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## **The Neo-Liberal Turn in Regional Trade Agreements**

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# The Neo-Liberal Turn in Regional Trade Agreements \*\*

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## Table of Contents

Introduction.....	3
PART ONE.....	10
The Proliferation of Regional and Bilateral Trade Agreements.....	10
<i>Standard Justifications for Regionalism and Bilateralism</i> .....	10
<i>The Long Litany of U.S. Regional, Bilateral Trade and Investment Agreements</i> .....	12
<i>Regional Initiatives</i> .....	13
<i>Trade and Investment Framework Agreements (TIFAs)</i> .....	14
<i>Bilateral Investment Treaties (BITs)</i> .....	14
<i>Model Agreements</i> .....	14
Economic Partnership Agreements (EPAs) and E.U.'s Global Europe Strategy.....	15
<i>Choice of Countries/Regions</i> .....	18
PART II.....	19
Accounting for the Turn to Regional Trade Agreements.....	19
<i>Forum Shifting</i> .....	19
<i>Forum Shifting Reduces Opportunities for Developing Country Coalitions</i> .....	25
<i>Other Reasons Accounting for Spread of Regionalism and Bilateralism</i> .....	27
<i>Influence By Global Norms – Constructivist Explanations</i> .....	28
<i>Competition</i> .....	34
PART III .....	37
Fortifying the Neo-Liberal Agenda of the Washington Consensus .....	37
Asymmetrical Liberalization.....	40
<i>Intellectual Property Rights (IPR) and Asymmetrical Liberalization</i> .....	41
Resulting Tensions in the Trade Regime.....	43
Is Resistance An Option?: The SACU Example.....	45
<i>The KOREA-U.S. FTA</i> .....	47
Conclusion .....	47

## Introduction

One of the first bipartisan standing ovations that President Obama received in his 2010 State of the Union address was his declaration that the United States was committed to pursuing trade agreements with other countries to create jobs for Americans and opportunities for U.S. exporters.<sup>1</sup> Similarly in the 2011 State of the Union Address, President Obama urged Congress to pass trade deals his administration had signed with India, China and South Korea. He argued, to further bipartisan applause, that he was determined to continue pursuing trade agreements with Panama, Colombia and with the Asia-Pacific region.<sup>2</sup> President Obama, like many former Presidents, has made it a goal to export more American goods – which the President wants to double in the next five years – as a central pillar of his job creation goal.<sup>3</sup> In fact, for President Obama, trade agreements are part of his plan to create two million jobs. This will be done under a National Export Initiative “to help farmers and small businesses increase their exports, and reform export controls consistent with national security.”<sup>4</sup>

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<sup>1</sup> See Address Before a Joint Session of Congress on the State of the Union, Daily Comp. Pres. Doc. 201000055 (Jan. 27, 2010) (available at <http://origin.www.gpo.gov/fdsys/pkg/DCPD-201000055/pdf/DCPD-201000055.pdf>) [hereinafter State of the Union Address]. President Obama outlined this strategy in an address to his Export Council, see Remarks Prior to a Meeting with the President’s Export Council, Daily Comp. Pres. Doc. 201001055 (Dec. 9, 2010) (available at <http://origin.www.gpo.gov/fdsys/pkg/DCPD-201001055/pdf/DCPD-201001055.pdf>) (where the President referred back to his 2010 State of the Union address promising to open foreign markets for U.S. products and to create jobs for the U.S. workers. The President was addressing his Export Council that has outlined a strategy for improving U.S. exports that includes entering into more foreign market opening trade agreements. For the report, see President’s Export Council, Report to the President on the National Export Initiative: The Export Promotion Cabinet’s Plan to Double Exports in Five Years, September 10, 2010 available at [http://www.whitehouse.gov/sites/default/files/nei\\_report\\_9-16-10\\_full.pdf](http://www.whitehouse.gov/sites/default/files/nei_report_9-16-10_full.pdf)).

<sup>2</sup> See Address Before a Joint Session of Congress on the State of the Union, (January 25, 2011) available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>

<sup>3</sup> State of the Union Address, *id.*

<sup>4</sup> *Supra* note 1.

Connected with this, the President also announced that the United States must “seek new markets aggressively,” just as the U.S.’s competitors are doing.<sup>5</sup> As he put it, “[i]f America sits on the sidelines while other nations sign trade deals, we will lose the chance to create jobs on our shores. (Applause.)”<sup>6</sup>

President Obama further argued in favor of “enforcing those agreements so that our trading partners play by the rules.”<sup>7</sup> He argued that the administration was continuing to “shape a Doha trade agreement that opens global markets,” as well as to “strengthen our trade relations in Asia and with key partners like South Korea and Panama and Colombia. (Applause.)”<sup>8</sup>

None of these proposals was new. The Obama administration’s trade policy in many respects continues the trade policy of previous administrations. Notably, on December 14, 2009 the United States Trade Representative, (USTR), notified Congress of the Obama Administration’s intention of negotiating a Trans-Pacific Partnership Agreement.<sup>9</sup> This agreement, the USTR argued, represents a “new kind of trade agreement for the 21<sup>st</sup> century.”<sup>10</sup> This announcement confirms the Obama administration is carrying forward the recent U.S. policy of market opening and job creation through regional and bilateral free trade agreements. This is not surprising since for at least a decade, pursuing such objectives at the World Trade Organization (WTO) has not been very successful.

Regionalism and bilateralism have increasingly become an important avenue for consolidating and implementing the trade agenda of the U.S., and the E.U. The trend towards regionalism and bilateralism in trade has however expanded beyond these big

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* See also Part II *infra* noting competition for markets and resources as one explanation for the popularity of the trend towards bilateralism and regionalism in trade.

<sup>7</sup> State of the Union Address, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> See Office of the United States Trade Representative, <http://www.ustr.gov/tpp>.

<sup>10</sup> Press Release, Office of the United States Trade Representative, Trans-Pacific Partnership Announcement (Dec. 14, 2009), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement>.

economies as I will show in Part II below.<sup>11</sup> Developing economies are also furiously negotiating these agreements. For example, the South African Customs Union (SACU) which comprises of South Africa, Botswana and some of the poorest economies in southern Africa, (Lesotho, Namibia and Swaziland), signed a SACU-EFTA Free Trade Agreement with Norway, Iceland, Switzerland/Liechtenstein in 2006, a SACU-MERCOSUR Preferential Trade Agreement in 2004, a SACU-USA Trade, Investment and Development Cooperation Agreement (TIDCA) in 2008, and is currently negotiating several others.<sup>12</sup> The World Trade Organization, Committee on Regional Trade Agreements reports that as of October 15, 2009, “457 regional trade agreements (RTAs), counting goods and services notifications separately, have been notified to the GATT/WTO, 266 of which are currently in force.”<sup>13</sup>

This paper is not about whether or not regionalism and bilateralism are stumbling or building blocks to the multilateral trade regime, a topic that I have written about recently.<sup>14</sup> Rather, this paper argues that the increased resort to bilateral and regional trade agreements has taken a neo-liberal turn. In other words, that bilateral and regional trade agreements are now a primary means through which greater investor protections; commodification of social services, guaranteed rights of investor access to investment opportunities, privatization of public service goods; and generally and the diminution of sovereign control are being realized. These trade agreements make the foregoing goals possible not just in developing countries, but in industrialized economies as well. I show that these agreements provide business interests with opportunities to exercise concerted

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<sup>11</sup> There is a large literature on whether regional blocks are a stumbling or block for global trade integration, see, e.g., Jagdish Bhagwati, *THE WORLD TRADING SYSTEM AT RISK* (Princeton University Press 1991); see also Jagdish Bhagwati, David Greenway & Arvind Panagariya, *Trading Preferentially: Theory and Policy*, 108 *Econ. J.* 1128, 1138; Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation With Free Trade Areas*, in *THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS* (Jagdish Bhagwati & Anne O. Krueger eds., 1995); Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 38 *J. of Econ. Lit.* 287, 328; Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing institutional challenges in the new millennium*, 22 (2005), available at [http://www.wto.org/English/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/English/thewto_e/10anniv_e/future_wto_e.pdf).

<sup>12</sup> South African Customs Union, <http://www.sacu.int/traden.php?include=about/traden/bilateral.html>.

<sup>13</sup> Committee on Regional Trade Agreements, *Report (2009) of the Committee on Regional Trade Agreements to the General Counsel*, WT/REG/20, III (4) (Oct. 16, 2009).

<sup>14</sup> James Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 *N.C. J. Int'l L. & Com. Reg.* 571.

pressure to influence the adoption of neo-liberal economic policies in both developed economies and developing economies.

As such, the paper tells a story of spreading neo-liberalism, not only through the market power of developed economies, or coercion, as this story has been predominantly told, but also through constructivist influences.<sup>15</sup> Constructivism explains the spread of neo-liberalism in regional trade agreements in a number of ways including the increasing convergence of business interests with a largely shared set of ideas in support of market governance in developing and developed countries that form coalitions to support mutually beneficial agreements.<sup>16</sup> Further, leading officials in developing country governments have increasingly begun mimicking developed country strategies such as the pursuit of regional and bilateral trade agreements. As such, this paper differs from leading accounts of the spread of neo-liberalism that primarily or exclusively focus on explanations based on coercion to account for the diffusion of neo-liberalism. It differs from accounts based solely on the role of institutions in lowering transactions costs and supporting interdependence, as institutionalists do.<sup>17</sup> It also differs from accounts based primarily on coercion as realists and critics of neo-liberalism do.<sup>18</sup> Further, it is distinctive from approaches that focus on how economic interests, relative power and the need for credible commitments alter the instrumental calculations of actors as liberal intergovernmentalists do.<sup>19</sup> My claim here is not that constructivism is a superior explanatory or causal factor in the diffusion of neo-liberalism that the preceding largely functionalist and rationalist approaches. Rather, my claim is that constructivism can help

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<sup>15</sup> For constructivists accounts in international law, see Jutta Brunnee and Stephen J. Toope, *International Law and Constructivism: Elements of an International Theory of International Law*, 39 Colum. J. Transnat'l L. 19; David J. Bederman, Review Essay, *Constructivism, Positivism, and Empiricism in International Law*, 89 Geo. L.J. 469; Claire Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 Mich. J. Int'l L. 673; Claire Kelly, *Realist Theory and Real Constraints*, 44 Va. J. Int'l L. 545.

<sup>16</sup> Other plausible accounts of neo-liberalism in developing countries include 'sincere deference to authority,' 'a culturally appropriate action' or 'the response to education by the new elite,' see Andrew Moravcsik, *Bringing Constructivist Integration Theory Out of the Clouds: Has It Landed Yet?*, 2 Eur. Pol. 237.

<sup>17</sup> Robert Keohane and Lisa Martin, *The Promise of Institutional Theory*, 20 Int'l Security (1990).

<sup>18</sup> Realists argue that international institutions and rules mitigate the anarchical nature of international society. See Joseph Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 Int'l Org. 485.

<sup>19</sup> Andrew Moravcsik, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* (1998).

account for the circumstances under which neo-liberalism arises in the turn towards regionalism and bilateralism in trade by taking into account how ideas about market governance and the institutions and experts that generate and perpetuate these ideas impose an incentive structure within which choices in favor of neo-liberalism are more than less likely to be exercised. In this sense, a constructivist approach supplements insights of the diffusion of neo-liberalism based on donor conditionality or coercion. A constructivist lens opens up other diffusionist methods for neo-liberalism such as liberal intergovernmentalism or functionalism. For example, neo-liberalism in bilateral and regional trade agreements may very well be the result of a tactical or strategic policy adjustment or a response to technological or market trends as rationalist explanations would proffer as much as a consequence of changes in ideas that were mimicked or voluntarily adopted because the mimickers came to believe them or were socialized in them and began changing their economic goals and policies accordingly.<sup>20</sup> Simply put, constructivism helps to figure out how socialization in new norms and ideas influences the preferences and policies of governments and behavior.<sup>21</sup> The turn to regional trade agreements are a good case study of such constructivism.

In particular, this paper shows that:

**First**, free trade agreements and bilateral investment agreements include treaty commitments in areas such as government procurement and investor protection that provide a foothold for U.S. investors in signatory countries that are otherwise unavailable at the WTO. In addition, these free trade agreements incorporate heightened intellectual property rights protection and financial liberalization commitments which go beyond the treaty commitments contained in the World Trade Organization's TRIPS Agreement.

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<sup>20</sup> In other words, I do not claim that constructivism itself is a binding constraint on policy. Clearly, this is not to overstate the possibility that political behavior is not always consistent with stated principled justifications, *see* Robert Putnam, *THE BELIEFS OF POLITICIANS* (1973).

<sup>21</sup> Notably, even critics of constructivism agree that EU integration has been linked to neo-liberal ideology, *see* Andrew Moravcsik, *Bringing Constructivist Integration Theory Out of the Clouds: Has It Landed Yet?*, 2 *Eur. Union Pol.* 230 (notably, as Moravcsik approvingly quotes Lupa and McCubbins to the effect that "Can one really disentangle preference change driven by persuasion and socialization from strategic adaptation in the face of changed incentives, or from passive, cognitively simplifying imitation," *supra* note 19, at 232.

**Second**, these agreements adopt many of the elements of the Washington consensus of economic reform for development<sup>22</sup> that have had the following consequences:

- Developing country signatory States assume enhanced obligations to protect the rights of foreign investors – a role that often creates enormous tensions with their role as guardians of their citizens.<sup>23</sup>
- Transnational corporations under protection as foreign investors increasingly come to be seen as providers of social services such as education, health, water, electricity, garbage collection and disposal. In essence, these agreements help to commoditize and make social services tradable opportunities that foreign investors can compete for.
- Trade and investment agreements further provide a set of guaranteed rights of access to this market of tradable service provisioning – including the non-discrimination rights of most favored nation; national treatment and transparency; as well as the right to arbitration should their rights be violated.<sup>24</sup>
- By making private service provisioning through the market rather than through the State, the traditional mechanisms for the public to hold governments accountable when they do not provide quality, affordable and accessible services are undermined.
- As a consequence, these agreements reach “deep behind the border[s] of developing countries], guaranteeing rights of entry and commercial operation to foreign services firms and imposing market disciplines on the policy and regulatory choices of national governments.”<sup>25</sup>

**Third**, the turn to regional free trade agreements makes it much easier to bully smaller groups of countries to commit to the objectives of the Washington Consensus or neo-liberal economic restructuring than it would be through arduous multilateral trade negotiations at the WTO. Notably, however, the aggressive unilateralism of bilateral and

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<sup>22</sup> By the Washington consensus, I mean the three big ideas John Williamson argued in 1989 had come to gain wide consensus in Washington that Latin American countries ought to have been undertaking. These three ideas were macro-economic discipline, a market economy, and openness to the world in respect to trade and foreign direct investment. The list of ten specific elements of the consensus were: fiscal discipline particularly in reducing large deficits and balance of payments as high inflation; reordering public expenditure policies; tax reform; liberalizing interest rates; a competitive exchange rate; trade liberalization; liberalization of inward foreign direct investment; privatization; deregulation and strong property rights regimes. See John Williamson, “Did the Washington Consensus Fail?,” Outline of Speech at the Center for Strategic and International Studies, Washington DC, Nov. 6, 2002, available at <http://www.iie.com/publications/papers/paper.cfm?researchid=488>.

