THE U.S. APPROACH TO REGIONALISM: RECENT PAST AND FUTURE

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The "new regionalism"[1] of the last decade shows a turn away from regional groupings (such as the North American Free Trade Agreement (NAFTA),[2] the Southern Common Market (MERCOSUR)[3] and Free Trade of

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1. The "new regionalism" of the last decade has been described as a response to frustration countries feel at the slow and blocked progress in multilateral trade liberalization through the Doha Round and their belief that free trade agreements can be used for the required economic liberalization. United Nations Conference on Trade and Development, New York and Geneva, *Trade and Development Report 2007*, 54, UNCTAD/TDR/2007(Sept. 5, 2007), *available at* http://www.unctad.org/en/docs/tdr2007_en.pdf (last visited Feb. 25, 2009) [hereinafter TRADE AND DEVELOPMENT REPORT 2007].

United Nations Conference on Trade and Development (UNCTAD) characterizes this new regionalism from the perspective of developing countries as having two basic characteristics: 1) bypassing multilateralism (in the institutions and arrangements) to pursue economic perspective; and 2) adopting the idea that successful integration into the world economy requires "access to the markets of the North and attracting FDI from developed country investors." *Id.* at 55.

If this is a new wave of regionalism it would be the third wave of such efforts since the beginning of the world trading system. *See* NEW DIMENSIONS IN REGIONAL INTEGRATION 3–4 (Jamie De Melo & Arvind Panagriya eds., Cambridge Univ. Press 1993) (describing the first wave of regionalism as coming in the early 1960s, following the European Common market, and the second wave starting in the middle 1980s, when the United States became a major player by into entering into free trade agreements with Israel, Canada and Mexico); *see also* World Trade Organization (WTO), *World Trade Report 2007*, at 306 (2007), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf (last visited Feb. 25, 2009) [hereinafter WORLD TRADE REPORT 2007] (noting that the second wave of regionalism came when the United States negotiated the U.S.-Canada FTA and began a shift from multilateralism to regionalism).

2. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (containing chs. 1–9), 32 I.L.M. 605 (containing chs. 10–22) [hereinafter NAFTA].

3. MERCOSUR is the short form for the Mercado Común del Sur (Common Market of the

the Americas (FTAA)[4]) towards the negotiation and implementation of more bilateral arrangements. These bilateral agreements have proliferated worldwide but many of them involve North-South arrangements between developed and developing countries.[5] The European Community (EC) and the U.S. lead[6] in the formation of these newer bilateral free trade agreements. The United States only negotiates and enters into free trade agreements (FTA). Since the time of the NAFTA negotiations, the United States has developed and refined a model free trade agreement[7] that pursues all of its U.S. goals on deep economic integration.

This article will focus on the recent past and future of the U.S. approach to regionalism. In doing so, it will begin with an analysis of why the pursuit of free trade agreements has become the *vehicle of choice*[8] for U.S. trade liberalization. This analysis will set forth the form and contours of the U.S. approach to negotiating free trade agreements as well as the development of the model FTA. The second part of the article will detail the impact of the U.S. approach on its free trade partners—the developing countries—that have completed negotiations with the United States. The third section of the article

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South). MERCOSUR entered into force in 1992 following the adoption of the Treaty of Asuncion in 1991. Treaty Establishing a Common Market, Arg.-Braz.-Para.-Ura., Mar. 26, 1991, 30 I.L.M.1041 (1991).

4. The Free Trade Area of the Americas initiative was launched in 1994 with a goal of creating a free trade area uniting all of the 34 democracies in the Western Hemisphere. The negotiating process for the FTAA went on until 2005 and created multiple drafts before it was suspended in 2005. The United States has taken the position that "[o]ther leaders indicated that the conditions did not exist for the achievement of the FTAA." World Trade Organization (WTO), Trade Policy Review Body, *Trade Policy Review Report by the United States*, WT/TPR/G/200 (May 5, 2008), *available at* www.wto.org/english/tratop_e/tpr_e/g200_e.doc (last visited Feb. 26, 2009) [hereinafter US/TPR]. For an analysis of the reasons why the FTAA failed to materialize, see David A. Gantz, *The Free Trade Area of the Americas: An Idea Whose Time Has Come—and Gone?*, 1 LOY. INT'L L. REV. 179 (2004) [hereinafter Gantz, *Free Trade Area*].

5. TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 55 (noting that the North-South bilateral free trade agreements have increased from 14% of the world wide number reported to the WTO in 1995 to 27% in 2007).

6. *Id.* at 55–56 (describing the reasons for the increase in negotiations of bilateral free trade agreements by the EC and U.S.). *See also* Chris Brummer, *The Ties the Bind? Regionalism, Commercial Treaties, and the Future of Global Economic Integration*, 60 VAND. L. REV. 1349, 1364 (2007) (detailing the numbers of bilateral FTAs negotiated by the European Community (E.C.) and the United States).

7. The United States has completed fifteen free trade agreements, thirteen of which have been implemented in the United States and its partner countries. All of these agreements, except for NAFTA and the Central American Free Trade Agreement CAFTA/DR have been bilateral FTAs. By contrast, the EC has used regional agreements for the different purposes. It has used association agreements to prepare countries for joining the EC common market (a customs union). The EC has negotiated bilateral free trade agreements with developing countries. Most recently it has focused on a long process of replacing its prior preference programs for its former colonial trading partners in the African, Caribbean and Pacific (ACP) countries with Economic Partnerships Agreements (EPAs). TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 56.

8. *See* discussion *infra* Part II.A.

focuses on how the United States could improve by looking at other models and by altering its approach to both the design and the negotiations for future free trade agreements.

I. THE RECENT PATTERN OF U.S. REGIONALISM

The United States has developed an entire system for negotiating economic integration agreements over the last two decades.[9] Before the 1980s, the United States focused more on multilateralism and unilateralism than regionalism.[10] The United States has developed four approaches to economic integration. The lowest level are Trade and Investment Framework Agreements (TIFAs),[11] setting out general principles on free trade and investment. The TIFAs are often used as precursors to either Bilateral Investment Treaties (BIT)[12] or Free Trade Agreements (FTAs) (pursued on a regional basis, largely

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9. Susan G. Esserman, *Proceeding of the Canada-United States Law Institute Conference on Understanding Each Other Across the Largest Undefended Border in History: U.S. Speaker*, 31 CAN.-U.S. L.J. 11, 13 (2005).

10. The United States was actually the biggest defender of the multilateral system. *See* Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, *in* NEW DIMENSIONS IN REGIONAL INTEGRATION, *supra* note 1, at 29.

The United States later shifted to what could be considered aggressive regionalism. According to Bhagwati, this shift was due to a number of factors including: the belief that the GATT was inadequate; that multilateral negotiations were moving too slowly; and, that regionalism in North America would constitute a countervailing bloc to the Europe 1992 drive to complete the single market. *Id.* at 29, 30. *See also* Jagdish Bhagwati, *The Diminished Giant Syndrome: How Declinism Drives Trade Policy*, FOREIGN AFF. (Council on Foreign Relations), Spring 1993, at 22.

The U.S. move towards regionalism sped up when the Uruguay Round negotiations broke down in 1990 over an impasse between the United States and the European Community regarding agriculture issues. President George H.W. Bush's response to this stalemate was to move more decisively to pursue negotiations with Mexico and Canada for a free trade agreement. *See* C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 2, 9–10 (1994) [hereinafter *NAFTA/Battle*]. Once NAFTA was completed, the Clinton Administration continued the pursuit of regionalism and that process intensified under President George W. Bush. *See* discussion *infra* Part II.

11. The United States currently has Trade and Investment Framework Agreements (TIFAs) in place. TIFAs cover general agreements between the United States and its partners on an investment protections, intellectual property issues, customs improvements and transparency (for government and commercial regulations). The United States offers TIFAs to many of the countries that later become FTA partners. For example, the United States had TIFAs and later FTAs with the following countries: Australia, Bahrain, Singapore and one regional TIFA with the the Association of Southeast Asian Nations (ASEAN) countries. *See* OFFICE OF U.S. TRADE REP. (USTR), TRADE AND INVESTMENT FRAMEWORK AGREEMENTS (TIFAs) (2004), http://www.sice.oas.org/TPD/USA_OMN/Negotiations/07072004TIFA_e.pdf (last visited Feb. 18, 2009).

12. The United States has over 40 Bilateral Investment Treaties (BITs) in place. Of its current FTA partners, the following countries were also BIT countries: Bahrain, Honduras, Jordan, Morocco, and Panama. *See* TRADE COMPLIANCE CENTER, BILATERAL INVESTMENT TREATIES, *available at*

through regional trade initiatives such as NAFTA, the Enterprise for ASEAN Initiative (EAI)[13] and the FTA) or bilateral FTAs. Current regional initiatives cover every major continent or region,[14] except for Europe. Bilateral free trade agreements have spun off these regional initiatives or have been pursued with individual countries.[15]

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http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited Feb. 18, 2009). Over the years, the United States has developed a model BIT which it uses when it negotiates with partner countries. U.S. DEP'T OF STATE, BILATERAL INVESTMENT TREATIES AND RELATED AGREEMENTS, 2004 U.S. MODEL BIT (2004), http://www.state.gov/documents/organization/117601.pdf (link to 2004 U.S. Model BIT found on U.S. Department of State website) (last visited Feb. 25, 2009).

13. Under the terms of the Enterprise for ASEAN Initiative (EAI) with the ASEAN countries of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam, the United States offered agreements to any country committed to U.S. free trade goals which was both a World Trade Organization (WTO) member and a TIFA signatory. OFFICE OF THE U.S. TRADE REP. (USTR), ENTERPRISE FOR ASEAN INITIATIVE, http://www.ustr.gov/Trade_Agreements/Regional/Enterprise_for_ASEAN_Initiative/Section_Index.html (last visited Feb. 18, 2009).
The EAI was launched in 2002 and produced the U.S.-Singapore Free Trade Agreement. United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html (last visited Feb. 26, 2009). The United States has also entered into negotiations with Malaysia and Thailand for bilateral free trade agreements. US/TPR, *supra* note 4, at 20–22.

14. All of the regional initiatives were launched in either 2002 or 2003. In addition to the EAI (Asia), the United States began initiatives in Africa with the South African Customs Union (SACU), the Middle East with the Middle East Free Trade Area (MEFTA) Initiative and Latin America with Central America Free Trade Agreement (CAFTA) Initiative.

The SACU negotiations were designed to build on the success of the U.S. preference program for Africa. OFFICE OF THE U.S. TRADE REP. (USTR), BACKGROUND INFORMATION ON THE U.S.-SACU FTA (2003), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Southern_Africa_FTA/Background_Information_on_the_US-SACU_FTA.html?ht= (last visited Feb. 18, 2009). The United States suspended active negotiations in 2006 but has declared that the FTA remains a "long term objective." US/TPR, *supra* note 4, at 15.

The MEFTA Initiative was launched in 2003 and has produced three free trade agreements with Morocco, Bahrain, and Oman. U.S.-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html (last visited Feb. 18, 2009) [hereinafter U.S.-Morocco FTA]; United States-Bahrain Free Trade Agreement, U.S.-Bahr., Sept. 14, 2004, 44 I.L.M 544, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html (last visited Feb. 18, 2009) [hereinafter U.S.-Bahrain FTA]; United States Trade Representative, *U.S.-Oman Free Trade Agreement*, U.S.-Oman, Jan. 18, 2006, http://ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html (last visited Feb. 18, 2009).

The CAFTA Initiative led to the Central American-Dominican Republic-United States Free Trade Agreement. Central American-Dominican Republic-United States Free Trade Agreement, U.S.-Dom. Rep., Aug. 5, 2004, 43 I. L.M. 514, *available at* http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited Feb. 18, 2009) [hereinafter CAFTA/DR].

15. The regional initiatives have produced FTAs with Singapore (EAI), Morocco, Bahrain, and Oman (MEFTA), NAFTA and CAFTA. The other free trade agreements are bilaterals with Israel; U.S.-Israel Free Trade Agreement, U.S.-Isr., Apr. 22, 1985, 24 I.L.M. 653, *available at*

Before the G. W. Bush Administration (Bush Administration), the United States entered into only four free trade agreements, the U.S.-Israel FTA (enacted in 1985), the U.S.-Canada FTA (enacted in 1988), NAFTA (enacted in 1994) and the U.S.-Jordan FTA (enacted in 2001).[16] The preceding Clinton Administration focused on completing the side agreements on labor and environment cooperation and pursued passage and implementation of NAFTA.[17] Most of its focus on regionalism, however, was on the Free Trade of the Americas initiative. While informal bilateral talks were held with several countries[18] that approached the United States about free trade agreements, only one agreement was completed, the U.S.-Jordan FTA.[19] Armed in 2002 with the trade negotiating authority[20] long denied to the preceding administration, the Bush Administration broadened its approach to regionalism. In every year from 2003 to 2007, the United States completed, and Congress approved, at least one free trade agreement. Those eight free trade agreements are: the U.S.-Singapore (2003), U.S.-Chile (2003); U.S.-Australia (2004), U.S.-Morocco (2004); U.S.-CAFTA/DR (2005), U.S.-Bahrain (2006), U.S.-Oman (2006) and U.S.-Peru

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http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp (last visited Feb. 18, 2009) [hereinafter U.S.-Israel FTA]; U.S.-Canada Free Trade Agreement, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281, *available at* http://wehner.tamu.edu/mgmt.www/NAFTA/fta/complete.pdf (last visited Feb. 18, 2009) [hereinafter U.S.-Canada FTA]; U.S.-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (last visited Feb. 18, 2009); U.S.-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248, *available at* http://ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html (last visited Feb. 18, 2009) [hereinafter U.S.-Australia FTA]; United States Trade Representative, *U.S.-Peru Trade Promotion Agreement*, U.S.-Peru, April 12, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html (last visited Feb. 18, 2009) [hereinafter U.S.-Peru FTA].

