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## Bilateral Trade and Investment Agreements

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# Bilateral Trade and Investment Agreements

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## **Abstract**

This article explores the rationale behind the development of bilateral trade and investment agreements as measures of state action. In examining the arguments in support of such bilateral agreements, it scrutinizes the virtues and deficiencies associated with each. It concludes by considering whether bilateralism contributes to the development of principles and standards governing multilateral trade and investment.

## BILATERAL TRADE AND INVESTMENT AGREEMENTS

by

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This article explores the rationale behind the development of bilateral trade and investment agreements as measures of state action. In examining the arguments in support of such bilateral agreements, it scrutinizes the virtues and deficiencies associated with each. It concludes by considering whether bilateralism contributes to the development of principles and standards governing multilateral trade and investment.

The proliferation of bilateral trade and investment agreements has helped to fill lacunae in a multilateral trade process that is impeded by the impasse of negotiations in the World Trade Organization [WTO].<sup>1</sup> At the same time, the development of bilateral agreements arguably has discouraged some states from engaging in multilateral negotiations.<sup>2</sup> The result is a new genre of trade and investment relations in which bilateral and regional mechanisms are increasingly adopted in substitution for multilateral trade and investment processes including in dispute resolution.<sup>3</sup> While, bilateral agreements diverge significantly in their form and substance, including in relation to trade as distinct from investment, they have an important, albeit controversial impact upon multilateral commerce. The one view is that bilateralism reflects a shift back towards consensual relationship between sovereign states from a multilateral process based on a *ius cogens* that transcends state power. The contrary view is that such bilateralism advances the multilateral process, binding states to a *ius cogens* of peremptory norms such as in their dealings with direct foreign traders and investors.

This article examines different arguments for asserting that bilateral trade and investment agreements have advanced multilateral commercial relations. It poses a

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<sup>1</sup> On the changing character of the WTO, see Julia Ya Qin, *The Challenge of Interpreting "WTO-Plus" Provisions*, 44 J. WORLD TRADE 127 (2010); PETER GALLAGHER, *THE FIRST TEN YEARS OF THE WTO: 1995-2005* (CAMBRIDGE, U.K.: CAMBRIDGE UN. PRESS 2005); PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* (CAMBRIDGE UN. PRESS, 2005). On the history of global trade negotiations, see e.g. THOMAS R. HOWELL, ALAN WM. WOLFF, BRENT L. BARTLETT & R. MICHAEL GADBAW, *CONFLICT AMONG NATIONS: TRADE POLICIES IN THE 1990S* (BOULDER, CO: WESTVIEW PRESS, 1993); FATOUMATA JAWARA & AILEEN KWA, *BEHIND THE SCENES AT THE WTO – THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATION* (LONDON & NEW YORK: ZED BOOKS, 2003).

<sup>2</sup> For convenience, bilateral investment agreements are referred to as BITs and bilateral free trade agreements are referred to as FTAs. On the relationship between BITs and FTAs, see e.g. S. Woolcock (ed.), *TRADE AND INVESTMENT RULE-MAKING: ROLE OF REGIONAL AND BILATERAL AGREEMENTS*, TOKYO/NEW YORK: UNITED NATIONAL UNIVERSITY PRESS, 2006). On the proliferation of FTAs, see <http://www.cfr.org/publication/10890/> On the history of BITS, see K. J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005).

<sup>3</sup> On dispute resolution under the WTO, see Yang Guohua, Bryan Mercurio & Li Yongjie, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (London, Kluwer Law International, 2005); Colin B. Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INTL ECON. L. 267 (2005); PETROS C. MAVROIDIS & N. DAVID PALMETER, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* (CAMBRIDGE, U.K.: CAMBRIDGE UN. PRESS, 2004); ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (LONDON, THE HAGUE, BOSTON: KLUWER LAW INTERNATIONAL, 1997). On regional trade agreements, see e.g. JAMES H MATHIS, *REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNATIONAL TRADE REQUIREMENT* (THE HAGUE: T.M.C. ASSER PRESS, 2002).

variety of questions. To what extent is the development of bilateral agreements founded on sound trade and investment principles?<sup>4</sup> Have bilateral agreements added value to or detracted from the perceived demands of multilateral trade and investment? Are states subject to suitable guidelines grounded in a multilateral *ius cogens* in negotiating and concluding such bilateral agreements? To what extent are they required to redress the practices of recalcitrant states based on universal legal norms, or by such practical measures as trade and investment boycotts and other sanctions for violating international trade law or for treating direct foreign investors unfairly?<sup>5</sup>

Related to these questions are tensions between policies over the nature of trade and investment liberalization. One 19<sup>th</sup> century policy is grounded in principles of *laissez faire*: that states should be comparatively unchecked in concluding bilateral trade and investment agreements in the interests of both promoting the free exchange of goods and services and international investment. This policy is grounded in the autonomy of states and the assertion that international trade and investment law is no greater than the sum of agreements to which states are parties, with a limited override of customary international law.

Another policy holds that states are bound to respect their bilateral agreements and that violating them ought to lead to the censuring of offending states according to peremptory principles of law. In support of reconciling these two policies is the claim that states that consent to bilateral agreements both surrender their sovereignty and territoriality bilaterally and subject themselves to international standards of compliance not limited to those embodied in the General Agreement on Tariffs and Trade [GATT] and its WTO successor, including in their treatment of investors from partner states.<sup>6</sup>

The first two sections of this article evaluate the reasoning behind the liberalization of trade and investment and the assumptions in favor of bilateral free trade agreements

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<sup>4</sup> For illustrations of structural changes wrought by bilateral trade agreements upon multilateral trade, particularly in regard to trade liberalization and protectionism, see Scott L. Baier & Jeffrey H. Bergstrand, *The Growth of World Trade: Tariffs, Transport Costs and Income Similarity*, 53 J. INT'L ECON. 27 (2001); Anne O Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?* 13(4) J. ECON. PERSPECTIVES 105 (1999); Paul Krugman, *The Move Towards Free Trade Zones*, at <http://www.kansascityEd.org/publicat/Sympos/1991/S91krugm.pdf>

<sup>5</sup> See generally Robert McMahon, *The Rise in Bilateral Free Trade Agreements*, Council on Foreign Relations, June 13 2006 at <http://www.cfr.org/publication/10890/> But see [http://www.bilaterals.org/article.php?id\\_article=1227](http://www.bilaterals.org/article.php?id_article=1227) (a website devoted to the downfall of bilateral free trade agreements). On the development of bilateral investment treaties, see eg Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity*, 41(1) GEORGE WASHINGTON INT'L. L.REV. 1-65 (2010).

<sup>6</sup> See e.g., Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders* 19(2) WORLD BANK ECON. REV. 287 (2005); Chad P. Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86(3) REV. ECON. & STATISTICS 811 (2004); James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 Int'l. Organization 137 (2003); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (UK: ROUTLEDGE, 1995). Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, at <http://www.carleton.ca/ctpl/pdf/conferences/REINHARDT-BUSCH!95.pdf>. For a comprehensive list of publications on global commerce and the WTO, see <http://henningcenter.berkeley.edu/gateway/wto.html>.

[FTA] and bilateral investment treaties [BITs]. The third section critiques different arguments in favor of negotiating and concluding BITs and FTAs. The fourth section proposes legal principles and standards to guide the application of bilateral trade and investment agreements in the future.

The purpose is to contrast the divergence among FTAs and BITs, with the convergence of a multilateral system of trade and investment law, and to determine whether the two are reconcilable, ideologically, conceptually and functionally.<sup>7</sup> Another purpose, developed in Part 3, is to present the article through the eyes of developing states, in particular the extent to which FTAs and BITs promote their individual and collective interests.

## I. The Liberalization of Trade and Investment

The post Second World War era has heralded two not always harmonious developments: a commitment by nation states to reduce barriers to trade and investment and an effort to establish principles and guidelines for the free flow of goods and services and investments across national boundaries.<sup>8</sup> In particular, the General Agreement on Tariffs and Trade (GATT) sought to unify multilateral trade practice through a pervasive, transparent and commonly understood set of principles directed at harmonizing trade and investment practice and maximizing on cooperation in the global interest. The underlying rationale was that these principles were the product of the multilateral consent of states, and reflected unifying norms of conduct that bound them in the conduct of trade including their treatment of foreign investors.<sup>9</sup>

Despite these developments, global liberalization of trade and investment has fallen short of a resounding success. Trade protectionism and investment selectivity that marked the era prior to the Second World War has remained a serious impediment to liberalized trade and investment, along with disparities in the power of trading states and the more recent fragmentation of trade and investment agreements along bilateral

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<sup>7</sup> On this divergence leading to convergence, see *eg* STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (CAMBRIDGE INTERNATIONAL TRADE AND ECONOMIC LAW, 2009); Jeffery P. Commission, *Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129, 148 (2007); ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 467–591 (2008); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008).

<sup>8</sup> See *infra* Section II, i. On challenges to the WTO, see *e.g.* KENT ALBERT JONES, *WHO'S AFRAID OF THE WTO?* (OXFORD UN.PRESS, 2003); BENJAMIN HEIM SHEPARD & RONALD HAYDUK, *FROM ACT UP TO THE WTO: URBAN PROTEST AND COMMUNITY BUILDING IN THE ERA OF GLOBALIZATION* (VERSO, 2002); ROBIN BROAD, *GLOBAL BACKLASH: CITIZEN INITIATIVES FOR A JUST WORLD ECONOMY* (ROMAN LITTLEFIELD, 2002).

<sup>9</sup> This conception of cooperation is exemplified by the requirements under the WTO, as distinct from the GATT, that China satisfy three levels of commitment to be admitted as a member of the WTO. Firstly, China was obliged to commit itself to the objectives of the WTO, such as to the most-favored nations' clause, national treatment and transparency requirements, as exemplified in the GATT and developed in the ensuing WTO agreements. Secondly, China had to demonstrate in its accession protocol its commitment to establishing and complying with a series of WTO trade rules applicable in specific sectors, such as in relation to agricultural and textiles, information technology and telecommunications. Thirdly, China had to establish its commitment to its bilateral agreements with its major trading partners, and that it had their support in negotiating its entry into the WTO. See *further infra* notes 41, 42 and 62.

lines.<sup>10</sup> While the GATT purported to incorporate both bilateral and regional trade and investment practices on grounds that they furthered multilateralism, such bilateralism arguably has chipped away at the development of global principles of trade and investment that some viewed as unduly protective of the national interests of developed states and their investors.<sup>11</sup>

Against this background, the tension between bilateralism and multilateralism has re-arisen with a vengeance as states have repeatedly failed to reach multilateral accord on account of their conflicting domestic interests.<sup>12</sup> A by-product of this tension has been the growth of bilateral agreements between selected trade and investment partners on supposedly mutually satisfying terms. The result of this by-product has been applauded as evidence of trade and investment development by those who favor bilateralism as a legitimate and efficacious development,<sup>13</sup> but a source of concern for those who worry about lost opportunities for the multilateral trade and investment processes. In issue, too, are systemic differences over the extent to which bilateralism undermines the multilateral process by marginalizing common principles that underlie it and imposing discriminatory standards of treatment upon foreign traders and investors.<sup>14</sup>

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<sup>10</sup> For the argument that the liberalization of trade through free trade agreements generally benefits multilateral trade, see Emanuel Ornelas, *Endogenous Free Trade Agreements and the Multilateral Trading System*, 67(2) J. INT'L ECON. 471 (2005). On the tension between trade liberalization and protectionism, see Gea M. Lee, *Trade Agreements with Domestic Policies as Disguised Protection*, 71(1) J. INT'L ECON. 241-259 (2007). See generally JOHN HOWARD JACKSON, *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* (CAMBRIDGE, UK, CAMBRIDGE UN. PRESS, 2006). But see Judith L. Goldstein & Lisa Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 63 (2003).

