Regionalism*, *in* EXPANDING MEMBERSHIP IN THE EUROPEAN UNION 25 (Richard E. Baldwin et al. eds, 1995) (advancing the competitive liberalization hypothesis to account for the increased spread of regional and bilateral trade agreements and advancing a domino theory to account for the increased spread of regionalism and bilateralism).

25. 2010 State of the Union Address, *supra* note 18.

Colombia. (Applause.)"[26]

None of these proposals was new. The Obama administration's trade policy in many respects continues the trade policy of previous administrations. Notably, on December 14, 2009, the United States Trade Representative (USTR) notified Congress of the Obama administration's intention to negotiate a Trans-Pacific Partnership Agreement (TPP).[27] This agreement, the USTR argued, represents a "new kind of trade agreement for the 21st century."[28] As this announcement shows, the Obama administration is carrying forward the recent U.S. policy of market opening and job creation through regional and bilateral free trade agreements. Initiatives such as the TPP are not surprising—for at least a decade, pursuing such objectives at the WTOhas not been very successful.[29] The deadlock in multilateral trade negotiations has made bilateral and regional agreements more viable alternatives.[30]

The United States and the EU increasingly use regionalism and bilateralism as important avenues for consolidating and implementing their respective trade agendas.[31] However, the trend towards regionalism and bilateralism in trade has expanded beyond these big economies.[32] Developing economies are also feverishly negotiating these agreements. For example, the SACU, which comprises South Africa, Botswana, and

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26. *Id.*

27. *See TPP Statements and Actions to Date*, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/about-us/press-office/fact-sheets/2009/december/tpp-statements-and-actions-date (last visited Aug. 31, 2011); *see also Economic Opportunities and the TPP*, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/about-us/press-office/fact-sheets/2009/december/economic-opportunities-and-tpp (last visited Aug. 28, 2011).

28. Press Release, Office of the U.S. Trade Representative, Trans-Pacific Partnership Announcement (Dec. 14, 2009), http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement.

29. *See* C. O'Neal Taylor, *The U.S. Approach to Regionalism: Recent Past and Future*, 15 ILSA J. INT'L & COMP. L. 411, 417 (2009).

30. For more discussion on the shift to bilateral and regional trade agreements, see *infra* Part II.

31. *See* Taylor, *supra* note 29, at 418.

32. There is substantial literature on whether regional blocs are a stumbling block for global trade integration. *See* Jagdish Bhagwati, THE WORLD TRADING SYSTEM AT RISK (1991); *see also* Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation With Free Trade Areas*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1 (Jagdish Bhagwati & Anne O. Krueger eds., 1995); Jagdish Bhagwati, David Greenaway & Arvind Panagariya, *Trading Preferentially: Theory and Policy*, 108 ECON. J. 1128, 1138 (1998); Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 38 J. ECON. LITERATURE 287, 328 (2000); Consultative Board to the Director-General, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004), *available at* http://www.wto.org/English/thewto_e/10anniv_e/future_wto_e.pdf.

three of the poorest economies in southern Africa—Lesotho, Namibia, and Swaziland—signed a European Free Trade Agreement (EFTA) with Norway, Iceland, and Switzerland/Liechtenstein in 2006;[33] the *Mercado Común del Sur* (MERCOSUR), a Preferential Trade Agreement, with Argentina, Brazil, Paraguay, and Uruguay in 2004;[34] a Trade, Investment, and Development Cooperation Agreement (TIDCA) with the United States in 2008;[35] and is currently negotiating a FTA with India.[36] The WTO Committee on Regional Trade Agreements reports that as of October 15, 2009, "457 regional trade agreements (RTAs), counting goods and services notifications separately, have been notified to the GATT/WTO, 266 of which are currently in force."[37]

This section outlines and discusses the proliferation of bilateral and regional trade and investment agreements such as the ones discussed above. The number of these agreements entered into in the last few years demonstrates a preference for regional and bilateral trade agreements over multilateral trade agreements. This section also shows the broad range of areas that are covered by these agreements.

1. Bilateral Trade Agreements

Currently, the United States has FTAs in effect with seventeen nations.[38] Of these, eleven FTAs are bilateral agreements.[39] The United States also has free trade agreements with regional blocs, including the North American Free Trade Agreement (NAFTA) and the U.S.–Central America–Dominican Republic Free Trade Agreement (CAFTA-DR).[40]

The first bilateral FTA, between the United States and Israel, went into effect in 1985.[41] This was followed, over fifteen years later, by the U.S.–Jordan bilateral agreement, which became effective in 2001.[42] The

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33. *Bi-lateral Trade Negotiations*, S. AFR. CUSTOMS UNION, http://www.sacu.int/traden.php?id=414 (last visited Aug. 11, 2011).

34. *Id.*

35. *Id.*

36. *Id.*

37. Committee on Regional Trade Agreements, *Report (2009) of the Committee on Regional Trade Agreements to the General Council*, WT/REG/20 (Oct. 16, 2009).

38. List of U.S. Free Trade Agreements, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited Aug. 12, 2011).

39. *Id.* (Australia, Bahrain, Chile, Columbia, Israel, Jordan, Morocco, Oman, Panama, Peru, and Singapore).

40. *See id.*

41. Overview of the Israel Free Trade Agreement, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/israel-fta (last visited July 17, 2011).

42. Overview of the Jordan Free Trade Agreement, OFF. U.S. TRADE REPRESENTATIVE,

United States entered into more FTAs with countries such as Singapore and Chile in 2004, Australia in 2005, Morocco and Bahrain in 2006,[43] and Peru[44] and Oman in 2009.[45]

The United States has also signed free trade agreements with several countries—agreements that Congress has yet to ratify.[46] These unratified agreements include an FTA with Colombia (2006), South Korea (initially concluded in 2007 but eventually ratified by Congress and signed by the President in October 2011), and Panama (2007).[47] The United States concluded negotiations on the South Korean FTA in early December 2010. [48] It initiated, but later suspended, negotiations with Thailand.[49] Continuing negotiations are underway with Malaysia, the United Arab Emirates, and the SACU.[50]

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http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta (last visited July 17, 2011); *The U.S.-Jordan Free Trade Agreement Fact Sheet*, SUKHTIAN.COM, http://www.sukhtian.com/uploads/factsheet.pdf (last visited Sept. 19, 2011).

43. Summary of U.S. Free Trade Agreements, U.S. DEP'T OF STATE, http://www.state.gov/e/eeb/tpp/bta/fta/c26474.htm (last visited Sept. 21, 2011).

44. Overview of Peru Free Trade Promotion Agreement, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa (last visited Sept. 21, 2011).

45. Overview of Oman Free Trade Agreement, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta (last visited Sept. 21, 2011).

46. List of U.S. Free Trade Agreements, *supra* note 38 ("The United States has signed free trade agreements with Colombia, Korea, and Panama, but Congress must enact legislation to approve and implement each individual agreement in order for them to go into effect."). President Obama sent these agreements to Congress for votes in early October 2011 and votes are expected on them before the end of the month in the Senate. *See* Len Braken, *Reid, Daley Eye Oct. 12 Trade Deal Votes; House Rules, Senate Finance Acts Pave Way*, INT'L TRADE REPORTER ONLINE (BNA) (Oct. 6, 2011), *available at* http://news.bna.com/itln/lpages/lpages.adp?pg=breaking_news&bn_product=itln#urn:bna:a0c9g3q0x8. Congress eventually voted on the Agreements in mid-October 2011 and on Friday October 21, 2011, President Obama signed them into law. *See* Tom Devaney, *Obama Signs Free-Trade Pacts*, WASH. TIMES (Oct. 21, 2011), http://www.washingtontimes.com/news/2011/oct/21/obama-signs-free-trade-pacts.

47. *See supra* note 46.

48. Julie Pace & Ken Thomas, *Obama Hails S. Korea Trade Deal as Victory for US Workers*, ABC NEWS (Dec. 4, 2010), http://abcnews.go.com/Business/wireStory?id=12313653.

49. Overview of U.S. Trade with Thailand, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/countries-regions/southeast-asia-pacific/thailand (last visited Sept. 19, 2011).

50. Trade Agreement Advisory Services, THE ALL AM. SMALL BUS. EXP. ASS'N, http://aasbea.com/portal/index.php/international (last visited Sept. 19, 2011). The President's Export Council has made it an objective to "[u]se bilateral trade policy mechanisms to expand market-opening opportunities. Bilateral trade policy mechanisms, such as FTAs, Trade and Investment Framework Agreements, Joint Committees on Trade and Investment, and Bilateral Consultative Mechanisms, can be used to create new market opportunities with other key trading partners." EXPORT PROMOTION CABINET, *supra* note 18.

2. Regional Initiatives

In addition to pursuing bilateral trade agreements, the United States has entered into regional trade agreements including: the Association of Southeast Asian Nations, (ASEAN), Trade and Investment Framework Agreement, which was concluded in 2006; the U.S. Trans-Pacific Partnership (TPP) FTA, which is currently under re-negotiation; the CAFTA-DR FTA, which has been in effect since 2004 between the United States and El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic, and Costa Rica;[51] and NAFTA, which has been in effect since 1994 between Canada, Mexico, and the United States.[52]

3. Trade and Investment Framework Agreements (TIFAs)

The United States also has forty-four trade and investment framework agreements: eleven in Africa; fifteen in Europe and the Middle East; five in South and Central Asia; nine in Southeast Asia; and four in the Americas.[53] According to the United States Trade Representative, TIFAs "provide strategic frameworks and principles for dialogue on trade and investment issues between the United States and the other parties to the TIFA."[54] They also establish a framework for consultations and cooperation with a view to enhancing opportunities for trade and investment.[55]

4. Bilateral Investment Treaties (BITs)

The United States also signs BITs to guarantee U.S. investors favorable terms and conditions for private investment under international law. BITs guarantee fair and equitable treatment for investors, protect against discriminatory treatment and expropriation, and ensure investor dispute settlement through international arbitration.[56] Currently, the

51. Overview of the Dominican Republic–Central America FTA (CAFTA), OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (last visited Sept. 21, 2011).

52. Overview of the North American Free Trade Agreement (NAFTA), OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta (last visited Sept. 21, 2011).

53. *See Trade & Investment Framework Agreements*, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements (last visited July 17, 2011).

54. *Id.*

55. *Id.*

56. Overview of the U.S. Bilateral Investment Treaty Program, OFF. U.S. TRADE

United States has BITs with forty nations.[57]

5. Model Agreements

The United States has varying model FTAs and a Model BIT.[58] Unlike NAFTA, the U.S. FTA models have extensive obligations while also extending trade rules to many new areas not covered in any WTO treaty.[59] The obligations included in a typical U.S. Model FTA cover a broad range of areas including national treatment and market access for goods, general rules of origin, sector specific rules of origin, customs procedures, agriculture, standards, trade measures, government procurement, investment, services, competition policy, temporary entry, and intellectual property rights.[60]

While NAFTA was primarily intended to liberalize trade in goods, today's U.S. FTAs go beyond that. For example, they impose extensive obligations in areas such as trade in services, as well as obligations in areas that developing countries have blocked at the WTO, such as government procurement and competition policy.[61] For this reason, these trade treaties are designed to advance economic reforms such as liberalization, deregulation and privatization that favor U.S. business interests and consumers in the countries that sign them. As some commentators have noted, BITs in particular are more like "Bills of Rights" for foreign investors that guarantee rights of access and due process rights in signatory countries that are backed by binding international arbitration.[62] BIT and FTA negotiations increasingly cover

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REPRESENTATIVE, http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (last visited Sept. 19, 2011).

57. *See* Index of U.S. Bilateral Investment Treaties, TRADE COMPLIANCE CTR., http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited July 17, 2011).

58. *See* Model U.S. Bilateral Investment Treaty, U.S. DEP'T OF STATE (2004), http://www.state.gov/documents/organization/117601.pdf; *Testimony Regarding the Proposed United States – Trans-Pacific Partnership Free Trade Agreement*, PUB. CITIZEN (Mar. 4, 2009), http://www.citizen.org/documents/TPPFTACommentsFinal1.pdf; *see also generally* C. O'Neal Taylor, *Of Free Trade Agreements and Models*, 19 IND. INT'L & COMP. L. REV. 569 (2009) (discussing the U.S. model free trade agreement). On the use of NAFTA as a model for subsequent FTAs and their variation, see David 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 (2004).

59. *See* Taylor, *supra* note 58.

60. *Id.* at 585–86.

61. *See* Martin Khor, *Developing Countries Resist WTO Agreement on 'Competition Policy,'* THIRD WORLD NETWORK (Apr. 1999), http://www.twnside.org.sg/title/1889-cn.htm.

62. Jose E. Alvarez, *North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 308 (1997); *see also id.* at 304 (arguing that NAFTA is a "bilateral

the same subject matter. For example, a typical U.S. FTA includes provisions for investment protection.[63] The convergence of BITS and FTAs is helping the EU and United States to defragment the distinctions between trade and investment and create stronger rights and protections for investors.

B. Economic Partnership Agreements (EPAs) and the EU's Global Europe Strategy

The EU has also taken significant steps to protect its economic interests with other nations through regional and bilateral trade agreements. The current negotiations on EPAs with African, Caribbean, and Pacific (ACP) States exemplify this quite well.[64] The EU's agenda is embodied in the October 2006 Global Europe Strategy. The primary goal of this strategy is to make Europe more competitive by giving "a sharper focus on market opening and stronger rules in new trade areas of economic importance to the [EU], notably intellectual property, services, investment, public procurement and competition."[65] In this strategy, the EU declared the need for comprehensive trade agreements that would uphold the need to protect the competitiveness of EU's markets while safeguarding EU export interests through tariffs and non-tariff barriers.[66]

These objectives are more recently reflected in the EU's 2020 Strategy.[67] This strategy argues that "the EU will require a stronger

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investment treaty on steroids"). This theme is further echoed in PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR 117–42 (2005) (noting the tendency to interpret international investment rules in isolation of other international law rules and to give priority to investor rights over rules that protect human rights and the environment).