<sup>23</sup> See Joel Ngugi, *Making New Wine for Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?*, 8 U.C. Davis J. Int’l L. & Pol’y 73.

<sup>24</sup> See James Thuo Gathii, *WAR, COMMERCE, AND INTERNATIONAL LAW* (2009).

<sup>25</sup> Jane Kelsey, “Confronting Trade-Related Human Rights in a GATS-Compatible World,” (2007) (1) *Law, Social Justice & Global Development Journal (LGD)* available at [http://www.go.warwick.ac.uk/elj/lgd/2007\\_1/kelsey](http://www.go.warwick.ac.uk/elj/lgd/2007_1/kelsey) at 2.



regional trade agreements has not always assured victory for big countries.<sup>26</sup> As we shall see later in the paper, the U.S. has been unable to conclude a full-fledged Free Trade Agreement with the Southern African Customs Union, (SACU), which objected to many of the commitments the U.S. wanted SACU to agree to. In addition, as already noted above, many developing countries have committed themselves to pursuing bilateral and regional trade agreements to promote their interests very much the same way that developed economies have. In so doing, they have mimicked the turn to bilateralism and regionalism pursued by the major trading partners by changing their policies and preferences in trade among themselves as well as with major trading partners.

This paper proceeds as follows. Part One briefly outlines the standard justifications in favor of bilateralism and regionalism in trade as well as the long litany of such agreements entered into by the United States and the European Union. This part will also discuss the Model Agreements used by the U.S. and E.U. and the type of commitments contained in them. Part 2 will proceed to examine the reasons that account for the unmistakable spike in bilateralism and regionalism in the recent past including forum shifting and the consequences this has had on the ability of developing countries to build coalitions around trade negotiations. These reasons are primarily rationalist. This Part also proceeds to examine two other reasons for the spread of bilateralism and regionalism: diffusion and mimicry as well as competition for resources and markets – or constructivism. Thus Part 2 demonstrates the simultaneous explanation for the rise or production of neo-liberalism in the core countries of the world on rationalist accounts, but also shows its diffusion or reception in the periphery can be accounted for by constructivist reasons as well. Part 3 will examine how the types of commitments being included in bilateral and regional trade agreements fortify the agenda of the Washington consensus with specific examples from the CARIFORUM Economic Partnership Agreement between CARIFORUM States and the EU as well as the US-Morocco FTA of 2003. This part also discusses the contrasting failure of the U.S.-SACU FTA and the recently concluded South Korea-US FTA. The paper ends with a conclusion.

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<sup>26</sup> In fact, statistical evidence suggests as much, *see* Ka Zeng, “Trade Structure and the Effectiveness of America’s ‘Aggressively Unilateral’ Trade Policy,” *available at* <http://isanet.ccit.arizona.edu/noarchive/Ka%20Zeng--Trade%20Structure.pdf>.

## PART ONE

### The Proliferation of Regional and Bilateral Trade Agreements

#### *Standard Justifications for Regionalism and Bilateralism*

As the summary of my arguments in the introduction reveal, this paper demonstrates that the traditional arguments<sup>27</sup> made in favor of bilateral and regional agreements are not the ones driving the current accelerated trend towards trade regionalism and bilateralism.<sup>28</sup> I will briefly outline some of these traditional justifications in favor of trade regionalism and bilateralism with a view to giving additional background context against which the claims I make in this paper may be seen.

There are at least three types of traditional justifications for bilateral and regional trade agreements. First, it is argued it is easier to create and implement bilateral and regional trade agreements, as opposed to multilateral agreements because great geographical differences between various regions can make global multilateral cooperation extremely complicated. Countries from each sector have different concerns and these concerns are not easily solved with an overarching multilateral trade agreement.

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<sup>27</sup> By traditional here, I mean arguments supporting trade regionalism or bilateralism that fail to or do not take into account that the overriding objectives of these agreements today are not the standard arguments in favor of free trade but much more mercantilist ideas of foreign market opening and job creation, a phenomenon that in the United States coincided with Laura Tyson's tenure as U.S. Trade Representative. See Laura D'Andrea Tyson, *WHO'S BASHING WHOM?: TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES* (1992).

<sup>28</sup> This paper shows the continued use of regional and bilateral agreements particularly by big economies as tools to pry open foreign markets while keeping their own closed. That trend for the U.S. began in earnest in the 1980's, J. Bhagwati, H.T. Patrick (eds), *AGGRESSIVE UNILATERALISM. AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* (1991); See also, Jagdish Bhagwati, *Fair Trade, Reciprocity and Harmonization: The New Challenge to the Theory and Policy of Free Trade*, in *ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM* 547-549 (A.V. Deardorff, R.M. Stern eds., 1994).

Bilateral and regional agreements, by contrast are argued to be ideal because they take into account the different conditions of particular regions.<sup>29</sup> Since each region has specific needs, countries can independently agree to accords that are beneficial to all parties involved.<sup>30</sup> Furthermore, because only the needs of a particular country or region are being negotiated, most agreements are reached much faster.<sup>31</sup> For example, coastal nations would have issues of interest that would not concern land-locked nations. Thus, it would be significantly simpler for these nations to resolve their issues in a bilateral or regional agreement than in a multilateral setting.

Second, and related to the foregoing is the claim that the cultural, geographical, and political proximity of countries involved also promotes the spread of bilateral and regional agreements.<sup>32</sup> Geographic and cultural proximity and affinity means neighboring countries have similar interests and have had strong ties with each other.<sup>33</sup> Thus, they can negotiate an agreement that is beneficial to all parties involved at a much faster pace than in a multilateral forum.<sup>34</sup>

Third, it is argued that rules of the multilateral trading system allow the existence of regional and bilateral trade agreements under certain conditions. Indeed, both the General Agreement on Trade and Tariffs, (GATT), and the General Agreement on Trade in Services, (GATS), permit the creation of Regional Trade Agreements, (RTAs) under certain conditions.<sup>35</sup> Article XXIV of GATT provides that “contracting parties recognize

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<sup>29</sup>See Paul Bowles & Brian MacLean, *Understanding Trade Bloc Formation: The Case of the ASEAN Free Trade Area*, 3 Rev. Int’l Pol. Econ. 319 (explaining benefits received by ASEAN nations by negotiating as a bloc).

<sup>30</sup> See *id.*

<sup>31</sup>See Nathalie Chalifour, *Global Trade Rules and the World’s Forests: Taking Stock of the World Trade Organization’s Implications for Forests*, 12 Geo. Int’l Env’tl. L. Rev. 575, 583 n.52 (citing Pierre Marc Johnson & Andre Beaulieu, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* (1996)).

<sup>32</sup> See Sanford Gaines, *Environmental Protection in Regional Trade Agreements, Realizing the Potential*, 28 St. Louis U. Pub. L. Rev. 253 (addressing the use of RTAs to further regional awareness and protection of the environment especially for “countries close enough to each other that environmental behavior in one country may have a direct effect on another.” Thus, nations with a close political proximity can use regional trade agreements to further issues of interest to each other).

<sup>33</sup> See Matthew Barrier, *Regionalization: The Choice of a New Millenium*, 9 Currents Int’l Trade L.J. 25.

<sup>34</sup> Chalifour, *supra* note 31.

<sup>35</sup> I examine at length the controversy relating to the permissibility of such agreements in James Gathii, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* (forthcoming 2010).

the desirability of increasing freedom of trade by development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.”<sup>36</sup> GATS has similar provisions concerning services or service suppliers. In addition, the “Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries” allows developing countries to extend preferences to each other without offering the same preferences to other members.<sup>37</sup> As I will show in Part II, these standard justifications for regional and bilateral trade agreements differ from the more immediate reasons that account for the contemporary rise of these agreements.

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

Currently, the United States has free trade agreements (FTAs) in effect with 17 nations.<sup>38</sup> Of these, 11 FTAs are bilateral agreements. The U.S. also has free trade agreements with regional blocks including under the North American Free Trade Agreement (NAFTA) and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).<sup>39</sup>

The first bilateral FTA, between the United States and Israel, went into effect in 1985.<sup>40</sup> This was followed, over fifteen years later, by the U.S.-Jordan bilateral agreement which became effective in 2001.<sup>41</sup> From 2003 to 2009, the U.S. entered into more FTAs

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<sup>36</sup> General Agreement on Tariffs and Trade of 1947, Art. XXIV, ¶ 4, Oct. 30, 1947, 1 B.D.I.E.L. [hereinafter GATT 1947].

<sup>37</sup> See World Trade Organization, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, available at [http://www.wto.org/English/docs\\_e/legal\\_e/enabling1979\\_e.htm](http://www.wto.org/English/docs_e/legal_e/enabling1979_e.htm).

<sup>38</sup> Office of the United States Trade Representative, Free Trade Agreements, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

<sup>39</sup> See *id.*

<sup>40</sup> Office of the United States Trade Representative, Israel Free Trade Agreement, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/israel-fta>.

<sup>41</sup> Office of the United States Trade Representative, Jordan Free Trade Agreement, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta>.

including with Jordan and Vietnam in 2001; Singapore and Chile in 2004; Australia in 2005; Morocco and Bahrain in 2006; and Peru and Oman in 2009.<sup>42</sup>

The United States has also signed free trade agreements with– Columbia (2006), South Korea (initially concluded in 2007), and Panama (2007) – that Congress has yet to ratify.<sup>43</sup> Negotiations on the South Korean FTA were concluded in early December 2010.<sup>44</sup> Negotiations had begun but were suspended with Thailand, and continuing negotiations are undergoing with “Malaysia, the United Arab Emirates, and the Southern African Customs Union (SACU) - which includes Botswana, Lesotho, Namibia, South Africa, and Swaziland.”<sup>45</sup>

### *Regional Initiatives*

In addition to pursuing bilateral trade agreements, the U.S. has entered into regional trade agreements including: the U.S. ASEAN Trade and Investment Framework Agreement, which was concluded in 2006; the U.S. Trans Pacific Partnership (TPP) Free Trade Agreement, that is currently under re-negotiation; the Dominican Republic-Central America-United States Free Trade Agreements (CAFTA-DR), which has been in effect since 2004 between the U.S., El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic and Costa Rica; and, the North American Free Trade Agreement (NAFTA) which has been in effect since 1994 between the U.S., Canada, and Mexico.<sup>46</sup>

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<sup>42</sup> Free Trade Agreements, *supra* note 38.

<sup>43</sup> *See id.*

<sup>44</sup> Associated Press, “Obama Hails S. Korea Trade Deal as Victory for US Workers,” Dec. 4, 2010 available at [http://www.google.com/hostednews/ap/article/ALeqM5gZDujKl7Z5Iuu0BkZ4tiEl\\_jztSg?docId=43f16a7ce994480b65389021a5d5e50](http://www.google.com/hostednews/ap/article/ALeqM5gZDujKl7Z5Iuu0BkZ4tiEl_jztSg?docId=43f16a7ce994480b65389021a5d5e50).

<sup>45</sup> *See* U.S. Exports, <http://www.export.gov/fta/>. The President’s Export Council has made it an objective to “Use bilateral trade policy mechanisms to expand market-opening opportunities. Bilateral trade policy mechanisms, such as FTAs, Trade and Investment Framework Agreements, Joint Committees on Trade and Investment, and Bilateral Consultative Mechanisms, can be used to create new market opportunities with other key trading partners,” *see* President’s Export Council, *Report to the President on the National Export Initiative: The Export Promotion Cabinet’s Plan to Double Exports in Five Years*, Sept. 10, 2010 available at [http://www.whitehouse.gov/sites/default/files/nei\\_report\\_9-16-10\\_full.pdf](http://www.whitehouse.gov/sites/default/files/nei_report_9-16-10_full.pdf) ) at page 49.

<sup>46</sup> *See* Free Trade Agreements, *supra* note 38.

### *Trade and Investment Framework Agreements (TIFAs)*

The U.S. also has forty-four trade and investment framework agreements: 11 in Africa; 16 in Europe and the Middle East; 4 in South and Central Asia; 9 in South East Asia; and 4 in the Americas.<sup>47</sup> According to the United States Trade Representative, TIFAs “provide strategic frameworks and principles for dialogue on trade and investment issues between the United States and the other parties to the TIFA.”<sup>48</sup> They also establish a framework for expanding trade and a mechanism for resolving outstanding disputes with signatory countries.

### *Bilateral Investment Treaties (BITs)*

The U.S. also signs BITs to guarantee U.S. investors favorable terms and conditions for private investment under international law. BITs guarantee fair and equitable treatment for investors as well guarantees against discriminatory treatment and expropriation as well as guaranteeing investor dispute settlement through international arbitration. Currently, the U.S. has BITs with 83 nations.<sup>49</sup>

### *Model Agreements*

Both the U.S. and the E.U. have model FTAs/EPAs and Model BITs. Unlike NAFTA, the U.S. FTA model is a WTO-Plus Model which contain extensive obligations while also extending trade rules to many new areas. The obligations included in a typical U.S. Model FTAs cover a broad range of areas. Here is a typical list:

- National Treatment and Market Access for Goods
- General Rules of Origin
- Sector Specific Rules of Origin
- Customs Procedures
- Energy
- Agriculture

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<sup>47</sup> See Office of the United States Trade Representative, Trade and Investment Framework Agreements, available at <http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements>.