<sup>11</sup> It is arguable that BITs should be primarily regulated by the General Agreement on Trade and Services [GATS] not by the WTO. See Art. 2(2), Annex., General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1B, 1869 U.N.T.S. 183. See generally, Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007). See *infra* Section II, vi.

<sup>12</sup> Despite the image of a liberalizing trade and investment culture shifting from multilateralism to bilateralism, multilateralism is sometimes quietly resurrected through diplomacy. On the "quiet" resurrection of the Doha Talks through to Hong Kong, see e.g. recent comments of the U.S. Trade Representative, Susan Schwab, at <http://www.iht.com/articles/ap/2007/02/23/business/NA-FIN-US-Doha-Talks.php>. On different WTO negotiation strategies since Doha, see [http://www.twinside.org.sg/trade\\_1.htm](http://www.twinside.org.sg/trade_1.htm) See too Robert M. Stern, *Perspectives on the WTO Doha Development*, 5(4) GLOBAL ECON.J.(2005).

<sup>13</sup> In the contribution of BITs to the unification of a multilateral law governing investment, see eg T. Rixen & I. Rohlfiing, *The Institutional Choice of Bilateralism and Multilateralism in International Trade and Taxation*, 12 INT'L NEGOTIATION 389 (2007); CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION – SUBSTANTIVE PRINCIPLES* (Oxford International Arbitration Series 2007); Stephan Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. INT'L ARB. 265 (2007). In defense of bilateral free trade agreements, see e.g. Daniel Griswold, *Bilateral Deals are No Threat to Global Trade*, *The Financial Times* (27 July 2003); CBO, *The Pros and Cons of Pursuing Free Trade Deals*, Congressional Economic and Budget Issue Brief (Congressional Budget Office, 31 July 2003).

<sup>14</sup> See e.g. BRYAN MERCURIO & SIMON LESTER, *BILATERAL AND REGIONAL TRADE AGREEMENTS: ANALYSIS AND COMMENTARY* (CAMBRIDGE, UK: CAMBRIDGE UN. PRESS, UPCOMING 2007); LORAND BARTELS & FEDERICO ORTINO, *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* (OXFORD, UK: OXFORD UN. PRESS, 2006).

## II. Reconciling Multilateralism and Bilateralism

Despite inevitable tensions between bilateral and multilateral trade and investment processes, international instruments historically have tried to reconcile them. In particular, the GATT sought to do so as a matter of policy, principle and practice.<sup>15</sup> Article XXIV of the GATT specifically endorsed customs unions and free-trade agreements between members, noting that

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of [those] countries.<sup>16</sup>

The rationale behind the GATT's endorsement of regional and bilateral trade and arguably also investment agreements was that, by reducing barriers to entry between two or more members, the presupposed net result was the enhancement of global trade and investment.<sup>17</sup> The inferred result was an overall increase in total global trade and investment arising from the accretion of a series of profitable regional and bilateral agreements that exceeded their net cost.<sup>18</sup>

Whether or not these assumptions in Article XXIV have been satisfied depends on a careful scrutiny of the arguments favoring regional and bilateral trade and investment, and an assessment of their impact on trade and investment practice. What follows are reflections on different rationale favoring bilateral trade and investment agreements, followed in each case by arguments challenging them. The intention is neither to echo nor gainsay the principles or the arguments behind Article XXIV of the GATT, but to consider how they apply to conventional trade and investment practice.<sup>19</sup>

### i. The Rationale favoring Liberalized Trade and investment

The liberalization of trade and investment along bilateral lines is grounded in a set of interrelated political, economic and social assumptions. The first is that the liberalization of trade law in general is most effective when states reduce barriers to trade and investment including through bilateral agreements, when buyers, sellers

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<sup>15</sup> On the history of Article XXIV of the GATT and divisions among developing states over its virtues, see James H Mathis, *supra* note 3; J. Goto & K. Hamada, *Regional Economic Integration and Article XXIV of the GATT*, 7(4) REV. INT'L ECON. 555(1999).

<sup>16</sup> The text of Article XXIV, clause 4, continues that the contracting parties "recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." See further [http://www.wto.org/english/tratop\\_e/region\\_e/regatt\\_e.htm#gatt](http://www.wto.org/english/tratop_e/region_e/regatt_e.htm#gatt)

<sup>17</sup> The rules of the GATT and WTO provide that, except in relation to free trade areas (which would include bilateral trade agreements), a state may not impose a higher tariff against one member state than another, so that any diminution in a state's barriers to trade must apply equally to imports from all other member countries. As a result, reducing a state's barriers to trade supposedly promotes the competitiveness of all imports equally, so that the growth in imports from one state will displace domestic production and not imports from other states.

<sup>18</sup> See Fred C. Bergsten, *Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century* APEC Working Papers No. 96-15 (Washington D.C.: Institute for International Economics, 1996). It is through this "competitive liberalism" that GDP is expected to grow.

<sup>19</sup> See generally ELHANAN HELPMAN, *THE MYSTERY OF ECONOMIC GROWTH* (HARVARD UNIVERSITY PRESS, CAMBRIDGE, MA. 2004); J.R. MACARTHUR *THE SELLING OF FREE TRADE* (HILL AND WANG 2000).

and investors have greater freedom to transact within regional and bilateral free trade zones, when avenues to foreign investment are opened, and when the cost and prices of goods and services are reduced as a result of lower economies of scale in the production, distribution and sale of such goods and services within such regional or bilateral markets.<sup>20</sup> A second and related assumption is that trade and investment is more effectively liberalized when barriers to the supply of goods and services between particular states and their investors are reduced selectively, including when bilateral agreements are devised to have that effect.<sup>21</sup> A third assumption is that bilateral trade and investment agreements that reduce barriers to trade and investment between specific parties and their respective investors ordinarily liberalize trade and investment multilaterally as well.<sup>22</sup> A fourth qualifying assumption is that bilateral agreements that benefit global trade and investment when the benefit of expanded trade and investment between bilateral parties more than offsets the loss of trade and investment to states and their investors that are not parties to those agreements.<sup>23</sup> A fifth assumption is that liberalized trade and investment can and should have a positive distributive effect, namely, when the accretion in wealth derived from expanded trade and investment is distributed by partner states to bilateral trade and investment agreements to those subjects who have the greatest need.<sup>24</sup>

These assumptions are best examined in light of the principles underlying global trade and investment and in applying those principles to relationships among states engaged in bilateral, regional and multilateral trade and investment in particular.

## ii. Principled Reasons for Liberalizing Trade and Investment

<sup>20</sup> On historical debate over the extent to which global competition promotes trade liberalization, *see e.g.* EDWARD MONTGOMERY GRAHAM & J. DAVID RICHARDSON, *GLOBAL COMPETITION POLICY* (INSTITUTE FOR INTERNATIONAL ECONOMICS, 1997); MICHAEL STORPER, *THE REGIONAL WORLD: TERRITORIAL DEVELOPMENT A GLOBAL ECONOMY* (NEW YORK, NY: GUILFORD PRESS, 1997); ELHANAN HELPMAN & PAUL ROBIN KRUGMAN, *MARKET STRUCTURE AND FOREIGN TRADE PRESENTS A COHERENT THEORY OF TRADE IN THE PRESENCE OF MARKET STRUCTURES OTHER THAN PERFECT COMPETITION* (CAMBRIDGE, MASS.: MIT PRESS, 1985).

<sup>21</sup> Debate over the extent to which bilateral trade and investment is selective and exclusionary, *see e.g.* MARTIN WOLF, *WHY GLOBALIZATION WORKS* (NEW HAVEN: YALE UN. PRESS, 2004); Jagdish Bhagwati & Arvind Panagariya, *The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends*, 86(2) *AM. ECON.REV.* 82 (1996); A.O. Krueger, *Are Preferential Trading Arrangements Liberalizing or Protectionist?* 13(4) *J.ECON.PERSPECTIVE* 105 (1999); Raymond Riezman, *Can Bilateral Trade Agreements Help to Induce Free Trade*, 32 *CAN. J. ECON.* 751 (1999); Kyle Bagwell & Robert W. Staiger, *Will Preferential Agreements Undermine the Multilateral Trading System?* 108 *The ECON.J.* 1162 (1998); Philip I. Levy, *An Political-Economic Analysis of Free Trade Agreements*, 87 *AM.ECON.REV.* 506 (1997).

<sup>22</sup> On the impact of bilateral trade agreements upon non-parties, *see* Kyle Bagwell & Robert W. Staiger, *Erratum to Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO*, 67(2) *J. INT'L ECON.* 268(2004). *See too* Emanuel Ornelas, *Endogenous Free Trade Agreements and the Multilateral Trading System*, *supra* note 21.

<sup>23</sup> This relative decrease in barriers to trade occurs when the parties to bilateral or regional trade agreements erect barriers to trade to non-parties that do not exceed the reduced trade barriers between the parties to those agreements. *See e.g.* Helpman & Krugman, *supra* note 20. For criticisms that the economic benefits of BITS outweigh their costs, *see* J.W.Salacuse, *The Treatification of International Investment Law*, 8 *STUD. INT'L FIN. ECON. & TECH. L.* 241, 245 (2007).

<sup>24</sup> For an analysis of the distribution effect of trade policy, *see* Guido G. Porto, *Using Survey Data to Assess the Distributional Effects of Trade Policy*, 70(1) *J. INT'L ECON.* 140 (2006).

The philosophical basis for bilateral trade and investment is grounded in the interrelated principles of democratic liberalism affirmed in the 19<sup>th</sup> century<sup>25</sup> coupled with economic rationality that has evolved primarily in the 20<sup>th</sup> century.<sup>26</sup> Democratic liberalism infers that states ought to empower their subjects to engage in the free flow of goods and services across national boundaries as a democratic entitlement. Freedom within a liberal democracy includes, not only the personal liberty of individuals, but also their rights to profit from state sponsored trade and investment including from bilateral trade and investment. Coupled to this notion is the view that states that liberalize trade and investment bilaterally act in an economically rational manner in reducing barriers to the free flow of goods and services between bilateral parties and their investors. The result of the coalescence of democratic liberalism and economic rationalism is that trade and investment becomes more profitable for the benefit of the state parties and their traders and investors.<sup>27</sup>

To these principles is added a controversial third principle of equitable treatment, namely that a by-product of the liberalization of trade and investment between states is the promotion of “fairer trade and investment, an outgrowth of the early 29<sup>th</sup> century welfare state.”<sup>28</sup> Fairer trade and investment is achieved on a level playing field of equal opportunity when state parties to bilateral trade and investment agreements seek to benefit the subjects of treaty partners through “most favored nation” treatment, or “national” treatment. Fairer trade and investment is presumably economically rational as well in helping to sustain trade and investment between parties who are more equal in status and capacity.<sup>29</sup>

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<sup>25</sup> In rooting multilateral trade, including bilateral trade agreements in the traditions of a liberal democracy see e.g. DANIEL VERDIER, *DEMOCRACY AND INTERNATIONAL TRADE: BRITAIN, FRANCE, AND THE UNITED STATES, 1860-1990* (PRINCETON, N.J.: PRINCETON UN. PRESS, 1995).