63. *See* Taylor, *supra* note 58, at 592.

64. EPA negotiations were triggered by article 36 of the Cotonou Agreement, a partnership agreement between the EU and African, Caribbean, and Pacific (ACP) states, following a decision of the WTO Dispute Settlement Body requiring these parties to negotiate WTO compliant trade agreements. *See* Agreement Amending for the Second Time the Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States, of the One Part, and the European Community and Its Member States, of the Other Part, Mar. 19, 2010, 2010 O.J. (L 287) 3, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:287:0003:0049:EN:PDF [hereinafter Cotonou Agreement].

65. Trade Policy Review Body, *Report by the European Communities*, WT/TPR/G/177, at 10–11 (Jan. 22, 2007), http://www.wto.org/english/tratop_e/tpr_e/g177_e.doc.

66. *See Global Europe: Competing in the World*, EUROPEAN COMM'N, 2 (2006), http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf [hereinafter Global Europe Strategy].

67. *See* European Commission, *Trade Policy as a Core Component of the EU's 2020 Strategy*, COM (2010) 612 final (Nov. 9, 2010).

export orientation" to create more growth and jobs.[68] This strategy makes the case for a strong and positive link between trade and growth. The European Commission gives several reasons for this linkage:

> First, [trade] openness enhances efficient resource allocation. It creates incentives for capital and labour to be put to work in areas with the highest return. Second, trade facilitates the dissemination of knowledge and innovations embodied in goods, services and investments. Third, open trade encourages competition and thereby provides an incentive to supply the best quality/price ratio of goods to consumers and to increase productivity. Fourth, opening up trade gives producers access to larger markets and hence, the possibility to reap the benefits of increasing returns to scale and specialisation.[69]

In short, the EU attributes to trade opening three critical benefits: economic growth, consumer benefits, and employment.[70]

The EU's economic partnership agreements are similar to the typical U.S. Model FTA in a number of respects. While the United States has a greater interest in using trade agreements to advance its foreign policy and national security goals,[71] the EU primarily uses regional and bilateral trade agreements to protect its economy and advance the competiveness of its industries in the global market.[72] Accordingly, the EU arguably takes for granted that its "commercial interests correspond to the development needs" of the countries with which it signs bilateral

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68. European Commission Staff, *Trade as a Driver of Prosperity*, at 4, SEC (2010) 1269.

69. *Id.* at 8–9.

70. This 2020 Strategy is a continuation of the EU's trade agenda embodied in the October 2006 Global Europe Strategy. The primary goal of the Global Europe Strategy was to make Europe more competitive by giving "a sharper focus on market opening and stronger rules in new trade areas of economic importance to the [EU], notably intellectual property (IPR), services, investment, public procurement and competition." Report by the European Communities, Trade Policy Review, 11, WT/TPR/G/177 (Jan. 22, 2007). In this Strategy, the EU declared the need for comprehensive trade agreements that would uphold the need to protect the competitiveness of the EU's markets while safeguarding EU export interests through tariffs and non-tariff barriers. *See* Global Europe Strategy, *supra* note 66.

71. *See, e.g.*, *The U.S.-Colombia Free Trade Agreement: Securing Economic Growth and American Leadership*, BUSINESS ROUNDTABLE (Sept. 7, 2011), http://businessroundtable.org/studies-and-reports/the-u.s.-colombia-free-trade-agreement-securing-economic-growth-and-america.

72. *See* JANE KELSEY, S. CTR., RESEARCH PAPER NO. 31, LEGAL ANALYSIS OF SERVICES AND INVESTMENT IN THE CARIFORUM-EC EPA: LESSONS FOR OTHER DEVELOPING COUNTRIES (July 2010), http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=1860&Itemid=182&lang=en.

or regional agreements.[73] The EC is currently negotiating with or has interim agreements with several of the ACP countries, but currently only has a comprehensive EPA with the CARIFORUM countries, a Caribbean regional group of fifteen full member countries.[74] This CARIFORUM–EC EPA is the first trade agreement that has been concluded using the template approved by the Council of Europe and therefore is an example of the model that the EU will use in similar agreements.[75]

Some key elements of the CARIFORUM EPA include: member nations agreed to liberalize 86.9% of imports from the EU within 25 years—82.7% within the first fifteen years— when prior to the agreement, only 51% of EU imports were duty free; member nations will be given a transition period of up to twenty-five years on some products, and can use a general moratorium for the first three years of the agreement; CARIFORUM nations can maintain other duties and charges for up to seven years of the agreement, before they must phase them out during the subsequent three years; "regional preference" will extend any concession granted to one country to all member countries; and finally, the EU will liberalize 94% of its services sector, CARIFORUM countries will liberalize 75%, and least developed countries (LDC) will liberalize 65%.[76]

The CARIFORUM EPA has been held out as a "Trade Partnership for Sustainable Development"—emphasizing its objective to be consistent with using scarce resources in a manner that they will be available for future generations.[77] There are reasons to doubt that the CARIFORUM EPA will promote sustainable development, discussed further below.

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73. *Id.* at 32; *see also* Global Europe Strategy, *supra* note 70, at 12 ("We will also take into account the development needs of our partners and the potential impact of any agreement on other developing countries, in particular the potential effects on poor countries' preferential access to EU markets. The possible impact on development should be included as part of the overall impact assessment that will be conducted before deciding to launch FTA negotiations. In line with our position in the WTO, we will encourage our FTA partners to facilitate access by least-developed countries to their market, if possible by granting duty and quota free access.").

74. *See Overview of EPA – State of Play*, EUROPEAN COMM'N (Feb. 5, 2010), http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf.

75. *See* KELSEY, *supra* note 72, at i, iv, ix, 1.

76. Errol Humphrey, Ambassador of Barb. & Vice-Dean of the CARIFORUM College of EPA Negotiators, Presentation at the DG Trade-Organized Workshop in Brussels: CARIFORUM EPA Negotiations: Initial Reflections on the Outcome (Feb. 13, 2008), http://trade.ec.europa.eu/doclib/docs/2008/april (follow "tradoc_138606.pdf" hyperlink).

77. Henning Grosse Ruse-Khan, *Tailoring IP Protection for Sustainable Development: An Examination of the CARIFORUM EPA*, TRADE NEGOTIATIONS INSIGHTS 10 (Eur. Ctr. for Dev. Policy Mgmt. and Int'l Ctr. for Trade and Sustainable Dev.) (Nov. 2010), *available at* http://ictsd.org/i/news/tni/94176/.

The EU's Model EPAs contain similar elements to the U.S. Model FTA. However, the EU's model is viewed as less radical than the U.S. template. "[F]or example, the [United States] insists on a negative list approach to schedules of commitments, listing sectors and measures that are excluded, and on the inclusion of investment expropriation provisions that can be enforced through investor-initiated arbitration."[78] This type of a schedule system makes certain that all new services will be covered automatically, excluding only those that have been specifically excluded. The EU, on the other hand, takes a "positive list approach" that details specific sectors for commitments.[79] This allows the EU to implement new sectors according to the agreement and does not automatically include sectors not explicitly enumerated.

1. Choice of Countries/Regions

Countries chosen by the United States and EU for regional and bilateral agreements are generally those with which they have a trade surplus—countries over which they exercise great market power.[80] Thus, the United States and EU can use this advantage to influence the direction of negotiations and commitments entered into in the agreements. The best example of such an agreement is the U.S.–Morocco FTA—which was promoted by the Bush administration as a yardstick for future negotiations.[81] The U.S.–Morocco FTA is discussed further in Part III below. The converse is also true: the U.S. Congress seems hesitant to accept trade agreements with nations to whom the United States is indebted. An example of this is the U.S.–Korea FTA, which had been caught up in a stalemate in Congress for quite some time; in late 2010 there was a breakthrough, but the agreement has yet to receive congressional approval.[82]

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78. KELSEY, *supra* note 72, at 2.

79. *Id.* at 25.

80. Notably, market power may not always be determinative. On this, see discussion of the failed U.S.–SACU FTA, *infra* Part III; *see also* Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, *in* NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 219, 219 (John S. Odell ed., 2006).

81. Press Release, Office of the U.S. Trade Representative, U.S. and Morocco Conclude Free Trade Agreement (Mar. 2004), *available at* http://www.ustr.gov/about-us/press-office/press-releases/archives/2004/march/us-and-morocco-conclude-free-trade-agreemen (noting that the agreement was a vital step in expanding the network of U.S. FTAs in the Middle East and North Africa); *see also* Overview of the Morocco Free Trade Agreement, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta (last visited Oct. 19, 2011).

82. *See* Overview of the Korea–U.S. Free Trade Agreement, OFF. U.S. TRADE REPRESENTATIVE,

The United States and the EU also have a much easier time negotiating trade agreements with countries that are dependent on their economies as export markets.[83] These large economies can exercise their market power to extract concessions from countries with an interest in maintaining or gaining access to their large market. By contrast, it is harder for these large economies to negotiate trade treaties with countries that have a trade surplus in these large economies, because neither the United States nor the EU can exercise the same amount of market power against such economies. South Korea has a trade surplus in both the EU and the United States. The EU has nevertheless signed a free trade deal with South Korea, even though it "runs a deficit with South Korea in goods trade."[84] The EU was only able to sign the agreement after securing a concession to place a safeguard clause allowing it to take emergency measures if increased imports from South Korea would "cause serious injury, or threat thereof, to the domestic industry."[85] Therefore, even though the EU agreed to sign a free trade agreement with a country with which it has a deficit, it used its negotiating experience to its advantage.

II. ACCOUNTING FOR THE TURN TO REGIONAL AND BILATERAL TRADE AGREEMENTS

This section examines the reasons that account for the unmistakable commitment among major trading powers like the United States and the

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http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta (last visited July 17, 2011); *see also* Overview of Trade with Korea, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/countries-regions/japan-korea-apec/korea (last visited July 17, 2011) (detailing U.S. goods trade deficit with Korea to be $10 billion in 2009); *U.S. Senate Breakthrough for Trade Agreements with Korea, Colombia, and Panama*, MERCOPRESS (Aug. 4, 2011), http://en.mercopress.com/2011/08/04/us-senate-breakthrough-for-trade-agreements-with-korea-colombia-and-panama; Pace & Thomas, *supra* note 48.

83. This Article does not intend to undermine the well established phenomenon that large trading countries tend to enter into bilateral and regional trade agreements with other large trading countries, particularly those that are geographically proximate. *See* Scott L. Baier et al., *Do Economic Integration Agreements Really Work? Issues in Understanding Causes and Consequences of the Growth of Regionalism*, 31 WORLD ECON. 461, 492–93 (2008).

84. *See* Press Release, Eur. Comm'n, EU and South Korea Sign Free Trade Deal (Oct. 6, 2010), http://trade.ec.europa.eu/doclib/press/index.cfm?id=626.

85. Free Trade Agreement, EU-S. Kor., art. 3, Oct. 6, 2010, 2011 O.J. (L 127) 6, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:EN:PDF. Safeguard acts are a mechanism created under GATT, art. XIX, under which a WTO member may take action to protect specific industries from any imported product or products that are causing, or threaten to cause, serious injury to an industry. *See Safeguard Measures*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (last visited July 21, 2011).

EU to turn to regional trade agreements. These reasons include the failure of multilateral trade negotiations where developing and developed countries are locked in an impasse in part because of their conflicting priorities. It is notable that Brazil, Russia, India, and China have not been left out of this trend; some of their bilateral and regional trade initiatives are referred to below.[86] Before delving into these issues, this part of the Article will first examine standard justifications for regional and bilateral trade agreements.

A. Standard Justifications for Regionalism and Bilateralism Emphasize the Benefits to Developing Countries

Traditional arguments used to justify the shift to regionalism and bilateralism focus on ease of implementation because of geographical location; cultural and political proximity and their compatibility with the rules of the General Agreement on Tariffs and Trade and the WTO. These arguments[87] do not adequately explain the current accelerated trend towards trade regionalism and bilateralism.[88] This section briefly outlines some of these traditional justifications in favor of trade regionalism and bilateralism to provide some background context against which to appreciate the immediate reasons for the spike in regional and bilateral trade agreements.[89]

There are three traditional justifications for bilateral and regional trade agreements. First, some argue that bilateral and regional trade agreements are easier to create and implement than multilateral agreements because great geographical differences between various regions can make global cooperation extremely complicated.[90] Countries

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86. For more on China in Africa, see JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES (2011).

87. This refers to arguments supporting trade regionalism or bilateralism that fail to take into account that the overriding objectives of these agreements today are not the standard arguments in favor of free trade but much more mercantilist ideas of foreign market opening and job creation, a phenomenon that in the United States coincided with Laura Tyson's tenure as U.S. Trade Representative. *See* LAURA D'ANDREA TYSON, WHO'S BASHING WHOM?: TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES (1992).

88. This Article shows the continued use of regional and bilateral agreements particularly by big economies as tools to pry open foreign markets while keeping their own closed. That trend for the United States began in earnest in the 1980s. *See* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1991).

89. For reasons accounting for the current rise in bilateral and regional trade agreements, see discussion *infra* Part II.B.

90. *See* Robert Devlin & Ricardo French-Davis, *Towards an Evaluation of Regional Integration in Latin America in the 1990s*, *in* REGIONAL INTEGRATION AND MULTILATERAL COOPERATION IN

from each sector have different concerns that are not easily solved through multilateral trade agreements.