<sup>48</sup> *Id.*

<sup>49</sup> See Trade Compliance Center, [http://tcc.export.gov/Trade\\_Agreements/Bilateral\\_Investment\\_Treaties/index.asp](http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp).

- Standards
- Trade Measures
- Government Procurement
- Investment
- Services
- Competition Policy
- Temporary Entry
- Intellectual Property

While NAFTA was primarily intended to liberalize trade in goods, today's Model FTAs clearly go beyond that and have extensive obligations in areas such as trade in services. They also include obligations in areas that developing countries have blocked at the WTO, such as government procurement and competition policy. For this reason, these trade treaties are designed to advance economic reforms such as liberalization, deregulation and privatization that favor U.S. business interests and consumers in the countries that sign them. As some commentators have noted BITs in particular are the "Bills of Rights" for foreign investors that guarantee rights of access and due process rights in signatory countries that are backed by binding international arbitration.<sup>50</sup> Further, the negotiations of BITs and FTAs are increasingly covering the same subject matter. For example, a standard U.S. FTA covers investment protection. This convergence of BITs and FTAs is helping the E.U. and the U.S. to de-fragment the distinctions between trade and investment and create stronger rights and protections for investors.

### **Economic Partnership Agreements (EPAs) and E.U.'s Global Europe Strategy**

The E.U. has also taken significant steps to protect its economic interests with other nations through regional and bilateral trade agreements. The current negotiations on Economic Partnership Agreements (EPAs) with African, Caribbean and Pacific States

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<sup>50</sup> Jose Alvarez, *North American Free Trade Agreement's Chapter Eleven*, 28 U. Miami Inter-Am. L. Rev. 303, 308 (also arguing that NAFTA is a "bilateral investment treaty on steroids," *id.* at 304). This theme is further echoed in Philippe Sands, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR* 117-42 (2005) (noting the tendency to interpret international investment rules in isolation of other international law rules and to give priority to investor rights over rules that protect human rights and the environment).

exemplify this quite well.<sup>51</sup> The E.U.'s agenda is embodied in the October 2006 Global Europe Strategy. The primary goal of this strategy is to make Europe more competitive by giving "a sharper focus on market opening and stronger rules in new trade areas of importance to the [E.U.], notably intellectual property (IPR), services, investment, public procurement and competition."<sup>52</sup> In this Strategy, the EU declared the need for comprehensive trade agreements that would uphold the need to protect the competitiveness of EU's markets while safeguarding EU export interests through tariffs and non-tariff barriers.<sup>53</sup>

The Economic Partnership Agreements of the E.U. are similar to the U.S. Model FTA in a number of respects. While the U.S. has a greater interest in using trade agreements to advance its foreign policy and national security goals, the E.U. primarily uses regional and bilateral trade agreements to protect its economy and to advance the competitiveness of its industries in the global market.<sup>54</sup> Accordingly, the E.U. arguably takes it as granted that its "commercial interests correspond to the development needs" of the countries it signs bilateral or regional agreements with.<sup>55</sup> As of December 2010, the E.U. is currently negotiating with or has interim agreements with at least 24 states, but it currently only has a comprehensive EPA with the CARIFORUM countries - a Caribbean regional group of 15 full member countries (the agreement is not signed by Haiti).<sup>56</sup> This CARIFORUM-EC EPA is the first trade agreement that has been concluded using the template approved

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<sup>51</sup> Negotiations of EPA's were triggered by a clause in the Cotonou Agreement between the EU on the one part and African, Caribbean and Pacific states, on the other, following a decision of the WTO Dispute Settlement Body requiring these parties to negotiate WTO compliant trade agreements.

<sup>52</sup> World Trade Organization, *Trade Policy Review: Report by The European Communities* 11 (2007), available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/g177\\_e.doc](http://www.wto.org/english/tratop_e/tpr_e/g177_e.doc).

<sup>53</sup> See European Commission, *GLOBAL EUROPE, COMPETING IN THE WORLD* (2006), available at [http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130376.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf) [hereinafter, "Global Europe Strategy"].

<sup>54</sup> See JANE KELSEY, *ANALYSIS OF THE LEGAL RISKS IN TITLE II SERVICES & INVESTMENT OF THE CARIFORUM-EC EPA*, 27 (forthcoming 2010).

<sup>55</sup> *Id.* at 28; see also *Global Europe Strategy*, *supra* note 53, at 12 ("We will also take into account the development needs of our partners and the potential impact of any agreement on other developing countries, in particular the potential effects on poor countries' preferential access to EU markets. The possible impact on development should be included as part of the overall impact assessment that will be conducted before deciding to launch FTA negotiations. In line with our position in the WTO, we will encourage our FTA partners to facilitate access by least-developed countries to their market, if possible by granting duty and quota free access").

<sup>56</sup> See ACP-EU Trade Website, <http://www.acp-eu-trade.org/index.php?loc=epa/>.



by the Council of Europe and therefore is an example of the template that the E.U. will use in other similar agreements.

Some key elements of the CARIFORUM-EC EPA include:

1. The CARIFORUM nations agreed to liberalize 86.9% of the imports from the E.U. within 25 years, 82.7% within the first 15 years, while they previously only allowed 51% of imports from the E.U. to remain duty free before the agreement.
2. CARIFORUM nations will be allowed a transition period of up to 25 years on some products and can use a general moratorium for the first three years of the Agreement.
3. CARIFORUM nations will be able to maintain Other Duties and Charges (ODCs) for up to seven years of the agreement, before they must phase out them during the subsequent three years.
4. “Regional Preference” will apply to any concession that is granted to one country, so that it may be applied to all countries.
5. The E.U. will liberalize 94% of its services sector; CARIFORUM countries will liberalize 75% and lesser developed countries (LDC) will liberalize 65%.<sup>57</sup>

The CARIFORUM EPA has been held out as a ‘Trade Partnership for Sustainable Development’ – emphasizing its objective to be one of sustainable development of all parties to that agreement. There are reasons to doubt this as I note below.

The E.U.’s Model Economic Partnership Agreements (EPAs) contain similar elements to the U.S. Model FTA. However, the E.U.’s Model EPA is viewed as less radical than the US template. “[F]or example, the U.S. insists on a negative list approach to schedules of sectoral commitments, listing sectors and measures that are excluded, and the inclusion of investment expropriation provisions that can be enforced through investor-initiated arbitration.”<sup>58</sup> This type of a schedule system makes certain that all new services will be covered automatically, excluding only those that have been specifically excluded. The E.U., on the other hand, takes a “positive list approach” that details specific sectors for

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<sup>57</sup> Errol Humphrey, Ambassador of Barbados & Vice-Dean of the CARIFORUM College of EPA Negotiators, Presentation to a DG Trade-organized workshop on *CARIFORUM EPA Negotiations: Initial Reflections on the Outcome*, (Feb. 13, 2008), available at [http://trade.ec.europa.eu/doclib/docs/2008/april/tradoc\\_138606.pdf](http://trade.ec.europa.eu/doclib/docs/2008/april/tradoc_138606.pdf).

<sup>58</sup> Kelsey, *supra* note 54, at 24.

commitments. This allows the E.U. to implement new sectors according to the plan of the agreement and does not automatically include sectors not explicitly included.

### *Choice of Countries/Regions*

Countries chosen by the U.S. and E.U. for regional and bilateral agreements are generally those with which they have a trade surplus – countries over whom they exercise vast amounts of market power over.<sup>59</sup> Thus, the U.S. and E.U. can use this advantage to control the direction of the negotiations and the commitments entered into in the agreements. The best example of such an agreement is the U.S.-Morocco FTA (January, 2003) – which the Bush administration argued to be a yardstick for future negotiations.<sup>60</sup> I will discuss the U.S.-Morocco FTA in Part III below.

The converse is also true. The United States Congress seems hesitant to accept trade agreements with nations that the U.S. has a deficit. An example of this seen is the U.S.-Korea FTA that is currently stuck in Congress and that in late 2010 resulted in a breakthrough.<sup>61</sup> The U.S. and the E.U. have a much easier time negotiating trade agreements with countries that are dependent on their economies as an export markets. This is because these large economies can exercise their market power to get concessions from countries with an interest in maintaining or getting access to their large market. By contrast, it is harder for these large economies to negotiate trade treaties with countries with a trade surplus in their economies because neither the U.S. nor the E.U. can exercise

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<sup>59</sup>Notably, market power may not always be determinative. On this, see my discussion of the failed SACU-US FTA. *See also*, Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, in *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* 219 (John S. Odell, ed., 2006).

<sup>60</sup> *See* Office of the United States Trade Representative, Morocco Free Trade Agreement, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta>.

<sup>61</sup> *See* Office of the United States Trade Representative, Korea-U.S. Free Trade Agreement, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>. *See also* Office of the United States Trade Representative, Korea, *available at* <http://www.ustr.gov/countries-regions/japan-korea-apec/korea> (detailing U.S. goods trade deficit with Korea to be \$10.6 billion in 2009). *See also* Associated Press, “Obama Hails S. Korea Trade Deal as Victory for US Workers,” Dec. 4, 2010 *available at* [http://www.google.com/hostednews/ap/article/ALeqM5gZDujK17Z5Iuu0BkZ4tiEl\\_jztSg?docId=43f16a7cec994480b65389021a5d5e50](http://www.google.com/hostednews/ap/article/ALeqM5gZDujK17Z5Iuu0BkZ4tiEl_jztSg?docId=43f16a7cec994480b65389021a5d5e50).

the same amount of market power against such economies. South Korea has a trade surplus in both the E.U. and the U.S. The EU nevertheless has signed a free trade deal with South Korea, even though it “runs a deficit with South Korea in goods trade.”<sup>62</sup> However, the EU agreed to sign the agreement after it secured a concession to place a safeguard clause that allows it to take emergency measures if the increased imports from South Korea would “cause serious injury, or threat thereof, to the domestic industry.”<sup>63</sup> Therefore, even though the EU agreed to sign a free trade agreement with a country with which it has a deficit, it used its negotiating experience to its advantage.

## PART II

### Accounting for the Turn to Regional Trade Agreements

In this part of the paper, I examine the reasons that account for the unmistakable commitment among major trading powers like the U.S. and the E.U. to turn to regional trade agreements. Notably, the BRIC, (Brazil, Russia, India and China), have not been left out of this trend and I refer to some of their bilateral and regional trade initiatives a little further below.<sup>64</sup>

#### *Forum Shifting*

The continued breakdown of WTO negotiations as indicated by the collapse of Ministerial meetings in Seattle in 1999, and in Cancun, Mexico in 2003 has led to a shift in focus by developed nations towards the regional and bilateral agreements to further

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<sup>62</sup> See Press Release, European Commission: Trade, EU and South Korea Sign Free Trade Deal (Oct. 6, 2010), *available at* <http://trade.ec.europa.eu/doclib/press/index.cfm?id=626>.

<sup>63</sup> EU-Korea Free Trade Agreement, Eur. Union.-S. Korea, art. 3, Oct. 6, 2010, *available at* [http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc\\_145160.pdf](http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145160.pdf). Safeguard acts are a mechanism created under GATT Article XIX, under which a WTO member may take action to protect specific industries from any imported product or products that is causing, or threatens to cause, serious injury to an industry. World Trade Organization, Safeguard Measures, *available at* [http://www.wto.org/english/tratop\\_e/safeg\\_e/safeg\\_e.htm](http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm).

<sup>64</sup> For more China in Africa, *see* Gathii, *supra* note 35.

goals that have been slowed down or frustrated at the WTO. The ministerial conference in 1999 was cancelled, and negotiations stalled since there was little agreement among the countries and as a result of large protest activities outside the conference building.<sup>65</sup> In Cancun, the negotiations collapsed again. In Cancun, there was a lack of willingness to negotiate the Singapore issues on the part of developing countries.<sup>66</sup> The Singapore issues refer to four issues – competition policy, trade facilitation, investment liberalization, and government procurement.<sup>67</sup> In July 2004, three of the Singapore issues – investment, competition, and government procurement – were by agreement dropped from the Doha agenda. Negotiations for trade facilitation would continue.<sup>68</sup> As one commentator noted, this “ended, for the time being, the developed countries’ attempt to greatly expand the WTO by introducing three new major areas of liberalization.”<sup>69</sup> Agriculture has also become one of the most important and hotly debated issues in these negotiations.<sup>70</sup> Developing countries have argued that agricultural subsidies particularly in the U.S. and the E.U. create an insuperable barrier for them to sell their agricultural goods.<sup>71</sup> The wide differences between the developed nations and developing nations on

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<sup>65</sup> Joseph Kahn, *Swiss Forum Has Its Focus on Memories From Seattle*, N.Y. Times, Jan. 29, 2000, available at <http://www.nytimes.com/2000/01/29/business/international-business-swiss-forum-has-its-focus-on-memories-from-seattle.html?scp=2&sq=protest+seattle+wto+collapse&st=nyt>.

<sup>66</sup> Ian Fergusson, *World Trade Organization Negotiations: The Doha Development Agenda*. CRS Report for Congress, Jan. 18, 2008, Page 4, available at <http://www.nytimes.com/2003/09/10/opinion/showdown-in-cancun.html?scp=2&sq=+developing+nations+cancun&st=nyt>.

<sup>67</sup> Ian Fergusson, *CRS Report RS21664: The WTO Cancun Ministerial 5-6*, Congressional Research Service, November 6, 2003, available at <http://congressionalresearch.com/RS21664/document.php?study=The+WTO+Cancun+Ministerial>.

<sup>68</sup> Martin Khor, *Analysis of the Doha Negotiations and the Functioning of the WTO* (draft version), South Centre (2009), available at [http://www.southcentre.org/index.php?gid=1678&option=com\\_docman&task=doc\\_download](http://www.southcentre.org/index.php?gid=1678&option=com_docman&task=doc_download) (explaining the development of the Doha Agenda on an issue-by-issue basis).

<sup>69</sup> *Id* at 8.

<sup>70</sup> Elizabeth Becker and Ginger Thompson, *Poorer Nations Plead Farmers’ Case at Trade Talks*, N.Y. Times, Sept. 11, 2003, available at <http://www.nytimes.com/2003/09/11/world/poorer-nations-plead-farmers-case-at-trade-talks.html?scp=3&sq=agriculture+wto&st=nyt>. See also Committee on Trade and Development, *Note by the Secretariat, Developmental Aspects of the Doha Round of Negotiations*, WT/COMTD/W/143/Rev.4 (Aug. 19, 2010) (“Agriculture plays an important role in the development of many WTO Members. For a large number of developing countries and least-developed countries (LDCs), agriculture made a significant contribution to their economies, including its direct contribution to gross domestic production, export revenue and employment as well as to rural development and livelihood security... However, many of the world’s agricultural producers are currently disadvantaged in the world trading environment because of high tariff barriers and competition from producers that receive high levels of domestic or export-related support.”).