<sup>26</sup> See generally D. SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION* 71-108 (CAMBRIDGE UNIVERSITY PRESS 2008); D. HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 15-19 (OXFORD UNIVERSITY PRESS 2005); RAZEEN SALLY, *CLASSICAL LIBERALISM AND INTERNATIONAL ECONOMIC ORDER: STUDIES IN THEORY AND INTELLECTUAL HISTORY* (UK: ROUTLEDGE, 1998). For a criticism of “economic rationality” attributed primarily to the United States, see e.g. Peter Karl Kresl, *The United States, Canada, and the ‘Market Mentality*, 14 (1) J. INTERAMERICAN STUD. & WORLD AFFAIRS 3 (1972).

<sup>27</sup> See PORTER, *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* (WASHINGTON DC, BROOKINGS INSTITUTION PRESS, 2001).

<sup>28</sup> See e.g. Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, IILJ Working Paper 2009/6 (Global Administrative Law Series), pp. 1-2, available at <http://www.iilj.org/publications/2009-6Kingsbury-Schill.asp> (last visited March 31, 2010); JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (CAMBRIDGE UNIVERSITY PRESS 2005), ch.9; Roger B. Porter, *ibid*). But see Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77(1) International Affairs 15–30 (2001).

<sup>29</sup> On the “most favored nation” treatment in international trade, see e.g. Faya Rodriguez, *The Most-Favored-Nation Clause in International Investment Agreements*, 25 J. INT’L ARB. 89 (2008); Endre Ustor, *Most-Favoured-Nation Clause*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 468 (Vol. III) (Bernhardt & Macalister-Smith eds.1997); Kamal Saggi, *Tariffs and the Most Favored Nation clause* 63 J. INT’L ECON. 341 (2005); Andrew F. Daughety & Jennifer F. Reinganum, *Exploiting Future: Settlements: A Signaling Model of Most-Favored National Clauses in Settlement Bargaining*, 35(3) RAND J. ECON. 467 (2004); Andrew A. Faye, *APEC and the New Regionalism*:

These philosophical assumptions behind bilateralism are at best generalizations. However much bilateralism may expand trade and investment between partner states and their subjects, the process of bilateral agreement is both selective and exclusionary in inception, application and operation. In particular, it leads to the privileging of some states and their subjects over other states and their subjects. However rational states may appear to be and however much they may propose to liberalize trade and investment practices bilaterally, acting in their rational self-interest does not ensure that the results are fair. Self-interest sometimes supports decisions to act inequitably, including by granting trade and investment benefits differentially on political grounds.. It also accounts in part for the observation that many BITs are viewed as overly favoring a dominant party at the expense of a subservient one. It also demonstrates the extent to which states that consider themselves disadvantaged as parties to a BIT do not ratify up to one third of BITs.<sup>30</sup>

Nevertheless, bilateralism does have a wide appeal. The rhetoric is that, in the absence of viable alternatives, bilateralism renders trade and investment across national boundaries more cost effective and ultimately more profitable. Insofar as bilateral trade and investment furthers these objectives, however questionable it may be in particular cases, one would expect states to support FTAs and BITs.<sup>31</sup> One would also expect states to act “rationally” in seeking the economic good of other states so long as doing so is consistent with furthering their own good.<sup>32</sup> One would also presuppose that most states would support the “invisible hand” of a free market of rational states, traders and investors in which bilateral agreements reduce barriers to trade and investment, lower the costs of goods and services, and help to promote higher standards of living in partner states.<sup>33</sup>

### iii. Benefits Ascribed to Bilateralism

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*GATT Compliance and Prescriptions for the WTO*, 28. See generally LAW & POLICY INT’L. BUS. 175 (1996).

<sup>30</sup> There is evidence that BITs have played only a “minor and secondary role in influencing FDI Flows...” See UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, UN Doc. UNCTAD/ITE/IIT/7 (1998), at 141-2. For the observation that only 800 out of 2,500 BITs were ratified, see M. Somarajah, *The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?* in FEDERICO ORTINO *et al.*, INVESTMENT TREATY LAW (2007). E. Neumayer & L. Spess, *Do bilateral investment treaties increase foreign direct investment to developing countries?*, at 5, LSE Research Online, available at: <http://eprints.lse.ac.uk/archive/00000627>; L.S. Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2009/2010 (K. Sauvant ed., forthcoming 2010). Van Harten, *supra* note 3, at 30-31.

<sup>31</sup> See generally ADAM SZIRMAI, THE DYNAMICS OF SOCIO-ECONOMIC DEVELOPMENT: AN INTRODUCTION (CAMBRIDGE: CAMBRIDGE UNIV. PRESS, 2005); PHILIP DAVID MCMICHAEL, DEVELOPMENT AND SOCIAL CHANGE: A GLOBAL PERSPECTIVE 3<sup>RD</sup> ED. (PINE FORGE PRESS, 2004); ROURDES BENERIA & SAVITRI BISNATH, GLOBAL TENSIONS: CHALLENGES AND OPPORTUNITIES IN THE WORLD ECONOMY (UK: ROUTLEDGE, 2003).

<sup>32</sup> For example, it is presumably rational for states to use bilateral free trade agreements as ways of “encouraging” states to engage in social reform in the interests of more stable, and mutually profitable, trade over the longer term. See further *infra* Section II iv.

<sup>33</sup> The conception of the “invisible hand” in the free market is attributed to Adam Smith and his “Wealth of Nations,” although in the two passages in which he refers to the invisible hand of the individual, not the state. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS PARA.IV.2.9 & PARA.IV.I.10 (EDINBURGH, 1776).

Bilateral trade and investment agreements are by their formal nature, reciprocal, consensual and inclusive of the state parties while being exclusionary of other states. As a matter of practice, however, FTAs and BITs are internally different from one another. Some are seemingly all encompassing in liberalizing trade and investment and in seeking to provide unrestricted access to local markets.<sup>34</sup> Others are distinctly protectionist.<sup>35</sup> Some set clear shields around sensitive industries like education, the media and healthcare.<sup>36</sup> Others do so generically through open-ended protection of “the national interest.”<sup>37</sup> Some bilateral trade and investment agreements resemble treaties of friendship more than instruments of trade and investment liberalization. Some states, like Ecuador, withdraw from BITs on the economic grounds that they fail adequately to benefit the domestic economy.<sup>38</sup>

Against such a background of difference,<sup>39</sup> one ought not to expect bilateral agreements to represent comparable patterns of reciprocity, inclusiveness for the parties to such agreements and their investors or the exclusion of non-parties and their investors. Nor should one expect such differences to derive solely from the changing normative attitudes of states towards democratic liberalism or their disparate support for economic rationality. Different values ascribed to bilateral agreements also derive functionally, from a quantitative assessment of economic data such as the impact of foreign direct investment upon the balance of trade and investment on gross domestic production.<sup>40</sup>

Nor should one expect bilateral trade and investment practice to follow a consistent pathway. States conclude FTAs and BITs for a multiplicity of reasons that also

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<sup>34</sup> See TRAKMAN, DISPUTE SETTLEMENT UNDER THE NAFTA: MANUAL AND SOURCEBOOK (NEW YORK: TRANSNATIONAL PUBL., 1997); ROBERT E. LITAN & PETER HAKIM, THE FUTURE OF NORTH AMERICAN INTEGRATION: BEYOND NAFTA (WASHINGTON DC: BROOKINGS INSTITUTION PRESS, 2002).

<sup>35</sup> Protectionism is often based on the “infant industry” syndrome, namely, that a state needs to protect an industry that is as yet under-developed and would be undermined by foreign competition in the absence of such protection. Equally often, such protection is girded by the interest of a government in preserving relationships with particular industries, as when a government supports farmers who represent significant voting strength in rural constituencies. On infant industries, see e.g. *Symposium on Infant Industries: A Comment*, 31(1) OXFORD DEVELOP. STUD 33 (2003); Steven M. Suranovic, *International Trade Theory and Policy*, at <http://internationalecon.com/Trade/Tch100/T100-4.php>

<sup>36</sup> For instance, the US-Australia Free Trade Agreement. See e.g. JEFFREY J. SCOTT, FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES (INSTITUTE FOR INTERNATIONAL ECONOMICS, 2004); Peter Drahos & David Henry, *The Free Trade Agreement between Australia and the United States*, BMJ. Com, 27 (Feb.2007); P.I. Levy, *A Political-Economic Analysis of Free-Trade Agreements*, 87(4) AM. ECON.REV.(2003).

<sup>37</sup> Such protectionism is apparent when smaller states wish to protect their “cultural heritage” in negotiating FTAs and BITs with more powerful trade partner. Both Canada and Mexico under the NAFTA and Australia under the U.S.-Australia Free Trade Agreements were so preoccupied. See e.g. John A. Ragosta, *The Cultural Industries Exemption From NAFTA – Its Parameters*, 3 Canada-US L. J. (1997); Report, Department of Foreign Affairs and Trade, *An Australia-United States Free Trade Agreement* (Australian Government, DFAT, 2001 at [http://www.dfat.gov.au/publications/aus\\_us\\_fta\\_mon/](http://www.dfat.gov.au/publications/aus_us_fta_mon/)

<sup>38</sup> See L.E. Peterson, L.E. Peterson, *Ecuadorian President reportedly asks Congress to terminate 13 BITs; Move Comes on Heels of Earlier Termination of Multiple BITs*, 2(17) INVESTMENT ARB. REP. (30 October, 2009).

<sup>39</sup> On the debate over the extent to which states, not limited to developing states, protect their agricultural sectors, see *infra* Section III, vi.

<sup>40</sup> See Jewswald Salacuse & Nicholas Sullivan, *Do BITs Really Work? An Evaluation of BITs and their Grand Bargain*, 46 HARV. INT’L L.J. 67 (2005).

change over time, place and space. For example, China's interest in bilateral trade and investment has changed with its accession to global markets for exports and investment;<sup>41</sup> yet it has continued to restrict trade and foreign investment that otherwise would threaten its vulnerable rural economy.<sup>42</sup>

Similarly, bilateral trade and investment practices vary according to a shifting balance of power within, between and among specific trading blocs like the Economic Union [EU] and the North American Free Trade Agreement [NAFTA].<sup>43</sup> Bilateral trade and investment practices also vary with the practices that evolve in particular trading hubs, such as Hong Kong and Singapore as each hub seeks to liberalized trade and investment in its own distinctive way.<sup>44</sup>

Whatever the rhetoric -- that bilateral trade and investment agreements are used to liberalize trade and investment, or to protect favored or vulnerable industries from competition, most states recognize that the benefits of bilateral trade and investment are inconsistent at best. One can generalize the perceived benefits and disadvantages of free trade zones, such as for the EU or the NAFTA, so long as one considers the exceptions that sometimes disprove the rule.