Bilateral and regional agreements can account for the different conditions of particular regions.[91] Because each region has specific needs, countries can independently agree to accords that benefit all parties.[92] For example, because coastal nations have issues of interest that do not concern land-locked nations, it would likely be much simpler for such nations to resolve their issues in a bilateral or regional agreement than in a multilateral setting involving land-locked nations. In addition, bilateral and regional trade agreements are likely to be reached much faster than multilateral agreements.[93]

Second, some contend that the cultural, geographical, and political proximity of the participating countries also promotes the spread of bilateral and regional agreements.[94] According to this claim, because neighboring countries have similar interests and strong cultural ties with each other,[95] they can negotiate agreements that are beneficial to all parties much more quickly than in a multilateral forum.[96]

Third, some argue that the rules of the multilateral trading system permit the existence of regional and bilateral trade agreements.[97] Indeed, both the GATT and the General Agreement on Trade in Services

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THE GLOBAL ECONOMY 96 (Jan Joost Teunissen ed., 1998) (noting that geographically close countries tend to have more specialized trade because of cultural similarities and ease of transport, while farther countries face transport and cultural challenges).

91. *See generally* Paul Bowles & Brian MacLean, *Understanding Trade Bloc Formation: The Case of the ASEAN Free Trade Area*, 3 REV. INT'L POL. ECON. 319 (explaining benefits received by Association of Southeast Asian (ASEAN) nations by negotiating as a bloc).

92. *See id.* at 328 (discussing the characteristics of trade blocs).

93. *See* Nathalie Chalifour, *Global Trade Rules and the World's Forests: Taking Stock of the World Trade Organization's Implications for Forests*, 12 GEO. INT'L ENVTL. L. REV. 575, 583 n.52 (2000) (citing PIERRE MARC JOHNSON & ANDRE BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 1 (1996)).

94. *See* Bowles & MacLean, *supra* note 91, at 328 (discussing "successful blocs"); Sanford Gaines, *Environmental Protection in Regional Trade Agreements: Realizing the Potential*, 28 ST. LOUIS U. PUB. L. REV. 253, 262 (2008) (This addresses the use of RTAs to further regional awareness and protection of the environment, especially for "countries close enough to each other that environmental behavior in one country may have a direct effect on another." Thus, nations with a close political proximity can use regional trade agreements to further issues of mutual interest.).

95. *See* Matthew W. Barrier, *Regionalization: The Choice of a New Millennium*, 9 CURRENTS INT'L TRADE L.J. 25, 26 (2000).

96. *Id.* at 33 ("[R]egional trade area integration is the fastest mode of investment cohesion that is presently acceptable by many countries around the world.").

97. *See generally* Roland Bartels, *Regional Trade Agreements*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum et al., ed) (Oxford Univ. Press 2010).

(GATS) allow the creation of RTAs under certain conditions.[98] Article XXIV of GATT provides that "contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements."[99] GATS has similar provisions concerning services or service suppliers.[100] In addition, the decision on "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries" allows developing countries to extend preferences to each other without offering the same preferences to other members.[101] As discussed in Part II, these standard justifications for regional and bilateral trade agreements differ from the more immediate reasons, such as constructivist diffusion as discussed in this article, that account for the contemporary rise of these agreements.

B. The Breakdown of Multilateral Negotiations Has Resulted in Forum Shifting

The continued breakdown of WTO negotiations—indicated by the collapse of ministerial meetings in Seattle in 1999 and in Cancún, Mexico in 2003—has led developed nations to a shift towards regional and bilateral agreements to further goals that have been delayed or frustrated at the WTO.[102] Negotiations stalled when the ministerial conference in 1999 was cancelled due to a lack of agreement among the countries and large protest activities outside the conference building.[103] In Cancún, the negotiations collapsed again. This time, developing

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98. *See generally* General Agreement on Trade in Services, art. V, ¶ 1, Jan. 1995, *available at* http://www.worldtradelaw.net/uragreements/gats.pdf [hereinafter GATS]; General Agreement on Tariffs and Trade, art. XXIV, ¶ 4, Oct. 30, 1947, 1 Basic Docs. of Int'l Econ. Law 44 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter GATT]; GATHII, *supra* note 86 (examining the controversy relating to the permissibility of regional trade agreements).

99. GATT, *supra* note 98, at art. XXIV.

100. GATS, *supra* note 98.

101. *See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 1, L/4903 (Nov. 28, 1979), *available at* http://www.wto.org/English/docs_e/legal_e/enabling_e.pdf.

102. For more on the breakdown of WTO negotiations in this period, see James Thuo Gathii, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361 (2006) (reviewing FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF TRADE NEGOTIATIONS/THE LESSONS OF CANCUN (2004)).

103. *See* Joseph Kahn, *Swiss Forum Has Its Focus on Memories From Seattle*, N.Y. TIMES, Jan. 29, 2000, at C1, *available at* http://www.nytimes.com/2000/01/29/business/international-business-swiss-forum-has-its-focus-on-memories-from-seattle.html?scp=2&sq=protest+seattle+wto+collapse&st=nyt.

countries were unwilling to negotiate the "Singapore issues."[104] The "Singapore issues" refers to four things—competition policy, trade facilitation, investment liberalization, and government procurement—which developed countries have sought to negotiate with a view to arriving at new agreements covering these four areas since 1996.[105] In August 2004, three of the issues—investment, competition, and government procurement—were, by agreement, dropped from the Doha agenda.[106] Negotiations for trade facilitation, however, would continue.[107] As one commentator noted, this "ended, for the time being, the developed countries' attempt to greatly expand the WTO by introducing three new major areas of liberalization."[108]

Agriculture has also become one of the most important and hotly debated issues in these negotiations.[109] Developing countries have argued that agricultural subsidies, particularly in the United States and the EU, create an insuperable barrier for them to sell their agricultural goods.[110] The wide differences between developed nations and

104. IAN F. FERGUSSON, CONG. RESEARCH SERV., RL32060, WORLD TRADE ORGANIZATION NEGOTIATIONS: THE DOHA DEVELOPMENT AGENDA 4 (Jan. 18, 2008), http://fpc.state.gov/documents/organization/69477.pdf; *see also* Op-Ed., *Showdown in Cancún*, N.Y. TIMES, Sept. 10, 2003, at A24, *available at* http://www.nytimes.com/2003/09/10/opinion/showdown-in-cancun.html.

105. IAN F. FERGUSSON, CONG. RESEARCH SERV., RS21664, THE WTO CANCÚN MINISTERIAL (Nov. 6, 2003), http://congressionalresearch.com/RS21664/document.php?study=The+WTO+Cancun+Ministerial.

106. Overview of the Doha Agenda, *Cancún 2003, Hong Kong 2005*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (last visited Sept. 19, 2011).

107. *See generally* MARTIN KHOR, S. CTR., ANALYSIS OF THE DOHA NEGOTIATIONS AND THE FUNCTIONING OF THE WTO (Nov. 25 2009) (draft version), http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=1678&Itemid=182&lang=en.

108. *Id.* at 8.

109. *See* Elizabeth Becker & Ginger Thompson, *Poorer Nations Plead Farmers' Case at Trade Talks*, N.Y. TIMES, Sept. 11, 2003, *available at* http://www.nytimes.com/2003/09/11/world/poorer-nations-plead-farmers-case-at-trade-talks.html; *see also* Committee on Trade and Development, *Note by the Secretariat, Developmental Aspects of the Doha Round of Negotiations*, 2, WT/COMTD/W/143/Rev.4 (Aug. 19, 2010) ("Agriculture plays an important role in the development of many WTO Members. For a large number of developing countries and least-developed countries (LDCs), agriculture makes a significant contribution to their economies, including its direct contribution to gross domestic production, export revenue and employment as well as to rural development and livelihood security . . . . However, many of the world's agricultural producers are currently disadvantaged in the world trading environment because of high tariff barriers and competition from producers that receive high levels of domestic or export-related support.").

110. *See* KHOR, *supra* note 107, at 22; *see also* Kevin C. Kennedy, *The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False*

developing nations on these and related issues continue to make it unlikely that current WTO negotiations will be successfully concluded any time soon.[111]

In a sense, the current stalemate in the Doha round of negotiations primarily pits developed countries against developing countries. Developed countries subscribe to a vision of development that many developing countries contest. Developing countries argue that developed nations have been inattentive to development issues that matter to them. This is because developed countries insist that developing countries should adopt policies that prioritize economic growth through increased export trade at the expense of other development objectives such as the protection of the weak and vulnerable.[112] In fact, developing countries argue that their development prospects would be much better addressed by removing agricultural subsidies in developed country markets; ensuring access to affordable essential medicines for epidemics such as HIV/AIDS; continuing special and differential treatment of developing countries for their products, produce and services; and putting in place a special safeguard mechanism (SSM) for their agricultural products—an issue that led to a breakdown of Doha round negotiations in Geneva in July 2008.[113]

As a result of these differences between the priorities of developed and developing countries, developed nations have, in large measure, shifted forums towards bilateral and regional agreements. Forum shifting is a strategy that "attempt[s] to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another."[114] Forum shifting allows countries

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Hope for Sub-Saharan Africa's Cotton Farmers?, 14 KAN. J.L. & PUB. POL'Y 307, 316 (2005). Although U.S. production costs for cotton "are higher, with the help of domestic and export subsidies, U.S. cotton growers—the world's largest exporters of cotton—suppress and depress the price of cotton on world markets by increasing its supply through overproduction." *Id.* This creates a market that is unprofitable for least-developed countries, for which cotton and agriculture play greater roles than they do for industrialized countries. *Id.* at 31.

111. *See* KHOR, supra note 107; *see also* Martin Khor, Long Stalemate Ahead for WTO Talks, S. CTR., http://www.southcentre.org/index.php?option=com_content&view=article&id=1274%3Asb46a1&catid=144%3Asouth-bulletin-individual-articles&Itemid=287&lang=en (last visited July 14, 2011).

112. *See* James Thuo Gathii, *Process and Substance of WTO Reform*, 56 RUTGERS L. REV. 885, 902 (2003) (explaining the United States' and the EU's underestimation of how well-organized developing countries were at the Cancún Ministerial).

113. *See* FERGUSSON, *supra* note 104, at 9–17; *see also* Committee on Trade and Development, *Note by Secretariat: Developmental Aspects of the Doha Round of Negotiations*, 5, WT/COMTD/W/143 (Aug. 19, 2010) (explaining that even in the March 2010 stocktaking report, "[m]embers have not been in a position to substantively resolve matters").

114. Anke Dahrendorf, *Global Proliferation of Bilateral and Regional Trade Agreements: A*

to choose a new forum where they will encounter less concerted resistance to their agenda, which in turn gives them more wiggle room or policy space to achieve their objectives more readily.[115]

Forum shifting through the use of regional and bilateral trade agreements has yielded successful outcomes for developed countries. For example, even though the Singapore issues were dropped from the Doha agenda, developed countries are now pursuing them through bilateral and regional trade agreements.[116] As noted above, Global Europe Strategy makes it a priority for the EU to pursue issues of investment, competition, and government procurement in its EPAs with African, Caribbean, and Pacific countries. Negotiating objectives that were unsuccessful in the WTO become part of the EU's strategy in bilateral and regional trade agreements. Further, according to the EU, EPAs are also tools for "tackling issues which are not ready for multilateral discussion."[117] Thus, objectives such as enhanced intellectual property protection and financial liberalization, which are not formally part of the Doha agenda, are being negotiated through bilateral or regional agreements such as the EPAs.[118] Increasingly, developed countries are using regional and bilateral agreements to achieve objectives that are difficult, if not impossible, to achieve at the multilateral level.[119]

As noted in a little more detail below, the competition for new bilateral and regional trade agreements has prompted countries without bilateral or regional agreements to begin seeing themselves as "losers"[120] because their products, produce and services often do not receive the preferential treatment or trade concessions that other countries have

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Threat for the World Trade Organization and/or for Developing Countries 15 (Maastricht Faculty of Law, Working Paper No. 6, 2009) (quoting Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 14 (2004)), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1382820.

115. *See, e.g.*, *id.* at 16. Anke Dahrendorf believes that these agreements do not preclude discussion of these issues in a multilateral forum. Instead, these agreements are seen to function as a "laboratory" for future multilateral agreements. *Id.* at 17.

116. KHOR, *supra* note 107, at 9.

117. Global Europe Strategy, *supra* note 66, at 10.

118. *Id.*

119. Committee on Regional Trade Agreements, *Note on the Meeting of 15–16 March 2010*, WT/REG/M/56 (Mar. 23, 2010) ("The representative of El Salvador remarked that RTAs represented an instrument to achieve deeper trade liberalization and, more recently, to strengthen relationships between countries beyond trade.").

120. Fredrick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism A Threat?*, 10 J. INT'L ECON. L. 571, 577 (2007).

negotiated.[121] Indeed, even the Obama administration seems to believe that the domestic economy will suffer if the United States does "not join the wave of PTAs."[122]

Laurence Helfer has argued that "regime shifting might actually serve the industrialized states' interests by diverting attention and resources from potentially effective treaty-making efforts in [multilateral forums such as the] WIPO or the WTO while simultaneously creating the appearance of sharing developing countries' concerns."[123] According to this view, multilateral trade negotiations leave all countries better off than bilateral and regional trade agreements. One scholar has summarized some of the varied perspectives on the merits and demerits of bilateral and regional agreements versus multilateral trade agreements in the following terms:

> For too many years, multilateralists have argued that bilateral trade negotiations are a 'stumbling block' to the development of a WTO-sponsored trade agreement, political leaders have argued that bilateral trade negotiations are a 'building block' towards a WTO-sponsored trade agreement, and the WTO has essentially argued that bilateral trade negotiations are a building block and a stumbling block.[124]

The deadlock and stalemate in WTO negotiations in areas of importance to developing countries contrasts sharply with the little success that developed countries are often able to eke out in bilateral and regional trade deals.[125] Indeed, it is more likely that developing countries would prefer to have the EU and the United States reduce agricultural subsidies at the WTO than in bilateral and regional trade agreements. In fact, reducing agricultural subsidies in developed countries is a crucial precondition for success of multilateral negotiations.[126] Some scholars have argued that developing countries may regard WTO negotiations as

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121. *See id.* at 577–78.

122. *See id.* at 578.

123. Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of Intellectual Property Lawmaking*, 29 YALE J. INT'L LAW 1, 57 (2004) (footnote omitted); *see also* Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125 (2003).

124. Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 J. INT'L ECON. L. 487, 510 (2006).

125. *See* KHOR, *supra* note 107, at 11–13 (discussing developing countries' interest in discussing implementation issues which were subsequently placed on the "back-burner" in favor of issues of importance to developed nations).

126. Abbott, *supra* note 120, at 581–82.

not being worth the effort if such concessions cannot be won.[127] For the moment, forum shifting is more advantageous for developed countries and yields few results for developing countries. Moreover, once countries with little trade negotiating capacity shift away from multilateral trade negotiations, issues that could have been pushed to fruition might be ignored or given less than full attention as more focus and resources are devoted to negotiating regional and bilateral trade agreements.

In addition, there is often no clear understanding of the impact that issues negotiated in bilateral agreements and regional trade agreements will have on a multilateral trade system.[128] Countries that have already entered into regional trade agreements are only now looking back to understand the effects these agreements will have on their economies and on the world trading system.[129] The Committee on Regional Trade Agreements has begun using the Transparency Mechanism[130] to closely analyze the merits and demerits of RTAs and make recommendations for future negotiations.[131]

C. *Forum Shifting Reduces Developing Countries' Opportunities to Form Regional Coalitions*

As noted above, the United States and EU have found that it is much easier to negotiate with countries individually or in small groups than at the WTO. This strategy serves the interests of developed nations because they can use their market power to leverage negotiations to their advantage over much weaker economies. Bilateralism favors those with more resources since it limits the ability of weaker states to form cross-issue alliances which could increase their ability to negotiate with richer States.[132] Similarly, WTO adjudication in the Dispute Settlement Body

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127. *Id.*

128. *See* RICHARD BALDWIN & PHIL THORNTON, MULTILATERALISING REGIONALISM: IDEAS FOR A WTO ACTION PLAN ON REGIONALISM (2008).

129. *See* Committee on Regional Trade Agreements, *Note on the Meeting of 14 June 2010*, WT/REG/M/57 (June 24, 2010).

130. The Transparency Mechanism for RTAs was established provisionally on December 14, 2006, to provide early announcement of any RTAs to the WTO. *Transparency Mechanism for RTAs*, World Trade Organization, http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (last visited Aug. 9, 2011).

131. Committee on Regional Trade Agreements, *Note on the Meeting of 14 June 2010*, WT/REG/M/57 (June 24, 2010); *see also* Committee on Regional Trade Agreements, *Note on the Meeting of 15–16 March 2010*, 4, WT/REG/M/56 (Mar. 23, 2010) (outlining committee deliberations on how to structure the transparency mechanism).

132. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and*

increases the likelihood that developing countries will gain better outcomes than in bilateral negotiations.[133] By contrast, FTAs give powerful governments the opportunity to consolidate their vision of market governance through debt conditions, enforceable trade commitments and tied aid. An example is the Aid for Trade program, a $41.7 billion program[134] that conditions aid to developing countries on subscription to the package of reforms imposed by big donors and lenders, including international financial institutions. Aid for Trade may further indebt developing economies and undermine rather than contribute to poverty eradication.[135] FTAs therefore give powerful governments an opportunity to "more directly and less publicly [pressure] weaker governments to make extensive commitments."[136]

At the Cancún WTO Ministerial Meeting of 2003, a coalition of developing countries emerged and helped to "block the adoption of an agreement which they viewed as largely ignoring their interests."[137] Many large developing countries—including Thailand, Brazil, and India—worked together to create opposition blocks against developed nations.[138] Developing countries and their supporters viewed their successful effort at blocking the Cancún Ministerial as a victory.[139] The resort to regional and bilateral trade agreements has taken away the

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the Fragmentation of International Law, 60 STAN. L. REV. 595, 595 (2007)

133. *See* Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, *in* NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 220 (John S. Odell ed., 2006). Davis argues that four mechanisms make this outcome likely: (1) a guarantee for the right to negotiate, (2) a common standard for evaluating outcomes, (3) option for several countries to join a dispute, and (4) incentives for states to change a policy found to violate trade rules. *Id.*

134. Committee on Trade and Development, *Note by Chairman: On the Meeting of 27 May 2010*, 2, WT/COMTD/AFT/M/15 (July 15, 2010).

135. *But see generally* AID FOR TRADE AND DEVELOPMENT (Dominique Njinkeu & Hugo Cameron eds., 2008).

136. Kelsey, *supra* note 13, at 19.

137. Gumisai Mutume, *Hope Seen in the Ashes of Cancún*, AFRICA RECOVERY, Oct. 2003, at 3, http://www.un.org/ecosocdev/geninfo/afrec/vol17no3/173wto.htm.

138. *See Showdown in Cancún*, *supra* note 104.

139. *See* Gathii, *supra* note 102, at 1366 (book review explaining authors' celebration of the "Group of 20" or "G20," a coalition of developing nations that resisted the imposition of developed nations' agendas); *see also* Press Release, Dep't of Commerce, G-20 Ministerial Meeting (Mar. 19, 2005) (India), *available at* http://commerce.nic.in/wto_sub/g20/pressrel.htm (explaining importance of agricultural negotiations in the WTO and the need for developing countries to "garner collective strength if they are to succeed in eliminating the practices of a small group of rich nations that provide huge amounts of support and protection to their farmers, depress prices, gain undue market shares and compromise the food security and livelihoods of billions of farmers across developing countries").

potential to build coalitions to advance the interests of developing countries, like those formed at Cancún. However, as it will be shown below, it is still possible for groups of developing countries to advance their interests by declining to enter into trade agreements inimical to their interests.

The EU's EPA with CARIFORUM countries illustrates the EU's success in effectively extracting concessions from developing countries grouped in a region. The EU maintained the negotiating positions it held at the WTO when it attended the CARIFORUM negotiations. Unlike at the WTO, the CARIFORUM states did not have the bargaining advantage that could be accomplished by building coalitions with similarly situated countries. Consequently, the EU held fast to its position on labor mobility in its EPA with the CARIFORUM nations, as it had done in its negotiations with India, by allowing only certain classes of immigrants access to the EU. In essence, the EU was able to negotiate an asymmetric deal in its favor that restricted access to the EU for labor from CARIFORUM states, which they have in plenty.[140] The commitments that the EU won in the CARIFORUM EPA were significantly larger than the service liberalization commitments that the CARIFORUM states had committed to "in their GATS 1994 schedules and offered in the GATS 2000 negotiations; for example, Suriname went from 15 to 75 percent, Grenada from 23 to 69 percent and Guyana from 19 to 82 percent."[141] This means that the small economies of Suriname and Grenada have become that much more open to European firms and labor and as such these small economies will face stiff competition from far more efficient service providers from the EU. This does not bode well for local service providers without the wherewithal to compete with these foreign providers. Foreign service providers therefore displace local producers, resulting not only in job losses from competing products and services but, more importantly, in reducing the ability of local firms to innovate, grow or to train their own highly skilled personnel.

The United States has also leveraged its market power over groups of developing countries by holding firm to its model FTA as the minimum it is willing to sign onto. The case of SACU, which is discussed at length below, is illustrative of this approach. According to Tshediso Matona, the South African Director–General of the Department of Trade and

140. *See* KELSEY, *supra* note 72, at 81–93. Chapter Four of the EPA seems to suggest entry for the elite or well educated classes of CARIFORUM states but holds multiple reservations and conditions that prevent many from making use of the access. Kelsey cautions other ACP countries against seeking concessions on labor mobility when negotiating with the EU. *Id.*

141. *Id.* at 10.

Industry:

> The U.S. approach is not developmental . . . . When we engage in trade negotiations at the World Trade Organisation, we make the point that countries must open their economies to the extent that their economies are able to cope. We want to be able to phase in liberalisation, and exempt certain items. They want free trade now and they want everything. They want to retain the right to subsidise their agriculture. They have a template-based approach. One of their agencies conceded: 'We don't want to negotiate. We put a paper down and show you this is where you sign.'[142]

With these types of negotiating techniques, it is not surprising that less-developed nations have much less room to negotiate terms that are beneficial to their economies in a bilateral or regional setting than in a multilateral setting such as the WTO.

D. Other Reasons Accounting for the Spread of Regionalism and Bilateralism

So far, this Article has focused on how the breakdown of multilateral trade negotiations and incentives to shift negotiating venues has influenced the spread of bilateralism and regionalism. There are, however, other explanations: the spread of bilateralism and regionalism can also be accounted for by constructivist and competition explanations. From this vantage point, none of these theories is in itself determinative. Below, these constructivist and competition accounts of the spread of bilateralism and regionalism in trade are examined.

1. The Influence of Global Norms: Constructivist Explanations

Constructivism provides a sociological explanation for the spread of bilateralism and regionalism among countries in the periphery of the world trading system. Under this explanation, these countries are simply following a fad or the example of developed economies even though no solid evidence has established the benefits of bilateralism and regionalism.[143] Because bilateralism and regionalism are often depicted

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142. Michael Hamlyn, *U.S. All-or-Nothing Position Derails Free Trade Talks*, BILATERALS.ORG (Nov. 16, 2006), http://bilaterals.org/spip.php?article6489.

143. Frank Dobbin, Beth Simmons & Geoffrey Garret, *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. SOC. 449, 451 (2007); *see also* Witold Henisz, Bennet Zelner & Mauro Guillen, *The Worldwide Diffusion of Market-Oriented Infrastructure Reform, 1977–1999*, 70 AM. SOC. REV. 871 (2005) (arguing that emulation explains

as integral to economic growth by their proponents, particularly in developed countries, economies in the periphery of the world trading system have embraced them.

Constructivism can also account for the rise of bilateral and regional trade agreements as a result of the preferences of actors supporting the agenda in these agreements within the respective domestic domains before these preferences come to constitute those of the state and eventually of international society.[144] In other words, the neoliberal ideas embedded in regional trade agreements do not simply reflect the material goals of interest groups, but are also culturally grounded ideals of a particular type of economic governance. These neoliberal ideas are therefore as much constituted, or given meaning, by the underlying material interests,[145] as by the ideas and meanings attached to them both by actors that shape them and those who are persuaded to adopt them as their own.[146] Thus, from a constructivist perspective, neoliberalism in the core and periphery of the global economic system is produced in part by habits and expectations among actors and not simply on the basis of imposition. There has indeed been a convergence in academic and policy thinking about economic reforms motivated in part by similar considerations, such as concern for higher economic growth and greater efficiency in the provision of public services.[147]

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the diffusion patterns of market-oriented reforms).

144. *See generally* Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992). Wendt argues that "the raw materials out of which members of the state system are constituted is created by domestic society before states enter the constitutive process of international society." *Id.* at 402. Constructivists, according to Wendt, "share a cognitive, intersubjective conception of process in which identities and interests are endogenous to interaction, rather than a rationalist-behavioral one in which they are exogenous." *Id.* at 394.

145. Realists and critics of neoliberalism would argue that these material interests are the pursuit of power. *See* Janine Brodie, *Globalization, Canadian Family Policy, and the Omission of Neoliberalism*, 88 N.C. L. REV. 1559, 1566 (2010).

146. *See, e.g.*, Kelly, *supra* note 1, at 693. Kelly argues that a modified constructivist approach can simultaneously acknowledge power and interests as well as how these are constituted, because access, process and transparency ameliorate the lack of inclusiveness in defining global norms. She also argues that modified constructivism reintroduces national constituency preferences, which helps secure compliance with its rules. *Id.* at 699. Kelly refers to this as the "normative feedback loop." *Id.* at 674. However, she notes that such a loop is likely to be diluted when a state, after forming its identity through the feedback of its domestic constituencies, then has to negotiate with other states at the international level. *Id.* at 721.

147. *See* William Mitchell, *Beyond Austerity*, THE NATION, Mar. 16, 2011, *available at* http://www.thenation.com/article/159288/beyond-austerity (discussing neoliberalism relating to the financial crisis); *see also* Philip G. Cerny, Georg Menz & Susanne Soederberg, *Different Roads to Globalization: Neoliberalism, the Competition State, and Politics in a More Open World*, *in* INTERNALIZING GLOBALIZATION: THE RISE OF NEOLIBERALISM AND THE DECLINE OF NATIONAL VARIETIES OF CAPITALISM 1, 19 (Susanne Soederberg, Georg Menz & Philip G. Cerny eds., 2005)

While initially neoliberalism in developing countries depended almost exclusively on exogenous coercive imposition through conditionality,[148] today the tool kit for its diffusion includes the fact that third world states are consciously and increasingly redefining their identities in terms of understandings and commitments consistent with neoliberalism.[149] Many of these countries want to be seen as "safe" for investment and are arguably adopting neoliberal ideas as a strategic response to the fact that investors want the assurance of investing in economies where they have a chance to reap the highest returns. Thus, countries that want to attract investment may have to adopt neoliberal reforms independent of any direct coercion.

For this reason, some of the most neoliberal leaning adherents are no longer exclusively based at the World Bank, the International Monetary Fund (IMF), or in Washington or Brussels. For example, one of the most neoliberal outposts in Africa is the small land-locked East African country of Rwanda. In 2010, the World Bank's *Doing Business: Reforming Through Difficult Times* report ranked Rwanda as the world's top performer in the types of regulatory reforms that made it easier for doing business.[150] Among the reforms Rwanda put in place were: reduction in the procedures to start a business to only two so that a new business could be started in three days;[151] reorganizing the property registry to reduce the time it takes to transfer property;[152] adopting a more efficient import and export system;[153] and, increasing investor protection and the range of assets that entrepreneurs can use as security to secure credit.[154] Rwanda has been adopting these types of neoliberal

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(discussing the forces moving neoliberalism in the same direction).

148. Tayyab Mahmud, *"Surplus Humanity" and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession*, 14 CHAP. L. REV. 1, 22 (2010) (citing Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 207, 212 (Michael Byers ed., 2000)).