<sup>71</sup> Khor, *supra* note 68, at 22. See also Kevin C. Kennedy, *The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa’s Cotton Farmers?*, 14-WTR Kan. J.L. & Pub. Pol’y 307 (holding that although the United States production costs for cotton “are higher, with the help of domestic and export subsidies, U.S. cotton growers – the

these and related issues continue to make it unlikely that current WTO negotiations will be successfully concluded any time soon.<sup>72</sup>

In a sense, the current stalemate in the Doha Round of negotiations primarily pits developing countries on the one hand, and developed countries, on the other. Developed countries subscribe to a vision of development which many developing countries contest. Developing countries argue that developed nations have been inattentive to issues of development, by insisting on a model of trade and development that prioritizes economic growth through increased export trade at the expense of other development objectives such as the protection of the weak and vulnerable.<sup>73</sup> In fact developing countries argue that their development prospects would be much better addressed by removing agricultural subsidies in developed country markets, ensuring access to affordable essential medicines for epidemics such as HIV/AIDS, continuing special and differential treatment of developing for their products, produce and services, and putting in place a special safeguard mechanism (SSM) for their agricultural products – an issue that led to break down of Doha round negotiations in Geneva in July 2008.<sup>74</sup>

As a result of these differences between the priorities of developing and developed countries, developed nations have in a large measure shifted forums towards bilateral and regional agreements. Forum-shifting is a strategy that “attempt[s] to alter the status quo by moving treaty negotiations, law-making initiatives, or standard setting activities from

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world’s largest exporters of cotton – suppress and depress the price of cotton on world markets by increasing its supply through overproduction.” This creates a market that is unprofitable for least-developed countries, for whom cotton and agriculture play greater roles than it does for industrialized countries).

<sup>72</sup> See Khor, *supra* note 68. See also Martin Khor, “Long Stalemate Ahead for WTO Talks, South Centre”, available at: [http://www.southcentre.org/index.php?option=com\\_content&view=article&id=1274%3Asb46a1&catid=144%3Asouth-bulletin-individual-articles&Itemid=287&lang=en](http://www.southcentre.org/index.php?option=com_content&view=article&id=1274%3Asb46a1&catid=144%3Asouth-bulletin-individual-articles&Itemid=287&lang=en).

<sup>73</sup> See James Thuo Gathii, *Process and Substance of WTO Reform*, 56 Rutgers L. Rev. 885, 902 (explaining the United States and E.U.’s underestimation of how well organized developing countries were at the Cancun Ministerial).

<sup>74</sup> See Ian Fergusson, *World Trade Organization Negotiations: The Doha Development Agenda* at 9 - 17. See also, Note by Secretariat, *Developmental Aspects of the Doha Round of Negotiations*, *supra* note 70 (explaining that even in the March 2010 stocktaking report, “[m]embers have not been in a position to substantively resolve matters...”).

one international venue to another.”<sup>75</sup> Forum shifting allows countries to choose a new forum where they will encounter less concerted resistance to their agenda, which in turn gives them more wiggle room to achieve their objectives more readily.<sup>76</sup>

Forum shifting, through the use of regional and bilateral trade agreements, has yielded successful outcomes for developed countries. For example, even though the Singapore issues were dropped from the Doha agenda, they are now being pursued through bilateral and regional trade agreements.<sup>77</sup> Global Europe Strategy makes it a priority for the EU to pursue issues of investment, competition, and government procurement in its EPAs with African, Caribbean and Pacific countries as we saw above. Negotiating objectives that were unsuccessful in the WTO therefore become part of the EU’s strategy in bilateral and regional trade agreements. Further, according to the EU, EPAs are also tools for “tackling issues which are not ready for multilateral discussion.”<sup>78</sup> Thus objectives, beyond the Singapore issues such as enhanced intellectual property protection and financial liberalization, which are not formally part of the Doha negotiating agenda are being negotiated through bilateral or regional agreements such as the EPAs.<sup>79</sup> For developed countries therefore, regional and bilateral agreements are increasingly the venue to achieve objectives that are difficult, if not impossible, to achieve at the multilateral level.<sup>80</sup>

As I will note in a little more detail below, the competition for new bilateral and regional trade agreements has made countries that have no bilateral or regional agreements to

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<sup>75</sup> Anke Dahrendorf, “Global Proliferation of Bilateral and Regional Trade Agreements: A Threat for the World Trade Organization and/or for Developing Countries”, Maastricht Faculty of Law Working Paper No. 6, 15 (2009), available at SSRN: <http://ssrn.com/abstract=1382820> (Draft) (quoting L.R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Yale J. Int’l L. 1, 14).

<sup>76</sup> *Id.* at 16. (Anke Dahrendorf believes that these agreements do not preclude discussion of these issues in a multilateral forum. Instead, these agreements are seen to function as a “laboratory” for future multilateral agreements).

<sup>77</sup> Khor, *supra* note 68, at 9.

<sup>78</sup> Global Europe Strategy, *supra* note 53, at Ch. 4.2 (ii).

<sup>79</sup> *Id.*

<sup>80</sup> “The representative of El Salvador remarked that RTAs represented an instrument to achieve deeper trade liberalization, and more recently, to strengthen relationships between countries beyond trade.” Committee on Regional Trade Agreements, *Note on the Meeting of 15-16 March 2010*, WT/REG/M/56 (Mar. 23, 2010).

begin seeing themselves as “losers” since their products may not be receiving the preferential treatment or trade concessions that other countries have negotiated.<sup>81</sup> Indeed, even the Obama administration seems to have come to the same view that the U.S. economy will suffer if the U.S. does “not join the wave of PTAs.”<sup>82</sup>

Lawrence Helfer has argued, that “regime shifting might actually serve the industrialized states’ interests by diverting attention and resources from potentially effective treaty making efforts in [multilateral forums such as] WIPO or the WTO while simultaneously creating the appearance of sharing developing countries’ concerns.”<sup>83</sup> On this view, multilateral trade negotiations leave all countries better off than bilateral and regional trade agreements do. One scholar has summarized some of the varied perspectives on the merits and demerits of bilateral and regional agreements versus multilateral trade agreements in the following terms:

For too many years, multilateralists have argued that bilateral trade negotiations are a ‘stumbling block’ to the development of a WTO-sponsored trade agreement, political leaders have argued that bilateral trade negotiations are a ‘building block’ towards a WTO-sponsored trade agreement, and the WTO has essentially argued that bilateral trade negotiations are a building block and a stumbling block.<sup>84</sup>

The deadlock and stalemate in WTO negotiations in areas of importance to developing countries contrasts sharply with the success developed countries are often able to eke out in bilateral and regional trade deals.<sup>85</sup> Indeed, it is more likely that developing countries would prevail to have the EU and United States reduce agricultural subsidies at the WTO than in bilateral and regional trade agreements. In fact, concessions in reducing developed country agricultural subsidies are a crucial precondition for success of multilateral negotiations. Some scholars have argued that developing countries may regard WTO negotiations as not being worth the effort if such concessions cannot be

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<sup>81</sup> See Fredrick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism A Threat?*, 10 J. Int’l Econ. L. 571, 577-78.

<sup>82</sup> *Id.*

<sup>83</sup> Lawrence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of Intellectual Property Lawmaking*, 29 Yale J. Int’l Law 56, 57. See also, Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. Ottawa L. & Tech. J. 125.

<sup>84</sup> L. Crump, *Global Trade Policy Development in a Two-Track System*, 9 J. Int’l Econ. L. 487, 510.

<sup>85</sup> See generally, Khor, *supra* note 68.

won.<sup>86</sup> For the moment therefore, forum shifting is more advantageous to the agenda of developed countries and yields little by way of results for developing countries. Moreover, once countries with little trade negotiating capacity focus away from multilateral trade negotiations, issues that could have been pushed to fruition might get ignored or be given less than full attention as more attention and resources are devoted to negotiating regional and bilateral trade agreements.

In addition, there is often no clear understanding of the impact that issues negotiated in bilateral agreements and regional trade agreements will have on multilateral trade system.<sup>87</sup> Countries that have already entered into regional trade agreements are only now looking back to understand the effects these agreements will have on their economies and on the world trading system.<sup>88</sup> The Committee on Regional Trade Agreements has begun using the Transparency Mechanism<sup>89</sup> to take a close look at RTAs with a view to figuring out their merits and demerits and to make recommendations in future RTA negotiations.<sup>90</sup>

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<sup>86</sup> See Abbott, *supra* note 81, at 581-82.

<sup>87</sup> On this, see Richard Baldwin and Phil Thornton, *MULTILATERALISING REGIONALISM: IDEAS FOR A WTO ACTION PLAN ON REGIONALISM*, (2008).

<sup>88</sup> Committee on Regional Trade Agreements, *Note on the Meeting of 14 June 2010*, WT/REG/M/57 (Jun. 24, 2010).

<sup>89</sup> The Transparency Mechanism for RTAs was established provisionally on December 14, 2006 to provide early announcement of any RTAs to the WTO. See World Trade Organization, *Transparency Mechanism for RTAs*, available at [http://www.wto.org/english/tratop\\_e/region\\_e/trans\\_mecha\\_e.htm](http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm).

<sup>90</sup> Committee on Regional Trade Agreements, *Note on the Meeting of 14 June 2010*, WT/REG/M/57 (June 24, 2010). See also Committee on Regional Trade Agreements, *Note on the Meeting of 15-16 March 2010*, at note 10 (“In [the view of the representative of the European Union], the analysis should be essentially factual and focus on some of the key elements in RTAs, such as of course export and import restrictions and charges, use of tariff rate quotas, rules of origin, safeguard measures, technical barriers to trade, and sanitary and phyto-sanitary measures, amongst others. He was also interested in the implementation of overlapping agreements, since in different parts of the world there had been "spaghetti bowls" or "noodle bowls" of overlapping RTAs. In this respect, more clarity was needed on how overlapping agreements were consistent with the multilateral trading system and how RTAs continued to constitute "building blocks" towards multilateral rules. The EU considered it very important to pursue this initiative and suggested the Secretariat coordinate with the OECD, which was also conducting comprehensive analytical work on multilateralizing regionalism in the area of trade in services. On the Annual Review of RTAs, he noted that such work would bring added value provided that it did not limit itself simply to the factual presentations that had been prepared and discussed in the past, but rather used a more comprehensive picture of RTAs concluded during a given year, identifying the trends that were observable. In addition, he suggested to pick up and provide information on RTAs that had not been notified, since this would offer important value added to any annual review of RTAs. In his view, any annual review should go beyond what had simply been produced during a given year in the routine work of the Committee. On the link with the rules negotiations, he pointed out that the factual information derived from an annual review could be useful as and when Members were ready to go back to the negotiating table.”).



*Forum Shifting Reduces Opportunities for Developing Country Coalitions*

As we saw above, the U.S. and E.U. have found that it is much easier to negotiate with countries individually or in small groups than at the WTO. This strategy serves the interests of developed nations well since they can use their market power to leverage negotiations to their advantage over much weaker economies. “[B]ilateralism favors those with more resources since it limits the ability of weaker states to form cross-issue alliances which could increase their ability to negotiate with richer States.”<sup>91</sup> Similarly, WTO adjudication in the Dispute Settlement Body increases the likelihood of developing countries to gaining better outcomes with developed countries than in bilateral negotiations.<sup>92</sup> By contrast, FTAs give powerful governments the opportunity to consolidate their vision of market governance through debt conditionalities, enforceable trade commitments and tied aid. An example is the Aid for Trade program, whose commitments had reached \$41.7 billion in 2008<sup>93</sup> which condition aid to subscribing to the package of reforms that big donors and lenders, including the international financial institutions, impose on developing countries. Aid for trade may further indebt developing economies and therefore undermine rather than contribute to poverty eradication.<sup>94</sup> FTAs therefore give powerful governments an opportunity to “more directly and less publicly [pressure] weaker governments to make extensive commitments.”<sup>95</sup>

At the Cancun WTO Ministerial Meeting of 2003 a coalition of developing countries emerged and helped to “block the adoption of an agreement which they view[ed] as

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<sup>91</sup> See DANIEL DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* (2007).

<sup>92</sup> See Christina L. Davis, “Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam,” in *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA*, 220 (John S. Odell, ed., 2006). Davis argues four mechanisms make this outcome likely: (i) a guarantee for the right to negotiate (ii) a common standard for evaluating outcomes (iii) option for several countries to join a dispute and (iv) incentives for states to change a policy found to violate trade rules, *id.*

<sup>93</sup> Committee on Trade and Development, *Note by Chairman: On the Meeting of 27 May 2010*, WT/COMTD/AFT/M/15, available at <http://docsonline.wto.org/DDFDocuments/t/WT/COMTD/AFTM15.doc>.

<sup>94</sup> *But see*, Dominique Njinkeu and Hugo Cameron (eds.), *AID FOR TRADE AND DEVELOPMENT* (2008).

<sup>95</sup> Kelsey, *supra* note 25, at 2.

largely ignoring their interests.”<sup>96</sup> Many large developing countries - including Thailand, Brazil and India - worked together to create block opposition against developed nations.<sup>97</sup> This was hailed as a victory for developing nations.<sup>98</sup> The resort to regional and bilateral trade agreements has taken away the potential to build coalitions like those at Cancun to advance the interests of developing countries. However, as we shall see below, it is still possible for groups of developing countries to advance their interests by declining to enter into trade agreements inimical to their interests.