16. U.S.-Israel FTA, *supra* note 15; U.S.-Canada FTA, *supra* note 15; NAFTA, *supra* note 2; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf (last visited Feb. 18, 2009) [hereinafter U.S.-Jordan FTA].

17. Then candidate Bill Clinton campaigned in 1992 against the NAFTA negotiated by the G.H.W. Bush Administration and promised to negotiate labor and environmental side agreements to deal with gaps in the agreement. After winning the election, President Clinton completed that pledge in 1993. *See NAFTA/Battle, supra* note 10, at 2 (1994) (reviewing the importance of the labor and environmental issues before, during and after the NAFTA negotiations).

18. The Clinton Administration began FTA talks with Jordan, Chile, Singapore and Australia—all countries which approached the United States after NAFTA was completed. Esserman, *supra* note 9, at 14 (noting that the Clinton Administration did begin informal negotiations near the end of its term because of 1) the concern about the movement towards free trade agreements around the world, and 2) the paralysis at the WTO).

19. U.S.-Jordan FTA, *supra* note 16. The U.S.-Jordan FTA is the only FTA that does not follow the pattern of the model FTA. It is only twenty pages long and does not cover all of the subject matters areas negotiated in the others.

20. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§3801–13 (2002).

(2007).[21] Before the end of the Bush Administration, three other free trade agreements were completed and signed with Korea (KORUS 2007),[22] Colombia (2007),[23] and Panama (2007).[24] None of these agreements have been approved by Congress[25] or implemented. Before the end of the Bush administration, trade promotion authority expired and the latest FTAs were held up by the shift in political winds that comes with an election cycle.[26] During his election campaign, President-elect Obama expressed deep reservations about the U.S. approach to regionalism[27] and indicated there would be a reconsideration of the issue under his leadership.[28]

Viewing the list of completed FTAs reveals a clear pattern to the surge in U.S. regionalism. All of the recent FTAs, with the exception of the CAFTA/DR, were bilateral agreements. Almost all of the bilateral FTAs have been with developing or least-developed countries with asymmetric trading relationships with the United States.[29] Many of the FTAs have been with countries with which the United States has a foreign policy concern or agenda.[30]

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21. OFFICE OF U.S. TRADE REP. (USTR), THE PRESIDENT'S 2008 TRADE POLICY AGENDA 107-15 (2008), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Trade_Policy_Agenda/asset_upload_file649_14563.pdf (last visited Feb. 26, 2009).

22. OFFICE OF U.S. TRADE REP. (USTR), U.S.-KOREA FREE TRADE AGREEMENT, U.S.-KOREA (2007), http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html (last visited Feb. 26, 2009) [hereinafter KORUS].

23. OFFICE OF U.S. TRADE REP. (USTR), U.S.-COLOMBIA TRADE PROMOTION AGREEMENT, U.S.-COLOM. (Nov. 21, 2006), http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html (last visited Feb. 26, 2009) [hereinafter U.S.-Colombia FTA].

24. OFFICE OF U.S. TRADE REP. (USTR), U.S.-PANAMA FREE TRADE AGREEMENT, U.S.-PAN. (Jun. 28, 2007), http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Section_Index.html (last visited Feb. 26, 2009) [hereinafter U.S.-Panama FTA].

25. The Bush Administration made passage of the last three FTAs its chief priority. THE PRESIDENT'S 2008 TRADE POLICY AGENDA, *supra* note 21, at 2. Despite this emphasis, and its submission of the U.S.-Colombia FTA to Congress, none of the agreements was reviewed by Congress during the 2008 election year.

26. *See generally* Gary Clyde Hufbauer & Jeffrey J. Schott, *NAFTA's Bad Rap*, INT'L ECON. (Summer 2008), *available at* http://www.iie.com/publications/papers/hufbauer-schott0808.pdf (last visited Feb. 26, 2009) [hereinafter *NAFTA's Bad Rap*].

27. *Id.*

28. Mark Drajem, *Obama May Delay NAFTA Overhaul in Victory for Caterpillar, GE*, BLOOMBERG.COM, Nov. 18, 2008 [hereinafter *Obama NAFTA*], http://www.bloomberg.com/apps/news?pid=20601103&sid=aQeuS1RQRE3c&refer=us (last visited Feb. 26, 2009).

29. Canada and Australia were the only two developed countries with which the United States negotiated FTAs. The agreement with Australia is now the only bilateral FTA with a developed country.

30. The United States considers support of its foreign policy goals as one of the factors pointing FTA partner status. U.S. GEN. ACCOUNTING OFFICE, GAO-04-233, INTENSIFYING TRADE NEGOTIATING AGENDA CALLS FOR BETTER ALLOCATION OF STAFF AND RESOURCES 8 (2004), *available at* http://www.gao.gov/new.items/d04233.pdf. (last visited Feb. 28, 2009) [hereinafter GAO 2004 REPORT]. For

None of the completed FTAs have been with major trading partners. The one exception is the pending KORUS.[31]

Why over the last half-decade has the United States pursued so many FTAs for such limited gains in trade and investment rights? What has driven the developing country partners to pursue this avenue towards globalization? The answers to these questions are quite different. As the world's largest economy, the United States began to make FTAs the focus of its trade policy for two major reasons. First, despite its power and credibility, the United States has been unable to achieve its goals through multilateralism or wide-scale regionalism. At the World Trade Organization (WTO), the Doha Round has struggled, been suspended,[32] and limped along over impasses between developed countries[33] and between the developed and developing countries.[34]

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example, the countries selected for bilateral FTAs under MEFAI were supporters of U.S. goals in the Middle East and the "CAFTA nations supported U.S. objectives in IRAQ." *Id. See also* Craig Van Grasstek, *U.S. Trade Policy and Developing Countries: Free Trade Agreements, Trade Preferences and the Doha Round*, ICTSD INFORMATION NOTE 4 (Int'l Center for Trade and Sustainable Dev., Geneva), Feb. 2008, *available at* http://www.latn.org.ar/archivos/documentacion/PAPER_DOCop-71.pdf (last visited Feb. 26, 2009). According to Van Grasstek, the foreign policy goals were supporting the U.S. policy in the Middle East, cooperating in anti-narcotic activity and agreeing to leave the developing country coalition at the WTO (the Group of 21). Other particular foreign policy goals are met by the choice of Panama (security of the canal zone) and South Korea (to offset problems arising from U.S.-N. Korea relations) and anti-drug efforts (Colombia).

31. All of the existing and pending free trade agreements account for only sixteen percent of total U.S. trade and sixteen percent of total investment. U.S. GEN. ACCOUNTING OFFICE, GAO-08-59, AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATION UNDER TRADE PROMOTION AUTHORITY 20 (2007), http://www.gao.gov/new.items/d0859.pdf (last visited Feb. 28, 2009) [hereinafter GAO 2007 REPORT]. By contrast, S. Korea is the seventh largest trading partner of the United States. The pending FTA would cover more trade than any other FTA, except for NAFTA. Jeffrey J. Schott, *The Korea-U.S. Free Trade Agreement: A Summary Assessment*, PETERSON INST. FOR INT'L ECON., PB 07-7, Aug. 2007, at 1, *available at* http://www.petersoninstitute.org/publications/pb/pb07-7.pdf (last visited Feb. 26, 2009).

32. Sungjoon Cho, *The WTO Doha Round Negotiations: Suspended Indefinitely*, 10(22) ASIL INSIGHTS (2006), *available at* http://www.asil.org/insights060905.cfm (last visited Feb. 26, 2009) (describing what led to the suspension and post-suspension prospects).

33. The Doha Round negotiations have continued despite the suspension. In December 2008, the negotiating groups issued revised texts of agreements on agriculture and non-agricultural market access (NAMA) which still have gaps. The WTO member states still have to reach consensus on major issues before these agreements can be finalized. Statement by Pascal Lamy to the General Council, *WTO to Move Quickly on Wider Front in 2009*, WORLD TRADE ORGANIZATION (WTO), Dec. 18, 2008, http://www.wto.org/english/news_e/news08_e/tnc_dg_stat_17dec08_e.htm (last visited Feb. 26, 2009).

The ongoing impasse between the developed countries has been over the pace of liberalization in agricultural trade. *See* U.S GEN. ACCOUNTING OFFICE, GAO-07-379, WORLD TRADE ORGANIZATION: CONGRESS FACES KEY DECISIONS AS EFFORTS TO REACH DOHA AGREEMENT INTENSIFY (2007), *available at* http://www.gao.gov/new.items/d07379.pdf (last visited Feb. 28, 2009).

34. The most recent impasse between the developed and developing countries has come from the insistence of the United States that the larger developing countries should make deep cuts or eliminate tariffs

In its one protracted major regional effort, the FTAA, the United States was unable to obtain a comprehensive agreement that met its goal of going beyond WTO standards[35] with all of the countries in the Western Hemisphere. These failures inspired the creation of the "competitive liberalization"[36] approach to regionalism. The Bush Administration announced that it would move forward simultaneously on the multilateral, regional and bilateral level with the belief that success in one area (FTAs) would spur serious efforts to move forward at the multilateral level. The U.S. declared that it would negotiate with like-minded FTA partners ("can do" countries).[37]

Second, while the United States desires both increased trade opportunities in and increased investment rights from FTA partner countries, it wants its model FTA more.[38] The model FTA embodies the United States' views on the proper subjects and disciplines for trade negotiations. It would be preferable to achieve a multilateral consensus on all of the subject areas covered in the model. However, even if the WTO fails to completely adopt all of the topics, the free trade agreements embody what can and should be accomplished. In

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on major sectors of non-agricultural goods (such as chemicals and automobiles). The developing countries apparently see such a demand as "an unacceptable raising of the bar at a very late stage in the negotiations." *With No Doha Conclusion in Sight, WTO Considers How to Proceed*, 12 (No. 43), BRIDGES WEEKLY TRADE DIGEST (2008), *available at* http://ictsd.net/i/news/bridgesweekly/36562/ (last visited Feb. 26, 2009).

35. *See* Gantz, *Free Trade Area*, *supra* note 4; *see also* GAO 2007 REPORT, *supra* note 31, at 18 (United States Trade Representative (USTR) reported to the GAO that it had suspended the FTAA talks because all of the countries in the region were unwilling to accept the U.S. model FTA).

36. "Competitive liberalization" is the phrase created by former USTR Robert Zoellick to describe how the United States should proceed. "By pursuing multiple free trade initiatives, the United States has created a 'competition for liberalization,' launching new global trade negotiations, providing leverage to spur new negotiations and solve problems, and establishing models of success in areas such as intellectual property, e-commerce, environment and labor, and anti-corruption." ROBERT B. ZOELLICK, OFFICE OF U.S. TRADE REP. (USTR), THE PRESIDENT'S TRADE POLICY AGENDA FOR 2005 (Feb. 18, 2005), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/asset_upload_file820_7314.pdf (last visited Feb. 26, 2009).

37. Following the failure of the Cancun Ministerial meeting of the Doha Round negotiations in 2003, largely due to issues raised by developing countries, USTR Zoellick stated "we will not passively accept a veto over America's drive to open markets. We want to encourage reformers who favor free trade. If others do not want to move forward, the United States will move ahead with those who do." TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 56.

38. In the recent past, the United States committed itself to the idea that it should pursue only "highly comprehensive 'gold standard' bilateral and regional FTAs." GAO 2007 REPORT, *supra* note 31, at 18. This requires that agreements meet a number of "absolute requirements"—the inclusion of agriculture, negative list approach to services, and intellectual property rights. *Id.* USTR noted that it had been unable to pursue FTAs with major developed countries, the EU, Switzerland, and Japan, because of their unwillingness to accept the comprehensive FTA model. *Id.*

addition, the United States can meet its particular foreign policy goals and eliminate more preference programs[39] by adopting FTAs with certain countries.

For the developing country partners, the reasons for negotiating FTAs, and binding themselves to the United States, reflect their relative size and power. All of these countries are trying to avoid missing out on the worldwide regionalism effort[40] and plotting some strategy for coping with globalization. In practical terms, they seek secure market access to the world's largest market and to attract more foreign direct investment (FDI).[41] The governments seeking out and conducting these negotiations are also trying to "lock in"[42] domestic

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39. One of the motivations for the United States to pursue a regional or bilateral FTA is to convert "one-way U.S. trade preference programs into two-way reciprocal agreements." *Id.* at 16. For example, the Andean FTA Initiative (which produced bilateral FTAs with Peru and Colombia) "was motivated by a desire to replace the Andean Trade Preference Agreements, while CAFTA-DR was motivated in part by a desire to replace a major portion of the Caribbean Basin Initiative." *Id.*

All of the CAFTA/DR countries, as well as Peru, have already given up preference status by enacting FTAs with the United States. Panama and Colombia will have to do the same if those bilateral FTAs are approved by Congress.

40. The pace of regionalism, particularly bilateral free trade agreements, during the third wave picked up as the Doha Round began to hit impasses. *See* Robert V. Fiorentino, Luis Verdeja & Christele Toquebouef, *Discussion Paper No. 12, The Changing Landscape of Regional Trade Agreements: 2006 Update* 1–2, WTO SECRETARIAT (Geneva Switzerland) (2006), *available at* http://www.wto.org/english/res_e/booksp_e/discussion_papers12a_e.pdf (last visited Feb. 26, 2009).

The countries seeking out RTAs seem to do so in response to other countries having done so, and the trend "seems to have become irreversible almost as if FTA proliferation has reached a critical mass from which there is no turning back." *Id.* at 13.

41. The experience of Mexico under NAFTA provides support for the notions that a U.S. FTA will increase exports and investment. Without NAFTA, Mexico's global exports would have been twenty-five percent lower and investment levels would have been forty percent lower. THE WORLD BANK, LESSONS FROM NAFTA FOR LATIN AMERICAN AND CARIBBEAN COUNTRIES (Dec. 17, 2003), http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:20393778~pagePK:146736~piPK:146830~theSitePK:258554,00.html (last visited Feb. 26, 2009).