149. As noted below, some of this redefinition is stage management with a view to accessing credit and capital. *See infra* notes 165–200 and accompanying text. Additionally, there is clearly self-interest in adopting self-binding commitments like neoliberalism as the reigning development paradigm. Such commitments are in turn rewarded in a variety of ways including aid and credit. *Id.*

150. World Bank and the Int'l Fin. Corp., *Doing Business in 2010: Reforming Through Difficult Times*, at 2 (2009), http://www.doingbusiness.org/~/media/fpdkm/doing%20business/documents/annual-reports/english/db10-fullreport.pdf.

151. *Id.*

152. *Id.*

153. *Id.* at 49.

154. *Id.* at 39.

reforms since before 2008. The 2011 Doing Business Report noted that Rwanda was the second most improved business reformer over the last five years and had jumped twelve places to become the fifty-eighth ranked country in the 2011 index.[155]

Clearly, Rwanda has not recently converted to neoliberalism. Within the East African Community, Rwanda has been ahead of all the other members in opening its economy to citizens of other member states through the rights of residence and establishment, while other member states, like Tanzania, have remained reticent.[156] In fact, regional and international economic integration is a central plank of Rwanda's Vision 2020, a policy document aimed at transforming Rwanda into a middle-income country.[157] The other five pillars of this vision are a central part of the neoliberal orthodoxy: private-sector-led economy, good governance and a capable state, human resource development and a knowledge-based economy, infrastructure development, and productive and market-oriented agriculture.[158]

Rwanda's economic reforms have been so impressive that Western aid donors have ignored the political repression of the opposition in Rwanda.[159] This is also true of other economic reformers, such as Uganda's Yoweri Museveni and, to some extent, Ethiopia's Meles Zenawi.[160] There appear to be other factors at play, including the very

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155. World Bank and the Int'l Fin. Corp., *Doing Business in 2011: Making a Difference for Entrepreneurs*, at 4 (2010), http://www.doingbusiness.org/~/media/fpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf. *But see* Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 L. & SOC. INQUIRY 1095 (2007) (taking a skeptical look at *Doing Business* reports).

156. On the East African Community's Common Market Protocol which came into effect in July 2010, see GATHII, *supra* note 86; World Bank and the Int'l Fin. Corp., *Doing Business in the East African Community 2010*, http://www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Profiles/Regional/DB2010/DB10-East-African-Community.pdf (discussing Rwanda's advancements over its EAC partners).

157. REPUBLIC OF RWANDA, RWANDA VISION 2020 11 (2010), http://www.minecofin.gov.rw/webfm_send/1700.

158. *Id.*

159. *See generally Efficiency Versus Freedom: The West Should Not Be Silent When Efficient Leaders, Such as Rwanda's, Squash the Opposition*, THE ECONOMIST, Aug. 5, 2010, at 10, *available at* http://www.economist.com/node/16743333.

160. *See* Jason McLure, *Why Democracy Isn't Working: Despite an Economic Renaissance, Much of Africa is Drifting Toward a New Age of Authoritarianism*, NEWSWEEK, Jun. 18, 2010, *available at* http://www.newsweek.com/2010/06/18/why-democracy-isn-t-working.html. Museveni's re-election in February of 2011 resulted in a congratulatory message from the U.S. State Department that also noted the limitations Museveni had placed on the opposition to campaign freely without intimidation, electoral irregularities such as voter bribery and use of state funds to

powerful influences of donor agencies such as USAID and the UK's Department for International Development.[161] Undoubtedly, there are African government bureaucrats, civil society groups, and organizations whose budget lines depend on these market-oriented donors and who invariably subscribe to neoliberalism for self-interested reasons. Small countries like Rwanda may adopt neoliberalism and seek to reproduce it for selfish reasons, such as attracting foreign investment. After all, adoption of neoliberalism has been embraced within a community of mutual recognition that includes prospective investors and business intermediaries, like banks and insurance companies.[162] For these actors, adoption of neoliberalism also signals to foreign investors that their investments would be protected in that country.[163]

Another reason for the adoption of neoliberalism is that there is a much broader group of economists, including those in the Rwandese government, who studied in economics departments that fully subscribe to neoliberal economic reformism and believe in the efficacy of its ideals. Clearly neoliberalism has come to be adopted by this wide array of actors, including government economists and non-governmental activists, yet its prevalence cannot be solely accounted for by a narrative of imposition through conditionalities.[164] Despite the fact that actors have the freedom to choose whether or not to adopt neoliberal ideas, once created, inter-subjective understandings and expectations acquire a self-perpetuating character.[165] This is consistent with accounts of neoliberalism as practiced through World Bank or IMF conditionalities. It is not a one-way street imposition on recipient countries on a take-it-

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help Museveni retain power as well as the fact there was no independent electoral commission in place. *See* Press Release, Philip J. Crowley, Assistant Secretary, Bureau of Pub. Affairs, State Dep't, Uganda's Elections (Feb. 27, 2011), http://www.state.gov/r/pa/prs/ps/2011/02/156940.htm. On vote bribery, see Rosebell Kagumire, *Museveni Gets Another Five Year Lease in Most Expensive Election*, ROSEBELL'S BLOG (Feb. 24, 2011), http://rosebellkagumire.com/2011/02/24/museveni-gets-more-five-year-lease-in-most-expensive-election-deal/ (noting that Museveni seems to have learned that voter bribery is more efficient than election violence).

161. McLure, *supra* note 160; *see also* DAMBISA MOYO, DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA (2009).

162. For more on communities of mutual recognition, see generally Wendt, *supra* note 144.

163. *See* Beth Simmons, *Money and the Law: Why Comply With the Public International Law of Money*, 25 YALE J. INT'L L. 323, 342 (2000) (arguing that the IMF uses its sanctioning power sparingly because most states comply with IMF policies due to the fact that compliance signals that their money is safe and non-compliance would make their countries uncompetitive).

164. Wendt, *supra* note 144, at 410 ("Far from being exogenously given, the intersubjective knowledge that constitutes competitive identities and interests is constructed every day by processes of social will formation.") (internal quotations omitted).

165. *Id.* at 411.

or-leave-it basis, but rather, is a bargaining and negotiating process to determine the level of borrowed amounts and conditions between borrower governments, on the one hand, and the World Bank and IMF, on the other.[166] Robert Wade has shown how East Asian governments, such as Taiwan, bought into the Washington Consensus, but implemented a vision of economic governance at variance with their professed commitment to neoliberalism.[167] This insight about the strategic appropriation of neoliberalism dovetails with Alvaro Santos's account of the wide-ranging appeal of the World Bank's rule of law projects,[168] because the vague definition of rule of law not only obscures contradictions or tensions within it,[169] but also appeals to: local businesses and associations that have the ability to lobby for a favorable business environment;[170] public officials and political parties because of its promise to reduce corruption;[171] judges who seek to use the resources provided to increase their professional status;[172] legal scholars working as consultants;[173] lawyers benefitting from more clients;[174] and NGO activists attracted by the promise to not only combat corruption, but also to increase access to justice for the poor, women, and the disenfranchised.[175]

The diffusion of bilateralism and regionalism from the site of its production within the interstices of the Washington Consensus to sites of reception, both in developing and developed countries, has been documented in the past with regard to other fads.[176] For instance,

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166. 1 PAUL MOSLEY, JANE HARRIGAN & JOHN TOYE, *Preface to* AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING, at xiii (2d ed. 1995) (arguing that the best way to understand policy-conditioned loans was as a "dynamic bargaining process").

167. *See* Robert Wade, *East Asia's Economic Success: Conflicting Perspectives, Partial Insights, Shaky Evidence*, 44 WORLD POL. 270 (1992) (discussing neoliberal explanations for East Asian economic success as ignoring the importance of government intervention in that success).

168. Alvaro Santos, *The World Bank's Use of the "Rule of Law" Promise in Economic Development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253, 253 (David M. Trubek & Alvaro Santos eds., 2006) ("[A] legal order consisting of predictable, enforceable and efficient rules required for a market economy to flourish.").

169. The rule of law exhibits several contradictions and tensions, for example, between individualism and communitarianism or between procedural and substantive justice. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 84–85 (2004).

170. Santos, *supra* note 168 at 297.

171. *Id.* at 281.

172. *Id.* at 297.

173. *Id.*

174. *Id.* at 298–99.

175. *Id.* at 298–99.

176. On diffusion and reception, see generally Duncan Kennedy, *Three Globalizations of Law*

scholars have shown that countries are more likely to ratify women's rights conventions in years when there are rights conferences,[177] or how the ideas of John Maynard Keynes led to the rise of Keynesian economics.[178] In this sense, changes in ideas and institutions are attributable to socialization. However, constructivism also refers to the possibility of producing and reproducing all identities and interests anew.[179] Notably, my account of the diffusion of neoliberalism is that it is not simply being produced in Western capitals like Washington and received in the periphery, but rather is being reproduced in the periphery as well. After all, neoliberalism has taken many incarnations since it was inaugurated in the 1980s and its various manifestations are therefore being produced, reproduced, and diffused around the world simultaneously.

The United States and the EU have actively promoted regionalism and bilateralism and pursued neoliberal ideas through policy actions. Under a constructivist paradigm, these governments have modeled behavior that is mimicked by developing economies. This mimicry or emulation is voluntary rather than coerced. Neoliberal ideas have, in effect, had a constitutive relationship to the growth of bilateralism and regionalism in trade. Once bilateralism and regionalism caught on in the EU and the United States, the trend seems to have spread among developing countries without consideration as to whether or not it was beneficial.[180] Thus, even some of the smallest, least developed countries in the world, such as Lesotho, openly acknowledge that the success of regionalism in trade elsewhere has persuaded them to pursue regionalism more aggressively.[181]

Some have argued that the current rise of bilateral trade agreements is

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and Legal Thought: 1850-2000, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 168, at 19–73.

177. Cristine Min Wotipka & Francisco O. Ramirez, *World Society and Human Rights: An Event History Analysis of the Convention on the Elimination of All Forms of Discrimination Against Women*, *in* THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY 303, 332 (Beth A. Simmons et al. eds., 2008).

178. *See generally* PETER A. HALL, THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS (Peter A. Hall ed. 1989) (discussing the history of Keynesianism and its adoption).

179. *See* Wendt, *supra* note 144, at 411.

180. Other ideas, such as mass schooling and civil service reforms, have been shown to have spread in a similar manner. *See* Dobbin, Simmons & Garret, *supra* note 143, at 451–54.

181. *See* Propane Lebesa, Minister of Trade and Industry, Opening Address at LDC Trade Ministers Meeting (Feb. 2008) (noting that until recently regional economic groupings were not pursued as a strategy in that the past but that "in recent years [] it is being experimented with more seriously when success of the approach is in evidence elsewhere").

the result the success of the EU model in European integration which has in turn often served as a rhetorical model for advocates of regionalism. On its part, the EU has been an active proponent of the benefits of regionalism.[182] The EU is spreading regionalism directly through commitments like the Cotonou Agreement with the African, Caribbean, and Pacific (ACP) countries.[183] The Cotonou Agreement, whose objectives include eradication of poverty and integrating ACP countries in the global economy, set in motion a series of interim economic partnership agreements with various ACP regions and a completed EPA with Caribbean countries, the CARIFORUM EPA discussed above.[184] Together, these agreements establish goals and mechanisms to monitor what are essentially EU ideas and principles of economic reform and trade integration in ACP countries. In this sense, emulation can create hegemony because ACP countries adopt the EU's ideas and principles of economic and trade governance as part of their domestic legal and policy framework.[185]

2. *Competition for Resources and Markets*

Just as countries compete for capital and export markets, there is an element of competition for the best bilateral or regional trade deal—particularly between the EU, the United States, Brazil, India, and China

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182. Mario Telò, *Between Trade Liberalization and Various Paths Towards Deeper Cooperation, in* EUROPEAN UNION AND NEW REGIONALISM: REGIONAL ACTORS AND GLOBAL GOVERNANCE IN A POST HEGEMONIC WORLD 128, 144 (Mario Telò ed. 2007) (noting an explicit emulation of the EU in Africa); *see also* Albert Higgott, *Alternative Models of Regional Cooperation: The Limits of Institutionalization in East Asia, in* EUROPEAN UNION AND NEW REGIONALISM 75, 77 ("Regionalism is invariably conceptualized with comparative reference to Europe even though it is clear that policy learning and the politics of emulation . . . are major features of the current deliberations about regionalism in other parts of the world, and especially East Asia.").

183. *See* Cotonou Agreement, *supra* note 64, at art. 35(2) (providing that "[e]conomic and trade cooperation shall build on regional integration initiatives of ACP States" as a principal objective). *See* Partnership Agreement, ACP-EU, June 23, 2000, 2000 O.J. (L 317) 3, art. 37(1), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:317:0003:0286:EN:PDF ("Economic partnership agreements shall be negotiated during the preparatory period which shall end by 31 December 2007 at the latest."); *see also*, *id.* at arts. 35(2), 37(5) (providing a basis for conducting EPA negotiation with the regions rather than bilaterally, as part of the Cotonou Agreement's goal of strengthening regionalism in order to integrate ACP countries into the international trading system).

184. For objectives and fundamental principles of the Cotonou Agreement, see Cotonou Agreement, supra note 64, at. arts. 1, 2.

185. *See* Rita Giacalone, *Is European Inter-Regionalism A Relevant Approach for the World or Just for Europe?* (Jean Monnet/Robert Schuman Paper Series, Vol. 7, No. 14, Sept. 2007), http://www6.miami.edu/eucenter/Giacalone-EUregInteg-long070918.pdf. For further discussion, see GATHII, *supra* note 86.

on one hand, and developing countries, on the other.[186] Thus, the propensity to sign a bilateral investment agreement is much higher if neighboring countries have signed such agreements.[187] Much sought after markets are vigorously pursued by countries looking for the best trade deal. In addition, countries that want to attract foreign direct investment or other trade benefits have been shown to compete by offering incentives.[188] As discussed above, many countries, including LDCs, freely acknowledge that they cannot afford to be left behind.