The E.U.’s EPA with CARIFORUM countries is a good example of the E.U.’s success in negotiating effectively to get the concessions it wanted when it negotiates with developing countries grouped in a region. The E.U.’s negotiating positions at the WTO were continued in negotiations in the CARIFORUM negotiations. Unlike at the WTO, the CARIFORUM States did not have the bargaining advantage that could be accomplished by building coalitions with similarly situated countries. Thus, for example, the E.U. held fast to its position on labor mobility in its EPA with the CARIFORUM nations, as it had done with its negotiations with India by allowing only certain classes of immigrants access to E.U. In essence, the E.U. was able to negotiate an asymmetric deal in its favor.<sup>99</sup> The commitments that the E.U. won in the CARIFORUM EPA were significantly larger than those that the CARIFORUM states had committed to “in their GATS 1994 schedules and offered in the GATS 2000 negotiations; for example Suriname

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<sup>96</sup> Gumisai Mutame, *Hope Seen in the Ashes of Cancun: WTO Trade Talks Collapse, as Africa and Allies Stand Firm*, *Africa Recovery*, Vol. 17 #3 (Oct. 2003) at 900, available at: <http://www.un.org/ecosocdev/geninfo/afrec/vol17no3/173wto.htm>. See also Gathii, *supra* note 64.

<sup>97</sup> *Showdown in Cancun*, N.Y. Times, Sept.10, 2003, available at <http://www.nytimes.com/2003/09/10/opinion/showdown-in-cancun.html?scp=2&sq=+developing+nations+cancun&st=nyt>.

<sup>98</sup> James Thuo Gathii, *The High Stakes of WTO Reform*, 104 Mich. L. Rev. 1361, 1366 (explaining authors celebrating the fact that a coalition of twenty developing nations (called the “Group of 20” or “G20”) that prevented developed nations from forcing their agendas on developing nations). See also G-20 Ministerial Meeting, 19 March 2005, New Delhi, available at [http://commerce.nic.in/wto\\_sub/g20/pressrel.htm](http://commerce.nic.in/wto_sub/g20/pressrel.htm) (explaining importance of agricultural negotiations in the WTO and the need for developing countries to “garner collective strength if they are to succeed in eliminating the practices of a small group of rich nations that provide huge amounts of support and protection to their farmers, depress prices, gain undue market shares and compromise the food security and livelihoods of billions of farmers across developing countries.”).

<sup>99</sup> Kelsey, *supra* note 54, at 80-94. (Chapter 4 of the EPA seems to suggest entry for the elite or well educated classes of CARIFORUM states but holds multiple reservations and conditions that prevent many from making use of the access. Kelsey warns other ACP countries from seeking labor mobility as a gain from negotiating with the EU).

went from 15 to 75 percent, Grenada from 23 to 69 percent and Guyana from 19 to 82 percent.”<sup>100</sup>

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

The US approach is not developmental. When we engage in trade negotiations at the World Trade Organization, we make the point that countries open their economies to the extent that their economies are able to cope. We want to be able to phase liberalization, and exempt certain items. They want free trade now and they want everything. They want to retain the right to subsidise their agriculture. They have a template-based approach. One of their agencies conceded: ‘We don’t want to negotiate. We put a paper down and show you this is where you sign.’<sup>101</sup>

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

#### Other Reasons Accounting for Spread of Regionalism and Bilateralism

So far this paper has focused on how the breakdown of multilateral trade negotiations and incentives to shift negotiating venues has influenced the spread of bilateralism and regionalism. Part III below will focus on how this shift has been influenced by coercive techniques including conditionality in foreign aid and lending criteria or with a view to protecting their investment or expanding market opportunities through market opening for their exports. There are however other explanations for the spread of bilateralism and regionalism. Thus the spread of bilateralism and regionalism can be accounted for by constructivist and competition explanations. From this vantage point, none of these

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<sup>100</sup> *Id.* at 31.

<sup>101</sup> Michael Hamlyn, *US All-or-nothing Position Derails Free Trade Talks*, Business Report, Nov. 16, 2006.

theories is in itself determinative. Below, I examine these constructivist and competition accounts of the spread of bilateralism and regionalism in trade.

### Influence By Global Norms – Constructivist Explanations

Constructivism provides a sociological explanation for the spread of bilateralism and regionalism among countries in the periphery of the world trading system. Under this explanation, these countries are simply following a fad or the example of developed economies even though the benefits of bilateralism and regionalism have not been proved by any solid evidence.<sup>102</sup> Since bilateralism and regionalism have been constructed as being integral to economic growth, economies in the periphery of the world trading system have embraced them. Another manner in which constructivism is relevant is that it can account for the rise of bilateralism and regionalism in trade agreements from the preferences of the actors that stand behind and support the agenda in these agreements within the respective domestic domains before these preferences come to constitute those of the State and eventually of international society.<sup>103</sup> In other words, the neo-liberal ideas embedded in regional trade agreements are not simply a reflection of the material goals of interest groups, but are also culturally grounded ideals of a particular type of economic governance. These neo-liberal ideas are therefore as much constituted by the material interests –or the pursuit of power as realists and critics of neo-liberalism would argue - that stand behind them as much as the ideas and meanings attached to them both by those that shape them and those that are persuaded to adopt them as their own.<sup>104</sup> Thus

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<sup>102</sup> Frank Dobbin, Beth Simmons and Geoffrey Garret, *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 Ann. Rev. of Soc. 451. See also, Witold Henisz, Bennet Zelner and Mauro Guillen, “International Coercion, Emulation and Policy Diffusion: Market-Oriented Infrastructure Reforms, 1977-1999,” 70 *American Sociological Review* 871 – 897(2005) (arguing that emulation explains the diffusion patterns of market oriented reforms)

<sup>103</sup> Here I am influenced by Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 Int’l Org. 402. Wendt argues that “the raw materials out of which members of the state system are constituted is created by domestic society before states enter the constitutive process of international society,” *id.* at 402. Constructivists according to Wendt, “share a cognitive, intersubjective conception of process in which identities and interests are endogenous to interaction, rather than a rationalist-behaviorial one in which they are exogenous,” *id.* at 394.

<sup>104</sup> Notably, Claire Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 Mich. J. Int’l L. 673 argues that a modified constructivist approach can simultaneously acknowledge power and interests as well as how these are constituted, This is because access, process and transparency ameliorate the lack of inclusiveness in defining global norms, *id.* at 693-4. See also at 699

from a constructivist perspective, neo-liberalism in the core and periphery of the global economic system is produced in part by habits and expectations among actors and not simply or only on the basis of imposition. There is indeed been a convergence in academic and policy maker thinking about economic reforms in part motivated by similar concerns such as their concern for higher economic growth and greater efficiency in the provision of public services. While it is true that neo-liberalism initially almost exclusively depended on exogenous coercive imposition through conditionality in developing countries, today the tool-kit for its diffusion now includes the fact that third world States are self-consciously and increasingly re-defining their identities in terms of understandings and commitments consistent with neo-liberalism.<sup>105</sup> Many of these countries want to be seen as 'safe' for investment and are arguably adopting neo-liberal ideas as a strategic response to the fact that investors want the assurance of investing in economies where they have a chance to reap the highest returns. Thus countries that want to attract investment have to may adopt neo-liberal reforms independent of any direct coercion.

That is why some of the most neo-liberal leaning adherents are no longer exclusively based at the World Bank, the International Monetary Fund or in Washington or Brussels. Take one example. One of the most neo-liberal outposts in Africa is the small land-locked East African country, Rwanda. In 2010, the World Bank's *Doing Business: Reforming Through Difficult Times* report ranked Rwanda the world's top performer in the types of regulatory reforms that it had undertaken between June 2008 and May 2009 that made it easier for doing business.<sup>106</sup> Among the reforms Rwanda had put in place across seven of ten business regulation areas measured by the Bank were: reduction in the procedures to state a business to only two so that a new business could be started in three

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where the author argues that modified constructivism reintroduces national constituency preferences which helps secure compliance with its rules. Claire Kelly refers to this as the normative feedback loop. She however notes that such a loop is likely to be diluted when a State after forming its identity through the feedback of its domestic constituencies then has to negotiate with other States at the international level, *id.* at 721.

<sup>105</sup> Clearly as noted below, some of this redefinition is stage management with a view to accessing credit and capital. In addition, there is clearly self-interest in adopting such self-binding commitments as neo-liberalism as the reigning development paradigm. Such commitments are in turn rewarded in a variety of ways including aid and credit.

<sup>106</sup> World Bank, *Doing Business in 2010: Reforming Through Difficult Times* (2010).

days; reorganizing the property registry to reduce the time it takes to transfer property; adopting a more efficient import and export system; increasing investor protection and the range of assets that entrepreneurs can use as security to secure credit. Rwanda did not start adopting these types of neo-liberal reforms in 2008. The 2011 Doing Business Report noted that Rwanda was the second most improved business reformer over the last five years and had jumped 12 places to become the 58<sup>th</sup> ranked country in the 2011 index.<sup>107</sup> Clearly, Rwanda is not recently converted to neo-liberalism. Within the East African Community, Rwanda has been ahead of all the other members in allowing its economy to be open to citizens of other member States through the rights of residence and establishment while other member States like Tanzania have remained reticent.<sup>108</sup> In fact, a central plank of Rwanda's vision 2020 whose primary aim is to transform it into a middle income country is regional and international economic integration.<sup>109</sup> The other five pillars of this vision are a central part of the neo-liberal orthodoxy: private sector-led economy; good governance and a capable state; human resource development and a knowledge based economy; infrastructure development and productive and market-oriented agriculture.

Rwanda's economic reforms have been so impressive that western aid donors have ignored the political repression of the opposition in Rwanda.<sup>110</sup> This is also true of other economic reformers such as Uganda's Yoweri Museveni and to some extent Ethiopia's Meles Zenawi.<sup>111</sup> Clearly there are other factors at play here including the very powerful

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<sup>107</sup> World Bank, *Doing Business in 2011: Making a Difference for Entrepreneurs* (2011). For a skeptical view of these doing business reports, see Kevin E. Davis and Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 Law & Soc. Inquiry 1095.

<sup>108</sup> On the East African Community's Common Market Protocol which came into effect in July 2010, see Gathii, *supra* note 35.

<sup>109</sup> Republic of Rwanda, *Rwanda Vision 2020* (2010) available at <http://www.minecofin.gov.rw/docs/LatestNews/Vision-2020.pdf>

<sup>110</sup> See The Economist, "Efficiency Versus Freedom: The West Should Not Be Silent When , Such as Rwanda's, Squash the Opposition," Aug. 5, 2010 available at <http://www.economist.com/node/16743333>.

<sup>111</sup> See Jason McLure, "Why Democracy Isn't Working: Despite an Economic Renaissance, much of Africa is Drifting Toward a New Age of Authoritarianism," Newsweek, Jun. 18, 2010 available at <http://www.newsweek.com/2010/06/18/why-democracy-isn-t-working.html>. Museveni's re-election in February of 2011 resulted in a congratulatory message from the US State Department which also noted the limitations Museveni had placed on the opposition to campaign freely without intimidation, electoral irregularities such as voter bribery and use of state funds to help Museveni retain power as well as the fact there was no independent electoral commission in place. See Uganda's Elections, Press Statement, Philip J.

influences of donor agencies such as USAID and the UK's Department for International Development.<sup>112</sup> Undoubtedly, there are African government bureaucrats, civil society groups and organizations whose budget lines depend on these market oriented donors and who invariably subscribe to neo-liberalism for self-interested reasons. Small countries like Rwanda may adopt neo-liberalism and seek to reproduce it for selfish reasons such as attracting foreign investment. After all, adoption of neo-liberalism has become embraced within a community of mutual recognition that includes prospective investors and business intermediaries such as banks and insurance companies.<sup>113</sup> Adoption of neo-liberalism for these actors also serves as a signaling device that their investments would be protected in that country.<sup>114</sup>

Another reason for the subscription to neo-liberalism is that there is a much broader group of economists, including in the Rwandese government, that have studied in economics departments that fully subscribe to neo-liberal economic reformism and believe in the efficacy of its ideals since the late 1980s. Yet, clearly neo-liberalism has come to be adopted by this wide array of actors through collective meanings in their interactions with each other which cannot be solely accounted for by an essentialist narrative of imposition.<sup>115</sup> Once created, these understandings or inter-subjective understandings and expectations may come to acquire a self perpetuating character.<sup>116</sup> All the time, such understandings leave the various actors with freedom to choose these ideas or not to. This is consistent with accounts of neo-liberalism as practiced through World Bank or IMF conditionality, not as one-way street imposition on recipient countries on a

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Crowley, Assistant Secretary, Bureau of Public Affairs, State Department, Washington DC, February 27, 2011 available at <http://www.state.gov/r/pa/prs/ps/2011/02/156940.htm>

<sup>112</sup> *Id.* See also Dambisa Moyo, *DEAD AID: HOW AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA* (2009).

<sup>113</sup> On community of mutual recognition, see Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 *Int'l Org.* 413.

<sup>114</sup> See Beth Simmons, *Money and the Law: Why Comply With the Public International Law of Money*, 25 *Yale J. Int'l L.* 323, 342 (arguing that the IMF uses its sanctioning power sparingly since most States comply with IMF policies since compliance signals that their money is safe and non-compliance would make their countries uncompetitive).

<sup>115</sup> Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 *Int'l Org.* 410 (cites Richard Ashley and argues that collective identities are far 'from being exogenously given' constituted by intersubjective knowledge that is "constructed everyday by processes of 'social will formation'," *id.* at 410.

<sup>116</sup> *Id.* at 411

take it or leave it basis, but rather as a bargaining and negotiating process determining the level or borrowed amounts and conditions between borrower governments, on the one hand, and the World Bank and IMF, on the other.<sup>117</sup> Robert Wade has shown how East Asian governments such as Taiwan bought into the Washington consensus but on the ground implemented a vision of economic governance at variance with their professed commitment to neo-liberalism.<sup>118</sup> This insight about the strategic appropriation of neo-liberalism dovetails with Alvaros Santos account of the wide-ranging appeal of the World Bank's rule of law projects since the vague definition of what the rule of law really means not only obscures tensions within it, but appeals to local businesses who favor a favorable business environment; public officials and political parties because of its promise to reduce corruption; to judges who seek to use the resources provided to increase their professional status; to legal scholar who serve as consultants; lawyers who can then have more clients; to NGO activists because of the promise to not only combat corruption but increase access to justice for the poor, women and disenfranchised.<sup>119</sup>

Conceiving bilateralism and regionalism as contemporary global norms that are experiencing diffusion from its site of production within the intersices of the Washington consensus and its diffusion to sites of reception regardless of whether a country is developed or not has been documented in the past with regard to other fads.<sup>120</sup> Thus, scholars have shown that countries are “more likely to ratify women's rights conventions

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<sup>117</sup> Paul Mosley, Jane Harrigan and John Toye, *AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING*, vol. 1 (2d ed.1995) (arguing that the best way to understand policy-conditioned loans was as a ‘dynamic bargaining process,’ *see* Preface at xiii).