42. Kim Hyun-Chong, Minister for Trade, Republic of Korea, Remarks at the High Level Panel on "WTO's Institutional Challenges" at the WTO Public Symposium, Regionalism, Development and Political Direction: Major Challenges for the WTO in the 21st Century 2 (April 20, 2005), *available at* http://www.wto.org/english/news_e/events_e/symp05_e/kim_e.doc (last visited Feb. 26, 2009) (According to Minister Kim, the socio-political reason for a country to pursue an FTA is "to push ahead on domestic reforms and to break with the past. Korea needs domestic reforms to continue its economic growth. Reforms must be supported by liberalization measures or they can be undone overnight—what good are reform measures if they could be undone overnight? Therefore, liberalization through FTAs is necessary to support the reform process."). *Id.* at 2.

This same desire to "lock in" reform was one of the motivating forces for Mexico entering NAFTA and for the countries in CAFTA/DR. THE WORLD BANK, CENT. AM. DEP'T AND OFFICE OF CHIEF ECON. LATIN AM. AND CARIBBEAN REGION, DR-CAFTA: CHALLENGES AND OPPORTUNITIES FOR CENTRAL AMERICA 32 (2005), *available at* http://siteresources.worldbank.org/LACEXT/Resources/258553-1119648763980/DR_CAFTA_Challenges_Opport_Final_en.pdf (last visited Feb. 26, 2009) [hereinafter DR-CAFTA: Challenges] ("For Central American nations, locking many of the reforms of recent years with an FTA that is costly to violate should generate a credibility effect that could boost investment levels."). *Id.* at 32.

reform efforts. In addition, the negotiation of a U.S. FTA can help complete other integration efforts.[43] There are two main aspects to this model-driven approach to regionalism—the creation and refinement of the model and the adoption of a system for selecting FTA[44] partners.

A. The Creation of the U.S. Model FTA

The U.S. model FTA, widely acknowledged by both the U.S. government[45] and observers,[46] has been in development for the last fifteen years. There are two versions of the model: the NAFTA model and the later evolution, the WTO-plus model. The United States pursues only free trade agreements because of the freedom they allow. Free trade agreements have only limited GATT discipline and virtually no real oversight[47] by the WTO. Thus, once a

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43. One of the gains the Central American countries hoped for was to revitalize and complete the Central American Common Market. *Id.* at 16–18.

44. *See* discussion *infra* Part II (discussing of how the United States has selected its FTA partners during the Bush Administration).

45. In its review of how the Bush Administration has conducted free trade negotiations under Trade Promotion Authority, the GAO interviewed the officials at USTR and the other agencies (Agriculture, Commerce, Labor, State and Treasury) which join in an interagency process with USTR to advise the President on potential FTA partners. GAO 2007 REPORT, *supra* note 31, at 1–2. These officials discussed the comprehensive model FTA. *Id.* at 17–18. *See also* ROBERT B. ZOELLICK, OFFICE OF U.S. TRADE REP. (USTR), THE PRESIDENT'S 2003 TRADE POLICY AGENDA 10 (2003), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_Trade_Policy_Agenda/asset_upload_file666_6142.pdf (last visited Feb. 26, 2009) (noting that the regional and bilateral FTAs pursued by the United States promote the broader trade agenda by "serving as models, breaking new negotiating ground, and setting high standards"); US/TPR, *supra* note 4, at 14.

46. Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, 10 J. INT'L ECON. L. 571, 578 (2007) (stating that "[w]hen the United States or European Union tenders a draft PTA [preferential trade agreement] to a developing country, it expects the basic template of its proposal to be followed, and in some areas (such as investment of IPRE protection), the possibilities for effective counterproposal are almost non-existent"); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 56–57 (2005) [hereinafter HUFBAUER & SCHOTT] (noting that the NAFTA provisions have served as precedents for the later FTAs and that successive agreements "have drawn heavily on their predecessors, with NAFTA sewing as the primary template").

47. With regard to the rules—WTO Member States desiring to enter into free trade agreements only have to satisfy the requirements of GATT Article XXIV if they cover trade in goods and Article V if the General Agreement on Trade in Services if they cover services. *See* General Agreement on Tariffs and Trade art. XXIV (5), (8)(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=1&id=208&chapter=10&lang=en#Participants (last visited Mar. 21, 2009) [hereinafter GATT]; General Agreement on Trade in Services in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1168, *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Feb. 25, 2009) [hereinafter GATS].

It is generally agreed that the actual requirements of GATT Art. XXIV and GATS V are relatively loose and have not been fully defined. WORLD TRADE REPORT 2007, *supra* note 1, at 308–12 (for a review by the

free trade satisfies the basic GATT rules, it can contain whatever the partners negotiate. One aspect of the model, however, is clear. The asymmetry in negotiating power between the United States and its developing country partners means that the latter have extremely limited leverage with regard to the content of the agreement, the text or the level of commitments.

The NAFTA model established the basic design and coverage of the model FTA. The NAFTA model also crated the basic layout of such agreements. There is an opening section, Part One, that sets out the objectives (Chapter One) and General Definitions (Chapter Two).[48] There are other sections covering Trade in Goods, Standards, Trade in Services, Investment and Intellectual Property; all in all, there are sixteen subject matter areas.[49] The other sections are devoted to Administrative and Institutional matters, including dispute settlement, and to exceptions and final provisions.[50] The agreement text itself is heavily drafted with core obligations and exceptions modeled on or adopted from[51] GATT rules. The text tends to run for more than 300 pages.[52] Each

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WTO of the elements in each article that have not been fully defined and how they might be interpreted).

With regard to the limited oversight—the WTO requires Member States entering regional trade agreements to notify the organization. The Committee on Regional Trade Agreements (CRTA) has jurisdiction over these arrangements. In 2006, the WTO established a review process for these agreements that requires the creation of a factual report about the operation of each agreement. To date, the CRTA has made only limited progress in finalizing some reports. WORLD TRADE REPORT 2007, *supra* note 1, at 306.

48. All U.S. FTAs begin with the same objective—to create consistently with GATT Article XXIV (and for the later FTAs, GATS Art. V) a free trade area. *Compare* NAFTA, *supra* note 2, art. 101, *with* U.S.-Peru FTA, *supra* note 15, art. 1.1.

49. In 2005, the International Trade Commission (ITC) reviewed the first three FTAs based on the NAFTA model. According to its comparison, the model FTA consists of twenty to twenty-five chapters, all organized in the same order in all of the agreements with annexes (to address non-conforming measures with regards to services) sometimes contains separate chapters on specific industry sectors or regulatory issues. U.S. INT'L TRADE COMMISSION (ITC), PUB. 3780, THE IMPACT OF TRADE AGREEMENTS IMPLEMENTED UNDER TRADE PROMOTION AUTHORITY 2-2, Table 2.1 (2005), *available at* http://hotdocs.usitc.gov/docs/pubs/332/pub3780.pdf (last visited Feb. 25, 2009) [hereinafter ITC IMPACT REPORT] (comparing the structure and contents of the Singapore, Chile and Morocco FTAs).

50. In NAFTA, these are Parts 7 and 8. Part 7 covers both general dispute settlement systems (chapters 19 and 20). Part 8 covers the Exceptions to the FTA (chapter 21) and the Trial Provisions (chapter 22). NAFTA, *supra* note 2, at Pts. 7, 8.

51. The NAFTA text either adopts core GATT obligations or models the NAFTA obligation on the GATT rule. An illustration of the first method comes in Art. 301(1) of NAFTA where each Party agrees to "accord national treatment to the goods of another Party in accordance with Article III of the *General Agreement on Tariffs and Trade* (GATT), including its interpretative notes . . . ." NAFTA, *supra* note 2, art. 301(1). This provision concludes with the Parties agreeing to incorporate Art. III (and its interpretive notes) or any equivalent provision of a successor agreement into NAFTA. *Id.* Another example is in the General Exceptions provision of NAFTA where the Parties agree, subject to some limitations, to incorporate Art XX of the GATT. *Id.* art. 2101(1)(b). The NAFTA provision does not repeat all of the exceptions listed in GATT Article XX but it does clarify the meaning of two of the exceptions. "The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human,

chapter has the same structure internally—with definitions for each topic appearing at the beginning or end, general obligations in the middle sections, and detailed annexes that contain either exceptions reservations or implementation aspects at the end. NAFTA covers labor cooperation and environmental cooperation with two side agreements. The subject-matter chapters cover National Treatment and Market Access for Goods,[53] Sector-Specific Rules of Origin,[54] General Rules of Origin,[55] Customs Procedures,[56] Energy,[57] Agriculture,[58] Standards,[59] Trade Measures,[60] Government Procurement,[61] Investment,[62] Services,[63] Competition Policy,[64] Temporary Entry[65] and Intellectual Property.[66] All of the later FTAs follow the same design and even have the same basic ordering of subject areas. Instead of side agreements on labor and

animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources." *Id.* art. 2101(1).

By contrast in Art. 309(1) of NAFTA, the Parties chose language that was modeled on that of Art. XI(1) of the GATT). *Compare* art. 309(1) "no Party may adopt or maintain any prohibition or restriction on the importation of any good . . . or on the exportation or sale for export of any good destined for the territory of another Party," *with* art. XI(1) "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotes, import or export licenses or other measures, shall be instituted or maintained by any contracting Party on the importation of any product . . . or on the exportation or sale for export of any product destined for the territory of any other contracting party." NAFTA, *supra* note 2, art. 309(1); GATT, *supra* note 47, art. XI(1).

52. The NAFTA text is more than 300 pages. The same is true of the more recent FTAs. *See* U.S.-Peru FTA, *supra* note 15 (FTA runs for 334 pages not including the annexes containing special rules or side letters.).

53. NAFTA, *supra* note 2, at Ch. 3.

54. *Id.* at Ch. 3, Annexes 300-A (Trade and Investment in the Automotive Sector), 300-B (Textile and Apparel Goods).

55. *Id.* at Ch. 4.

56. *Id.* at Ch. 5.

57. *Id.* at Ch. 6.

58. NAFTA, *supra* note 2, at Ch. 7A.

59. *Id.* at Ch. 7B (Sanitary and Phyto-Sanitary measures); *id.* at Ch. 9 (Technical Barriers to Trade).

60. *Id.* at Ch. 8.

61. *Id.* at Ch. 10.

62. *Id.* at Ch. 11.

63. NAFTA, *supra* note 2, at Ch. 12 (Cross Border Trade in Services); *id.* at Ch. 13 (Telecommunications); *id.* at Ch. 14 (Financial Services).

64. *Id.* at Ch. 15.

65. *Id.* at Ch. 16.

66. *Id.* at Ch. 17.

environmental matters,[67] there are side letters for many of the subject matter chapters.[68]

The design reflects the basic reality that a U.S. free trade agreement is one that produces managed free trade. For example, with regard to Trade in Goods, the NAFTA model provides for the traditional phase-out of tariffs.[69] In the case of NAFTA, this was fifteen years.[70] Built into the phase-out, however, is the practice of back loading all sensitive products so that the worst effects on job and market loss will be postponed until the parties can adjust. Another major feature of the model Trade in Goods chapter is the adoption of generally restrictive rules[71] of origin that allow the parties to shield both specific products and industries from full competition.

By contrast, the goal in the Trade in Services section of the NAFTA model was to liberalize as much trade as possible. In the Trade in Services section, there are several chapters covering the general approach to services liberalization as well as special chapters on services governments traditionally

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67. In the more recent FTAs, the agreements on labor cooperation and environmental cooperation have been moved into the main body of the agreement. *See* U.S.-Peru FTA, *supra* note 15, at Ch. 17–18.

68. Recent U.S. FTAs have large numbers of side letters. *See* U.S.-Peru FTA, *supra* note 15 (which has side letters). These are negotiated in response to the Executive Branch/Congressional cooperation that occurs in order to produce the implementing legislation for FTAs. *See* CAROLYN C. SMITH, CONG. RESEARCH SERV.,TRADE PROMOTION AUTHORITY AND FAST-TRACK NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS: MAJOR VOTES 13 (2007), *available at* http://www.italy.usembassy.gov/pdf/other/RS21004.pdf (noting that Congress insists on additions or clarifications to trade agreements by this process). All U.S. FTAs have side letters but not all of them have the same legal weight. Some are "records of understanding, others can amount to agreed upon interpretations that add to or make effective changes." ITC IMPACT REPORT, *supra* note 49, at 2–6.

69. The recent U.S. FTAs with developing countries have tariff phase-outs that go on for fifteen, seventeen, or twenty years. The longer timeframes are reserved for import sensitive products, particularly agricultural goods. Industrial goods' tariffs are always phased out by year ten. In this area, the U.S. FTAs match most other FTAs worldwide, where the common pattern is for ninety percent of most of the imports to be duty-free by the tenth year of implementation. WORLD TRADE REPORT 2007, *supra* note 1, at 309.

70. NAFTA, *supra* note 2, at Ch. 3, Annex 302.2. NAFTA phased out tariffs gradually with some being eliminated immediately, while others were phased out at five, ten and fifteen year intervals.