It is against the background of exceptions that the benefit of bilateral trade and investment should be evaluated. However multifarious bilateral agreements may

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<sup>41</sup> See e.g. Stephan Schill, *Tearing Down the Great Wall – The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73. (2007); GERALD CHAN, CHINA'S COMPLIANCE IN GLOBAL AFFAIRS: TRADE, ARMS CONTROL, ENVIRONMENTAL PROTECTION, HUMAN RIGHTS (NEW JERSEY, WORLD SCIENTIFIC, 2006); YONG DENG & FEI-LING, CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY (LANHAM, MD, ROWMAN & LITTLEFIELD, 2005); PITMAN B. POTTER, THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE (ROUTLEDGE, 2001).

<sup>42</sup> See AIMIN CHEN & SHUNFENG SONG, CHINA'S RURAL ECONOMY AFTER THE WTO: PROBLEMS AND STRATEGIES (ASHGATE PUBL., 2006); DEEPAK BHATTASALI & SHANTONG LI, CHINA AND THE WTO: POLICY AND POVERTY AFTER CHINA'S ACCESSION TO THE WTO (WORLD BANK, 2004). SEE TOO JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION (MARTINUS NIJHOFF, 2008).

<sup>43</sup> "second generation" regional free trade agreements is intended those regional agreements that have arisen over the last two decades under the WTO, notably the North American Free Trade Agreement (NAFTA) as distinguished from "first generation" agreements like the European Union (EU) which traces back further. On the history of the EU, see CHRISTOPHER STEVENS & JANE KENNAN, POST LOME WTO COMPATIBLE TRADING ARRANGEMENTS, ECONOMIC PAPER 45 (ECONOMIC PAPER SERIES, COMMONWEALTH SECRETARIAT, 2002); ERNST-ULRICH PETERSMANN & MARK A. POLLACK, TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO (OXFORD, UK: OXFORD UN. PRESS, 2003).

<sup>44</sup> See e.g. L.S. Poulsen, *Are South-South BITs any Different? A Logistic Regression Analysis of Two Substantive BIT Provisions*, Paper for the American Society of International Law Biennial Conference (November 2008); K. Miles, *Imperialism, Eurocentrism and International Investment Law: Whereto From Here for Asia?*, Paper for the Second Biennial General Conference of the Asian Society of International Law (August 2008); RAMKISHEN S. RAJAN, REZA Y. SIREGAR & RAHUL SEN, SINGAPORE AND FREE TRADE AGREEMENTS: ECONOMIC RELATIONS WITH JAPAN AND THE UNITED STATES (INSTITUTE OF SOUTH EAST ASIAN STUDIES, 2001); Sen Rahul, *Free Trade Agreements in Southeast Asia* (Institute of Southeast Asian Studies, 2004); John Ravenhill, *The New Bilateralism in the Asia Pacific*, 24(2) Third World Quarterly 299 (2003); RAMKISHEN S. RAJAN, REZA Y. SIREGAR & RAHUL SEN, SINGAPORE AND FREE TRADE AGREEMENTS: ECONOMIC RELATIONS WITH JAPAN AND THE UNITED STATES (INSTITUTE OF SOUTHEAST ASIAN STUDIES, 2001).

appear to be, they assuredly satisfy similar economic interests differently and different interests similarly.<sup>45</sup> However distinctive their benefits may be to the bilateral partners and their home and host state investors, pervasive benefits for the multilateral trade community depends upon the social, economic, political and legal circumstances in which FTAs and BITs arise and to which they are applied.<sup>46</sup> Ascertaining those benefits involves a shift from rhetoric, speculation and generalizations about the economic rationality of bilateral trade and investment to evidence of identifiable benefits derived from them.. It challenges the idealized belief that the liberalization of trade and investment is “good” in itself; and it calls for demonstration of how bilateral trade and investment agreements actually lead to a greater economic or social “good.”

In determining the virtues of FTAs and BITs, it is appropriate to identify particular obstacles to them, institutionalized reactions to those obstacles and the manner in which those reactions have affected trade and investment practice.

#### iv. Challenges to FTAs and BITs

The conduct of bilateral trade and investment is sometimes depicted as a victory for economic and political stability. The rationale is that it leads to more pervasive, effective, reliable, transparent and predictable trade and investment relations than in centuries past when pirates ravaged and plundered the wealth of targeted states and their subjects.<sup>47</sup> Despite the rhetoric that modern BITs and FTAs stabilize trade and investment, the reality is that modern states sometimes expropriate and confiscate investments,<sup>48</sup> and less self-evidently, by sanctioned infringements of intellectual

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<sup>45</sup> On the significance of complex geo-political and economic forces within the WTO, *see* Fatoumata Jawara & Aileen Kwa, Behind the Scenes at the WTO – The Real World of International Trade Negotiations, *supra* note 1; Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L ECON. L. 153 (2007).

<sup>46</sup> A multilateral trade culture is certainly part of a “legal” culture, but again far from a fixed culture grounded in clear-cut legal principles like freedom of contract and the binding force of agreements. *See generally* Leon E. Trakman, *Legal Traditions and International Commercial Arbitration*, American Review of Arbitration (Spring 2007), also at [http://works.bepress.com/leon\\_trakman/](http://works.bepress.com/leon_trakman/); Roger Cotterrell, *The Concept of Legal Culture*, Article 1 in DAVID NELKEN, ED., COMPARING LEGAL CULTURES, 13-31 (ALDRSHOT: DARTMOUTH PUBLISHING COMPANY, 1997); Alan Watson, *Legal Change: Sources of Law and Legal Culture* 131 U. Pa. L.REV.1121 (1982). *See too* CLIFFORD GEERZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* (BASIC BOOKS, 1973).

<sup>47</sup> *See e.g.* Michael N. Barnett & Raymond. Duvall, *Power in Global Governance* 98 Cambridge Studies in Global Governance (Cambridge, UK, 2005); JAGDISH NATWARLAL BHAGWATI, IN DEFENSE OF GLOBALIZATION (OXFORD, U.K.: OXFORD UNIVERSITY PRESS, 2004); BERNARD M. HOEKMAN & PHILIP AADITYA MATTOO, DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK (NEW YORK: WORLD BANK PUBL., 2002). On applauding the apparatus supporting the GATT and WTO systems, including the public servants that maintain the offices of multilateral trade institutions, *see* YI CHONG XU & PATRICK WELLER, GOVERNANCE OF WORLD TRADE: INTERNATIONAL CIVIL SERVANTS AND GATT/WTO (GLOS., U.K.: EDWARD ELGAR PUBL., 2004). *But see* M. Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment*, Norman Paterson School of International Affairs Simon Reisman Lecture in International Trade Policy, Ottawa (12 September, 2002), available at: <http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf>; Robert B. Zoellick, *The WTO and New Global Trade Negotiations: What's at Stake* (October 30, 2001), COUNCIL ON FOREIGN RELATIONS, available at <http://www.cfr.org/world/wto-new-global-trade-negotiations-s-stake/p4149>.

<sup>48</sup> *See e.g.* James E. Anderson & Oriana Bandiera, *Traders, Cops and Robbers*, 70(1) J. INT'L ECON. 197-215 (2006).

property rights.<sup>49</sup> Dominant investors, in turn, exercise quasi-public authority in their sphere of economic influence.

A further challenge to the effective, reliable and predictable conduct of bilateral trade and investment is in the muting of legal sanctions against states such as in their treatment of home state investors. Not only are states sometimes inefficient in concluding, interpreting and applying regional or bilateral agreements.<sup>50</sup> Otherwise compliant states resist sanctioning such inefficiency, not least of all to protect their own brand of domestic protectionism.<sup>51</sup> The result is that, however seemingly efficient bilateral trade and investment agreements might have become, they are diffusely construed and applied. The practical reality, too, is that identifying and isolating instances of doubtful state practice is often difficult if states shroud anti-competitive practices behind the veil of state sovereignty and national interest, in which partner states acquiesce to avoid negative political or economic repercussions.<sup>52</sup>

Finally, any attempt to ensure that bilateral and regional trade and investment agreements are applied in a manner that promotes an idealized “good” practice raises, not only the question of what constitutes “bad practice”, but how to identify and regulate “bad” practice. As far as action against allegedly recalcitrant states is concerned, Article XXIV of the GATT is difficult to enforce because it requires consensus among states to establish principles and guidelines to deal with dubious trade and investment practices.<sup>53</sup> For another thing, the multilateral community may

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<sup>49</sup> See generally Matthew Kennedy, *When Will the Protocol Amending the Trips Agreement Enter into Force?* 13 J. INT'L ECON. L. 459, 459 (2010); Henning Grosse Ruse-Khan, *Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection* 1(1) TRADE L. & DEV. 56 (2009); Donald D. Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the Trips Agreement* (Armonk, NY: M.E. Sharpe Publ, 2004); Will Martin & Mari Pangestu, *Options for Global Trade Reform: A View from the Asia-Pacific* (Cambridge Un. Press, 2003); *Intellectual Property in the Global Marketplace*, 3(3) Economic Perspectives, An Electronic Journal of the U.S. Information Agency (May 1998); KEITH EUGENE MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (WASHINGTON DC: INSTITUTE FOR INTERNATIONAL ECONOMICS, 2000); MITCHELL B. WALLERSTEIN, MARY ELLEN MOGEE & ROBERTA A. SCHOEN, *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY* (WASHINGTON DC: NATIONAL ACADEMIES PRESS, 1993). See generally <http://www.cid.harvard.edu/cidtrade/issues/ipr.html>

<sup>50</sup> For the argument that some developing states have unreliable public institutions which, in turn, has important implications for the design of monetary policies and institutions, see Haizhou Huang & Shang-Jin We, *Monetary Policies for Developing Countries: The Role of Institutional Quality*, 70(1) J. INT'L ECON. 239-252 (2006).

<sup>51</sup> It remains to be seen how bilateral agreements can constrain recalcitrant behavior by states such as in regard to foreign investment. But see Stephan Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. INT'L ARB. 265 (2007). See too Robert McMahon, “The Rise in Bilateral Free Trade Agreements”, *supra* note 6.

<sup>52</sup> Studiously avoiding trade and investment conflict is an old strategy in multilateral trade relationships. For Canadian perspectives including foreign policy on conflict avoidance, see e.g. PHILIPPE G. LE PRESTRE, *ROLE QUESTS IN THE POST-COLD WAR ERA: FOREIGN POLICIES IN TRANSITION* (MONTREAL, CANADA: MCGILL UNIVERSITY PRESS, 1997); DUNCAN CAMERON, *THE FREE TRADE PAPERS* (OTTAWA, CANADA: JAMES LORIMER & CO., 1986). On trading with recalcitrant states, see e.g. Dilip Das, *Globalization and the Anti-Globalization Lobby: Investigating Two Sides of One Veracity* (April 2005) at <http://www.cid.harvard.edu/cidtrade/Papers/das-aaa.pdf>.