<sup>118</sup> Robert Wade, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990).

<sup>119</sup> On dissensus within the World Bank, *see* Alvaro Santos, “The World Bank's Use of the ‘Rule of Law’ Promise in Economic Development,” in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, 298-9 (David M. Trubek and Alvaro Santos, eds. 2006).

<sup>120</sup> On diffusion and reception, *see* Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000,” in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, 19 (David M. Trubek and Alvaro Santos, eds. 2006). Notably my account proposes that neo-liberalism is not simply being produced in Western capitals like Washington and received in the periphery, but rather is being reproduced in the periphery as well. Neo-liberalism after all has taken many incarnations since it was inaugurated in the 1980s and its various manifestations are therefore being produced and reproduced and diffused around the world simultaneously.



in years when there are rights conferences,”<sup>121</sup> or how the ideas of John Maynard Keynes led to the rise of Keynesian economics.<sup>122</sup> In this sense, changes in ideas and institutions are attributable to socialization such as in the adoption of Keynesian economics.

However, constructivism also refers to the possibility of producing and reproducing all identities and interests anew.<sup>123</sup>

The argument here is that leading western governments such as the U.S. and the E.U. have actively promoted regionalism and bilateralism and pursued neo-liberal ideas with policy actions. In doing so, under a constructivist paradigm these governments have modeled behavior that is being mimicked by developing economies. This mimicking or emulation is voluntary rather than coerced. Neo-liberal ideas have in effect had a constitutive relationship to the growth of bilateralism and regionalism in trade. Once bilateralism and regionalism caught on in the EU and the US, then the trend seems to have caught on among developing countries without reference to whether or not it was good for them.<sup>124</sup> Thus even some of the smallest countries in the world such as Lesotho openly acknowledge that the success of regionalism in trade elsewhere has persuaded LDCs such as Lesotho to pursue regionalism more aggressively.<sup>125</sup>

Another explanation of emulation is that the success of the EU model in European integration has often served as a rhetorical model for advocates of regionalism.<sup>126</sup>

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<sup>121</sup> *Id* at 451, citing C.M. Wotipka and F.O. Ramirez, “World Society and Human Rights: An Event History Analysis of the Convention on the Elimination of All Forms of Discrimination Against Women,” in *THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY* (B. Simmons et al, 2007).

<sup>122</sup> HALL P.A., *THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS* (1989).

<sup>123</sup> Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 *Int’l Org.* 403, note 42.

<sup>124</sup> Other ideas such as mass schooling and civil service reforms have been shown to have similarly spread, see Frank Dobbin, Beth Simmons and Geoffrey Garret, *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 *Ann. Rev. Soc.* 454.

<sup>125</sup> See Opening Address of Hon. Papane Lebesa, Minister of Trade and Industry, Cooperatives and Marketing in Lesotho at the Opening of the February 2008 LDC Trade Ministers Meeting in Maseru, Lesotho, available at [http://www.lesotho.gov.ls/articles/2008/OFFICIAL\\_OPENING\\_SPEECH.pdf](http://www.lesotho.gov.ls/articles/2008/OFFICIAL_OPENING_SPEECH.pdf) (nothing that until recently regional economic groupings were not pursued as a strategy in that the past but that “in recent years that is being experimented with more seriously when success of the approach is in evidence elsewhere,” *id* at 6-7).

<sup>126</sup> Mario Telo, *Between Trade Liberalization and Various Paths Towards Deeper Cooperation, in EUROPEAN UNION AND NEW REGIONALISM: REGIONAL ACTORS AND GLOBAL GOVERNANCE IN A POST HEGEMONIC WORLD* 144 (2nd ed., 2007) (noting an explicit emulation of the EU in Africa). See also Albert Higgott, *Alternative Models of Regional Cooperation: The Limits of Institutionalization in East Asia, in*

Further, the EU itself is spreading regionalism as reflected its commitment in the Cotonou Agreement with the African, Caribbean and Pacific, (ACP), countries to do precisely that.<sup>127</sup> The Cotonou Agreement has set in motion a series of interim Economic Partnership Agreements, (EPAs), with various ACP regions and a completed EPA with the Caribbean region, the CARIFORUM EPA discussed above. These interim agreements and the Cotonou Agreement establish goals and mechanisms to monitor what are essentially EU ideas and principles of economic reform and integration in ACP countries. In this sense, emulation serves as a form of hegemony because ACP countries are adopting the EU's ideas and principles of economic and trade governance as part of their domestic legal and policy framework.<sup>128</sup>

### Competition for Resources and Markets

Just like countries compete for capital and export markets, there is clearly an element of competition for the best bilateral or regional trade deal particularly by the EU, the US, Brazil, India and China on the hand, and developing countries, on the other.<sup>129</sup> Thus the propensity to sign a bilateral investment agreement is much higher if neighboring countries have signed such agreements.<sup>130</sup> Much sought after markets are vigorously pursued by countries for the best trade deal. In addition, countries that want to attract foreign direct investment or other trade benefits have been shown to compete by offering

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EUROPEAN UNION AND NEW REGIONALISM (Mario Telo, ed.), *id.*, noting that "Regionalism is invariably conceptualized with comparative reference to Europe even though it is clear that learning and the politics of emulation...are major features of the current debate on regionalism in other parts of the world, and in East Asia in particular," *id* at 77.

<sup>127</sup> Article 37(1) of the Cotonou Agreement between the EU and the ACP States provides that EPAs "shall be negotiated during the preparatory period which shall end by 31 December 2007." Article 35(2) and 37(5) provide a basis conducting EPA negotiation with the regions rather than bilaterally as part of the Cotonou Agreement's goal of strengthening regionalism as a strategy of integrating ACP countries better within the international trading system.

<sup>128</sup> For someone making a similar claim, *see also* Rita Giacalone, "Is European Inter-Regionalism A Relevant Approach for the World or Just for Europe?," *available at* <http://www6.miami.edu/eucenter/Giacalone-EUregInteg-long070918.pdf>. For further discussion, *see* Gathii, *supra* note 35.

<sup>129</sup> *See* UNCTAD, *The New Regionalism and North South Trade Agreements*, in UNCTAD 2007 Trade Development Report, UNCTAD/TDR/2007 *available at* [http://www.unctad.org/en/docs/tdr2007ch3\\_en.pdf](http://www.unctad.org/en/docs/tdr2007ch3_en.pdf).

<sup>130</sup> Elkins Z., Guzman A. and Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 *Int'l Org.*, 811-46.

incentives.<sup>131</sup> Many countries including LDCs as we saw above freely acknowledge that the trend towards bilateralism and regionalism is one that they cannot afford to be left behind in.

The increasing popularity of MFN clauses in bilateral and regional trade agreements is further evidence of the competition for the best trade deals. An MFN clause in a regional or bilateral trade agreement may be surprising since it is often assumed regional and bilateral trade agreements confer exclusive benefits to the signatories – and as such that an MFN clause extending such benefits to non-members is what you would expect in a multilateral treaty. Developed economies like the EU have insisted on MFN clauses particularly in the EPAs to ensure that whatever concessions are granted under a *future* regional trade agreement must be extended to current regional trade signatories. The final EPA signed by the CARIFORUM countries with the EU has such an MFN clause which applies to all subsequent free trade agreements insofar as they cover customs duties, commercial presence and investment, cross-border supply of services and where such agreements involve developed countries or major trading economies.<sup>132</sup> As such, should the CARIFORUM states give the U.S. concessions in these areas, this would automatically trigger an obligation on the part of the CARIFORUM States to extend similar concessions to the EU.

Alternatively, such clauses have required signatory countries to commence new negotiations upon entering into agreements with another developed economy. This is well illustrated in the Pacific Agreement on Closer Economic Cooperation, (PACER), between the New Zealand and Australia, on the one hand, and the Pacific Island Countries of the South Pacific, on the other. Article 6(3)(a) and (b) of PACER has been argued by New Zealand and Australia to require all 14 South Pacific Island Countries to negotiate a new trade agreement following the signing of a Pacific Interim EPA covering

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<sup>131</sup> Gray V., *Competition, Emulation, and Policy Innovation*, in *NEW PERSPECTIVES ON AMERICAN POLITICS* 230-48 (L.C. Dodd & C.C. Jillson, eds., 1994).

<sup>132</sup> See Economic Partnership Agreement between CARIFORUM States and the EU, (30<sup>th</sup> October, 2008), available at [http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc\\_137971.pdf](http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf). Major trading economies are defined as those representing individually more than 1 per cent of world merchandise exports or, as a group of countries, with more than 1.5 % of world merchandise exports. For more on the CARIFORUM EPA, see Kelsey, *supra* note 54.

trade in goods that only Fiji and Papua New Guinea have signed. Australia and New Zealand have helped the Pacific Island countries set up a fully funded Office of the Chief Trade Advisor to the Forum Island Countries Secretariat to help them negotiate a PACER-PLUS Agreement. That such clauses are increasingly part of bilateral and regional trade agreements indicates the increasing competition for access to foreign markets with the most advantageous concessions possible.

China and India, two of the largest economies in Asia, are in a furious competition for Africa's mineral wealth and markets and each has engaged in a race for trade and investment agreements.<sup>133</sup> These 'emerging economic "giants"' and their burgeoning economies are creating a greater demand for natural resources, as well as light manufactured goods, and other goods such as household consumer items.<sup>134</sup> Although Chinese and Indian Foreign Direct Investment (FDI) in Africa have traditionally been concentrated in the oil extraction and mining industries, in recent years, FDI flows between the two Asian countries and Africa has become more diversified, with FDI being made in the apparel industry and processed foods, as well as other sectors.<sup>135</sup> China established the Forum for China Africa Cooperation, (FOCAC), to encourage collective consultation, promote political dialogue, and economic cooperation.<sup>136</sup>

FOCAC's fourth Ministerial Conference was hosted by Egypt in 2010 from November 8<sup>th</sup> to 9<sup>th</sup><sup>137</sup> to review the implementation of the follow-up actions to the Beijing Summit of the Forum held three years before and to discuss new ways to enhance Sino-African trade relations.<sup>138</sup> To this end, FOCAC adopted the Sharm El Sheikh Action Plan of the

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<sup>133</sup> H. G. Broadman, *Africa's Silk Road: China and India's New Economic Frontier*, at 42 available at [http://siteresources.worldbank.org/AFRICAEXT/Resources/Africa\\_Silk\\_Road.pdf](http://siteresources.worldbank.org/AFRICAEXT/Resources/Africa_Silk_Road.pdf) (last visited Aug. 21, 2010).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> FOCAC, *Characteristics of FOCAC*, [www.focac.org/eng/ltada/ltjj/t157576.htm](http://www.focac.org/eng/ltada/ltjj/t157576.htm) (last visited Aug. 21, 2010).

<sup>137</sup> Forum on China-Africa Cooperation, *Declaration of Sharm El Sheikh of the Forum on China-Africa Cooperation*, Nov. 12, 2009, available at [www.focac.org/eng/zxxx/t626388.htm](http://www.focac.org/eng/zxxx/t626388.htm) (last visited Aug. 21, 2010) [hereinafter Sharm El Sheikh Declaration].

<sup>138</sup> *Id.*

Forum on China-Africa Cooperation (2010-2012) at the Conference.<sup>139</sup> The Sharm El Sheikh Action Plan seeks to strengthen Sino-African cooperation in Political Affairs and Regional Peace and Security; International Affairs; Economic; Social Development; and Cultural and People-to-People Exchanges.<sup>140</sup> China has promised to extend \$10 billion in preferential loans to African countries over the next three years to be used for infrastructure and social development projects.<sup>141</sup> China has also agreed to support African regional integration efforts.<sup>142</sup> China has so far signed bilateral agreements with 33 countries to expand trade and investment and signed another 13 agreements with African countries to avoid double taxation in addition to having investment interests in 49 African countries.<sup>143</sup>

### PART III

#### Fortifying the Neo-Liberal Agenda of the Washington Consensus

A major impetus for bilateral and regional trade agreements is that they are a conduit for the Washington consensus into developing countries. The ten elements of the Washington Consensus are: fiscal discipline, redirection of public expenditures to fields offering high economic returns, tax reform, interest rate liberalization, a competitive exchange rate, trade liberalization, liberalization towards foreign direct investment, and privatization.<sup>144</sup> These elements of the Washington consensus, originally outlined in 1989, were and continue in many respects to be prescribed as necessary to promote economic development initially in Latin America and subsequently to developing

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<sup>139</sup> *Id.*

<sup>140</sup> Forum on China-Africa Cooperation, *Sharm El Sheikh Action Plan (2010-2012)*, Nov. 12, 2009, available at [www.focac.org/eng/zxxx/t626387.htm](http://www.focac.org/eng/zxxx/t626387.htm) (last visited Aug. 21, 2010) [hereinafter Sharm El Sheikh Action Plan].

<sup>141</sup> *Id.* at art. 4.5.

<sup>142</sup> *Id.* at art. 4.3.3.

<sup>143</sup> See Information Office of the State Council of China, *China-Africa Economic Trade Cooperation White Paper*, Dec. 28, 2010 available at [http://www.gov.cn/english/official/2010-12/23/content\\_1771603.htm](http://www.gov.cn/english/official/2010-12/23/content_1771603.htm).

<sup>144</sup> Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. Pa. J. Int'l Econ. L. 513, 584.

countries in general.<sup>145</sup> Three of the primary elements of this consensus are trade openness and openness to foreign direct investment as well as a market economy. Advocates of this agenda recommended that developing countries could achieve economic development by liberalizing their markets and the dismantling the welfare state in so far as services such as energy, telecommunications and water were provided by the State.<sup>146</sup> The International Monetary Fund (IMF), the World Bank, and the World Trade Organization have used many of these elements as conditions on access to funds developing countries get from them.<sup>147</sup>

In this sense, regional and bilateral trade agreements have increasingly become an alternative track to the World Bank and IMF to further buttress the liberalization of trade and foreign direct investment. Commitments in the area of trade in services in bilateral and regional trade agreements are therefore now a primary route of introducing the private provisioning public goods like water, education and health care. Thus the market is increasingly supplanting public provisioning of important services in accordance with the commitment to market governance of the Washington consensus. Such reforms that promote the liberalization and deregulation of services further remove the policy space and regulatory autonomy for poor countries in commercially significant areas. They do so by creating binding rules of establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of foreign investments on the territory of the signatory countries. Most significantly, these new rules compel competition for activities that were previously provided by public monopolies such as postal and courier services and telecommunications. By incorporating such commitments, regional and bilateral trade agreements have granted U.S. and E.U. corporations unlimited geographical reach and an unlimited number of consumers.