71. The rules of origin in an FTA specify which goods are entitled to duty-free treatment. NAFTA established the set of general rules of origin still used in the later FTAs. *See* NAFTA, *supra* note 2, art. 401 (originating goods). The NAFTA rules are regarded as complex to apply because they have a higher degree of variation across product types. The rules are those designed to, and have the effect of, protecting certain products and sectors. *See* HUFBAUER & SCHOTT, *supra* note 46, at 474–76 (The authors explain how the rules could be reformed in order to avoid the protectionist aspects. As currently designed, however, it is clear that the restrictive/product specific rules are more difficult for traders to apply and custom officials to enforce). According to one study, this aspect has been found to offset the advantage of the duty-free status granted under the tariff phase-out provisions of NAFTA. *See* Bolormaa Tumurchudur, Oliver Cadot, Antoni Estevadeordal, Jaime De Melo, Akiko Suwa-Eisenmann & Jose Anson, *Rules of Origin in North-South Preferential Trading Arrangements with an application to NAFTA*, 13 REV. OF INT'L ECON. 501, 501–17 (612–29) (2005).

operate or heavily regulate—telecommunications and financial services. The NAFTA goal of maximum liberalization is achieved by using the negative list method for scheduling commitments.[72] Unless a NAFTA party expressly removes a service sector from liberalization—by listing it as a reservation—it is opened up with regard to the core obligations of non-discrimination and market access.[73] This method:

1) tends to produce greater liberalization (unless the negotiating partners agree on extensive reservations);
2) locks in any prior liberalization (since it does not allow roll back); and
3) guarantees that any new service will be automatically covered by the agreement.[74]

Other major subject-matter chapters of the NAFTA model—Government Procurement, Intellectual Property Rights, and Investment—have been retained and often expanded in later FTAs. As is the case with Trade in Services, all of these areas are ones of U.S. comparative advantage and/or areas where the United States wanted to go beyond the existing GATT/WTO disciplines. In the case of Government Procurement, the NAFTA model chapter requires governments to open up all listed federal government entities to competition.[75] The chapter also contains the only approved method for such competition —tendering procedures.[76] The only multilateral Agreement on Government Procurement (AGP) is not a mandatory requirement of WTO membership.[77] By requiring such a chapter, the NAFTA model thus opens a closed-off market for

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72. This is completely different from the approach used in the GATS Agreement—where a service sector is not covered by the agreement unless it is listed in the schedule (the "positive list" approach). NAFTA, *supra* note 2, at Ch.12; GATS, *supra* note 47, art. VIII.

73. NAFTA, *supra* note 2, arts. 1202, 1203. The non-conforming measures or reservations taken by each NAFTA party are attached as an Annex. *Id.* at Ch. 12, Annex I.

74. ITC IMPACT REPORT, *supra* note 49, at 2–14. Another aspect of the negative list approach is that even though an FTA partner can take reservations by designating them as such in the agreement, if the country later liberalizes a non-conforming measure, it becomes "bound" and must continue. *Id.*

75. NAFTA, *supra* note 2, at Ch. 10. The chapter provides national treatment to all NAFTA firms which went to bids for government procurements. This addition to the model FTA is significant because of the large amount of trade in goods and services done by governments. *See* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 60 (noting that "government spending on goods and services can amount to ten percent of GDP or more").

76. NAFTA, *supra* note 2, at Ch. 10B.

77. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1153. The Agreement on Government Procurement (Annex 4(b)) has a membership of approximately forty countries as opposed to the WTO membership of fifteen countries.

goods and services. The chapter on Investment has three major features that cover all U.S. concerns. "Investment" is broadly defined in the model chapter,[78] there are extensive protections offered for investor rights,[79] and there is neutral, binding investor/state arbitration to back up these rights.[80] The Intellectual Property Rights chapter covers not only what Intellectual Property (IP) rights the FTA parties must recognize,[81] but also the enforcement obligations (in the form of border measures, administrative measures, and judicial proceedings) that must be undertaken.[82] Introduced in the NAFTA model are subject matter chapters that have either been used for many, if not all, later agreements—Standards chapters (Sanitary and Phyto-Sanitary Standards (SPS) and Technical Barriers to trade),[83] and Competition Policy.[84]

The NAFTA model also established the list of issues that were and remain off the table. Labor mobility is limited solely to temporary entry privileges.[85] There are no rules that would discipline the use of the unfair trade statutes,

78. NAFTA, *supra* note 2, art. 1139.

79. *Id.* arts. 1102–10. The investor rights and protections are the same in each U.S. FTA (National Treatment, MFN Treatment, Minimum Standard of Treatment, Performance Rights, Senior Management of Boards and Directors, Transfers, and Expropriation).

80. *Id.* at Ch. 11B.

81. The IP rights covered under NAFTA were patent, copyright, trademark, trade secrets, industrial designs, and the lay-out design of integrated chips. NAFTA, *supra* note 2, at Ch. 17, arts. 1705, 1708, 1709, 1710, 1711, 1713. The recent FTAs have followed the same template of covering trademarks, geographical indications, domain names on the internet, copyrights and patents, in that order. *See* U.S.-Chile FTA, *supra* note 15, at Ch. 17; U.S.-Peru FTA, *supra* note 15, at Ch. 16; U.S.-CAFTA/DR, *supra* note 14, at Ch. 15.

82. NAFTA, *supra* note 2, at Ch. 17 (arts. 1714–19).

83. All of the U.S. FTAs have chapters on Sanitary and Phyto-Sanitary Standards and Technical Barriers to Trade. The later FTAs do not adopt the NAFTA text for the SPS Chapter but instead require the parties to adhere to the later-adopted WTO SPS Agreement. *See* U.S.-Peru FTA, *supra* note 15, at Ch. 6.

84. Competition law chapters have not been included in all recent FTAs. There are no chapters on this subject in the Jordan, Morocco, CAFTA/DR, Bahrain, Oman and Panama FTAs. This is an area where the United States does not insist on the NAFTA model being followed. For a full analysis of these chapters in U.S. FTAs, *see* D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 258, 279–82 (2008).

According to Sokol, "the United States position may best be described as one that does not oppose competition policy chapters as long as the chapters remain non-binding and the [F]TA counter-party finds the conclusion of such a chapter to be important." *Id.* at 258–59.

85. NAFTA, *supra* note 2, at Ch. 16, Annex 1603 (allowing temporary entry for business visitors, traders and investors, intra-company transferees and professionals).
Although allowing free movement of labor, particularly unskilled labor, would be of great interest to U.S. developing country FTA partners, it has never been considered. During the debate over fast track negotiating authority and NAFTA itself, the issue of job loss was heavily debated and one of the reasons many in Congress voted against NAFTA. *NAFTA/Battle*, *supra* note 17, at 43–47.

antidumping, and countervailing duty laws.[86] The NAFTA model also limits what is done to liberalize one of the most restricted areas of trade—trade in agriculture.[87] None of these issues was considered possible given the Congressional concerns that drove the debate about fast track negotiating authority and NAFTA itself.[88]

Two other distinctive aspects of the NAFTA model are its limited institutionalism and diffuse dispute settlement mechanisms. The two features are interrelated. The United States was determined to avoid creating a supranational institution that would possess legislative or adjudicative authority. The NAFTA model retains most of the powers under the agreement for the governments.[89] The trade ministers of each government comprise the Free Trade Commission that oversees the implementation of the FTA. The actual work of administering the rules falls to advisory-only working groups[90] established for each major subject matter area. The NAFTA Secretariat

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86. In NAFTA, there is a chapter on safeguards. NAFTA, *supra* note 2, at Ch. 7. The later FTAs have a similar chapter. None of the U.S. FTAs have relied on the content of or how to administer/apply the antidumping and countervailing duty laws. NAFTA partners, Canada and Mexico, did not want antidumping laws to be allowed in the free trade area. *See* Sokol, *supra* note 84, at 278.

Congress has always been resistant to any trade legislation that would undermine the existing antidumping statute. Under the recently expired TPA, the President was required to report to Congress within 180 days before the acceptance of any agreement if it could impact existing antidumping laws. 19 U.S.C. § 3804(d)(3)(A). One view is that it is the absence in FTAs of any discipline over anti-dumping that allows key U.S. industries to support trade agreements. *See generally* SAFEGUARDS & ANTIDUMPING IN LATIN AMERICAN TRADE LIBERALIZATION: FIGHTING FIRE WITH FIRE (J. Michael Finger & Julio J. Nogués eds., Palgrave Macmillan & The World Bank 2005); *see also* Matthew Schaefer, *Ensuring that Regional Trade Agreements Complement the WTO System: U.S. Unilateralism A Supplement to WTO Initiatives?*, 10 J. INT'L ECON. L. 585, 590 (2007) (discussing why anti-dumping is not part of FTAs).

87. The United States has refused to negotiate over the major agricultural barriers facing its developing country FTA partners (production subsidies and tariff peaks or escalations) even in the regional FTAA negotiations. These issues have never been on the table in any of the recent FTAs. *See* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 59 (noting that the developed countries do not offer increased market access on agricultural goods because they would face hostile and well-organized industry lobbying efforts against such a move); *see also* Schaeffer, *supra* note 86, at 588 (noting that the behavior on agriculture in regional trade arrangements tends to mirror the WTO behavior and is a manifestation of the "same political sensitivities that prevent significant liberalization in the WTO").

88. *See* NAFTA/Battle, *supra* note 17, at 15–32. For a detailed analysis of the debate about the ill effects of NAFTA on American employment. *See generally id.* at 117–22.

89. *See* HUFBAUER & SCHOTT, *supra* note 46, at 488 (noting the limited institutionalism of NAFTA).

90. This is one thing that has changed in recent FTAs. The actual work of the agreements is done in subcommittees and working groups established for various subject matter area commitments. *See* CAFTA/DR, *supra* note 14, art. 19.1(3) (authorizing the Free Trade Commission to delegate to subcommittees and working groups the power to modify the tariff phase-out schedule and to create common guidelines on tariffs and government procurement matters); *see also* U.S.-Peru FTA, *supra* note 15, at Ch. 20.1.

charged with overseeing the dispute settlement mechanisms and the working groups was split into national sectors in preference to creating one central political organ. All of the later FTAs share this same limited-governance structure.

With regard to dispute settlement, the NAFTA model created multiple mechanisms instead of one powerful entity. There are three major dispute settlement mechanisms[91] designed to cover the major substantive areas of dispute (trade and investment) and to deal with the problem caused by not having FTA rules on unfair trade measures. Under Chapter 20,[92] the parties can have claims heard on violations of the agreement by provisions or nullifications of the benefits of the agreement. Under Chapter 11B, NAFTA investors/ investments are allowed to pursue binding investor/state arbitrations to recover damages from alleged violations of covered investment rights.[93] In Chapter 19, NAFTA citizens who have been subjected to unfair trade measures are allowed to invoke their governments to pursue bi-national review of any antidumping or countervailing measure that is improper under the administering country's law.[94] The creation of separate tailored mechanisms was meant to deal with

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91. There actually four systems for dispute settlement in the NAFTA text itself. The fourth one is a specialized dispute settlement system for disputes in the financial services sector. NAFTA, *supra* note 2, at Ch. 14. NAFTA borrowed this idea from the U.S.-Canada FTA. No disputes have been brought under this mechanism.

In addition, there are dispute mechanisms in the side agreements on labor cooperation and environmental cooperation. *See* North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept 14, 1993, 32 I.L.M. 1499, 1509–13 (Arts. 27–41), *available at* http://www.dol.gov/ILAB/regs/naalc/main.htm (last visited Feb. 26, 2009); North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480, 1490–94 (Arts. 22-36), *available at* http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english (last visited Feb. 26, 2009).

92. NAFTA, *supra* note 2, at Ch. 20. In Chapter 20 proceedings, a NAFTA party can bring a claim that another party has violated the agreement or nullified or impaired benefits it expected under the agreement. *Id.* art. 2004. The *ad hoc* arbitral tribunal empanelled to hear the dispute issues a report which can form the basis for a negotiated solution between the parties. *Id.* art. 2018(1). This means that the panel's determination is not binding. However, under Article 2005, there is a choice of forum that allows NAFTA parties to choose the WTO's dispute settlement system. *Id.* art. 2005.

93. *Id.* at Ch. 11B. In Chapter 11B proceedings, an investor is allowed to seek an arbitral panel for alleged violations of the investor rights provided in Chapter 11A of NAFTA. The NAFTA parties consent in advance to these arbitrations. The arbitral award (for money damages) here is binding and enforceable in a court.

94. *Id.* at Ch. 19. Under Chapter 19, a firm in one of the NAFTA countries facing an adverse anti-dumping or countervailing duty determination by another NAFTA party can make its government invoke the bi-national review. The arbitral panel reviews whether the administrative determination is consistent with the law of the issuing country. The decision of the panel can either affirm the determination or reverse it and remand it to the administering authority. This bi-national review serves as a replacement for judicial appeals in cases involving NAFTA parties.

each area of dispute[95] but not to create overall interpretations of NAFTA law. All of the later FTAs have a corresponding general dispute resolution chapter and an investment arbitration mechanism, but none have the bi-national review process for unfair trade measures.

The WTO-model retains all of the major elements of the NAFTA model. The shift or evolution has come as the United States has tried to achieve three goals:

1) to use its FTAs as "models for success" for the multilateral system;[96]
2) to adopt the FTAs that would obtain political acceptance by Congress;[97] and
3) to cover new measures of concern, particularly development issues.

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95. The purpose of the Chapter 19 process was to resolve a controversial issue between the United States and Canada. At the time of the U.S.-Canada FTA, Canada pushed for a resolution to the alleged problem of United States bias against Canadian companies and Canada in the administration of its anti-dumping and countervailing duty laws. Rather than accept Canada's offer to harmonize unfair trade statutes, the United States agreed to a bi-national review of final AD and CVD determinations. Canada then insisted that the system be carried over into NAFTA. *See* HUFBAUER & SCHOTT, *supra* note 46, at 199–200.

96. *See* US/TPR, *supra* note 4, at 14. This is the idea behind "competitive liberalization." The U.S. was using the three-pronged approach of negotiating trade liberalization at the bilateral, regional and multilateral level simultaneously in order to move forward more quickly. The goal, however, was to also create a model for the WTO to emulate. If the WTO failed to adopt fully the U.S. agenda, the FTAs would stand as illustrations of successful attempts and deep economic integration, particularly on issues such as investment and intellectual property. *See* GAO 2004 REPORT, *supra* note 30, at 17.

97. The President and Congress share authority over trade policy. Any trade agreement negotiated by the President must be approved by Congress. Since the 1970s, this power sharing has been accomplished through a process whereby Congress delegated its authority to negotiate trade agreements, which are then returned for approval quickly and without amendment. This "fast track" authority was most recently renamed the Trade Promotion Authority (TPA). It is under the 2002 version of TPA that the Bush Administration completed all of the recent FTA negotiations (with Singapore, Australia, Morocco, Chile, CAFTA/DR, Oman, Bahrain, Peru, Panama, Colombia and S. Korea).