The increasing popularity of Most Favored Nation (MFN) clauses in bilateral and regional trade agreements[189] is further evidence of competition for the best trade deals. The MFN clause in the GATT, the basic multilateral trade agreement, provides for non-discriminatory treatment by obliging signatories to extend the same privileges and concessions to all the members of a trade agreement. An MFN clause in a regional or bilateral trade agreement may be surprising because it is often assumed that regional and bilateral trade agreements confer exclusive benefits to the signatories—as such, an MFN clause extending benefits to non-members in bilateral and regional agreements inconsistently with the GATT MFN clause is very unusual. Developed economies like the EU have insisted on MFN clauses particularly in EPAs to ensure that whatever concessions are granted under a *future* regional trade agreement are also extended to current regional trade signatories. The CARIFORUM EPA has such an MFN clause; it applies

186. *See* United Nations Conference on Trade and Development, *Trade and Development Report*, 53, UNCTAD/TDR/2007 (2007), http://www.unctad.org/en/docs/tdr2007_en.pdf. Some of the best academic work done here includes, Bergsten, C.F., "Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century," Working Paper No. 96-15 (Washington DC, Institute for International Economics); Richard E. Baldwin, *A Domino Theory of Regionalism*, *in* EXPANDING MEMBERSHIP IN THE EUROPEAN UNION 25 (Richard E. Baldwin et al. eds, 1995) (advancing the competitive liberalization hypothesis to account for the increased spread of regional and bilateral trade agreements and advancing a domino theory to account for the increased spread of regionalism and bilateralism).

187. RASUL SHAMS, HAMBURG INST. INT'L ECON. (HWWA), PAPER NO. 61, "NATURAL INTEGRATION": A NEW APPROACH TO REGIONAL INTEGRATION IN DEVELOPING COUNTRIES 6 (1998), http://ageconsearch.umn.edu/bitstream/26210/1/dp980061.pdf.

188. See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 657 (1998) (explaining that poor countries sign investment treaties to attract foreign investment even though those treaties are often inimical to their best interests).

189. *See* El Hadji A. Diouf, *Why the MFN Clause Should Not Be Included in EPAs*, TRADE NEGOTIATIONS INSIGHTS (Eur. Ctr. for Dev. Policy Mgmt. and Int'l Ctr. for Trade and Sustainable Dev.), Oct. 2010, at 8, http://www.acp-eu-trade.org/library/files/tni_en_9-8.pdf.; Cheikh Tidiane Dièye & Victoria Hanson, *MFN Provisions in EPAs: A Threat to South-South Trade?*, TRADE NEGOTIATIONS INSIGHTS (Eur. Ctr. for Dev. Policy Mgmt. and Int'l Ctr. for Trade and Sustainable Dev.), Mar. 2008, at 1, http://www.acp-eu-trade.org/library/files/TNI_EN_7-2.pdf.

to all subsequent free trade agreements insofar as they cover customs, duties, commercial presence, and investment, cross-border supply of services, and where they involve developed countries or major trading economies.[190] As such, should the CARIFORUM states give the United States concessions in these areas, an obligation to extend similar concessions to the EU would be automatically triggered.

Alternatively, MFNs have required signatory countries to commence new negotiations upon entering into agreements with other developed countries. This requirement is well illustrated in the Pacific Agreement on Closer Economic Cooperation (PACER) between New Zealand, Australia, and the Pacific Island countries of the South Pacific.[191] New Zealand and Australia have argued that Article 6(3)(a) and (b) of PACER requires all fourteen Pacific Island countries to negotiate a new trade agreement following the signing of a Pacific Interim EPA which covers trade in goods and that only Fiji and Papua New Guinea have signed.[192] Australia and New Zealand have helped the Pacific Island countries set up a fully funded Office of the Chief Trade Advisor to the Forum Island Countries Secretariat to help them negotiate a PACER-PLUS Agreement. The increasing use of such clauses demonstrates rising competition for access to foreign markets with the most advantageous concessions possible.

For example, China and India are in a furious competition for Africa's mineral wealth and access to its markets. This is reflected by the fact that both countries are engaged in a race for trade and investment agreements.[193] These "emerging economic giants" and their burgeoning economies are creating a greater demand for natural resources and light

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190. *See* Economic Partnership Agreement, CARIFORUM States-European Cmty., art. 70, Oct. 30, 2008, 2008 O.J. (L 289) 3, http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf [hereinafter CARIFORUM EPA]. "Major trading economy" is defined as any developing country representing individually more than 1% of world merchandise exports or, a group of countries with more than 1.5% of world merchandise exports. *Id.* at art. 19, ¶ 4. For more on the CARIFORUM EPA, see KELSEY, *supra* note 72.

191. Pacific Agreement on Closer Economic Relations, PACIFIC ISLANDS FORUM SECRETARIAT, http://forum.forumsec.org/resources/uploads/attachments/documents/PACER.pdf (last visited Sept. 21, 2011).

192. *See* Technical Centre for Agricultural and Rural Cooperation [CTA], *Executive Brief: Update, EPA Negotiation Issues Between Pacific and the EU*, 2 (Apr. 2010), http://agritrade.cta.int/en/content/download/2721/139440/file/2d63ba16772c8c8f89eb6303aa908bab.pdf.

193. Harry G. Broadman, *Africa's Silk Road: China and India's New Economic Frontier*, WORLD BANK 1, 42 (2007), http://siteresources.worldbank.org/AFRICAEXT/Resources/Africa_Silk_Road.pdf.

manufactured goods.[194] Although Chinese and Indian foreign direct investment (FDI) in Africa have traditionally been concentrated in the oil extraction and mining industries, in recent years, FDI flows between the two Asian countries and Africa has become more diversified, with FDI now in the apparel industry and processed foods, as well as other sectors.[195]

In order to encourage collective consultation and to promote political dialogue and economic cooperation with African countries, China established the Forum for China Africa Cooperation (FOCAC).[196] FOCAC's fourth ministerial conference was hosted by Egypt in November 2010[197] to review implementation of action items from the Beijing Summit of the Forum held three years earlier and to discuss new ways to enhance Sino–African trade relations.[198] To this end, FOCAC adopted the Sharm El Sheikh Action Plan of the Forum on China-Africa Cooperation at the conference.[199] The Sharm El Sheikh Action Plan seeks to strengthen Sino-African cooperation in political affairs; regional peace and security; international affairs; economic and social development; and cultural and people-to-people exchanges.[200] China has promised to extend $10 billion in preferential loans to African countries over the next three years to be used for infrastructure and social development projects.[201] China has also agreed to support African regional integration efforts.[202] At the time of writing, China has signed bilateral agreements with thirty-three African countries to expand trade and investment and another eleven agreements to avoid double taxation, and has investment interests in forty-nine African countries.[203]

In sum, this Article has made two primary claims regarding competition for resources and markets. First, regional and bilateral trade

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194. *Id.*

195. *Id.*

196. *See Characteristics of FOCAC*, FORUM ON CHINA-AFRICA COOPERATION, http://www.focac.org/eng/ltda/ltjj/t157576.htm (last visited Aug. 21, 2010).

197. *Declaration of Sharm El Sheikh of the Forum on China-Africa Cooperation*, FORUM ON CHINA-AFRICA COOPERATION (Nov. 12, 2009), http://www.focac.org/eng/zxxx/t626388.htm.

198. *See id.*

199. *See id.*

200. *See Sharm El Sheikh Action Plan (2010–2012)*, FORUM ON CHINA-AFRICA COOPERATION (Nov. 12, 2009), http://www.focac.org/eng/zxxx/t626387.htm.

201. *Id.* at art. 4.3.3.

202. *Id.* at art. 4.3.2.

203. *See China-Africa Economic Trade Cooperation*, INFO. OFF. ST. COUNCIL (Dec. 28, 2010), http://www.gov.cn/english/official/2010-12/23/content_1771603.htm.

agreements are now a preferred policy preference for both developing and developed countries. The breakdown of WTO negotiations has played an important role in the proliferation of regional and bilateral trade agreements; countries have shifted from the WTO's trade framework to regional and bilateral trade agreements. Second, a convergence in policy preferences in favor of free trade as a national economic strategy is an equally important factor accounting for the popularity of regional and bilateral trade agreements. This common policy preference undermines claims that developed countries have imposed their free trade preferences on developing countries. However, many of the bilateral trade agreements negotiated between developing and developed countries impose unequal obligations on developing countries. Part III of this Article will further examine these inequities by showing that bilateral agreements have become an important avenue for promoting the neoliberal agenda of the Washington Consensus—free trade, openness to foreign investment, and free market reforms such as deregulation and privatization.

III. FORTIFYING THE NEOLIBERAL AGENDA OF THE WASHINGTON CONSENSUS

Bilateral and regional trade agreements have become a major avenue for implementing the Washington Consensus in developing countries. The Washington Consensus has ten elements: fiscal discipline, redirection of public expenditures to fields offering high economic returns, tax reform, interest rate liberalization, a competitive exchange rate, trade liberalization, liberalization towards foreign direct investment, privatization, deregulation, and secured property rights.[204] These elements, originally outlined in 1989 by John Williamson, have been prescribed as necessary to promote economic development in developing countries.[205]

Openness to trade, foreign direct investment, and market economy reforms such as deregulation and privatization of public enterprises, have been hallmarks of the Washington Consensus. Advocates of openness argue that developing countries can achieve economic

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204. Joel M. Ngugi, *Policing Neoliberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 584 (2005) (citing John Williamson, *What Washington Means by Policy Reform, in* LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 5, 7 (John Williamson ed., 1990)).

205. *See* John Williamson, Senior Fellow, Inst. for Int'l Econ., The Washington Consensus as Policy Prescription for Development, Lecture for the "Practitioners in Development" Series at the World Bank (Jan 13. 2004), http://www.iie.com/publications/papers/williamson0204.pdf.

development by liberalizing their markets and dismantling the welfare state[206] so that services such as energy, telecommunications, and water are no longer state provided. The IMF and the World Bank have conditioned developing countries' access to funds on their acceptance of the Washington Consensus.[207]

Regional and bilateral trade agreements have increasingly introduced elements of the Washington Consensus into developing economies. For example, commitments in the area of trade of services in bilateral and regional trade agreements have become a primary route of introducing private provisioning of public goods like water, education and health care.[208] Thus, the market is increasingly supplanting public provisioning of important services in accordance with the commitment to market governance of the Washington Consensus.[209]

Bilateral and regional trade agreements that promote the liberalization and deregulation of public services further remove the policy space to make public policy decisions that would not be contrary to the commitments made in these agreements. For example, the loss of such regulatory autonomy following urban water privatization has in some instances resulted in degradation of service provisioning while limiting the ability of governments to take corrective measures.[210] These agreements create binding rules of establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of foreign investments on the territory of the developing countries. More importantly, these rules compel competition for activities that were previously provided by public monopolies, such as postal services and telecommunications. By incorporating such commitments, regional and

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206. James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107 (1999); *see also* Chimugwuanya Nwobike, *The WTO Compatible ACP-EU Trade Partnership: Interpreting the Reciprocity Requirement to Further Development*, 8 ASPER REV. INT'L BUS. & TRADE L. 87, 101, 106 n. 94 (2008).

207. *See* Gathii, *supra* note 206, at 141.

208. *Africa's Trade in Services and Economic Partnership Agreements*, *supra* note 11, at 1.

209. *See generally* KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 52 (2002).

210. For example, Tanzania privatized water provisioning in one of its cities, but was able to retake the service after a foreign investor was unable to effectively provide water for city residents. The foreign investor brought an arbitration proceeding against Tanzania alleging violations of a bilateral investment treaty. Tanzania successfully defended its decision to retake the service and cancelled the contract with the foreign investor. *See* Biwater Gauff, Ltd. v. Tanz., ICSID Case No. ARB/05/22, at 99 (July 24, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67.

bilateral trade agreements have granted American, European, and other multinational corporations expanded reach into previously untapped consumer markets.

The EPA between the CARIFORUM states and the EU best illustrates how a regional trade agreement can promote the goals of the Washington Consensus. The agreement removes the CARIFORUM states' ability to impose currency controls vis-à-vis the EU, thereby requiring the liberalization of CARIFORUM financial markets consistently with the goals of the Washington consensus.[211] Committing certain sectors to their services schedule, CARIFORUM states automatically open these sectors to foreign investors under the national treatment norm.[212] Opening CARIFORUM states to migration of high level professionals without also obliging the EU to accept low-skilled labor from CARIFORUM nations effectively creates unequal obligations insofar as the EC gets market opening concessions in the services sector without making reciprocating concessions in a services area of importance to CARIFORUM states.[213] Removing CARIFORUM states' discretion to exercise regulatory authority in any manner that discriminates against foreign investor presence and giving them the right to have equivalent commercial presence as local investors is consistent with the Washington Consensus goal of strengthening investor protections.[214]

As these commitments come into effect, multinational corporations from the EU will have free reign to trade in these nations because local governments will no longer have regulatory authority to control the corporations' activities or protect competing local investors. In other words, markets that have been traditionally government controlled will be open for international investment and control.

Although the EU successfully negotiated the CARIFORUM Agreement to its advantage, it argues that the CARIFORUM nations also achieved some of their aims. First, the expiration of the Cotonou Agreement[215] would have disrupted Caribbean exports and the CARIFORUM nations needed to reach some form of agreement with the EU to avoid this disruption.[216] With no end in sight to WTO

211. *See* CARIFORUM EPA, *supra* note 190, at art. 122.

212. *See id.* at art. 68.

213. *See id.* at arts. 80–83.

214. *See id.* at arts. 67–68.