<sup>53</sup> For the reasons why the drafts of the GATT included Article XXIV, see *supra* notes 16 and 17. On Article XXIV of the GATT generally, see James H Mathis, *supra* note 3.

avoid imposing sanctions because the cost of compliance may outweigh the perceived benefit; and because state-investor disputes arising from expropriation as confiscation are considered 'private' to be resolved by investment arbitration, not by multilateral state action.<sup>54</sup> The result may well be states that engage in wide scale confiscation of foreign direct investment are willing to endure trade sanctions, boycotts and protests from the international community rather than change the way they do business. The further prospect is that, however much bilateral trade and investment agreements include provisions that purport to regulate a full spectrum of trade and investment practice, those provisions may be comparatively meaningless if states disregard them such as by declining to submit to investment arbitration.

## v. Institutional Remedies

An idealized challenge to state practice is to invoke institutional trade and investment remedies to deal with allegedly unfair or unreasonable trade and investment action by states. For example, a global response to alleged infractions of principles of international trade and investment law is to rely on the sanctioning force of the WTO or the TRIPS.<sup>55</sup> A regional response is to draw on the agreements and practices that bind the European Union (EU),<sup>56</sup> ASEAN in the Asia Pacific,<sup>57</sup> and the NAFTA in North America.<sup>58</sup> A bilateral response is to rely on trade and investment sanctions

<sup>54</sup> See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Judith Gill et al., *Contractual Claims and Bilateral Investment Treaties*, 21 J. INT'L ARB. 397 (2004); RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (Kluwer International, 1995).

<sup>55</sup> See e.g. Michael N. Barnett & Raymond. Duvall, *Power in Global Governance*, 98 Cambridge Studies in Global Governance (Cambridge, UK, 2005); JAGDISH NATWARLAL BHAGWATI, *IN DEFENSE OF GLOBALIZATION* (OXFORD, U.K.: OXFORD UNIVERSITY PRESS, 2004); BERNARD M. HOEKMAN & PHILIP AADITYA MATTOO, *DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK* (NEW YORK: WORLD BANK PUBL., 2002). On applauding the apparatus supporting the GATT and WTO systems, including the public servants that maintain the offices of multilateral trade institutions, see YI CHONG XU & PATRICK WELLER, *GOVERNANCE OF WORLD TRADE: INTERNATIONAL CIVIL SERVANTS AND GATT/WTO* (GLOS., U.K.: EDWARD ELGAR PUBL., 2004). But see M. Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment*, Norman Paterson School of International Affairs Simon Reisman Lecture in International Trade Policy, Ottawa (12 September, 2002), available at: <http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf>; Robert B. Zoellick, *The WTO and New Global Trade Negotiations: What's at Stake* (October 30, 2001), COUNCIL ON FOREIGN RELATIONS, available at <http://www.cfr.org/world/wto-new-global-trade-negotiations-s-stake/p4149>.

<sup>56</sup> On a history of EU trade policy, see Christopher Stevens & Jane Kennan, *Post Lome WTO Compatible Trading Arrangements*, *supra* note 44; Ernst-Ulrich Petersmann & Mark A. Pollack, *supra* note 44. See too GARY P. SAMPSON & STEPHEN WOOLCOCK, *REGIONALISM, MULTILATERALISM, AND ECONOMIC INTEGRATION: THE RECENT EXPERIENCE* (TOKYO, JAPAN: UNITED NATIONS UNIVERSITY PRESS, 2003).

<sup>57</sup> On the ASEAN Free Trade Area, see <http://www.us-asean.org/afta.asp>; <http://www.aseansec.org/economic/afta/afta.htm>. See too Vinod K. Aggarwal *The Political Economy of a Free Trade Area of the Asia-Pacific*, 14(2) BUS. ASIA (Feb. 2007); Jamus Jerome Lim, *The Dimensions of Regional Trade Integration in Southeast Asia* 23(3) ASEAN ECON.BULLETIN., 395-396 (2006); Vinod K. Aggarwal & Min Gyo Koo, *The Evolution of APEC and ASEM: Implications of the New East Asian Bilateralism*, 4(2) EU.J. EAST ASIAN STUD. 222-264 (2005). See too Vinod K. Aggarwal, *The Political Economy of a Free Trade Area of the Asia-Pacific*, 14(2) BUS. ASIA (Feb. 2007); Jamus Jerome Lim, *The Dimensions of Regional Trade Integration in Southeast Asia* 23(3) ASEAN ECON.BULLETIN., 395-396 (2006); Vinod K. Aggarwal & Min Gyo Koo, *The Evolution of APEC and ASEM: Implications of the New East Asian Bilateralism*, 4(2) EU.J. EAST ASIAN STUD. 222 (2005).

within bilateral trade and investment agreements, including remedies available to foreign investors in host states.<sup>59</sup>

However, one should not over-emphasize either the authority or the consistency of institutional responses to state action. Firstly, institutions diverge in their responses to aberrant state practice as the institutions themselves change. For example, far from being fixed in its responses to allegedly aberrant state conduct, the global response of the multilateral community has varied markedly from the 1947 General Agreement on Tariffs and Trade (GATT), to the WTO,<sup>60</sup> and from the Uruguay Round in 1994 to Seattle in 1999 to Doha in 2001 to Cancún in 2003 and to Hong Kong in 2005.<sup>61</sup> Regional and bilateral responses to dubious state practices are subject to mass-political change, such as arose out of the democratization of Eastern Europe and China's entry to the WTO.<sup>62</sup> Other changes occur gradually but significantly, such to

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<sup>58</sup> On Article 11 (Investment) of the NAFTA in relation to dispute resolution in particular, *see* T. Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 CAN. BUS. L.J. 405 (2002); C.N. Brower, C.H. Brower II & J.K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415 (2003); LEON E. TRAKMAN, *DISPUTE SETTLEMENT UNDER THE NAFTA: MANUAL AND SOURCE BOOK*, *supra* note 35. *See* too ANDREW D. M. ANDERSON, *SEEKING COMMON GROUND: CANADA-U.S. TRADE DISPUTE SETTLEMENT POLICIES IN THE NINETIES* (BOULDER, CO: WESTVIEW PRESS, 1995); David A. Gantz, *Resolution of Trade Disputes under NAFTA's Article 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 Law & Policy Int'l Bus. 3 (1998).

<sup>59</sup> On investor-state arbitration, *see generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008); *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (MUCHLINSKI/ORTINO/SCHREUER EDS., 2008); ANDREW NEWCOMBE & LLUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES – ETANDARDS OF INVESTMENT PROTECTION* (2009). On trade and investment remedies, *see* *RESOURCE BOOK ON TRIPS AND DEVELOPMENT*, UNCTAD-ICTSD STAFF, (CAMBRIDGE, UK: CAMBRIDGE UNIVERSITY PRESS, 2005); PANOS KOUTRAKOS, *TRADE, FOREIGN POLICY AND DEFENCE IN EU CONSTITUTIONAL LAW* (OXFORD, UK: HART PUBLISHING, 2001).

<sup>60</sup> *See generally* JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* (CAMBRIDGE, U.K., CAMBRIDGE UN. PRESS, 2000); MIKE MOORE, *A WORLD WITHOUT WALLS: FREEDOM, DEVELOPMENT, FREE TRADE AND GLOBAL GOVERNANCE* (CAMBRIDGE, UK: CAMBRIDGE UN. PRESS, 2003); JOHN MICKLETHWAIT & ADRIAN WOOLRIDGE, *A FUTURE PERFECT: THE CHALLENGE AND HIDDEN PROMISE OF GLOBALIZATION* (NEW YORK: CROWN PUBLISHERS 2000).

<sup>61</sup> *See* Doha Development Round gateway at [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm); Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT'L L.J. 1, 125 (2009); ANDREW G. BROWN *RELUCTANT PARTNERS: A HISTORY OF MULTILATERAL TRADE; COOPERATION, 1850-2000*, (ANN ARBOR, MICH: UN. MICHIGAN PRESS, 2003); BERNARD HOEKMAN & MICHEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, FROM GATT TO WTO* (OXFORD UK: OXFORD SCHOLARSHIP ONLINE, 2001).

<sup>62</sup> On China's accession to the WTO, *see* G. WEN, HUIZHONG, ZHOU & DING LU, EDS., *CHINA'S ECONOMIC GLOBALIZATION THROUGH THE WTO* (ABINGDON, OXFORD: ASHGATE PUBL., 2003); SHUMING BAO, SHUANGLIN LIN, CHANGWEN ZHAO, *THE CHINESE ECONOMY AFTER WTO ACCESSION* (ABINGDON, OXFORD: ASHGATE PUBL., 2006); GUY LIU SHAOJIA & GUY SHAOJIA LIU, *CHINA'S WTO ACCESSION AND THE IMPACT ON ITS LARGE MANUFACTURING ENTERPRISES* (WORLD SCIENTIFIC, SINGAPORE UN. PRESS, 2001); CHING CHEONG, CHING HUNG-YEE, CHEONG CHING & HUNG YEE CHING, *HANDBOOK ON CHINA'S WTO ACCESSION AND ITS IMPACTS* (WORLD SCIENTIFIC, 2003).

China's gradual realignment of political-economic relations within its neighborhood<sup>63</sup> and commercial hubs like Singapore imbedding themselves over time as international gateways between East and West.<sup>64</sup>

Nor is it suggested that this realignment of bilateral trade and investment relationships constitutes an insidious plot to shield "bad" practice by states. Using bilateral agreements to support unlawful activity is one thing. States that use bilateral agreements to legitimate self-interested practices that are legitimate is another. However much the multilateral community would like to reduce protectionist tariffs, developing states are likely to invoke bilateral agreements to expand their exports while also protecting their vulnerable agricultural industries from foreign trade and investment.<sup>65</sup> The negotiation of selective trade and investment barriers is not *per se* bad; nor is it akin to unfettered trade reductionism. What is "bad" is the capacity of states to act in flagrant disregard of international instruments and to try to shield themselves from sanction through the protective shield of bilateral agreements.

## vi. Privileges of Developed States

It is true that bilateral trade and investment is not conducted on a perfectly level playing field. Some states enjoy a competitive "wealth" advantage over others; sometimes success on the bilateral stage is tinged with a mixture of privilege and opportunism.<sup>66</sup>

On occasions, developing states find themselves in an awkward position. They feel compelled to criticize bilateral trade and investment agreements in general as favoring developed states, while at the same time trying to conclude bilateral agreements with developed states they otherwise would criticize as privileged against them. In trying to win the confidence of international capital markets, some developing states also

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<sup>63</sup> See e.g. Bruno Cabrillac, *A Bilateral Trade Agreement between Hong Kong and China: CEPA*, 54 *China Perspectives* 39 (2004). China's "arrival" in the global trade community is marked by speculation as to how China will change the global trading community, and vice versa. It is also a subject of debate at international conferences. See e.g., <http://www.jurisconferences.com/arbitration.php?id=1&p=1> On China's influence over global trade, see *supra* notes 10, 42, 43 and 62.