According to Esserman, the most important factor used by the United States to select which FTAs to negotiate has been to get the approval of the House of Representatives—"the need to secure 218 votes is the overriding determinant." Esserman, *supra* note 9, at 15.

Both the House and Senate are required to vote on trade agreements, but with its power over the budget, the House vote comes first. This also makes trade agreements a matter of local politics, particularly given the potential loss of jobs due to import competition. This was a major factor in the votes regarding NAFTA and CAFTA/DR. *Id.* at 17.

Obtaining Congressional approval has not always been easy for the recent bilateral and regional FTAs with developing countries. *See* David A. Gantz, *Settlement of Disputes Under the Central-America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 341 (2007) (noting that the Executive Branch used up negotiating resources and considerable capital for a free trade agreement that would produce about as much annual trade as NAFTA does in three weeks).

The "models for success" idea is that by expanding the discipline in certain areas (such as investment and intellectual property rights) the United States could establish what could be advanced[98] or added to the WTO negotiating agenda.[99] Two of the chapters from the model NAFTA have been substantively revised—the Investment chapter and the Intellectual Property Rights chapter. It is worth examining this evolution of the model for what it shows about U.S. concerns and goals. Investment was always considered crucial in FTAs. The United States hoped to gain increased and secure investment flows in all of the NAFTA Parties[100] and to encourage tariff-jumping investment by non-member country firms.[101] The first investment chapter appeared in the U.S.-Canada FTA.[102] By the time of NAFTA, the scope of covered investments was broadened and the crucial investor/state arbitration mechanism was added.[103] Almost all of the later FTA investment chapters[104] follow the design set out in NAFTA. Chapter 11B is actually a model based on

98. Intellectual property rights are covered by the WTO through the Trade Related Intellectual Property Rights Agreement (TRIPS). Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1125–26 (1994) [hereinafter TRIPS].

The U.S. led the push to get such an agreement during the Uruguay Round negotiations (1986–1994) through diplomacy at the then GATT and also aggressive use of Section 301(bringing unilateral trade actions against countries with inadequate intellectual property rights protection). For a full review of this process, *see* C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L. LAW 209, 220–37 (1997). Nevertheless, TRIPS sets only minimum standards for intellectual property rights. The United States would prefer to see even greater protections offered.

99. The United States has been the leading proponent of including investment in regional trade agreements. Negotiations on investment rights/protection were part of the Doha Development Agenda in 2001. However, the topic was withdrawn from the WTO agenda in the 2004 General Council meeting after string opposition at the 2003 Cancun Ministerial Meeting. TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 61.

100. The concern about making investment rights secure and enforceable was an issue of great concern vis-à-vis Mexico. Prior to the negotiating process for NAFTA, Mexico was known for its strict regulation of investment and its embrace of the Calvo Doctrine (foreign investors limited to the rights/enforcement given nationals). *See* HUFBAUER & SCHOTT, *supra* note 46, at 201–02.

101. NAFTA, and all of the U.S. FTAs, achieve this by granting the Chapter 11A rights to all NAFTA investors/investments, which allows non-party firms to take advantage of them. *See* NAFTA, *supra* note 2, art. 1101(1).

102. U.S.-Canada FTA, *supra* note 15, at Ch.16. The investment chapter in this early FTA lacked the investor/state arbitration.

103. HUFBAUER & SCHOTT, *supra* note 46, at 200–02.

104. In the case of the U.S.-Australia FTA, the United States agreed with Australia that the investment chapter did not have to include the investor/state arbitration mechanism. There is also no arbitration mechanism in the U.S.-Jordan FTA (which does not follow the NAFTA model). The United States later closed the gap by entering into a BIT with Jordan. In the case of the U.S.-Bahrain FTA, the United States had already entered into a BIT and, therefore, had no need to include the chapter.

a model.[105] In design[106] and substantive coverage,[107] Chapter 11B is based on the U.S. model Bilateral Investment Treaty. The United States believed, given its experience with BITs since 1980, that it understood what the core investment provisions meant. Additionally, the United States was not concerned about the investor rights provisions being invoked against it.[108]

In both regards, the United States was mistaken. There has been heavy use of the 11B system to challenge government measures in all three states. In almost every arbitration, claims were made alleging violations of the minimum Standard of Treatment (Art. 1105) and/or Expropriation (Article 1110). With regard to both provisions, several arbitral tribunals issued expansive readings.[109] This led the NAFTA governments to respond by seeking judicial review of the final awards and to their adopting an interpretation of one of the provisions.[110] The concern the three governments felt about the ability of the decisions to limit government regulatory powers—particularly in areas such as environmental protection—also led the United States to revise its model investment chapter for later FTAs[111] and to alter its model BIT. These revisions actually limit the type and range of complaints that can be made against the governments under the Investment chapters.

The Intellectual Property Rights chapter has also evolved from the NAFTA model. The United States Trade Representative (USTR) responded to U.S. industry demands most closely in regards to the substantive coverage of this chapter. USTR has even worked in conjunction with industry and the

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105. Chapter 11 of NAFTA was modeled on the first model BIT. That model was created in 1980 and revised in 1984. *See* Joel C. Beauvais, *Regulatory Expropriations under NAFTA: Emerging Principles and Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 253 (2002); *see also* Charles H. Brower II, *Structure, Legitimacy and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 44 (2003) [hereinafter Brower].

106. Chapter 11 is divided—as is the model BIT—into two sections. The first section sets out the investor/state arbitration mechanism.

107. The investor rights in Chapter 11A are the same ones offered in the model BIT. For the current version of the model BIT, *see* Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2004), *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Feb. 26, 2009).

108. HUFBAUER & SCHOTT, *supra* note 46, at 200–01 (noting that U.S. negotiators were not worried that Chapter 11 would be used against the United States).

109. For an analysis of how the results in these arbitrations altered the investment chapter in the WTO-plus model, see generally Meg Kinnear & Robin Hansen, *The Influence of Chapter 11 in the BIT Landscape*, 12 U.C. DAVIS INT'L L. & POL'Y 101, 106–12 (2005); David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 725–27 (2004) [hereinafter Gantz, *Evolution*].

110. *See* Brower, *supra* note 105, at 47–48.

111. *See* Gantz, *Evolution*, *supra* note 109, at 725–60.

Intellectual Property Advisory Group[112] to produce a "model of text" that greatly expands the rights of IP holders[113] beyond the gains made in NAFTA and the Trade-Related Intellectual Property Rights Agreement (TRIPS) of the WTO. This evolution moves from delineating the minimum standards and basic enforcement procedures for intellectual property rights towards prescribing U.S. levels in both areas. Significant alterations include limiting what is non-patentable,[114] limiting government regulatory power,[115] and expanding the terms of the two major forms of IP rights—patent and copyright.[116] The IP Advisory Group report on each FTA judges the negotiations as successful based

112. USTR uses an advisory group structure—based on topic or industry—for producing review reports on whether negotiated FTAs satisfy U.S. negotiating goals. GAO 2007 Report, *supra* note 31, at 53–58 (for how the trade advisory committee is set up, overseen and operates). One of these advisory groups reviews the intellectual property chapters of each FTA (ITAC 15).

113. REPORT OF THE INDUSTRY OF TRADE ADVISORY COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS (ITAC-15), THE U.S.-PERU TRADE PROMOTION AGREEMENT (TPA): THE INTELLECTUAL PROPERTY PROVISIONS 3 (2006) [hereinafter PERU ITAC REPORT], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Reports/asset_upload_file473_8978.pdf (last visited Feb. 28, 2009); *see also* REPORT OF THE INDUSTRY TRADE ADVISORY COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS (ITAC 15) REPORT OF THE INDUSTRY OF TRADE ADVISORY COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS (ITAC-15), THE U.S.-PANAMA TRADE PROMOTION AGREEMENT (TPA): THE INTELLECTUAL PROPERTY PROVISIONS (2007) [hereinafter PANAMA ITAC REPORT], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Panama_FTA/Reports/asset_upload_file960_11234.pdf (last visited Feb. 26, 2009).

114. In recent FTAs, U.S. partners have agreed to patent plants—an area left as one a country could consider non-patentable under TRIPS.

115. There has been a push by USTR to negotiate for a provision that would limit an FTA partner's ability to require (under certain circumstances) compulsory licensing of patent rights. *See generally* Rahul Rajkumar, *The Central American Free Trade Agreement: An End Run Around the DOHA Declaration on TRIPS and Public Health*, 15 ALB. L.J. SCI. & TECH. 433, 441–47, 473 (2005), for what TRIPS allows and the most recent FTAs.

116. In recent FTAs, the United States has pushed for the extension of copyright term closer to longest of U.S. levels. It has only achieved that commitment with Oman. In the Peru and Panama agreements, the countries would only agree to what ITAC-15 calls the compromise at seventy years. PERU ITAC REPORT, *supra* note 113, at 12. This goes well beyond the TRIPS' minimum standard of fifty years. TRIPS, *supra* note 16, art. 12.

With regard to patents, the protection offered would be extended if the issuance of the patent was subject to "unreasonable delay." U.S.-Peru FTA, *supra* note 15, art. 16.9(6)(b).

Since developing countries frequently take longer to issue patents than developed countries, this provision will ensure a patent holder the full enjoyment of the patent term. In the U.S.-Peru FTA, "unreasonable delay" was the later of five years from filing or three years after an examination request. PERU ITAC REPORT, *supra* note 113, at 15. In earlier FTAs, USTR had negotiated even better terms—the later of four years from filing or two years from examination. *Id.*

On patents, the FTAs also prohibit the marketing approval of generic drugs during the term of the drug patent. This provision effectively extends the life of the patent since competing countries must wait until after the patent has run to produce a competing product.

on how closely the extensions come to U.S. levels of protection.[117] The recent FTAs also make extensive additions to the enforcement obligations[118] and remedies[119] that must be allowed for IP infringements. The evolved Intellectual Property Rights chapter is designed to limit in every major way[120] how an FTA partner regulates intellectual property.

With regard to the second goal—working with Congress—it could only be satisfied by making the labor rights and environmental cooperation issues more prominent in the agreements. The Republicans and Democrats have tended to differ on why they support, or refuse to support, free trade agreements.[121] In order to achieve the necessary House votes, it was believed that the Democratic issues (of labor rights and environment protection) had to be given more prominence and effectiveness in the agreements.[122]

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117. PERU ITAC REPORT, *supra* note 113, at 5. The industry advisory committee (ITAC 15) urges USTR to obtain the U.S. level standard—as was done in several of the MEFTAI bilateral FTAs (Oman and Bahrain)—in future FTAs.

118. *Id.* at 19 (regarding enforcement obligations). The United States pushes its FTA partners to agree to greater enforcement obligations because despite its success at getting new rule-making in the IP area, the United States continues "to suffer billions of dollars in losses due to global piracy, counterfeiting and other infringements of rights provided in TRIPS (and in the various FTAs)—primarily due to ineffective enforcement by these trading partners." *Id.* at 18.

119. *See* U.S.-Peru FTA, *supra* note 15, art. 16.11 (11–17) (civil remedies), art. 16.11 (18–25) (provisional remedies), art. 16.11 (26–28) (criminal remedies); PERU ITAC REPORT, *supra* note 113, at 19–20.

120. *See* Kenneth C. Shadlen, *Globalization, Power and Integration: The Political Economy of Regional and Bilateral Trade Agreements in the Americas*, 44 J. DEV. STUDIES 1, 12 (2008) [hereinafter Shadlen] (noting how the government limitations on the monopoly given by patents—"how easy or difficult it is to obtain a patent, how long the exclusive rights last, and the extent to which the holder can exclude others from freely using the idea"—are those developing countries use to get access to foreign innovations). The WTO-Plus model IP chapter limits the regulatory power of each FTA partner in all of these areas.

121. *See* I. M. Destler, *American Trade Politics in 2007: Building Bipartisan Compromise* 2 PB 07-5 (2007), *available at* http://www.petersoninstitute.org/publications/pb/pb07-5.pdf (last visited Feb. 26, 2009) (noting that the Congressional approval process for CAFTA/DR revealed the split between the Republicans and Democrats—CAFTA/DR "energized the concerns of Democratic members and constituencies over deals with countries with poor perceived labor and environmental records."). *Id.* at 2.

122. The agreements on labor and environment were moved into the text of the U.S. model FTA. *Id.* at 6. These early Bush era FTAs, however, kept the NAFTA formula for such agreements—that the parties pledge to enforce their own labor and environmental laws. By 2007, the Democrats had enough votes in Congress to push for a long-held view that "U.S. trade agreements should include enforceable commitments to uphold basic labor standards." *Id.* at 6. The negotiations between the House Democrats and USTR ultimately produced a reworking of these agreements. In the labor chapters, the Parties agreed to "adopt, maintain and enforce in their own laws and in practice the five basic internationally recognized labor standards, as stated in the 1998 ILO Declaration." Those rights are:

1) *freedom of association;*
2) *effective recognition of the right to collective bargaining;*
3) *the elimination of all forms of forced or compulsory labor;*

The third goal of adding new areas, such as a Transparency/Anti-Corruption[123] chapter and one on Trade Capacity Building,[124] was necessitated

4) *effective abolition of child labor and a prohibition on the worst forms; and*

5) *elimination of discrimination in respect of employment and occupation.*

Id. at 20, app. B (containing summaries of the Bi-Partisan Agreement of May 10, 2007); see U.S.-Peru FTA, supra note 15, art. 17.2. In addition to having these provisions in the labor chapters, all of the more recent FTAs (Peru, Panama, Colombia, and KORUS) subject allegations of violation of the labor and environmental chapters to the same general dispute settlement system used for trade violations. See, e.g., U.S.-Peru FTA, supra note 15, arts. 17.7(6) (Labor chapter), 18.12(6) (Environmental chapter).