215. Cotonou Agreement, *supra* note 64.

216. *See id.* at art. 1; *see also* Overview of the Cotonou Agreement, EUROPEAN COMM'N, http://ec.europa.eu/development/geographical/cotonouintro_en.cfm ("The Cotonou Agreement is

negotiations, the CARIFORUM nations needed to act quickly to prevent the sudden economic turmoil that would result from the expiration of the Cotonou Agreement. Second, although the EU service liberalization schedules were not significantly greater than their previous negotiated amounts, the CARIFORUM nations did receive certain concessions that some have argued would have promoted economic growth in CARIFORUM countries.[217] Third, the modulated tariff liberalization schedule allows for a gradual change in tariff schedules that avoids the dangers of frontloading. Ambassador Errol Humphrey of the CARIFORUM Secretariat argued that this would mean only an additional 10.1% of tariff reduction on EU imports over the first ten years, and that a significant number of products that receive tariff reductions will be those that currently have "nuisance tariffs" and not "serious revenue earners or those intended to protect emerging industries."[218] Finally, the regional EPA protected the nations in the CARIFORUM EPA so that they could maintain their regional unity.[219] The EU could have easily negotiated bilateral agreements with individual countries, setting one nation against another and allowing the EU to fully use its negotiating strength to its advantage. However, as Ambassador Humphrey explained, "[a] central objective of CARIFORUM was to retain the integrity of its own regional integration process"—a fact it made clear to the EU in negotiations.[220]

A. Asymmetrical Liberalization

So far this Article has discussed how the CARIFORUM EPA in particular resulted in commitments that favored the EU at the expense of CARIFORUM states. This is not surprising since trade liberalization under the aegis of the Washington Consensus is asymmetrical in several respects. Developed countries have a comparative advantage in many areas that are opened up under regional and bilateral trade agreements—including services, investment measures, and intellectual property rights—while many developing countries have a comparative advantage in agriculture, where few or no meaningful concessions are made to

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the most comprehensive partnership agreement between developing countries and the EU. Since 2000, it has been the framework for the EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP).") (last updated Sept. 9, 2011).

217. KELSEY, *supra* note 72.

218. Humphrey, *supra* note 76, at 5.

219. *Id.* at 3 (preferential treatment for regional partners).

220. *Id.* at 5.

developing countries in these agreements.[221]

Overall, developed countries enjoy superior negotiating advantages in bilateral and regional trade agreements. For example, with respect to the CARIFORUM EPA, the EU successfully negotiated a pro-liberalization interpretation of Article V of GATS, which allows the formation of regional trade agreements, greatly extending the CARIFORUM states' exposure to international competition. On the other hand, the EU gave "very little new liberalization beyond its already extensive GATS commitments, especially in areas of interest to the CARIFORUM. The result is a gross asymmetry of liberalization in the EPA in favor of the EU."[222]

Developed countries are not as concerned about asymmetrical trade deals as developing countries. Many developed countries instead argue that bilateral and regional agreements are models for future WTO negotiations.[223] In essence, the assumption here is that these agreements are building blocks towards what these countries would like to see at the WTO. However, because the terms of these negotiations are often controlled by the United States and the EU, developing countries may not always find that their experience in bilateral and regional negotiations with developed economies set precedent for what they can negotiate at the multilateral level.[224] As Frederick Abbott has argued, the "most troubling aspect of the [Preferential Trade Agreement], phenomenon is the exercise of virtually unconstrained political and economic power by the United States and [the] EU to secure concessions from developing (and developed) countries."[225]

B. Intellectual Property Rights (IPR) and Asymmetrical Liberalization

Provisions targeting intellectual property rights represent an extreme form of asymmetrical liberalization. The United States and the EU have used a combination of RTAs, FTAs, and EPAs "to shape the evolution of norms in areas such as intellectual property protection and drug pricing where they have vital interests at stake and where their position on issues is far different from those of the vast majority of states."[226]

The WTO's TRIPS Agreement, enacted in 1994, set minimum

221. For an expanded view, see Gathii, *supra* note 112.

222. KELSEY, *supra* note 72, at 2.

223. *See* Global Europe Strategy, *supra* note 66; *see also* KELSEY, *supra* note 72.

224. *See* Abbott, *supra* note 120, at 582.

225. *Id.* at 583.

226. Benvenisti & Downs, *supra* note 132 (referring to this phenomenon as serial bilateralism).

standards for intellectual property protection in all WTO member nations.[227] The patent provisions of the TRIPS agreement are now widely recognized as correlated to the unavailability of affordable essential medicines in developing countries.[228] This is because patents have been found to be correlated with high prices for essential medicines making them unaffordable particularly for low-income people. WTO members addressed this problem by negotiating the Doha Declaration on TRIPS and Public Health and a proposed amendment.[229] Article 8 of TRIPS provides that members may "adopt measures necessary to protect public health and nutrition."[230] Some scholars have interpreted the TRIPS agreement in light of this objective to protect public health, arguing that the agreement should be construed to allow compulsory licensing,[231] parallel importation, flexibility in defining the scope of patentable subject matter, and an early working exception.[232] They also contend that the agreement should give countries discretion regarding the extent of test data protection and the right to control anti-competitive practices.[233] More definitively, the 2001 Doha Declaration on TRIPS and Public Health explicitly recognized that the TRIPS Agreement "does not and should not prevent Members from taking measures to protect public health."[234] These flexibilities built into the TRIPS Agreement may allow

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227. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORG. (Apr. 15, 1994), http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm [hereinafter TRIPS Agreement].

228. Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 J. INT'L ECON. L. 469 (2002); James Thuo Gathii, *Rights, Patents, Markets and the Global AIDS Pandemic*, 14 FLA. J. INT'L L. 261 (2002).

229. James Thuo Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention of the Law of Treaties*, 15 HARV. J.L. & TECH. 291, 302 (2002). Patent protections held the potential for limiting access to medicines in a health crisis which TRIPS was not intended to cause. Doha alleviated the concern by stating, in part "each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles." World Trade Org. [WTO], *Declaration on the TRIPS Agreement and Public Health*, at § 5(a), WT/MIN(01)/DEC/2 (Nov. 14, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

230. TRIPS Agreement, *supra* note 227, at art. 8.1.

231. Timothy Bazzle, *Pharmacy of the Developing World: Reconciling Intellectual Property Rights in India With the Right to Health: TRIPS, India's Patent System and Essential Medicines*, 42 GEO. J. INT'L L. 785, 798 (2011) ("TRIPS's compulsory licensing scheme reflects the balance States attempted to strike between IPR protection and the promotion of social welfare.").

232. *See* Charles T. Collins-Chase, *The Case Against TRIPS-Plus Protection in Developing Countries Facing AIDS Epidemics*, 29 U. PA. J. INT'L L. 763, 773–74 (2008) (discussing the framework of the TRIPS Agreement).

233. *Id.* at 771–75.

234. *Id.* at 778 (citing Declaration on the TRIPS Agreement and Public Health, *supra* note 229, at ¶ 4).

WTO members to find a balance between strong intellectual property protection and the public health and welfare of their citizens.

However, the United States and the EU have used bilateral and regional trade agreements to create even stronger intellectual property protection than those created under the TRIPS Agreement. Because the TRIPS Agreement only sets minimum standards for intellectual property protection, countries are free to negotiate stronger protections through bilateral and regional trade agreements, called TRIPS-plus provisions.[235] Developing countries facing public health pandemics such as HIV/AIDS, malaria, and tuberculosis preferred not to adopt stronger intellectual property rights protections than those required by the TRIPS Agreement. This is because strong protections would mean having high-cost essential medicines under patent. Stronger protections than those in the TRIPS Agreement have been referred to as TRIPS-plus provisions.

The best example of such TRIPS-plus provisions is in the U.S.–Morocco FTA of January 2003. Referred to as "the most advanced [intellectual property] chapter in any FTA negotiated so far" by the U.S. pharmaceutical industry, the U.S.–Morocco FTA has substantial intellectual property rights provisions with regard to copyrights, trademarks, and patents.[236] The IPR provisions create strong rules for protecting trademarks and copyrights—in particular, they specify detailed rules regarding the protection and use of trademarks and copyrights, protect the rights of parties involved, and require signatories to create means of adjudicating claims.[237] The FTA also contains strong patent provisions, especially with respect to pharmaceutical products. For example, the FTA requires Morocco to prohibit the marketing of pharmaceutical products that infringe patents and notify patent owners when their patents are infringed.[238]

In addition to its FTA with Morocco, the United States has also included TRIPS-plus provisions in its bilateral agreements with Jordan (2000), Chile (2003), Singapore (2003), Australia (2004), and in the

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235. *See* TRIPS Agreement, *supra* note 227, at art. 1.1 ("Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.").

236. *See FAQ: U.S-Morocco Free Trade Agreement (FTA)* answer to *How Does the FTA Protect Intellectual Property Rights?*, EXPORT.GOV (quotations omitted), http://www.export.gov/faq/eg_main_017504.asp (last updated Mar. 31, 2011 4:34 PM).

237. Free Trade Agreement, U.S.-Morocco, art. 15.2–15.7, Jun. 15, 2004, 118 Stat. 1103, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file797_3849.pdf [hereinafter U.S.-Morocco FTA].

238. *Id.* at art. 15.11, ¶ 4.

regional trade agreement CAFTA (2004).[239] While these countries were willing to accept TRIPS-plus provisions, the South African Customs Union (SACU) declined to sign off on TRIPS-plus protections, regarding them as disproportionately beneficial to the United States. [240] The SACU's resistance to concessions imposed by the United States is discussed below in my discussion on SACU's resistance of a U.S. FTA.

C. Agriculture and Asymmetrical Liberalization

Asymmetrical liberalization is not limited to intellectual property rights. It is also acutely demonstrated in the absence of a commitment to liberalize agriculture in the same way liberalization in industrial products, intellectual property rights, and services has proceeded. Multilateral negotiations in the Doha Round have taken a back seat to the liberalization of services and investment opportunities as well as the strengthening of intellectual property rights protection in bilateral and regional trade agreements. Yet liberalization in agriculture—an area in which developing countries have a comparative advantage—has faltered. Similarly, development concerns have not fared well in bilateral and regional trade agreements or at the WTO, notwithstanding the fact that the Doha Ministerial Declaration that launched the current WTO round of negotiations in 2001 committed the members to ensuring that development was at the heart of the new round of negotiations. The lackluster attitude towards agricultural liberalization and development contrasts sharply with the strong liberalization commitments made in favor of developed countries in the areas of intellectual property rights, services, and investment opportunities. Further, even issues of particular importance to developing countries, such as removal of cotton subsidies and distortions in agriculture, do not receive much attention. For example the WTO offers developing countries aid to offset agricultural imbalances instead of removing distortion-producing trade measures outright.[241]

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239. Collins-Chase, *supra* note 232, at 779.

240. *See* Chelsea Brown, *Trade Integration and Institutional Reform in Latin America: Can FTAA Be Revived?*, 15 LAW & BUS. REV. AM. 221, 228 (2009).

241. Brazil, for example, settled for technical assistance and capacity-building assistance in the cotton sector in Brazil worth $147 million annually as a countermeasure to settle its victory against the United States in the WTO Appellate Body decision finding U.S. cotton subsidies to be inconsistent with the United States' WTO obligations. *See* Press Release, Office of the U.S. Trade Representative, U.S., Brazil Agree on Memorandum of Understanding As Part of Path Forward Toward Resolution of Cotton Dispute, http://www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-memorandum-understanding-part-path-f (last visited July 21, 2011).

Another significant problem with bilateral and regional trade agreements is that they eliminate conventional means of accommodating countries through Special and Differential Treatment as well as the built-in flexibilities of the multilateral trading system.[242] Thus, regional and bilateral agreements can potentially exacerbate trade distortions rather than resolve them. For example, the subsidized U.S. agricultural market has strong adverse effects on Chilean wheat and sugar markets. Although the Chilean agricultural sector has gained much from fruit and agro-industrial exports to the United States under the Chile–U.S. FTA, highly subsidized wheat and sugar from the United States sells at low prices, making it difficult for Chilean wheat and sugar farmers to compete.[243] This could potentially crash Chile's domestic wheat and sugar market, resulting in substantial rural worker displacement.[244] As the Chile example illustrates, U.S. agricultural subsidies will continue to adversely affect developing countries' access to developed countries' markets unless the United States stops subsidizing its agricultural industry.[245]

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242. The Kigali Declaration on the Economic Partnership Agreement Negotiations of the African Union's Conference of Trade Ministers (following a meeting from October 29 to November 2, 2010) resolved the "commitment to concluding development-friendly EPAs that will contribute meaningfully to reducing and ultimately eradicating poverty in our countries. In this regard, we urge the EU to dedicate additional, predictable and sustainable resources to specifically address EPA-related adjustment costs and build productive capacities." The Kigali Declaration on the Economic Partnership Agreement Negotiations of the African Union's Conference of Trade Ministers, African Union, ¶ 3, Nov. 2, 2010, http://www.southcentre.org/index.php?option=com_content&view=article&id=1432%3Asb52&catid=144%3Asouth-bulletin-individual-articles&Itemid=287&lang=en. The Declaration further resolved a "commitment to the proposals by the ACP Group that the objective criteria which form part of the political objectives agreed by the international community, at the multilateral level, are retained to determine the parameters that have to be met to enable the conclusion of the EPAs," implicitly referring to the need for special and differential treatment principles applicable in the WTO to apply in EPA negotiations. *Id.* at ¶ 6.

243. Lindsay M. Fainé, *The Internationalization of Chilean Agriculture: Implications of the United States-Chile Free Trade Agreement*, 13 MINN. J. GLOBAL TRADE 383, 400 (2004).

244. *Id.* at 401.

245. And no progress is being made in the multilateral negotiations, either. "The G20 was disappointed by the fact that no progress has been achieved in discussion of the trade aspects of cotton during the July 2008 Ministerial. The G20 was also concerned that current substantive negotiations on cotton seemed to be deadlocked and even back-tracking in the consultations of the Special Session on Agriculture. Developing country producers and exporters of cotton, particularly the poorest among them, continued to face unfair competition from developed country subsidies. The G20 urged developed countries, which accounted for the bulk of trade-distorting subsidies in cotton to live up to the mandate." Sub-Committee on Cotton, *Secretariat Progress Report: Implementation of the Developed Assistance Aspects of the Cotton-Related Decisions in the 2004 July Package and Paragraph and Paragraph 12 of the Hong Kong Ministerial*, ¶ 6, WT/CFMC/28 (2010).