<sup>64</sup> See e.g. R.S. Rajan & R.Sen, *Singapore's New Commercial Trade Strategy: The Pros and Cons of Bilateralism*, available at [http://scholar.google.com/scholar?hl=en&lr=lang\\_en&q=cache:\\_6DNZGy37RMJ:www.adelaide.edu.au/cies/0202.pdf+related:\\_6DNZGy37RMJ:scholar.google.com/](http://scholar.google.com/scholar?hl=en&lr=lang_en&q=cache:_6DNZGy37RMJ:www.adelaide.edu.au/cies/0202.pdf+related:_6DNZGy37RMJ:scholar.google.com/) Cf. R.S. Rajan & R.Sen, *Trade Reforms in India Ten Years on: How Has it Fared Compared to Its East Asian Neighbours?* at [http://scholar.google.com/scholar?hl=en&lr=lang\\_en&q=cache:PZWEzWPPxpkJ:www.adelaide.edu.au/CIES/0147.pdf+related:\\_6DNZGy37RMJ:scholar.google.com/](http://scholar.google.com/scholar?hl=en&lr=lang_en&q=cache:PZWEzWPPxpkJ:www.adelaide.edu.au/CIES/0147.pdf+related:_6DNZGy37RMJ:scholar.google.com/); Linda Low, *Singapore's Bilateral Free Trade Agreements: Institutional. and Architectural Issues*, April 22-23 2003, at [http://www.pecc.org/publications/papers/trade-papers/5\\_CP/3-low.pdf](http://www.pecc.org/publications/papers/trade-papers/5_CP/3-low.pdf)

<sup>65</sup> See CHARNOVOTZ, MAPPING THE LAW OF WTO ACCESSION IN THE WTO: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES (JANNOW, DONALDSON & YANOVITCH, EDS) CH 46 (2008) available at <http://ssrn.com/abstract=957651>. On the differential impact welfare and market access has upon tariff structures, see James E. Anderson & J. Peter Neary, *Welfare Versus Market Access: The Implications of Tariff Structure For Tariff Reform*, 71(1) *J. INT'L ECON.* 187 (2007).

<sup>66</sup> See generally Kyle Bagwell and Robert W. Staiger, *Multilateral trade negotiations, bilateral opportunism and the rules of GATT/WTO*, 63(1) *J. INT'L ECON.* 1-29 (2004).

risk foregoing sensible domestic economic policies in favor of perverse ones.<sup>67</sup> A real hazard is that wealthy developed states may exploit the vulnerabilities of developing states by extracting excessive trade and investment concessions that developing states can ill afford to sustain over the longer term.

Against this background, opponents of bilateral trade and investment agreements worry that FTAs and BITs will fail adequately to redress social and economic deprivation in developing states; and that developed states will turn a blind eye to human rights abuses in developing states as well.<sup>68</sup> A pervasive concern is that, far from liberalizing trade and investment, selectivity in bilateral trade and investment may expand upon the already formidable wealth and investment gap between developing and developed states, institutionalizing the trade and investment advantages of the latter.<sup>69</sup> Coupled with this is the threat of perpetuating of a systemic bias in favor of developed states and further marginalizing the competitive disadvantages of developing states, such as in relation to rules of origin.<sup>70</sup>

Accentuating these risks is concern that developing states lack the economic infrastructure to become 'equal opportunity' trade and investment partners for developed states and their investors.<sup>71</sup> For example, developing states may feel compelled to comply with international trade and investment standards, including by establishing labor and environment structures at a cost they cannot afford. Typifying this problem, Christian aid agencies claim that the cost of trade and investment to Sub-Saharan Africa comes at the price of US\$272 billion in compliance with international standards, in aid, loans and debt relief. The argument is that such money could be better spent elsewhere, investing in the vaccination of children and providing schooling, shelter and health care.<sup>72</sup> A consequential response is that these standards of health care and education are likely to deteriorate further as developing states mollify bilateral trade and investment partners by marginalizing the social cost of such initiatives.<sup>73</sup>

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<sup>67</sup> See Gea M. Lee, Sharun W. Mukand, *Globalization and the 'Confidence Game*, 70(2) J. INT'L ECON. 406-427 (2006).

<sup>68</sup> See R.J. Bubb & S. Rose-Ackerman, *BITs and Bargains: Strategic aspects of Bilateral and Multilateral Regulation of Foreign Direct Investment*, 27 INT'L REV. L. & ECON. 291 (2007); A. Guzman, *Why developing countries sign treaties that hurt them: Explaining the popularity of BITs*, 38 VA. J. INT'L L. 553 (1998). See too *infra* Section II, iv.

<sup>69</sup> Some critics stridently hold this view and indeed, it forms a core part of their antagonism towards the WTO in general and bilateral trade agreements in particular. See *e.g supra* note 9.

<sup>70</sup> See Won-Mog Choi, *Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade*, 13 J. INT'L ECON. L. 111, 114-24 (2010). But see *Rules of Origin: Outgoing chair says 55% of rules of origin agreed*, WTO: 2010 NEWS ITEMS (25 March 2010), available at [http://www.wto.org/english/news\\_e/news10\\_e/roi\\_25mar10\\_e.htm](http://www.wto.org/english/news_e/news10_e/roi_25mar10_e.htm) See further *infra* Section III, vi.

<sup>71</sup> Typical of additional costs to developing states are the communication costs associated with the liberalization of trade, including bilateralism. See *e.g.* Carsten Fink, Aaditya Mattoo & Ileana Cristina Neagu, *Assessing the Impact of Communication Costs on International Trade*, 67(2) J. INT'L ECON. 428 (2005).

<sup>72</sup> See AfricaFocus Bulletin, *Africa: The Cost of Free Trade* (July 5, 2005) at <http://www.africafocus.org/docs05/trad0507.php>; JOHN HILARY THE WRONG MODEL: GATS, TRADE LIBERALIZATION AND CHILDREN'S RIGHT TO HEALTH (LONDON: SAVE THE CHILDREN UK, 2000).

<sup>73</sup> On the compliance obligations imposed on developing states, see *e.g.* YONG-SHIK LEE, *RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM* (CAMBRIDGE, U.K.:

Developing states, as sovereign entities are free to decline to conclude FTAs and BITs on grounds that doing so conflicts with their collective self-interest.<sup>74</sup> They also have legal remedies if the agreements they conclude are violated, while their home state investors may also have arbitral remedies against dominant host states.<sup>75</sup> However, as a practical matter bilateral trade and investment agreements sometimes resemble adhesion contracts. Powerful states dictate their terms and dependant states and their investors must either adhere to them or sacrifice the benefits they seek from bilateral trade and investment.<sup>76</sup>

### III. Positional Support for Bilateral Trade and Investment

The rationale for bilateral trade and investment is grounded in a set of both general and specific arguments. What follows is an articulation of each, followed by a critical reflection.

#### i. More is better than less

A simplistic argument in favor of bilateral trade and investment agreements is that, all other things being equal, bilateral trade and investment agreements lead to there being more and that having more is better than having less. States and their subjects that have more can buy and sell more. Foreign direct investment provides employment and helps to improve standards of living in developing states. Taxes and duties secured from foreign entities enable developing states to extend economic benefits like social services, health care and education to the less fortunate. Having more allows developing states to share more.<sup>77</sup>

The counter-side to this analysis is that bilateral agreements can cause trade and investment to contract, not expand. For example, the net creation of trade and investment arising from FTAs and BITs can be more than offset by the net diversion

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CAMBRIDGE UN. PRESS, 2006). See too, Luis Abugattas Majluf, *Swimming in the Spaghetti Bowl: Challenges for Developing Countries under the 'New Regionalism'*, Policy Issues in International Trade and Commodities Study Series No. 27, United National Conference on Trade and Development, New York & Geneva, 2004), at

[http://scholar.google.com/scholar?hl=en&lr=&q=cache:0Q1J0qun6XcJ:www.unctad.org/en/docs/itcdta\\_b28\\_en.pdf+](http://scholar.google.com/scholar?hl=en&lr=&q=cache:0Q1J0qun6XcJ:www.unctad.org/en/docs/itcdta_b28_en.pdf+)

<sup>74</sup> It is apparent that a number of developing states have opted to enter into bilateral trade agreements. See <http://www.worldtradelaw.net>. At the same time, it is unreasonable to assume that, in doing so, they have somehow leveled the playing field with their developed trade partners.

<sup>75</sup> In addition to their legal remedies for treaty violation, developing states can invoke principles of comity that underscore not only the obligations that are owed to them, but also their historical disadvantage including in relation to international trade. On arbitral remedies available to foreign direct investors, see Trakman, Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity*, *supra* note 5 at 1. See further Section II, ii.

<sup>76</sup> But see Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 14(4) EUROPEAN. J. INTL. L. 753 (2002) at [http://ejil.org/forum\\_tradehumanrights](http://ejil.org/forum_tradehumanrights). On guiding principles of contract law, see Leon E. Trakman, *Contracts: Legal*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES, VOL.3 /8/102 (ELSEVIER PUB., U.K., 2001).

<sup>77</sup> As expressed by the Congressional Budget Office: "Market forces generally ensure that all countries involved in the trade share in the benefits from the increased output." Congressional Budget Office, *The Benefits of Multilateral Trade Liberalization*, at <http://www.cbo.gov/showdoc.cfm?index=4458&sequence=0>

of trade and investment away from non-parties.<sup>78</sup> Secondly, bilateral agreements can produce negative trade and investment distortions, as when the benefits of trade and investment in agricultural is diverted from developing states and their investors to developed states and their investors.<sup>79</sup> Thirdly, bilateral agreements may lead to there being more, but not necessarily better results. For example, they may produce greater wealth, but lead to less social justice when developing states decline to provide social services arising from foreign investment and developed states avoid interfering.<sup>80</sup> Indeed, the decline in the colonial dominance of the West has not necessarily led either to mass economic development or to sustained social reform in their once colonial supplicants.<sup>81</sup> Fourthly, the wealth derived from there being more trade and investment may be closely held. For example, corporate investors from wealthy states may distribute the increased profits from bilateral trade and investment primarily to their shareholders to the exclusion of other groups.<sup>82</sup> The net result may be a reduction in the aggregate social services benefits arising from trade and investment between developed and developing states.<sup>83</sup>

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<sup>78</sup> See e.g. T. Hertel, D. Hummels, M. Ivanic & R. Keeney, *How Confident Can We Be in CGE-Based Assessments of Free Trade Agreements?*, conference paper, 6th Annual Conference on Global Economic Analysis, The Hague, Holland, May 2003), at <http://econpapers.repec.org/paper/gtaworkpp/1324.htm>; T. Hertel, D. Hummels, M. Ivanic & R. Keeney, *Trade creation and trade diversion in the Canada – United States Free Trade Agreement* *Trade creation and trade diversion in the Canada – United States Free Trade Agreement*, 34(3) *Can. J. Econ.* 677 (2001); K. Fukao, T. Okubo & R.M. Stern, *An Econometric Analysis of Trade Diversion under NAFTA*, Discussion paper 491 (School of Public Policy, Univ. Michigan: Research Seminar in International Economics, October 30, 2002).

<sup>79</sup> See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *AGRICULTURE AND DEVELOPMENT: THE CASE FOR POLICY COHERENCE* (OECD, 2005); WORLD BANK, *AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT: CREATING A TRADING SYSTEM FOR DEVELOPMENT* (NEW YORK: WORLD BANK PUBL., 2004); ECONOMIC RESEARCH SERVICE, US DEPARTMENT OF AGRICULTURE, *ECONOMIC RATIONALE FOR NONRECIPROCAL PREFERENCES* (USDA GOVT. PUBL, 2006), at <http://www.ers.usda.gov/publications/err6/err6b.pdf>

<sup>80</sup> One can also question the extent to which a state's alleged human rights deficiencies are sometimes used as a political weapon directed at embarrassment on the international stage as distinct from a lever directed at social justice reform. See United States. Congress, House Committee on International Relations, Subcommittee on International Operations and Human Rights China, the WTO, and Human Rights: hearing before the Subcommittee on International Operations and Human Rights (US GPO, 2000).