123. The chapters on transparency and corruption provisions first appeared in the FTAs with Morocco. *See* U.S.-Morocco FTA, *supra* note 14, at Ch. 18.1-4 (dealing with the traditional transparency issues of publishing all rules, regulations and the due process rights allowed citizens concerning notification, administrative proceedings and review and appeal of administrative or judicial proceedings), 18.5 (dealing with the anti-corruption obligation to adopt measures to criminalize corrupt payments). The other two FTAs negotiated and enacted at around the same time, with Chile and Australia, have the transparency obligations but no provision on anti-corruption. All of the recent FTAs (CAFTA/DR, Peru and the pending FTAs with Panama, Colombia, and KORUS) have a slightly expanded section on anti-corruption.

Transparency has always been a core principal of U.S. FTAs. *See* NAFTA, *supra* note 2, art. 102(1) (transparency is listed as one of the principles of the agreement in Article 102—which sets out the objectives of NAFTA).

By placing the transparency obligations in a separate chapter the WTO-plus model attempts to underscore the connection between good governance and strong economics. Anti-corruption is now also widely regarded as one of the biggest constraints facing developing countries as they pursue economic growth. The World Bank with its mission of eradicating poverty, for example, has made anti-corruption one of its key priorities—aiming its efforts at World Bank projects. At the same time, the topic has attracted a great deal of attention on the issue of the link between corruption and development.

For a summary of the issues involved see Omar Azfar, Yong Lee & Anand Swamy, *The Consequences of Corruption*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 50–53 (2001) [hereinafter AZFAR] (noting the studies which have examined the link between corruption have found corruption has a negative impact on both the rate of investment and GDP growth of countries and that better institutional quality is linked to economic growth).

124. Trade Capacity Building was first added to U.S. FTAs in CAFTA/DR. *See* CAFTA/DR, *supra* note 14, at Ch. 19 (entitled Administration of the Agreement and Trade Capacity Building). Similar provisions are in the U.S.-Peru FTA, *supra* note 15, at Ch. 20, U.S.-Colombia FTA, *supra* note 23, at Ch. 20, and U.S.-Panama FTA, *supra* note 24, at Ch. 19. Befitting its level of economic development, the KORUS agreement lacks any trade capacity building provisions.

The United States coordinates trade capacity building assistance through the U.S. Agency for International Development (USAID). Trade capacity building was aimed at assisting countries with accession to and implementation of WTO agreements and to "build the physical, human, and institutional capacity to benefit more broadly from a rules-based trading system." GAO, U.S. TRADE CAPACITY BUILDING EXTENSIVE BUT ITS EFFECTIVENESS HAS YET TO BE EVALUATED, GAO-05-150, at 3 (2005) [hereinafter GAO 2005 REPORT]. The connection to U.S. FTAs is the existence of a USAID/USTR interagency group formed to assist countries involved in free trade negotiations. Such efforts were made with regard to CAFTA. *Id.* at 3, 4. Congress began to appropriate funds for trade capacity building programs in 2004. *Id.* at 6, 7. The largest proportion projects funded out of TCB were for trade facilitation—which includes, among other things, customs operation and administration and regional trade agreement capacity (defined as "to increase the ability of regional trade agreements and individual countries to facilitate trade and help potential regional trade agreement members.") *Id.* at 9, Table 1.

by the types of FTA partners chosen by the United States. As the Bush Administration was refining the model FTA, it was seeking out FTA partners that would adopt the model. For the FTAs negotiated after the granting of TPA, the United States developed a list of factors[125] for determining which countries should be FTA targets. The major factors became:

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

125. The National Security Council (NSC) actually developed the list by shortening an earlier 13 factor list developed by USTR. The thirteen factors were:

1) Congressional guidance;
2) Business and agricultural interest;
3) Special product sensitivities;
4) Serious political will of the prospective partner to undertake needed trade reforms;
5) Willingness to implement other reforms;
6) Commitment to WTO and other trade agreements;
7) Contribution to regional integration;
8) Support for civil society groups;
9) Cooperation in security and foreign policy;
10) Need to counter FTAs that place U.S. commercial interests at a disadvantage;
11) Need to do other FTAs in each of the world's major regions;
12) Need to ensure a mix of developed and developing countries; and
13) Demand on USTR resources.

According to USTR, these factors did not have relative weights. GAO 2004 REPORT, *supra* note 30, at 7–8.

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

The Executive Branch rarely moves forward if there is political opposition. *See* Gantz, *Free Trade Area*, *supra* note 4, at 187 ("Even the most free trade oriented administrations . . . are not likely to brave domestic political opposition unless there is enormous pressure from the business community to move forward and some semblance of bipartisan support in Congress.").

Factors 4 through 6—the political will of potential FTA partners to implement trade reform and other reforms—deal with whether the FTA partner is willing to undertake obligations inherent in a U.S.-led FTA. In judging these factors, USTR examines the target country's "trade capabilities" and its "track record in meeting current trade obligations." GAO 2004 REPORT, *supra* note 30, at 7. Since USTR regards FTAs as a "development tool," it is crucial that the FTA partner be willing to put in place other economic reforms. In choosing an FTA partner, USTR tries to make sure that the country understands "(1) how important it is to make this commitment to reform and (2) the extent of the obligations that a comprehensive FTA with the United States involves." *Id.* at 7–8.

An example of the type of other reforms undertaken by FTA partners were those taken by Chile to eliminate price controls and privatize state-owned enterprises. *Id.* at 42.

Factor 7—contribution to regional integration—is a recognition that bilateral FTAs can be an

1) country readiness;
2) the economic and commercial benefit of the agreement;
3) the benefits to the broader trade liberalization strategy of the United States;
4) compatibility with U.S. interests;
5) Congressional/Private sector support; and
6) U.S. government constraints.[126]

The first factor, country readiness, involves "the country's political will, trade capabilities and rule of law systems."[127] In the interagency review/selection process used to select FTA partners, each agency examined the issues of which they have competence.[128] Most notably, the Office of the USTR looked at the target partner's adherence to trade obligations and its leaders' "commitment to negotiating all trade issues that currently comprise the comprehensive FTAs that the United States seeks to negotiate."[129] While the United States examines the economic benefits for the FTA, the willingness of the partner to adopt the model FTA[130] as well as pro-market and rule of law[131] reforms, its support for

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important part of U.S. regional free trade initiatives. *Id.* at 8. For a discussion concerning Factor 9 regarding foreign policy and national security, see GAO 2004 REPORT, *supra* note 30.

Factor 10—countering FTAs that place U.S. commercial interests at a disadvantage—confronts one of the realities of the worldwide proliferation of regional trade agreements. Once a competing trading nation begins to enter into a trade agreement with a potential FTA partner, the United States would be at a disadvantage. One of the major reasons why the United States entered into an FTA with Chile was because that country had entered into FTAs with U.S. competitors—EC, Canada and Mexico—and, as a result, had cut its imports of U.S. products by almost one-third. *Id.* at 42 (noting that the United States lost export market share in Chile due to that country's other FTAs).

126. *Id.* at 9–10; GAO 2007 REPORT, *supra* note 31, at 12–14.

127. GAO 2004 REPORT, *supra* note 30, at 9. The United States relies on the definition for "rule of law" developed by USAID—the agency responsible for coordinating U.S. aid to developing countries. According to USAID, the rule of law "embodies the basic principles of equal treatment of all people before the law and is founded on a predictable and transparent legal system with fair and effective judicial and law enforcement institutions to protect citizens against the arbitrary use of state authority and lawless acts." *Id.* n.10.

128. USTR selects FTA partners after reviewing these factors with an inter-agency group consisting of the Departments of State, Commerce, Labor, Agriculture, the Environmental Protection Agency, the International Trade Commission and Treasury.

Each agency concentrates on its area of expertise. While USTR focuses on the trade ramifications of the FTA, the Treasury Department looks at the FTA partner's "overall macroeconomic stability and the strength of its financial and banking system." *Id.* at 9.

129. *Id.*

130. *Id.* at 16–18.

131. One of the motivating factors for the U.S.-Morocco FTA was to support the political reform movement in that country. GAO 2007 REPORT, *supra* note 31, at 13. In the case of CAFTA/DR, the United States was trying to strengthen "free-market" reforms in the belief that the growth and development that

U.S. trade policies (factor 3)[132] and foreign policy positions (factor 4), and whether the target has support from "Congress, business groups, and civil society" (factor 5)[133] matter more.

Almost all of the FTA partners chosen using this process (after 2003) were developing/least developed countries willing to adopt the full FTA model,[134] support the U.S. trade positions (in the FTA or WTO), allow the United States to convert trade preference program recipients into reciprocal trading partners, and help the United States pursue its foreign policy goals. Given the developing country status of its FTA partners, the United States began to consider free trade agreements as "development tools" and, therefore, decided to include some chapters to deal with two of the largest impediments faced by developing countries attempting trade liberalization—rules of law problems, particularly corruption, and practical limits on the ability to trade.[135]

II. THE EFFECTS OF THE MODEL FTA ON DEVELOPING COUNTRIES AND THE CONSEQUENCES FOR U.S. TRADE POLICY

A. The Reception of the Model FTA

The developing country FTA partners of the United States are seeking both concrete gains and more intangible policy achievements. In the first category falls the need all of them have for secure market access. Many of the U.S. FTA partners have access through U.S. preference programs offering duty-free treatment or products from recipient countries. But the Generalized System of Preferences (GSP) and the regional trade preference programs (such as the Andean Trade Preferences Act) all suffer from conditionality (which limits the products allowed to benefit from the duty-free treatment) and designed

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would come from an FTA would help "deepen democracy, the rule of law, and sustainable development." *Id.* at 13. With regard to the bilaterals with the Andean countries, the United States was trying to strengthen democracy and fundamental values (rule of law, sustainable development, transparency, anti-corruption, and good governance). *Id.*

132. The United States does push forward with countries that support U.S. trade goals. Of great importance here is whether the FTA partners have supported the United States in its regional free trade efforts and at the WTO. GAO 2004 REPORT, *supra* note 30, at 10. Chile and the CAFTA countries were chosen because of their support for the U.S. position in the FTAA (to get a comprehensive WTO-plus agreement) negotiations. *Id.* at 42–43, 52.

133. The President does not move forward on FTAs with partners unlikely to garner support from Congress—with which it shares political power—and business interest groups. Congress receives notification at least ninety days before the President starts negotiations with an FTA partner. *Id.* at 13.

134. None of these agreements (with CAFTA/DR, Oman, Bahrain, Peru, Panama, Colombia, and KORUS) have any departures from the WTO-plus model, *supra* note 14, at 15.

135. These are the recent FTA chapters on Transparency/Anti-Corruption and Trade Capacity Building. *Id.*

obsolescence (each program sunsets and must be renewed periodically).[136] All of these countries also need capital and are seeking infusions of foreign direct investment.[137] In the case of trade in services, the free trade agreement can force a liberalization that results in first time or more complete competition.[138]

In the area of policy goals, the developing countries are seeking to "lock in" previous macroeconomic reforms that the negotiating government has already achieved prior to the completion of the free trade agreement negotiations. The "lock-in" is achieved by the institutionalization required to implement the free trade agreement. Once these policies are put in place, it is very difficult[139]—if not impossible—for later governments to undo the reforms. The other policy goal of the developing countries is to have more control over the globalization process. In a world where regionalism is on the rise, a demanding free trade agreement from a major trading partner seems preferable to isolation or falling further behind as other countries gain preferential access.

Does the U.S. model FTA fulfill these needs and goals of its developing country partners? The evidence is mixed. By entering a reciprocal FTA, the

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136. The GSP is the largest U.S. preference program—it allows developing countries duty free access to the U.S. market GSP for thousands of products from over 100 designated, beneficiary countries. OFFICE OF U.S. TRADE REP. (USTR), A GUIDE TO THE U.S. GENERALIZED SYSTEM OF PREFERENCES (2006), *available at* http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html (last visited Feb. 26, 2009). The current version, which has been enacted multiple times, expires at the end of 2008. The Caribbean Basin Initiative (CBI), 19 U.S.C. § 2702 (2004), was first passed in 1983 and expanded in 2000 and 2002 in order to help countries in the area access the U.S. market. THE PRESIDENT'S 2008 TRADE POLICY AGENDA, *supra* note 21, at 130. The Andean Trade Preference Act, Pub. L. No. 102-182, 105 Stat. 1233 (1991), was passed to aid the Andean countries in their efforts to develop spur regional economic development to provide "economic alternatives to the illegal drug trade, promote domestic development, and thereby solidify democratic institutions." *Id.* at 129; *see also* Kevin L. Fandl, *Bilateral Agreements and Fair Trade Practices: A Policy Analysis of the Colombia-U.S. Free Trade Agreement*, 10 YALE HUM. RTS. & DEV. L.J. 64, 65 (2007) (noting the concern of Colombia over the Andean Trade Preferences Act).

137. All of these developing countries need capital. It is why so many of them have been willing to sign Bilateral Investment Treaties. *See* Andreas Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 126–28 (2003) (discussing the rationales for entering BITS); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 77–111 (2005) (describing the BIT as offering a "promise of protection of capital in return for the prospect of more capital in the future" and explaining that his study reveals that this bargain has worked).

138. Some of the FTA partners have government held and thus closed off services sectors. For example, Costa Rica had to open for the first time both its telecommunications and insurance sectors under the terms of CAFTA/DR. *See* DR-CAFTA: Challenges, *supra* note 42, at 44. Most of the other Central American countries had already liberalized most services sectors in the years prior to the agreement and hoped that the FTA commitments "should boost the credibility of the reforms of recent years . . . ." *Id.* at 42.