D. Is Resistance An Option?

In light of the asymmetrical liberalization in trade as demonstrated above, the question arises: is resistance an option for developing countries? Can developing countries say no when trade negotiations seem to invariably favor developed countries? The next section examines these questions.

1. The SACU Example

Even though the interests of developed countries are likely to prevail in bilateral and regional agreements, there has been some resistance to adopting the U.S. Model FTA. The best example of this resistance is the case of the Southern African Customs Union. As noted earlier, the SACU comprises Botswana, Lesotho, Namibia, South Africa, and Swaziland.[246] Negotiations for the U.S.–SACU FTA were launched in 2001, but were suspended in 2004 because of "diverging views on a number of issues."[247] The SACU rejected the one-size-fits-all approach taken by the United States in its FTAs.[248] The United States insisted that the SACU accept the standard U.S. Model FTA in its entirety, including provisions on intellectual property, government procurement, and investment.[249] The SACU argued it did not have the resources to enforce such extensive provisions.[250] For the SACU, the United States' "golden standards of trade relations" were too onerous.[251]

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246. *What is SACU?*, S. AFR. CUSTOMS UNION, http://www.sacu.int (last visited July 20, 2011).

247. *Trade Negotiations: Bi-lateral Trade*, S. AFR. CUSTOMS UNION, http://www.sacu.int/traden.php?id=414 (last visited Aug. 14 2011).

248. *See* Rodrick Mukumbira, *U.S.-SACU Free Trade Talks Hit Snags*, BILATERALS.ORG (May 15, 2006), http://www.bilaterals.org/spip.php?article4712 ("Botswana, Lesotho, Namibia, Swaziland, and South Africa refused to join the US free trade parade - citing flaws in the one-size-fits-all template the US offered."); *see also Statement by Ambassador Schwab at the SACU – TIDCA Signing Ceremony*, S. AFR. CUSTOMS UNION (July 16, 2008), http://www.sacu.int/main.php?include=docs/speeches/2008/sp0716a.html ("We have explored the possibility of pursuing an FTA with some African partners, but at this point most countries in the region are not yet in a position to undertake the types of commitments that would be required for a comprehensive FTA with the United States." The Ambassador also explains the goal of the United States, in the future, to negotiate the "Singapore Issues" with the SACU. "The ultimate goal of the TIDCA is to provide an umbrella under which the United States and SACU will be able to negotiate a series of trade and investment agreements or understandings on a wide range of issues, including sanitary and phytosanitary issues, customs cooperation and trade facilitation, removing technical barriers to trade, and investment promotion.").

249. *See* Mukumbira, *supra* note 248.

250. *See id.*

251. *Id.*

In particular, the SACU objected to the intellectual property rules because they would have limited compulsory licensing to governmental non-commercial use. The SACU further objected to the five-year minimum period of data exclusivity designed to enhance protections for clinical trial dates beyond those under the TRIPS Agreement.[252] The TRIPS-plus terms included in the FTA would have had a significant impact on SACU members' ability to distribute essential medicines because they would have been required to limit the use of public health flexibilities in TRIPS.[253] SACU countries cited the high prevalence of the HIV/AIDS epidemic in the region to argue against accepting such limitations on their ability to distribute anti-retroviral medicines at affordable prices.[254] As one scholar has noted, when comparing "the costs of AIDS to the anticipated benefits of the FTA . . . the economic and social costs outweigh the benefits, and these countries have done well to move away from FTAs with the United States."[255] Furthermore, South Africa objected to the investment provisions in the U.S. Model FTA that required termination of its black empowerment program.[256] The program required investors to employ a certain percentage of black employees as a remedy for racial discrimination under apartheid.[257]

2. *The U.S.–South Korea FTA*

The U.S.–South Korea FTA represents another example of difficult negotiations because of resistance to the terms of the agreement. Although, as noted earlier, an FTA with South Korea was eventually concluded, the United States had long resisted signing the FTA that was negotiated in 2007. While the SACU case involved objections to provisions imposed by the United States, resistance to the U.S.–South Korea FTA came from within the United States. In particular, the U.S.

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252. Brook K. Baker, *Ending Drug Registration Apartheid: Taming Data Exclusivity and Patent/Registration Linkage*, 34 AM. J.L. & MED. 303, 341 (2008); *see* Carlos Maria Correa, *Implications of Bilateral Free Trade Agreements on Access to Medicines*, 84 BULL. WHO 399, 399–401 (2006). Comprehensive coverage of issues relating to the SACU–U.S. FTA can be found in J. CLARK LEITH & JOHN WHALLEY, INST. FOR INT'L ECON., COMPETITIVE LIBERALIZATION AND A US-SACU FTA (May 2003), *available at* www.piie.com/publications/chapters_preview/375/12iie3616.pdf.

253. *See* Collins-Chase, *supra* note 232, at 798–801.

254. Alfonce Mbizwo, *AIDS Drugs Dog U.S.-Southern Africa Trade Deal*, BILATERALS.ORG (Apr. 29, 2005), http://www.bilaterals.org/spip.php?article1795.

255. Collins-Chase, *supra* note 232, at 801.

256. David Schneiderman, *Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules*, 25 S. AFR. J. HUM. RTS. 246, 270–75 (2009).

257. *Id.*

automobile and beef industries opposed the FTA because they believed it would result in domestic job losses.[258] Environmental and labor groups also opposed—and continue to oppose—the FTA, contending that it does little to protect environmental and labor rights.[259] Unlike the SACU, South Korea has a trade surplus with the United States and a significant market share in certain categories of the U.S. market, including apparel, textiles, footwear, machinery, electronics, and passenger cars.[260] In December 2010, South Korea finally made agreeable concessions on autos and beef, paving the way to an agreement that now remains to be ratified by the U.S. Congress and the South Korean Parliament. Congress ratified the FTA in mid-October, 2011 and the President signed it into law on Friday, October 21, 2011.[261] The U.S.–South Korean FTA therefore illustrates the market power that a country with a trade surplus vis-à-vis the United States can have in negotiating an FTA.

CONCLUSION

This Article has analyzed the upsurge in bilateral and regional trade agreements. It has argued that bilateral and regional trade agreements today provide a platform for developed countries to leverage aggressive unilateralism in trade and to enact WTO Plus obligations in areas such as intellectual property rights, trade in services, financial liberalization commitments, government procurement, competition, and investment measures. As trade negotiations shift to bilateral and regional agreements where developed countries can leverage their market power to impose economic programs, developing countries are much more likely to be hemmed into disadvantageous, enforceable treaty commitments.

However, the SACU's successful resistance to a standard U.S. Model

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258. *See* William Rogers, *Unions Say Korea US Trade Pact Means Job Losses in Both Countries*, LEFT LAB. REP. (July 8, 2011), http://leftlaborreporter.wordpress.com/2011/07/08/unions-say-korea-us-trade-pact-means-job-losses-in-both-countries.

259. *See Facing KORUS in the Fight for Fair Trade*, SIERRA CLUB, http://www.sierraclub.org/trade/downloads/2011-04-korea-factsheet.pdf (last visited Oct. 8, 2011). *See* Press Release, Public Citizen, Obama's Decision to Push Bush's NAFTA-Style Korea Trade Deal Without Real Fixes Is Major Policy, Political Mistake (Dec. 3, 2010), http://www.citizen.org/documents/obama-pushes-bad-korea-deal-statement-dec-3-10.pdf.

260. *See Agenda 2010—U.S.-Korea Free Trade Agreement (KORUS)*, AM. MANUFACTURING TRADE ACTION COALITION, http://www.amtacdc.org/Pages/Policy-Issues.aspx#KORUS (last visited Oct. 14, 2011).

261. *See supra*, note 46.

FTA indicates that such aggressive trade unilateralism does not always guarantee one-sided deals. Developing countries can use bilateral trade agreements to strengthen development-friendly objectives in the intellectual property context as well as to "reconsider the gains and losses of the multilateral bargain."[262] Developing countries can also move issues horizontally from one institutional domain to another—such as from the WTO to the World Intellectual Property Organization, from the WTO to the World Health Organization for health issues, or certainly from bilateral or regional negotiations to the Conference of Parties of the Convention on Biological Diversity.[263]

While alternative forums provide a safe place free from unilateral pressures to discuss issues often marginalized in other international settings,[264] not all alternative forums offer opportunities for consequential rule making.[265] Such forums do however offer these countries opportunities to develop and generate counter-norms,[266] political pressure, and the type of coalitions necessary to counter the dominance of developed countries in bilateral and regional trade negotiations. Yet one cannot underestimate how effectively bilateral and regional trade agreements split heterogeneous groups of developing countries in ways that undermine their ability to coalesce and bargain collectively through the multilateral setting of the WTO.[267]

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262. Okediji, *supra* note 123, at 145–46.

263. In October 2010, developing countries at the 2010 Conference of Parties of the Convention on Biological Diversity in Nagoya, Japan secured an important victory over industrialized States with a legally binding agreement to share equitably the benefits of genetic resources. References to market based mechanisms to combat climate change favored by industrialized countries were excluded from the meeting outcome documents which reflected the need for strong regulatory measures favored by developing countries. *See* The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity (Oct. 29, 2010), http:/www.cbd.int/Nagoya/outcomes/; Richard Gray, *Landmark UN Nagoya Bio-Diversity Deal Agreed to Save Natural World*, DAILY TELEGRAPH (Oct. 30 2010), http://www.telegraph.co.uk/earth/earthnews/8098540/Landmark-UN-Nagoya-biodiversity-deal-agreed-to-save-natural-world.html.

264. *See* Helfer, *supra* note 123, at 55; *see also* Peter Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 408–16 (2004).

265. Helfer, *supra* note 123, at 56–57.

266. Lawrence Helfer makes an analogous point when he argues that such alternative forums offer developing countries an opportunity "to generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO." *See id.* at 59.

267. Indeed, as Ruth Okediji has argued, since "regime shifting upsets coalitional dynamics between developing countries, the loss on the development side is doubled. Not only is there a dilution of a normative proposition, however subtle, but there is also the political loss resulting from splinters between developing countries whose membership in various regimes may be different, or whose position on issues within the regimes may differ." Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global*

Further, bilateralism and regionalism in trade are fads that are spreading neoliberal economic ideals to the periphery of the global trading system. In other words, emulation by small developing countries of neoliberal economic ideas and policies is a significant driver of economic reform. Developing countries adopt neoliberalism not simply because it is imposed, as many previous accounts suggest. Rather, neoliberalism is voluntarily adopted for a variety of reasons. First, there has been a convergence in the thinking of policymakers and academics in developing and developed countries through education or professional associations and contacts. Thus, developing countries are not isolated jurisdictions shaping their trade policies independently of other jurisdictions in developed economies. On this account, developing countries—particularly their form of the modern state—were historically created by similar projections of metropolitan power or mimicry of post-colonial elites. Thus, it is difficult to sustain hard and fast boundaries between locally produced ideas in a distinct autonomous zone and centrally produced ideas generated under the aegis of neoliberalism that developing countries must be protected and insulated from. Here, the literature on the autonomy of local government from centralized or federal decision making is very instructive. As the scholars in this area have noted, efforts to promote local autonomy from central power are "better understood as efforts to alter the central frameworks within which local discretion is inevitably exercised, rather than as attempts to substitute centralized command for local control."[268]

Second, government officials in developing countries have adopted neoliberal reforms because they believe that such reforms are preconditions to achieving increased economic growth and efficiency in the public sector. Third, officials in developing countries are strategically adopting neoliberal reforms through bilateral and regional trade agreements because such reforms signal that a country is "safe" for investment. Moreover, these agreements provide budget support that is otherwise unavailable to these developing country officials in their home country. Fourth, officials in developing countries are often passive

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Intellectual Property System, 7 SING. J. INT'L & COMP. L. 315, 373 (2003); *see also* Benvenisti & Downs, *supra* note 226, at 597, 610 (arguing that powerful regime shifting is favored by powerful states since "they know that weaker states are not only more numerous than they are, but they are also far more diverse with respect to size, wealth, and their level of development).

268. *See* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L. J. 377, 381 (2001). This of course is not to suggest that there are no locally specific values and ideas, but rather to argue that local ideas exist 'within a larger, coordinated structure and depend at all times upon central law for their autonomy." *Id.* at 410–11; *see also* Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

imitators. In the absence of solid evidence as to the efficacy of neoliberal ideals and often without having undertaken research into alternative reform ideas, these officials rationally resort to neoliberal ideals.[269]

In short, this Article has argued that the increased number of regional and bilateral trade agreements represents an important opportunity for further diffusion of neoliberal economic ideals, an insight often missing in leading accounts that have emphasized how this trend conforms to or departs from the norms of the WTO. Ultimately, constructivism can better account for the circumstances under which neoliberalism arises by taking into consideration the context within which these ideas are generated and perpetuated, resulting in a policy framework in which choices favoring neoliberalism are more likely to be exercised by developing countries.

269. David Strang & Michael Macy, *In Search of Excellence: Fads, Success Stories and Adaptive Emulation*, 107 AM. J. SOC. (2001) 147, 172. Notably, Katharina Pistor argues that standardization of the legal architecture for global markets "will accelerate the process of legal convergence with the double benefit of reducing transaction costs for transnational investors and increasing the quality of legal institutions in countries whose institutions are less developed." Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COM. L. 97, 97 (2002). Pistor's point is instructive, particularly if we think of standardization of legal norms as reducing the costs of developing country officials to investigate alternatives to neoliberal ideals or their efficacy. All they have to do is to adopt them, within margins of discretion of course, as these ideals come to be regarded as "best practice" or "efficient." For this reason, Pistor argues that developing country officials come to adopt rules or laws that do not reflect their context and the efficacy of such rules is therefore brought into question. *Id.* at 99.