<sup>81</sup> See James Oliver Gump, *The West and the Third World: Trade, Colonialism, Dependence, and Development*, (review) 11(2) *J. World History*, 396 (Fall 2000). Nor is economic imperialism confined to colonialism, see D.K. FIELDHOUSE ED. *THE THEORY OF CAPITALIST IMPERIALISM* (LONDON: LONGMAN, GREEN, 1967); FRANCIS W. HIRST, ED., *FREE TRADE AND OTHER FUNDAMENTAL DOCTRINES OF THE MANCHESTER SCHOOL* (NEW YORK: AUGUSTUS M. KELLEY, 1968); P.J. Cain, *J.A. Hobson, Cobdenism, and the Radical Theory of Economic Imperialism, 1898-1914*, 31(4) *EECON..HIST.REV.* 565 (1978); Michael Freeden, *J.A. Hobson as a New Liberal Theorist: Some Aspects of his Social Thought until 1914*, 34(3) *J. HISTORY OF IDEAS* 421 (1973).

<sup>82</sup> On trenchant criticism of corporate "abuses" of global trading benefits, see e.g. LORI WALLACH, MICHELLE SFORZA, *THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION*, (NEW YORK; SEVEN STORIES PRESS, 2000).

<sup>83</sup> Developed states may well provide significant social benefits to developing states, including through bilateral and regional free trade agreements. See *infra* Section III, iv on the U.S. humanitarian objectives in concluding such agreements with developing states. However, it should not be inferred that such humanitarian ends will trump the primary reasons for such agreements, namely, to build political alliances and to increase trade.

## ii. FTAs and BITs Fill Lacunae in the Multilateral Process

A similarly superficial argument favoring bilateral trade and investment is grounded in arithmetic. All other factors being constant, bilateral trade and investment negotiation involving a few parties with reconcilable interests is more likely to liberalize trade and investment than multilateral agreements that involve multiple parties with diverse interests that are not readily reconcilable.<sup>84</sup> Instead of requiring the consent of over 150 states with diverse and often conflicting cultural, social, economic and political priorities, bilateral trade and investment negotiations allow fewer states with fewer differences to reach common ground.<sup>85</sup>

This argument is compelling only in demonstrating that individual states are more likely to reach bilateral than multilateral accord. It does not address the quality of the bilateral agreements actually concluded, as when they provide limited tangible benefits or even disadvantage one party and its investors in favor of the other party and its investors.<sup>86</sup> Negotiating bilateral agreements may also disadvantage parties that negotiate more effectively in larger groups, particularly in dealing with powerful economic blocks like the EU.<sup>87</sup> They may also disadvantage developing states that depend on block support in order to secure trading and investment concessions from developed states generally.<sup>88</sup>

One conclusion might be that, all other factors being constant, bilateral trade and investment are more likely to satisfy the immediate interests of parties than multilateral agreements that usually take longer and are more complex. Whether the economic and social benefit of these bilateral agreements extends to the multilateral community at large is an aspiration, not a pre-established fact.<sup>89</sup>

## iii. Bilateral Agreements Enrich Multilateral Trade and investment

A further arithmetic argument favoring bilateral agreements is that the cumulative benefits of a plethora of bilateral agreements constitutes a net gain for the global

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<sup>84</sup> For an econometrics analysis of the benefits arising from free trade agreements, *see e.g.* Scott L. Baier & Jeffrey H. Bergstrand, *Do Free Trade Agreements Actually Increase Members' International Trade?* 71(1) J. INT'L ECON. 72-95 (2007).

<sup>85</sup> *See e.g.* Kyle Bagwell and Robert W. Staiger, note 60.

<sup>86</sup> For a useful site on international trade negotiations, *see* <http://www.iht.com/articles/ap/2007/02/23/business/NA-FIN-US-Doha-Talks.php>

<sup>87</sup> On the disparities between multilateral and bilateral trade interests, *see* Sampson & Woolcock, *supra* note 56.

<sup>88</sup> On strategies employed in WTO and related negotiations, *see e.g.* MICHAEL N. BARNETT & RAYMOND. DUVALL, *SUPRA* NOTE 48; VINOD K. AGGARWAL AND EDWARD FOGARTY, EDS., *EU TRADE STRATEGIES: BETWEEN REGIONALISM AND GLOBALISM* (PALGRAVE MACMILLAN, 2004); ANDREW G. BROWN, *RELUCTANT PARTNERS: A HISTORY OF MULTILATERAL TRADE COOPERATION, 1850-2000* (ANN ARBOR, MICH: UN. MICH. PRESS, 2003). *SEE TOO* NIELS M. BLOKKER, *INTERNATIONAL REGULATION OF WORLD TRADE IN TEXTILES: LESSONS FOR PRACTICE, A CONTRIBUTION TO THEORY* (THE HAGUE: MARTINUS NIJHOFF, 1990).

<sup>89</sup> On the growing number of bilateral free trade agreements, *see e.g.* Global Union Research Network (GURN), *Bilateral and Regional Trade Agreements TA's*, at <http://www.gurn.info/topic/trade/> On efforts to build a Free Trade Area of the Americas (FTAA), *see* <http://www.ftaa-alca.org/> For an even more comprehensive list of free trade agreements into which the US has entered, *see* <http://www.cbo.gov/showdoc.cfm?index=4458&sequence=0>

economy.<sup>90</sup> Illustrating this benefit is the observation that a series of individually negotiated bilateral agreements can overcome obstacles to concluding multilateral trade and investment agreements, such as relate to multifaceted issues of customs traffic, the environment, labor and electronic trade.<sup>91</sup>

There are benefits to quantifying the costs and benefits of trade and investment agreements in advance in order to reduce barriers to trade and investment between particular parties. Practice in negotiating FTAs and BITs does not make perfect; but it does assist states to avoid pitfalls. As Daniel Griswold argued, “FTAs can provide useful templates for broader negotiations.”<sup>92</sup> The problem is that, absent the capacity to measure the results of such a rationale, it remains speculative. To conclude that bilateral agreements that liberalize trade and investment between particular states encourage other states to follow suit is inspirational only; it does not lead to ensure beneficial results.

### iii. Bilateral Agreements Consolidate Regional Economies

A related argument is that bilateral trade and investment agreements consolidate the economies of partner states; they also lead to the more efficient production, finance, transportation and supply of goods and services.<sup>93</sup> Illustrating these efficiencies are regional agreements such as under the NAFTA,<sup>94</sup> and bilateral agreements between a superpower like the United States and its treaty trade and investment partners in Latin America, Europe, Africa, Asia and the Middle East.<sup>95</sup>

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<sup>90</sup> But see Z. Elkins, A.T. Guzman & B.A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT’L ORG. 811 (2006); *The Spread of Bilateral and Regional Trade Agreements*, at <http://www.gurn.info/topic/trade/>

<sup>91</sup> Daniel Griswold proposes that “[n]egotiating with one nation or a small group of like-minded countries can allow more meaningful liberalization .... Those talks can blaze a trail for wider regional and multilateral negotiations.” Daniel Griswold, *supra* note 75.

<sup>92</sup> *Ibid.* The Congressional Economic and Budget Issue brief, *supra* note 14, states that FTA’s “also offer a way to continue making headway toward the goal of free trade in the face of difficulties that have slowed progress in the Doha Round of WTO negotiations.” See *too supra* note 77.

<sup>93</sup> For arguments along these lines, see e.g., Gary P. Sampson & Stephen Woolcock, *Regionalism, Multilateralism, and Economic Integration: The Recent Experience*, *supra* note 56; International Confederation of Free Trade Unions, *The Spread of Bilateral and Regional Trade Agreements*, at [http://www.gurn.info/topic/trade/icftu\\_0604.pdf](http://www.gurn.info/topic/trade/icftu_0604.pdf).

<sup>94</sup> See e.g., Robert E. Litan & Peter Hakim, *The Future of North American Integration: Beyond NAFTA*, *supra* note 35; GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, PAUL L.E. GRIECO & YEE WONG (WASHINGTON DC: INSTITUTE FOR INTERNATIONAL ECONOMICS, 2005); JOSEPH A. MCKINNEY, *CREATED FROM NAFTA: THE STRUCTURE, FUNCTION, AND SIGNIFICANCE OF THE TREATY'S RELATED INSTITUTIONS* (NEW YORK & LONDON: M.E. SHARPE, 2001); ROBERT A. PASTOR, *TOWARD A NORTH AMERICAN COMMUNITY: LESSONS FROM THE OLD WORLD FOR THE NEW* (WASHINGTON DC: INSTITUTE FOR INTERNATIONAL ECONOMICS, 2001).

<sup>95</sup> Typifying the growth of bilateral free trade agreements is the push by the Bush Administration to extend the United States’ free trade relationships. Following its FTA with Israel in 1985, the United States concluded ten FTA’s: first with Canada and then with Canada and Mexico under, the NAFTA, followed by FTA’s with Jordan, Chile, Singapore, Australia, Morocco, El Salvador, Nicaragua, and Honduras. Four further FTA’s are approved by Congress, namely with Costa Rica, Bahrain, the Dominican Republic and Guatemala. Three additional FTAs with Columbia, Oman, Peru and Colombia are under consideration by Congress. The U.S. has also conducted bilateral free trade talks with eleven others, seeking either bilateral agreements or to create a customs union. The U.S. has also signaled its intention to negotiate a regional free trade agreement with the thirty four members of the Free Trade Agreement of the Americas (FTAA), and has engaged in bilateral trade talks with ten

There is also some evidence of the success of regional integration, including a lengthy literature that lauds the economic growth of the EU<sup>96</sup> and also the NAFTA.<sup>97</sup> There is also recent history of economic integration arising from bilateral trade and investment agreements, but accompanied by growing questions over the utility of such agreements including in economically dislocated Europe.<sup>98</sup>

However, determining whether and how trade and investment agreements lead to greater efficiency in the production, distribution and consumption of goods and services hinges upon careful scrutiny of how particular trade and investment agreements impact on specific economic contexts. The conclusion that economic consolidation leads to greater efficiency does not speak for itself.

#### iv. Bilateral Agreements Aid Development

The argument in favor of “aid for trade” is that both the state providing the aid for trade or investment and the state receiving that aid benefit in the longer term.<sup>99</sup> Developed states make short term economic and investment sacrifices in developing states in order to level the playing field between them and produce a more vibrant trading and investment environment in the future.<sup>100</sup> The anticipated result is growing demand for goods and services and greater access to foreign investment

The problem is that the rhetoric behind “trade for aid” speaks louder than the practice. For example, non-reciprocal preferences known as “special and differential treatment (SDT)”, readily available to developing states under the GATT,<sup>101</sup> have lost much of their moral authority and economic support.<sup>102</sup> The WTO “Aid for Trade” programs

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members of the Association of Southeast Asian Nations (ASEAN), including Vietnam which is seeking entry into the WTO. While not all these bilateral and regional agreements are likely to materialize – for example, the FTAA is currently stalled – they do indicate the extent to which a major power that traditionally relied on its muscle at the WTO has now embraced the bilateral trade process.