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<sup>145</sup> See John Williamson, "The Washington Consensus as Policy Prescription for Development," A Lecture delivered at the World Bank on Jan. 13, 2004.

<sup>146</sup> Justice Chimugwuanya Nwobike, *The WTO Compatible ACP-EU Trade Partnership: Interpreting the Reciprocity Requirement to Further Development*, 8 *Asper Rev. Int'l Bus. & Trade L.* 87, 101.

<sup>147</sup> See *id.*

The CARIFORUM EPA between CARIFORUM States and the EU best illustrates how a regional trade agreement can promote the goals of the Washington consensus. It does so by:

1. Removing the ability of CARIFORUM States to impose currency controls in relation to the E.U.;<sup>148</sup>
2. Committing certain sectors in their services schedule which in turn automatically opened them to foreign investors under the national treatment norm;<sup>149</sup>
3. Opening up CARIFORUM States to migration of high level professionals without obliging the E.U. to open up to low skilled labor from CARIFORUM nations;<sup>150</sup>
4. Removing any discretion on CARIFORUM States to exercise regulatory authority in any manner that discriminates against foreign investor presence and giving them the right to have equivalent commercial presence as local investors.<sup>151</sup>

As these commitments come into effect, multinational corporations from the EU will have free reign to trade in these nations as these nations have no regulatory authority to control their activities or to protect competing local investors. Markets that have always been controlled by the government are now open for international investment and control.

Although the E.U. was very successful in its negotiations of the CARIFORUM EPA, it has argued that the CARIFORUM nations have also achieved some of their aims in the EPA. First, the expiration of the Cotonou agreement would have disrupted Caribbean exports. The CARIFORUM nations needed to reach some form of agreement with the E.U. not to experience this disruption.<sup>152</sup> With no end in sight to WTO negotiations, the CARIFORUM nations needed to act quickly to prevent the sudden economic turmoil that would result from the expiration of the Cotonou Agreement. Second, although the E.U. service liberalization schedules were not significantly greater than their previous negotiated amounts, the CARIFORUM nations did receive some commitments that have

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<sup>148</sup> See Economic Partnership Agreement between CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other, art.124, Dec. 16, 2007, OJ 2008 L289/3.

<sup>149</sup> See *id.* at art. 68.

<sup>150</sup> See *id.* at art. 80-83.

<sup>151</sup> See *id.* at art. 67-68.

<sup>152</sup> See *id.* at 1. See also The European Commission on Trade, available at [http://ec.europa.eu/development/geographical/cotonouintro\\_en.cfm](http://ec.europa.eu/development/geographical/cotonouintro_en.cfm) (“The Cotonou agreement is the more comprehensive partnership agreement between developing countries and the EU. Since 2000, it has been the framework for the EU’s relations with 79 countries from Africa, the Caribbean and the Pacific (ACP).”).

been argued will promote economic growth in CARIFORUM countries. Third, the modulated tariff liberalization schedule allows for a gradual change in tariff schedules that avoids the dangers of frontloading. Ambassador Humphrey of the CARIFORUM Secretariat argued that this would mean only an additional 10.1% of tariff reduction over the first 10 years, and argued that a significant number of products that receive tariff reductions will be those that currently have “nuisance tariffs” not “serious revenue earners or those intended to protect emerging industries.”<sup>153</sup> Finally, the regional EPA protected the nations in the CARIFORUM-EC EPA so that they could maintain their regional unity. The E.U. could easily have negotiated bilateral agreements with individual countries that could have set one nation against another and allowed the E.U. to fully use its negotiating strength. However, as Ambassador Humphrey explained, “[a] central objective of CARIFORUM was to retain the integrity of its own regional integration process” – a fact it made clear to the E.U. in its negotiations.<sup>154</sup>

#### Asymmetrical Liberalization

Trade liberalization under the aegis of the Washington consensus ends up being asymmetrical in several respects. Developed countries have a comparative advantage in many areas - including services, investment measures, intellectual property rights, - while many developing countries have a comparative advantage primarily in agriculture.

Overall, however, developed nations have superior negotiating advantages in bilateral and regional trade agreements. An example of this can be found in the CARIFORUM-EC EPA where the E.U. successfully negotiated a pro-liberalization interpretation of Article V of GATS that greatly extends the exposure of the CARIFORUM states to international competition, while the E.U. gave “very little new liberalization beyond its already extensive GATS commitments, especially in areas of interest to the

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<sup>153</sup> *See id.* at 5.

<sup>154</sup> *Id.*



CARIFORUM. The result is a gross asymmetry of liberalization in the EPA in favor of the E.U.”<sup>155</sup>

Developed nations argue that bilateral and regional agreements have the benefit of being models for future WTO negotiations.<sup>156</sup> However, since the terms of these negotiations are often controlled by the U.S. and the E.U., developing countries may not always find that their experience in bilateral and regional negotiations with developed economies as not setting good precedents for what they can negotiate at the multilateral level.<sup>157</sup> As Prof. Frederick Abbott has argued the “most troubling aspect of the PTA phenomenon is the exercise of virtually unconstrained political and economic power by the United States and [the] EU to secure concessions from developing (and developed) countries.”<sup>158</sup>

#### *Intellectual Property Rights (IPR) and Asymmetrical Liberalization*

The United States and the EU have used a combination of RTAs, FTAs, and EPAs “to shape the evolution of norms in areas such as intellectual property protection and drug pricing where they have vital interests at stake and where their position on issues is far different from the vast majority of states.”<sup>159</sup>

The World Trade Organization’s TRIPS Agreement, enacted in 1994, has set the minimum standards of intellectual property protection required of all WTO member nations.<sup>160</sup> Although the patent provisions of the TRIPS agreement significantly related to the unavailability of access to affordable essential medicines in developing countries, the Doha Declaration on TRIPS and Public Health and a proposed amendment were

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<sup>155</sup> *Id.*

<sup>156</sup> See Global Europe Strategy, *supra* note 53.

<sup>157</sup> Abbott, *supra* note 81, at 582.

<sup>158</sup> *Id.* at 583.

<sup>159</sup> Eyal Benevisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595, 611 (referring to this phenomenon as serial bilateralism).

<sup>160</sup> World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm). [hereinafter TRIPS Agreement].

agreed to with a view to addressing this problem.<sup>161</sup> Article 8 of TRIPS provides that members may “adopt measures necessary to protect public health and nutrition.”<sup>162</sup> Some scholars have interpreted the TRIPS agreement in light of this objective to protect public health and argued that the agreement ought to be interpreted to allow compulsory licensing, parallel importation, flexibility in defining the scope of patentable subject matter, an early working exception as well as giving countries discretion regarding the extent of test data protection and the right to control anti-competitive practices.<sup>163</sup> More definitively, the 2001 Doha Declaration on TRIPS and Public Health explicitly recognized that the TRIPS Agreement “does not and should not prevent Members from taking measures to protect public health.” These flexibilities built into the TRIPS Agreement potentially allow WTO members to find a balance between strong intellectual property protection and the public health and welfare of their citizens. However, the United States and the European Union, have used bilateral and regional trade agreements to create even stronger intellectual property protection than under the TRIPS Agreement. Since the TRIPS Agreement only sets the minimum standards of intellectual property protection, countries are free to negotiate stronger protections through bilateral and regional trade agreements, called TRIPS-plus provisions.<sup>164</sup>

The best example of such TRIPS-plus provisions is in the U.S.-Morocco FTA of January, 2003. Referred to as “the most advanced IP chapter in any FTA negotiated so far” by the U.S. pharmaceutical industry, the U.S.-Morocco Free Trade Agreement has substantial IPR provisions with regard to copyrights, trademarks, and patents.<sup>165</sup> The IPR provisions create strong rules for protecting trademarks and copyrights – specifying detailed rules regarding their protection, use, the rights of parties involved, and the requirements of

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<sup>161</sup> James Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention of the Law of Treaties*, 15 Harv. J.L. & Tech. 291.

<sup>162</sup> TRIPS Agreement, *supra* note 160, at art. 8.1.

<sup>163</sup> Charles T. Collins-Chase, *The Case Against Trips-Plus Protection in Developing Countries Facing AIDS Epidemics*, 29 U. Pa. J. Int'l L. 763, 771.

<sup>164</sup> See Trips Agreement, *supra* note 160, at art. 1.1 (“Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”).

<sup>165</sup> See “How Does the FTA Protect Intellectual Property Rights?,” FAQ: U.S. – Morocco Free Trade Agreement (FTA), available at [http://www.export.gov/faq/eg\\_main\\_017504.asp](http://www.export.gov/faq/eg_main_017504.asp).

both countries to create means of adjudicating claims.<sup>166</sup> The agreement also has strong provisions on patents, especially regarding pharmaceutical products. The agreement requires Morocco to prohibit the marketing of pharmaceutical products that are infringing patents in addition to requiring Morocco to notify patent owners when their patents are infringed.<sup>167</sup>

While Morocco accepted these IPR provisions in its FTA with the U.S., SACU declined to sign off on such TRIPS-Plus protections. SACU regarded such provisions as disproportionately beneficial to the United States.<sup>168</sup> SACU's resistance to such an FTA with the U.S. is discussed a little further below. The United States has also concluded TRIPS-plus provisions in its bilateral agreements with "Jordan (2000), Chile (2003), Singapore (2003), Australia (2004), and Morocco (2004)," and in the regional trade agreement CAFTA (2004).<sup>169</sup>

### Resulting Tensions in the Trade Regime

As multilateral negotiations in the Doha Round have taken a back seat, the liberalization of services and investment opportunities as well as the strengthening of intellectual property rights protection in bilateral and regional trade agreements has taken center stage. Liberalization in agriculture, an area in which developing countries have a comparative advantage has faltered. Another area of concern for developing countries, development, has similarly not fared well both in bilateral and regional trade agreements as well as at the WTO. Yet, the Doha Ministerial Declaration that launched the current WTO round of negotiations in 2001 committed the members to ensuring that development was at the heart of the new round of negotiations. The lackluster attitude towards agricultural liberalization and development contrasts sharply with the strong

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<sup>166</sup> United States – Morocco Free Trade Agreement, US-Morocco, art. 15.2 – 15.7, Jun. 15, 2004 *available at* [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset\\_upload\\_file797\\_3849.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file797_3849.pdf) [hereinafter U.S. – Morocco FTA].

<sup>167</sup> *Id.*

<sup>168</sup> Chelsea Brown, *Trade Integration and Institutional Reform in Latin America: Can FTAA Be Revived?*, 15 L. & Bus. Rev. Am. 221, 228.

<sup>169</sup> Collins-Chase, *supra* note 163, 779.

liberalization commitments being made in favor of developed countries in the areas of intellectual property rights, services and investment opportunities in bilateral trade agreements. Further, even flagship issues of particular importance to developing countries such as removal of cotton subsidies and/distortions in agriculture are not receiving high level attention. Instead, at the WTO promises of aid for trade rather than the outright removal of WTO inconsistent trade distorting measures are being made to developing countries.<sup>170</sup>

Another significant problem with bilateral and regional trade agreements is that they do away with conventional ways of accommodating countries through Special and Differential Treatment as well as the built-in flexibilities of the multilateral trading system.<sup>171</sup> Thus regional and bilateral agreements have the potential to exacerbate trade distortions rather than resolving them. For example, the large subsidized U.S. agricultural market has strong adverse effects on Chilean wheat and sugar markets. Although the Chilean agricultural sector has gained much from fruit and agro-industrial exports to the U.S. under the Chile-U.S. FTA which was signed on June 6, 2003, the highly subsidized wheat and sugar from the U.S. sell at much lower prices than it is possible for Chilean farmers to produce.<sup>172</sup> This could effectively crash Chile's domestic wheat and sugar sector which cannot produce at the low subsidized cost levels of the U.S.

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<sup>170</sup> Brazil for example settled for technical assistance and capacity building assistance in the cotton sector in Brazil worth \$ 147 million annually as a countermeasure to settle its victory against the U.S. in the WTO Appellate Body decision finding U.S. cotton subsidies to be inconsistent with the U.S.'s WTO obligations. See memorandum available at <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-memorandum-understanding-part-path-f>.

<sup>171</sup> The Kigali Declaration on the Economic Partnership Agreement Negotiations of the African Union's Conference of Trade Ministers (following a meeting from 29 October to 2 November, 2010) resolved the "commitment to concluding development-friendly EPAs that will contribute meaningfully to reducing and ultimately eradicating poverty in our countries. In this regard, we urge the EU to dedicate additional, predictable and sustainable resources to specifically address EPA-related adjustment costs and build productive capacities," *id.* at Para 3. The Declaration further resolved a "commitment to the proposals by the ACP Group that the objective criteria which form part of the political objectives agreed by the international community, at the multilateral level, are retained to determine the parameters that have to be met to enable the conclusion of the EPAs," implicitly referring to the need for special and differential treatment principles applicable in the WTO to apply in EPA negotiations, *id.* at Para 6 available at [http://www.southcentre.org/index.php?option=com\\_content&view=article&id=1432%3AAsb52&catid=144%3Asouth-bulletin-individual-articles&Itemid=287&lang=en](http://www.southcentre.org/index.php?option=com_content&view=article&id=1432%3AAsb52&catid=144%3Asouth-bulletin-individual-articles&Itemid=287&lang=en).