139. Every U.S. FTA provides the parties with the right to withdraw from the agreement within six months after it provides notice to withdraw to the other parties. *See* NAFTA, *supra* note 2, art. 2205. Actual withdrawal, however, would be quite costly once business and trading patters had shifted to accommodate the new regime. No FTA partner has seriously considered withdrawal.

developing country does gain secure market access. The experience of Mexico illustrates that increased market access occurs and that the United States will continue to purchase a greater percentage of its needs from FTA partners.[140] This does not mean that the FTA can guarantee effective market access for each FTA partner. In order to gain this, the developing country has to have exports of value and satisfy U.S. standards.[141]

Using Mexico as the "model" developing country partner also reveals that investments are significantly increased when a country joins a U.S. FTA. [142] Levels of investment, however, do not provide a complete picture. The creation of a pro-investment regime is one factor in attracting FDI, but it is not the only factor.[143] The developing country FTA partners of the United States all have

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140. Using Mexico as a model—before NAFTA, Mexico faced a trade deficit with the United States. Ten years after its entry into force, Mexico was running a trade surplus with the United States of $28.9 billion. *See* Ranko Shakri Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me... What, Exactly?: An Assessment of the Economic, Social and Political Development in Mexico Since 1994 and their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 74 (2007) [hereinafter Oliver]. Mexico is also a more important trading partner of the United States—the second most important market for U.S. agriculture exports. Press Release, Office U.S. Trade Rep. (USTR), U.S.-Mex., Officials Meet to Discuss NAFTA (Jan. 11, 2008), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2008/January/US_Mexican_Officials_Meet_to_Discuss_NAFTA.html?ht= (last visited Feb. 26, 2009); *see also* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 70 (noting the increase in intraregional trade for Mexico as a result of NAFTA and the focus of those exports on the United States, so that Mexico is "the developing country with the highest concentration of exports to a single destination and the one with the largest increase in export opportunities from world import demand growth.").

141. Standards pose greater compliance costs for developing countries trying to enter a developed country market since they are "mainly standard-takers not standard makers. The cost for compliance are estimated to cause a 10% decrease in potential export earnings." UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), GLOBALIZATION FOR DEVELOPMENT: THE INTERNATIONAL TRADE PERSPECTIVE 6 (2008), *available at* http://www.unctad.org/en/docs/ditc20071_en.pdf (last visited Feb. 26, 2009) [hereinafter GLOBALIZATION FOR DEVELOPMENT].

The United States did make efforts during the CAFTA/DR negotiating process to begin working with the Central American countries on how to satisfy U.S. standards for particular products of major export interest to those countries. The negotiations also discussed support for technical assistance on standards issues and commitments were made for a continuation of such assistance from the United States and sanitary and agricultural agencies. DR-CAFTA: Challenges, *supra* note 42, at 35, n.7.

142. TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 74 (noting that investment levels almost quadrupled from the period before NAFTA (1990–1994), when they averaged $5 billion per year, to 2000–2004, when they were $19 billion per year). The United States has been the largest source of FDI to Mexico—contributing sixty-four percent of Mexico's FDI in 2006. *Id.*

143. *See* Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies for Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 109 (2003). Investment laws are not usually the "driving force" in the initial decision to invest in a country. *Id.* According to Lothian and Pistor, other factors "play a greater role, such as the importance of access to raw materials, the size and scope of the foreign market, or the geographical position of the target country . . . ." *Id.*

limitations—underdeveloped infrastructure,[144] workforce problems (relatively low levels of education and skills),[145] weak macroeconomic policies,[146] and government problems (security and corruption).[147] What this means is that the countries may or may not get sufficient investment of the type that will allow the country to make gains technologically.[148] The "lock in" goal also seems to be met. Although it is possible to withdraw from a U.S. FTA, no partner has yet done so. The recent U.S. FTA partners, particularly in Latin America, have also chosen closer integration with a major trading partner rather than lose out to Asian competition[149] or fall further behind Mexico.[150] There is also evidence that recent FTA partners have studied the Mexican experience under NAFTA and have negotiated better than their precursor, particularly with regard to

144. All of the Central American countries, for example, have to work on transportation issues (road quality and diversity) and ports to benefit fully from CAFTA/DR. DR-CAFTA: Challenges, *supra* note 42, at 11.

145. *Id.* (noting that all of the countries need to work on secondary education and that some—Guatemala, Nicaragua, and Honduras—need to work on primary education).

146. The decision a country makes on macroeconomic policy can actually dwarf gains from other efforts—like trade reform. It is difficult to assess exactly how NAFTA has impacted Mexico, in part, because of the effects of Mexico's use of capital inflows before NAFTA and its approach to inflation (anchoring the peso to the U.S. dollar). Going into NAFTA, Mexico had an overvalued currency and a significant current account deficit. TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 66.

147. DR-CAFTA: Challenges, *supra* note 42, at 11 (noting that several Central American countries must do work on governance issues).

148. Mexico offers an illustration of this phenomenon. "Mexican producers have become part of a regional industrial block." TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 72. Thus far, however, Mexico has not been able to move significantly up the production chain into full scale production of skill- and technology-intensive goods. Instead Mexican companies have been "involved many in the low-skill, assembly stages of the production of such goods." *Id.* at 73.
See also Oliver, *supra* note 140, at 83 (noting that export manufacturing "tends to be based on a production model in which component parts are imported to Mexico for processing or assembly and then re-exported." Mexico would need to shift more to a model in which domestic firms constituted a larger part of the chain of production to have spill over effects on other parts of the economy).

149. *See generally* Enrique Dussel Peters, *What Does China's Integration to the Global Economy Mean for Latin America?: The Mexican Experience* 58–81, *in* THE POLITICAL ECONOMY OF HEMISPHERIC INTEGRATION: RESPONDING TO GLOBALIZATION IN THE AMERICAS (Diego Sanchez Ancochea & Kenneth C. Shadler eds. Palgrave Macmillian 2008); *see also* HUFBAUER & SCHOTT, *supra* note 46, at 19, 30 (discussing the competition Mexico faces in trade and attracting FDI from E. Asia and China).

150. The United States is the major market for all of the recent Latin American FTA partners. *See generally* Shadlen, *supra* note 120, at 3–8. These countries send a greater proportion of their goods to the United States than to each other. Only 13.2% of Latin American exports are intra-regional. NATHALIE AMININAN, K.C. FUNG & FRACIS NG, WORKD BANK, POLICY RESEARCH WORKING PAPER NO. 4546, INTEGRATION OF MARKETS VS. INTEGRATION BY AGREEMENTS (2008), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2008/03/04/000158349_20080304084358/Rendered/PDF/wps4546.pdf (last visited Feb. 26, 2009).

agriculture liberalization.[151] But even this success is a limited one. The largest agriculture issue for many of these countries—having to face subsidized exports—is not and will not be resolved by any FTA. The only valuable solution would be a multilateral breakthrough at the WTO.

The U.S. model FTA, then, offers possibilities rather than guarantees. Nevertheless, given the asymmetry in bargaining power, the developing countries must accept the model largely as dictated. In recent years, countries that have resisted the U.S. approach have been isolated,[152] and the United States has refused to negotiate agreements not based on the model. An offer is a "one size fits all prescription"[153] at a time when economic analysis[154] suggests that trade (and financial) openness are not enough to create economic growth and development. What a developing county must do is adopt an individualized domestic policy agenda, focusing on governance reform, that complements whatever trade-related reforms it undertakes. The individualized aspect is crucial, as it reflects the reality that what holds back one developing country—its "binding constraint"[155]—is not always what hampers another. It is in this

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151. *See* Oliver, *supra* note 140, at 76–89 (noting the significant loss of agriculture jobs in Mexico after it opened up to more efficient and subsidized U.S. exports). By contrast, the CAFTA countries negotiated for exceptions for maize and other food staple products to avoid a similar dilemma. DR-CAFTA: Challenges, *supra* note 42, at 34.

152. *See* Abbott, *supra* note 46, at 578 (noting that Brazil and Argentina rejected meaningful participation in regionalism with the United States because they were "unwilling to accept the basic template" of the U.S. model FTA and that the United States then proceeded to negotiate with the Central American and Andean countries in an attempt to isolate Brazil and Argentina and to "cause them to rethink their own policy preferences.").

153. This description of the U.S. model approach has even been adopted by Congressional and private sector sources consulted about the U.S. process. *See* GAO 2007 REPORT, *supra* note 31, at 20. In its review of USTR's model based approach, the GAO also interviewed former Congressional staff and private sector sources who noted that "one size does not fit all" and developing countries "need help to develop before they trade with the United States." *Id.*
This is also the conclusion reached by studies done on the impact of NAFTA and on CAFTA/DR. *See* LESSONS FROM NAFTA, *supra* note 41; DR-CAFTA: Challenges, *supra* note 42.

154. *See generally* Ricardo Hausman, Dani Rodrik & Andres Velasco, *Growth Diagnostics, in* NARCI´S SERRA & JOSEPH E STIGLITZ, THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE (2008); *see also* Dani Rodrik, Abstract, *The New Development Economics: We Shall Experiment, But How Shall We Learn?* 24–28, *available at* http://ksghome.harvard.edu/~drodrik/The%20New%20Development%20Economics.pdf (last visited Feb. 26, 2009) (discussing the new development economics approach as one based on developing country-specific growth strategic and innovations in industrial policy); Yong Shik Lee, *Foreign Direct Investment and Regional Trade Liberalization: A Viable Answer for Economic Development*, 39 J. WORLD TRADE 701 (2003); LUIS ABUGATTAS MAJLUF, SWIMMING IN THE SPAGHETTI BOWL: CHALLENGES FOR DEVELOPING COUNTRIES UNDER THE "NEW REGIONALISM" (2004), *available at* http://unctad.org/en/docs/itcdtab28_en.pdf (last visited Feb. 26, 2009).

155. The term "binding constraint" is used by Prof. Dani Rodrik. *See* Dani Rodrik, *How to Save Globalization from its Cheeleaders*, 1(2) J. INT'L TRADE & POL'Y 1, 23 (2007), *available at*

regard that the U.S. model FTA most poorly serves its target partners. What the developing country partner needs is policy space,[156] more options for pursuing its own problems, and limitations. The U.S. model FTA forecloses that policy space in some areas (investment, government procurement, and subsidies)[157] that have been used by other developing countries regarded as success stories. There is no real freedom to experiment with industrial policy based on the values and concerns of the developing country. The overall effect is to constrain the use of industrial policy in the very areas that may actually limit growth and development. Finally, the U.S. model FTA imposes substantial implementation obligations and costs on developing country partners at the same time that it cuts off policy space.[158]

B. The Future Model: Adapting FTAs into Development Tools?

The recent U.S. model FTA approach to regionalism has reached an end. There are two reasons for this development. First, the underlying political realities in the United States have shifted. Second, there will now be competitive pressure for other approaches to regionalism in the face of stalled multilateralism. Each trend will be analyzed in turn.

Given the results of the 2008 election, there will be a shift by both the Executive Branch and Congress regarding trade policy. President-elect Obama campaigned on a pledge to renegotiate NAFTA[159] and against the pending

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http://www.jitd.com.tr/dtmadmin/upload/EAD/KonjokturIzlemeDb/JITD/volume_2/Dani_Rodrik.pdf (last visited Feb. 26, 2009) [hereinafter *Save Globalization*] (Rodrik notes that "[c]urrent thinking has moved considerably away from a standardized Washington Consensus-style approach to a diagnostic strategy which focuses on each country's own binding constraints." Differences in the nature of these constraints shape the appropriate economic strategies." *Id.* *See also* ROBERTO ZAGHA, GOBIND T NANKANI & WORLD BANK, ECONOMIC GROWTH IN THE 1990S: LEARNING FROM A DECADE OF REFORM 147 (World Bank 2005) (2004), *available at* http://www1.worldbank.org/prem/lessons1990s/chaps/05-Ch05_kl.pdf (last visited Feb. 26, 2009) (noting that developing countries signing regional agreements "will not generate positive export and growth responses unless the countries themselves also pursue other necessary economic, political and social reforms"). *Id.* at 147.

156. *See generally* TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 57–65 (for a complete analysis of all of the ways in which a developing country entering into a North-South FTA can lose policy space).

157. *See Save Globalization*, *supra* note 154; Azfar, *supra* note 123, at 706–11; TRADE AND DEVELOPMENT REPORT 2007, *supra* note 1, at 65.

158. The developing country FTA partners have to absorb the costs of implementing the agreement's obligations. In addition, without also making institutional and regulatory reforms, they will not benefit fully from the FTA. *See* DR-CAFTA: Challenges, *supra* note 42, at 174. The Central American countries suffer from excessive regulation (making start up time for firms slower) and relatively high levels of administrative corruption that can impose costs on FTA opportunities. *Id.* at 174, 186–88.

159. *See generally* Memorandum from the Trade Policy Study Group on A New Trade Policy for the United States to the President-Elect and the 111th Congress (Nov. 25, 2008, *available at*

FTAs. Although this position has moderated since the election,[160] there will be a focus on NAFTA issues prior to any attempt to deal with the other pending FTAs. Obama has focused on the negative effects of FTAs for the United States, particularly for U.S. workers. As a response to this focus, it is likely that NAFTA will be studied[161] and that the labor and environmental side agreements will be altered to make those rights actionable. These efforts will not really fix the impact of NAFTA—or other U.S. FTAs—on U.S. workers.[162] What would be more effective is the development of an effective Trade Adjustment Assistance (TAA) program[163] that retrains and supports workers displaced by the operation of U.S. trade agreements.

The new Congress, with more Democrats, will have a greater voice in the direction of U.S. trade policy. In order to complete the Doha Round of negotiations, and even to renegotiate NAFTA, President Obama will have to seek Trade Promotion Authority (TPA). In modern trade policy history,[164] each Presidential request for such authority has sparked an acrimonious debate about the scope and contours of the authority the President should be given. The Obama Administration will also be pushed towards adopting and funding a more complete[165] and accessible[166] TAA program in return for this grant of

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http://www.iie.com/publications/papers/20081217presidentmemo.pdf (last visited Feb. 26, 2009)) [hereinafter Memorandum to the President-Elect]. The Trade Policy Study Group is a bi-partisan group of twenty two former trade officials (including three former USTR heads) lawyers and economists. The listing of all of the members can be found at the end of the memorandum. *Id.* at 14.

160. *See NAFTA's Bad Rap*, *supra* note 26.