<sup>172</sup> Lindsay M. Fainé, *The Internationalization of Chilean Agriculture: Implications of the United States-Chile Free Trade Agreement*, 13 Minn. J. Global Trade 383, 400.

market.<sup>173</sup> For Chile, this could potentially mean “substantial rural worker displacement through the adjustment to liberalized agricultural markets and production.”<sup>174</sup> Without the willingness of subsidy granting rich countries to end them, or the ability of other countries to use their market power to do so, these subsidies will continue to adversely affect developing country access to developed country markets.<sup>175</sup>

### Is Resistance An Option?: The SACU Example

Although the interests of more powerful countries are likely to prevail in bilateral and regional agreements as we have seen so far, there have been cases of resistance to adopting the U.S.-Model FTA. The best example of this is the case of the Southern African Customs Union (SACU). As noted earlier, SACU is comprised of Botswana, Lesotho, Namibia, South Africa, and Swaziland.<sup>176</sup> Negotiations for the U.S.-SACU FTA were launched in 2001 but were suspended in 2004 because of “diverging views on a number of issues.”<sup>177</sup> The SACU States rejected the one-size-fits-all approach taken by the U.S. in its FTAs.<sup>178</sup> The U.S. had insisted that SACU had to accept lock, stock and

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<sup>173</sup> *Id.* at 400-401.

<sup>174</sup> *Id.*, at 401.

<sup>175</sup> And no progress is being made in the multilateral negotiations, either. “The G20 was disappointed by the fact that no progress has been achieved in discussion of the trade aspects of cotton during the July 2008 Ministerial. The G20 was also concerned that current substantive negotiations on cotton seemed to be deadlocked and even back-tracking in the consultations of the Special Session on Agriculture. Developing country producers and exporters of cotton, particularly the poorest among them continued to face unfair competition from developed country subsidies. The G20 urged developed countries, which accounted for the bulk of trade-distorting subsidies in cotton to live up to the mandate.” Sub-Committee on Cotton, *Secretariat Progress Report: Implementation of the Developed Assistance Aspects of the Cotton-Related Decisions in the 2004 July Package and Paragraph 12 of the Hong Kong Ministerial*, WT/CFMC/28 (May 21, 2010).

<sup>176</sup> South African Customs Union (SACU), <http://www.sacu.int/>.

<sup>177</sup> South African Customs Union (SACU), Trade Negotiations: Bi-lateral Trade, *available at* <http://www.sacu.int/traden.php?include=about/traden/bilateral.html>.

<sup>178</sup> See Rodrick Mukumbira, U.S.-SACU Free Trade Talks Hit Snags, Islam Online (May 2006) *available at* <http://www.bilaterals.org/spip.php?article4712> (“Botswana, Lesotho, Namibia, Swaziland, and South Africa refused to join the US free trade parade - citing flaws in the one-size-fits-all template the US offered.”); See also Statement by Ambassador Schwab at the SACU-TIDCA Signing Ceremony, *available at* <http://www.sacu.int/main.php?include=docs/speeches/2008/sp0716a.html> (“We have explored the possibility of pursuing an FTA with some African partners, but at this point most countries in the region are not yet in a position to undertake the types of commitments that would be required for a comprehensive FTA with the United States.” The Ambassador also explains the goal of the United States, in the future, to negotiate the “Singapore Issues” with the SACU. “The ultimate goal of the TIDCA is to provide an umbrella under which the United States and SACU will be able to negotiate a series of trade and investment agreements or understandings on a wide range of issues, including sanitary and phytosanitary

barrel the standard US-Model FTA including provisions on intellectual property, government procurement and investment.<sup>179</sup> SACU argued it did not have the resources to enforce such extensive provisions.<sup>180</sup> For SACU, the U.S.'s 'golden standards of trade relations' were too onerous.<sup>181</sup>

In particular, SACU objected to the intellectual property rules insofar as they would have had the effect of limiting compulsory licensing to governmental non-commercial use. SACU further objected to the five year, minimum period, of data exclusivity that greatly sought to enhance protections for clinical trial data beyond those under the TRIPS Agreement.<sup>182</sup> The TRIPS-plus terms included into the FTA would have had a significant impact on SACU member countries ability to essential medicines since it would have required them to limit the use of public health flexibilities in TRIPS.<sup>183</sup> SACU countries cited the high prevalence of the HIV/AIDS epidemic in the region to argue against accepting such limitations on their ability to distribute anti-retrovirals (ARV) medicines at affordable prices.<sup>184</sup> As one scholar has noted, when one compares "the costs of AIDS to the anticipated benefits of the FTA... the economic and social costs outweigh the benefits, and these countries have done well to move away from FTAs with the United States."<sup>185</sup> In addition, South Africa objected to the investment provisions in the Model US FTA since they would have required it to end its black empowerment program that requires investors to employ a certain percentage of black employees as a remedy to racial discrimination under apartheid.<sup>186</sup>

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issues, customs cooperation and trade facilitation, removing technical barriers to trade, and investment promotion.").

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Carlos Maria Correa, *Implications of Bilateral Free Trade Agreements on Access to Medicines*, 84 Bulletin of the WHO 399, 399-401 (2006). Comprehensive coverage of issues relating to the SACU-US FTA can be found in J. Clark Leith and John Whalley's article, see J. Clark Leith and John Whalley, *Competitive Liberalization and a US-SACU FTA*, Institute for International Economics, available at [www.piie.com/publications/chapters\\_preview/375/12iie3616.pdf](http://www.piie.com/publications/chapters_preview/375/12iie3616.pdf).

<sup>183</sup> See Collins-Chase, *supra* note 135.

<sup>184</sup> Alfonse Mbizwo, *AIDS Drugs Dog U.S.-Southern Africa Trade Deal*, Reuters, Apr. 29, 2005, available at <http://www.bilaterals.org/spip.php?article1795>.

<sup>185</sup> Collins-Chase, *supra* note 163, at 801.

<sup>186</sup> David Schneiderman, *Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules*, 25 S. Afr. J. Hum. Rts. 246, 270-75.

*The KOREA-U.S. FTA*

Although as noted earlier the U.S. has finally concluded a deal on an FTA with South Korea, the United States had long resisted signing an FTA that was negotiated in 2007. This time around, it was the U.S. auto and beef industry that was particularly opposed to the agreement. Unlike in SACU's case which involved resisting a standard US FTA, in South Korea's case, resistance was coming from within the U.S. Besides the beef and auto industries, environmental and labor groups opposed, and continue to oppose, the US-South Korea in part because it would result in job losses in the U.S. and because according to these critics the FTA does little to protect environmental or labor rights.<sup>187</sup> Unlike SACU, South Korea has a trade surplus with the U.S. and has significant strengths in the apparel, textiles, footwear, machinery, electronics and passenger cars in the U.S. market. In December 2010, South Korea finally made agreeable concessions on autos and beef paving way to an agreement that now remains to be ratified by the U.S. Congress and the South Korean Parliament.

The US-South Korean FTA therefore illustrates the market power that a country like South Korea which has a trade surplus with the United States possesses in negotiating an FTA.

### Conclusion

Bilateral and regional trade agreements today provide a platform for rich countries such as the U.S. and the E.U. to leverage aggressive unilateralism in trade and to enact WTO Plus obligations in areas such as intellectual property rights, trade in services, financial liberalization commitments as well as obligations on issues such as government procurement, competition and investment measures. As trade negotiations shift to bilateral and regional agreements, poor economies are much more likely to be locked and hemmed into enforceable treaty commitments since such forums give rich economies the

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<sup>187</sup> See Statement of Lori Wallach, Director Public Citizen's Global Trade Watch on Obama's Decision to Push Bush's NAFTA-Style Korea Trade Deal Without Real Fixes Is Major Political Mistake, Dec. 3, 2010, available at <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3226>.

ability to leverage their market power to impose economic programs that favor them with little or no countervailing power that coalitions in the WTO provide developing countries.

The successful resistance by SACU to a standard US Model FTA however indicates that such aggressive unilateralism in trade does not always guarantee one sided deals. As Ruth Okediji has argued, developing countries can use bilateral trade agreements to strengthen development friendly objectives in the intellectual property context as well as to ‘reconsider the gains and losses of the multilateral bargain.’<sup>188</sup> Another strategy developing countries have often used is to move issues horizontally from one institutional domain to another such as from the WTO to WIPO or from the WTO to the World Health Organization for health issues and certainly from bilateral or regional negotiations to places such as the Conference of Parties of the Convention on Biological Diversity.<sup>189</sup>

While alternative forums provide a safe place free from unilateral pressures to discuss issues often marginalized in other international settings,<sup>190</sup> not all alternative forums offer opportunities for consequential rule making.<sup>191</sup> Such forums do however offer these countries an opportunity to develop and generate counter-norms<sup>192</sup> and political pressure and hopefully the type of coalitions necessary to counter the dominance of big country economies in bilateral and regional trade negotiations. Yet, one cannot under-estimate

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<sup>188</sup> Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. Ottawa L. & Tech. J. 125,145-6.

<sup>189</sup> In October 2010, developing countries at the 2010 Conference of Parties of the Convention on Biological Diversity in Nagoya, Japan secured an important victory over industrialized States when a legally binding agreement to share equitably the benefits of genetic resources. References to market based mechanisms to combat climate change favored by industrialized countries were excluded from the meeting outcome documents which reflected the need for strong regulatory measures favored by developing countries. See Richard Gray, “Landmark UN Nagoya Bio-Diversity Deal Agreed to Save Natural World,,” *The Daily Telegraph*, 30 October, 2010 available at <http://www.telegraph.co.uk/earth/earthnews/8098540/Landmark-UN-Nagoya-biodiversity-deal-agreed-to-save-natural-world.html> . The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* was adopted at the tenth Conference of the Parties on 29th October 2010, in Nagoya, Japan can be retrieved at <http://www.cbd.int/nagoya/outcomes/>.

<sup>190</sup> Lawrence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of Intellectual Property Lawmaking*, 29 Yale J. Int’l Law, 55 and Peter Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 Loy. L.A. L. Rev. 408-416.

<sup>191</sup> Helfer, *supra* note 190, at 56.

<sup>192</sup> Lawrence Helfer makes an analogous point when he argues that such alternative forums offer developing countries an “opportunity to generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO,” *see id.*



how effectively bilateral and regional trade agreements split heterogeneous groups of developing countries in ways that undermine their ability to coalesce and bargain effectively through the multilateral setting of the WTO.<sup>193</sup>

This article has further argued that bilateralism and regionalism in trade are contemporary fads that are spreading neo-liberal economic ideals in the periphery of the global trading system. In other words, emulation by small developing countries of neo-liberal economic ideas and policies in developed countries is a significant driver of economic reform. Developing countries adopt neo-liberalism not simply because it is imposed as many accounts suggest. Rather, neo-liberalism is also voluntarily adopted for a variety of reasons. First because there has been a convergence in the thinking of policy makers and academic thinkers in developing and developed countries in part as a result of socialization through education or professional associations and contacts. Thus developing countries are not isolated jurisdictions shaping their trade policies independently of other jurisdictions in developed economies or elsewhere.<sup>194</sup> Second, as a result of persuasion that neo-liberal reforms are important preconditions for goals such as increased economic growth or the efficiency of public sector institutions, developing

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<sup>193</sup> Indeed as Ruth Okediji has argued, since “regime shifting upsets coalitional dynamics between developing countries, the loss on the development side is doubled. Not only is there a dilution of a normative proposition, however subtle, but there is also the political loss resulting from splinters between developing countries whose membership in various regimes may be different, or whose position on issues within the regimes may differ,” Ruth Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 Singapore J. Int’l & Comp. L., 373. See also Eyal Benvenisti and George Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595, 597, arguing that powerful regime shifting is favored by powerful states since “they know that weaker states are not only more numerous than they are, but they are also far more diverse with respect to size, wealth, and their level of development,” *id.*

<sup>194</sup> On this account, developing countries particularly their form of the modern state was historically created by similar projections of metropolitan power or mimicry of them by post colonial elites. Thus drawing hard and fast boundaries between locally produced ideas in a distinct autonomous zone as if developing countries could be thought of this way, and centrally ideas generated under the aegis of neo-liberalism that developing countries must be protected and insulated against is difficult to sustain. Here the literature on local government autonomy from centralized or federal decision making is very instructive. As the scholars in this area have noted, efforts to promote local autonomy from central power are “better understood as efforts to alter the central frameworks within which local discretion is inevitably exercised, rather than as attempts to substitute centralized command for local control,” see David J. Barron, “A Localist Critique of the New Federalism,” 51 Duke Law Journal, 381 (2001) (this of course is not to suggest there no locally specific values and ideas, but rather to argue that these exist ‘within a larger, coordinated structure and depend at all times upon central law for their autonomy,’ *id.* at 410-411). See also, Gerald E. & David Barron. “International Local Government Law,” 38 *The Urban Lawyer* 1 (2006)

country officials have adopted them. Third, because public officials in developing countries are strategically adopting neo-liberal reforms since they are regarded as a signaling device that their country is 'safe' for investment or because bilateral and regional trade agreements come with budget support that is otherwise unavailable to these developing country officials in their home country. Fourth, officials in developing countries are passive imitators who in the absence of solid evidence as to the efficacy of neo-liberal ideals on their own account or in relation to alternative reform ideas are rationally bounded actors who find it impractical to assess the efficacy of neo-liberal ideals or their alternatives.<sup>195</sup>

In short, this paper has argued that the increased number of regional and bilateral trade agreements represents an important opportunity for the further diffusion of neo-liberal economic ideals, an insight often missing in leading accounts that have emphasized how this trend conforms or departs from the norms of the World Trade Organization. Ultimately, I argue that constructivism can help account for the circumstances under which neo-liberalism arises in the turn towards regionalism and bilateralism in trade by taking into account how the context within which these ideas are generated and perpetuated impose an incentive structure within which choices in favor of neo-liberalism are more than less likely to be exercised by developing countries.

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<sup>195</sup> David Strang and Michael Macy, "In Search of Excellence: Fads, Success Stories and Adaptive Emulation," 107 *American Journal of Sociology*, 147-182 (2001). Notably, Katharina Pistor, "The Standardization of Law and Its Effect on Developing Economies," 50 *American Journal of Comparative Law*, 97 (2000) argues that standardization of the legal architecture for global markets "will accelerate the process of legal convergence with the double benefit of reducing transaction costs for transnational investors and increasing the quality of legal institutions in countries whose institutions are less developed," *id.*) Pistor's point is instructive particularly if we think of standardization of legal norms as reducing the costs of developing country officials to investigate alternatives to neo-liberal ideals or their efficacy. All they have to do is to adopt them, within margins of discretion of course, as these ideals come to be regarded as 'best practice' or 'efficient.' For this reason, Pistor argues that developing country officials come to adopt rules or laws that do not reflect their context and the efficacy of such rules is therefore brought into question, *id.* esp at 99.