161. *Obama's Trade Stance Coming Into Focus*, 12 (37) BRIDGES WEEKLY TRADE DIGEST, (Nov. 6, 2008), *available at* http://ictsd.net/i/news/bridgesweekly/32652/ (last visited Feb. 26, 2009) (noting that Obama is less interested in fundamentally changing the agreement than in "strengthening/clarifying" the language on labor and environment and making these issues core principles of the agreement). With regards to the other FTAs, such as KORUS, Obama would be seeking fixes to the deal (increased market access for autos, exports of manufactured goods, protections for U.S. workers losing jobs and resolution of the long running dispute over beef). *Id.*

162. *Obama NAFTA*, *supra* note 28. According to Gary Hufbauer, renegotiating NAFTA would not address the concerns raised about labor as it 'would have no impact' on unionized jobs or workers wages in the United States. *Id.*

163. Memorandum to the President-Elect, *supra* note 159, at 8, 9. See generally William J. Mateikis, *The Fair Track to Expanded Free Trade: Making TAA Benefits More accessible to American Workers*, 30 HOUS. J. INT'L L. 1 (2007) [hereinafter Mateikis], for a general description of the existing TAA program, its limits and how it could be fixed to offer more aid to displaced workers.

164. See *NAFTA/Battle*, *supra* note 17, at 9, for a description of the battle over fast track authorization before NAFTA was negotiated and how that battle represented the long-term power struggle between the President and Congress; *see also* Hal Shapiro & Lael Brainerd, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change*, 35 GEO. WASH. INT'L L.REV. 1, 10–31 (2003) (describing the fight over the granting of Trade Promotion Authority in 2002).

165. Mateikis, *supra* note 163, at 25. The existing TAA program does not cover all U.S. workers

trade promotion authority.[167] Democrats objected to key aspects of the WTO-plus model—the lack of sufficient and actionable labor and environmental rights[168] and overly extensive demands in the intellectual property chapter.[169] In 2007, they proceeded to use the power of their ultimate approval over all negotiated FTAs to force the renegotiation of the Peru, Panama, Colombia, and KORUS FTAs to meet their concerns.[170] Now that the new Congress will be faced with a trade-skeptical President, it is likely to be equally aggressive about indicating what changes it wants to see in the U.S. approach to regionalism.

This moment for rethinking U.S. trade policy offers the country the chance to completely change course. Instead of focusing on bilateral model-driven FTAs, the United States could put its efforts into reenergizing its commitment to multilateralism. This commitment could actually focus on making the link between trade and development, the original goal of the Doha Round, a real one. There is general agreement that completion of the Doha Round[171] would produce the greatest liberalization and the greatest benefit to developing countries. Another option would be to reengage with true regionalism. If the United States dropped its demands for the complete WTO-plus model FTA, it would be in a position to revive the FTAA process or pursue other regional efforts.[172] The United States could also redirect its approach with bilateral

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that might be impacted by job or income loss due to trade—it does not cover service workers. *See id.*

166. *Id.* at 25–37 (describing how not enough displaced workers benefit from the TAA program due to the certification process conducted, and mismanaged, by the Department of Labor); I.M. DESTLER, AMERICAN TRADE POLITICS 326–28 (Inst. for Int'l Economics 4th ed. 2005) (1992) [hereinafter American Trade Politics] (noting that, despite the expansion of funding in 2002, the participation rate has remained low). Destler points out that the TAA has always had lukewarm support from the Department of Labor and the unions, which see it as a "second best alternative to limits on import growth." *Id.* at 326.

167. American Trade Politics, *supra* note 166, at 295–98 (describing how the reformulation of the TAA program was central to getting Trade Promotion Authority passed in 2002).

168. *See generally* Destler, *supra* note 121, for a discussion of the push by Democrats for the issues on labor rights and the environment that would have to be altered in the most recent FTAs with Peru, Panama, Colombia, and KORUS; *see also id.* at 20–23, app. B (containing an extended summary of the Bi-Partisan Agreement of May 10, 2007).

169. *Id.* at 25–26, app. B (noting that the Bi-Partisan Agreement of May 10, 2007 limits the aspects of the FTAs that link drug testing (and the data produced for it) and patent issues).

170. *See generally* Abbott, *supra* note 46.

171. *See generally* Sungjoon Cho, *Doha's Development*, 25 BERKELEY J. INT'L L. 165 (2007); Memorandum to the President-Elect, *supra* note 159, at 10 (noting that the United States and other WTO Members would stand to gain three things from completing the Doha Round:

1) gaining the tariff and subsidy reforms negotiated over the last seven years;
2) avoiding the problems caused by countries pursing unilateralism and regionalism should multilateralism fail; and
3) keeping the WTO's credibility alive).

172. *See* Memorandum to the President-Elect, *supra* note 159, at 11 (noting that the President should

FTAs by choosing to negotiate with major trading partners (the EC and Japan) not considered before because of the U.S. insistence on the model or with the large developing countries (such as Brazil and China).[173]

Finally, the United States could change its approach to regionalism by reconfiguring its model into a development tool. The United States provides more development assistance in the form of Trade Capacity Building (TCB) than any other country.[174] The goal of trade capacity building is to place the developing country beneficiaries in positions to achieve economic growth through trade liberalization.[175] With the more recent U.S. FTAs, the United States started including a trade capacity building negotiating group. The negotiating group, which was turned into a TCB Committee[176] upon the implementation of each FTA, was used to provide developing country FTA partners with a forum for discussing their needs in such areas as infrastructure projects and standards capability,[177] which ultimately led to the funding of some

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reorient trade policy away from the recent FTA strategy, which is "running out of steam," and harmonize existing bilaterals into broader regional arrangements; the Trade Policy Study Group believes that such a "reorientation could boost stalled initiatives as the Free Trade of the Americas and a Middle East FTA.").

173. GAO 2007 REPORT, *supra* note 31, at 22; *See also* Memorandum to the President-Elect, *supra* note 159, at 12 (noting that a higher priority should be placed on major partners (EU and Japan) if the Doha Round falters; the Trade Policy Study Group also urges that "[t]alks with China and Brazil, and perhaps even India, could divert from the standard FTA template and focus on infrastructure services, energy and the environment.").

174. OFFICE U.S. TRADE REP. (USTR), PARTICIPATION, EMPOWERMENT, PARTNERSHIP: SEEKING SUSTAINABLE RESULTS THROUGH U.S. TRADE CAPACITY BUILDING 1 (Dec. 2005) *available at* http://www.ustr.gov/Trade_Development/Trade_Capacity_Building/2005Global/Section_Index.html (last visited Feb. 26, 2009).

175. DANIELLE LANGTON, CONGRESSIONAL RESEARCH SERVICE (CRS), TRADE CAPACITY BUILDING: FOREIGN ASSISTANCE FOR TRADE AND DEVELOPMENT 1 (2007), http://www.nationalaglawcenter.org/assets/crs/RL33628.pdf (last visited Feb. 28, 2009) [hereinafter CRS Report] (noting that some experts believe that TCB is necessary for developing countries to adjust to trade liberalization and achieve trade-led economic growth). *See also* H.R. REP. NO. 107–663 at 21 (2003) (describing trade capacity building as a critical part of development assistance because it "can be leveraged to generate economic growth, reduce poverty, [and] promote rule of law.").

176. *See* GAO 2005 Report, *supra* note 124, at 27 (discussing how the TCB negotiating group operated during the CAFTA/DR negotiations).

177. *Id.* at 27 (noting that the CAFTA-DR group met with each of the six CAFTA negotiating groups and that each country prepared a "national strategy to define and prioritize its trade capacity building needs.").

There is no formal definition of what constitutes trade capacity building, but the GAO did compile a list based on input from USTR and USAID. Most of the U.S. TCB funds are allocated to trade facilitation projects (business services/training, export promotion, customs operation/administration, and e-commerce development)—27%, human resources and labor standards—16%, agriculture development—12%, financial sector development—11%, and physical infrastructure—8%. *Id.* at 9, Table 1.

projects.[178] The use of this process did produce insight into some of the barriers that would be faced by the CAFTA countries in their attempts to implement and live with the FTA. Given the speed of the negotiations, however, no TCB projects were funded or started prior to the implementation of the free trade agreement by the Central American countries. A better approach would be to conduct a systematic diagnosis of the adjustment issues posed by U.S. FTA requirements for developing country partners during the negotiations themselves, and for project commitments to begin before the future FTAs are completed.[179] The United States[180] and the World Bank[181] have the ability and resources to perform such diagnoses. This new approach to the TCB effort would require that developing countries align their national development strategies with the FTA demands. But these countries would be more likely to make such commitments if they saw that the U.S.-led TCB process would provide not only the necessary financial resources, but also all of the technical

178. The United States provided $7.1 billion in trade capacity building assistance from 2001-2007. Latin America and the Caribbean area have received $1.9 billion during that time frame, $554 million of that figure in 2007. US/TPR, *supra* note 4, at 23. The Central American countries have received $650 million in trade-related assistance since 2003 (and it has focused on rural development and poverty reduction). OFFICE U.S. TRADE REP. (USTR), CAFTA POLICY BRIEF, CAFTA-DR-TRADE CAPACITY BUILDING PROGRAMS 1 (2007), *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file544_13195.pdf (last visited Feb. 26, 2009).

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

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

179. The fact that the FTA has not been approved or implemented in either the United States or the partner countries should not matter. The U.S. commitment to TCB extends throughout the world. It is not limited to countries with a special trading relationship with the United States. CRS Report, *supra* note 175, at 11 (listing financial outlays under the TCB program for 2006–2007 that cover countries on every continent, except for Europe).

180. The International Trade Commission (ITC) conducts a diagnosis of the impacts of every FTA on U.S. industries. See ITC Impact Report, *supra* note 49, at 2–6, 2–12, 2–19. for an illustration of such an analysis performed for the FTAs with Morocco, Singapore, and Chile.

181. The World Bank did a complete diagnosis of the effects of the CAFTA-DR and what the Central American countries needed to do in order to fully benefit from the agreement. *See* DR-CAFTA: Challenges, *supra* note 42, at 12. The DR-CAFTA report, however, was done after the agreement. For developing countries to benefit more fully from U.S. TCB efforts, such diagnostic studies need to be done prior to or concurrent with negotiations. This would allow the developing country partner to negotiate better terms within the FTA text and to refine its TCB requests.

assistance (experts and training) needed to benefit from trade liberalization.[182] In order to make TCB effective in this way, the United States would also have to do a better job at assessing the efforts it has already made in this area. The United States has yet to develop an effective monitoring system for judging whether projects under the current FTAs are working properly.[183] Monitoring and assessing are crucial for developing TCB projects, and an overall TCB approach, that will satisfy the long-term needs of developing country partners. One way to improve the TCB process would be to borrow some ideas from the recent efforts of the European Community. One of the EC's largest investments in regionalism has been its pursuit of Economic Partnership Agreements (EPAs) with its former colonial trading partners, the African, Caribbean and Pacific (ACP) countries. The EPAs are meant to replace the long-standing EC preference programs (Lomé and Cotonou) with free trade agreements.[184] In 2007, the EC completed the first regional EPA with the Caribbean countries, the CARIFORUM states.[185] The CARIFORUM EPA explicitly recognizes that "development cooperation is a crucial element" of the partnership[186] and that the cooperation can take financial and non-financial forms.[187] The EPA text also contains a commitment to funding the development cooperation projects out of the EC's general budget.[188] Finally, the EPA sets out the cooperative priorities—the trade capacity building efforts—on which the EC will work with its CARIFORUM partners.[189] The EC will continue to complete EPAs

182. CRS Report, *supra* note 175, at 26 (noting that Congress has stated that it wants USAID to "prioritize building developing country capacity to implement and benefit from special trading arrangements . . . ." This would require an emphasis on some programs like trade facilitation (improvements in customs, SPS measures), improvements in governance and transparency regarding government procurement). *Id.*

183. GAO 2005 Report, *supra* note 125, at 29. Since the GAO found that there was no effective monitoring of TCB efforts, the USAID and USTR have agreed to develop a system for gauging the success of U.S. TCB projects. *Id.* at 29–30.

184. EUROPEAN COMMISSION, ECONOMIC PARTNERSHIP AGREEMENTS: MEANS AND OBJECTIVES 6–7 (2003), *available at* http://trade.ec.europa.eu/doclib/docs/2003/december/tradoc_115007.pdf (last visited Feb. 26, 2009); *Id.* at 6 (noting that "EPAs are an instrument for development by strengthening regional integration and improving the business environment in a credible and sustainable way.").

185. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 2008 O.J. (L 289/I/4), *available at* http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf (last visited Feb. 26, 2009) [hereinafter CARIFORUM EPA].

186. *Id.* art. 7.1.

187. *Id.*

188. *Id.* art. 7.3.

189. The EPA contains cooperation priorities aimed at the biggest adjustment problems the CARIFORUM states will face by entering into a free trade agreement with the EC—assistance for capacity/institution building for tax administration assist with the loss of revenues from tariffs (Art. 8.1(ii)); support for the private sector and enterprise development and the diversifying exports through new investment

containing very similar provisions (based on the CARIFORUM model) with other ACP regions over the next few years. What this means is that the United States will face another approach to regionalism, what sets out to be a development-focused one, by its leading competitor. The U.S. model FTA would be more of a development tool if it made commitments to financing and to priority TCB projects in the text of the agreement.[190] None of the current U.S. FTAs have such provisions. A reenergized bilateral FTA program built around development goals would signal that the United States is as committed to these issues as the European Community.

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and the development of new sectors (Art. 8.1 (iii-iv)); assist with development of and compliance with standards (Art. 8.1(v)) and support for the development of infrastructure (Art. 8.1(vii)). CARIFORUM EPA, *supra* note 185, art. 8.

190. None of the recent FTAs have a commitment to provide financing in the text of the TCB chapters. The U.S. commitment to trade capacity building in the model FTAs is to create a committee on Trade Capacity Building for each agreement. The developing country partners are expected to periodically update and provide the Committee its national trade capacity building strategy. In turn, the Committee will seek to:

1) prioritize projects at a national or regional level, or both;
2) invite donor institutions and other groups to assist in developing and implementing the projects;
3) assist with the implementation of projects; and
4) monitor and assess progress in implementing progress.

The TCB Committee is required to meet at least twice a year during the transition period.