<sup>96</sup> See *supra* note 44.

<sup>97</sup> See *supra* notes 44 and 58.

<sup>98</sup> On the EU’s “commitment to open and fair trade”, see <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/> On bilateral trade and investment agreements with Eastern European states, see Michele Potestà, *Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ* (2009), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=michele\\_potesta&sei-redir=1#search="bilateral+investment+agreements+Eastern+Europe"](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=michele_potesta&sei-redir=1#search=)

<sup>99</sup> This is the central argument behind “aid for trade”. See e.g. Stiglitz and Charlton, *supra* note 108. See too E. Neumayer, *Self-interest, Foreign Need and Good Governance: Are Bilateral Investment Treaty Programs Similar to Aid Allocation?*, 10-11, LSE Research Online (2006), available at: <http://eprints.lse.ac.uk/archive/00000808>.

<sup>100</sup> See Caroline Dommen, *The WTO, International Trade, and Human Rights*, in Michael Windfuhr (Ed.), *Mainstreaming Human Rights in Multilateral Institutions* (2004) at

<sup>101</sup> For a detailed study on these STD’s, their origins and how they have fared, see Dilip K. Das, *Evolution in the International Trade Regime: Refining and Developing the Special and Differential Treatment*, at <http://www.cid.harvard.edu/cidtrade/Papers/das-emtr.pdf> See too, Institute for Agriculture and Trade Policy, Trade and Global Governance Program, *Can Aid Fix Trade: Assessing the WTO’s Aid for Trade Agenda*, at <http://www.tradeobservatory.org/library.cfm?refid=89070>

<sup>102</sup> On limitations associated with SDT’s, see *supra* note 101.

that have succeeded SDT's are poorly defined.<sup>103</sup> They also lack the structural support to sustain aid for trade or investment.<sup>104</sup>

Developed states also face the difficult policy choice between promoting social, health and environmental reform in developing states through trade and investment; and protecting local markets from foreign competition, such as lead declining domestic employment.<sup>105</sup> In the words of U.S. Senator Charles Schumer and Paul Craig Roberts, a former Reagan administration official statement: "Exporting jobs is not free trade."<sup>106</sup>

#### v. **Bilateral Agreements Promote Foreign Policy**

A related argument to "aid for trade" is that developed states can use bilateral trade and investment agreements to promote their own foreign policy. The rationale is that helping others in order to help oneself is not reprehensible. For example, the U.S. openly acknowledges its foreign policy goals in concluding both FTAs and BITs.

Foreign policy constitutes a second reason for the United States to seek FTAs. Because the proposed free-trade agreements would be of substantial benefit to the economies of small developing countries while having little effect on the U.S. economy (and a beneficial effect at that), they provide a relatively easy way for the United States to help such countries.<sup>107</sup>

In concluding bilateral agreements between Middle Eastern States, the United States understandable seeks to promote its foreign policy there

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<sup>103</sup> A related problem is that developing countries often lack the resources to evaluate what trade for aid provides them with most economic benefit. As a result, they sometimes enter into trade for aid relationships that fail significantly because the nature of the aid is unsuitable, however laudable the intent. For interesting discussion in this problem, see <http://queriinternational.com/>

<sup>104</sup> See e.g. *Can Aid Fix Trade?* *supra* note 101.

<sup>105</sup> See e.g. Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization - Actors, Processes and Possible Strategies*, 24 HUMAN RIGHTS QUARTERLY 1 (2002); John Hilary, *The Wrong Model: GATS, Trade Liberalization and Children's Right to Health* (London: Save the Children UK, 2000).

<sup>106</sup> Available at <http://www.iht.com/search/search.php>; <http://www.brookings.edu/comm/events/20040107.htm>. On protectionism arising out of safeguarding measures, see M. C. E. J. Bronckers, *Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community and United States Law*, 2(4) J. INT'L ECON. LAW 547-566 (1991). On the history of protectionism in relation to textiles, see VINOD K. AGGARWAL, *LIBERAL PROTECTIONISM: THE INTERNATIONAL POLITICS OF ORGANIZED TEXTILE TRADE* (BERKELEY: UNIVERSITY OF CALIFORNIA PRESS, 1985).

<sup>107</sup> *Reasons for and Against the Pursuit of Free-Trade Agreements in The Pros and Cons of Pursuing Free-Trade Agreements*, at <http://www.cbo.gov/showdoc.cfm?index=4458&sequence=0> See too Review of the U.S. Model Bilateral Investment Treaty: U.S. Advisory Committee on International Economic Policy, *Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty Presented to: The Department of State* (30 September, 2009), Annex B.

including through aid for development;<sup>108</sup> not unlike BITS concluded between China and African countries.<sup>109</sup>

However, one should not dismiss humanitarian ends that further foreign policy ends. Aid that is good politics is aid all the same.

#### vi. **Bilateral Agreements can empower Developing States Politically**

Developing states that conclude FTAs and BITs with one another such as through free trade zones in Africa, Latin America and Asia are allegedly empowered to conduct trade and investment negotiations in a manner not attainable through multilateral negotiations. They can use bilateral and regional agreements to uplift their fledgling economies;<sup>110</sup> to serve as an early warning system of threats to their shared interests;<sup>111</sup> and that provide astute, measured and robust responses to those threats.<sup>112</sup> One inferred result is that developing states can use such alliances to offset the power of countervailing trading and investment blocks such as the EU and the NAFTA.<sup>113</sup> Another is their capacity to form political alliances around such key issues as agricultural tariffs, as India brokered in the wake of the failed Doha Round.<sup>114</sup>

One should not overstate the capacity of developing states to join forces to offset the power of developed states. Firstly, developed states themselves form powerful countervailing trading and investment alliances, such as through the EU and the NAFTA.<sup>115</sup> Secondly, developed blocks impose import tariffs to protect their own domestic markets in goods like agriculture<sup>116</sup> in respect of which some developing

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<sup>108</sup> On a proposed US -Middle Eastern Free Trade Area, as articulated by the US Trade Representative, see [http://www.ustr.gov/Trade\\_Agreements/Regional/MEFTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/MEFTA/Section_Index.html). On free trade agreements between the US and different Middle Eastern countries, see e.g. The US-Oman Free Trade Agreement, at [http://www.ustr.gov/assets/Document\\_Library/Press\\_Releases/2006/January/asset\\_upload\\_file25\\_8774.pdf](http://www.ustr.gov/assets/Document_Library/Press_Releases/2006/January/asset_upload_file25_8774.pdf). On U.S. policy in which free trade agreements serve political-strategic ends, see JEFFRY J. SCHOTT, FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES (INSTITUTE FOR INTERNATIONAL ECONOMICS, 2004); ROBERT S. WALTERS, TALKING TRADE: U.S. POLICY IN INTERNATIONAL PERSPECTIVE (BOULDER, CO: WESTVIEW PRESS, 1993).

<sup>109</sup> On Chinese BITs, see eg [http://www.fdi.net/country/sub\\_index.cfm?countrynum=46](http://www.fdi.net/country/sub_index.cfm?countrynum=46); <http://www.bilaterals.org/IMG/pdf/Overview.pdf>

<sup>110</sup> On global trade negotiations, including strategies by which to protect the interests of developing countries, see Third World Network, at [http://www.twinside.org.sg/trade\\_1.htm](http://www.twinside.org.sg/trade_1.htm)

<sup>111</sup> See e.g. T.N. SRINIVASAN, DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM AFTER DOHA (E.G. CENTER, 2002).

<sup>112</sup> Even before the Doha Round of trade negotiations, some warned that these issues around agriculture might well lead to the failure of multilateral negotiations. See e.g. Tim Gosling, The WTO Agricultural Negotiations: Progress and Prospects, at <http://www.choicesmagazine.org/2005-2/wto/2005-2-08.htm>

<sup>113</sup> See e.g. the comments of the U.S. Trade Representative, Susan Schwab, at <http://www.iht.com/articles/ap/2007/02/23/business/NA-FIN-US-Doha-Talks.php>

<sup>114</sup> See further Peter Draper & Razeen Sally, *Developing-Country Coalitions in Multilateral Trade Negotiations*, at [http://www.lse.ac.uk/collections/internationalTradePolicyUnit/Razeen\\_articles/draper-sallyjnu1.doc](http://www.lse.ac.uk/collections/internationalTradePolicyUnit/Razeen_articles/draper-sallyjnu1.doc)

<sup>115</sup> The NAFTA is an imperfect example of a free trade zone of developing countries for several reasons. Firstly, unlike the EU, the US is the dominant party in the NAFTA. Secondly, while Canada has a developed economy, Mexico has a developing economy. See generally *supra* note 33.

<sup>116</sup> Even barriers to trade devised by developed states against one another, such as between the EU and the United States, often gives rise to collateral damage for developing states who are also subject to

states are threatened.<sup>117</sup> Thirdly, even large blocks of developing states are systematically disadvantaged by powerful states that have an expensive infrastructure of health, safety, labor, environmental and intellectual property requirements that developing states cannot afford.<sup>118</sup> Finally, not only do developed G-33 states fall into the trap of negotiating themselves into a multilateral *impasse*; developing states do so as well.<sup>119</sup>

The ongoing fact is that most developing states remain competitively disadvantaged *vis a vis* the developed world. Their disadvantages are borne out by the fact that their average gross domestic production and standards living are significantly lower than developed states.<sup>120</sup> Take agriculture, the lifeblood of most developing economies. Not only must developing states compete among themselves to export their undifferentiated agricultural produce to the developed world. They also face a formidable array of post-GATT barriers to trade and investment that exclude them from complex markets for high end agricultural goods that they lack the technological know-how and investment capital to develop themselves.<sup>121</sup>

### **vii. Bilateral Agreements Encourage Human Rights Reforms**

A final rationale for FTAs and BITS is the assumption that they provide developing states with both the incentive and means to engage in social, economic and political reform, such as in health care, education and housing.<sup>122</sup> The assumption is that

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resulting restrictions in trade and investment. *See e.g.* ERNST-ULRICH PETERSMANN & MARK A. POLLACK, *TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO*, *supra* note 44; Vinod K. Aggarwal & Edward Fogarty, *The Limits of Interregionalism: The EU and North America* (with Edward Fogarty), 27(3) *J. EUROPEAN INTEGRATION*, 327-346 (2005).

<sup>117</sup> This concern gives rise to related human rights concerns about multilateral trade and investment generally. *See e.g.* Towards Development: Human Rights and the WTO Agenda, Report of a panel discussion held during the WTO Ministerial Conference in Cancún, September 2003, at [www.3dthree.org](http://www.3dthree.org)

<sup>118</sup> *See ibid.* Global trade, understandably, has been oriented in favor of the interests of developed states long before developing states were recognized as players in the global trading community. What is less elucidating is the limited effort by the WTO to encourage the resort to FTAs to achieve socio-economic reform in developing states. Global human rights activist, like Carolyn Dommen clearly do not believe that the WTO has gone far enough in highlighting human rights. *See e.g.* Carolyn Dommen, *The WTO, International trade, and Human Rights*, *supra* note 88. *See generally supra* Section II, vi.

<sup>119</sup> On the “success” of trading blocks at negotiating themselves out of deals is the source of extensive debate. *See supra* note 2. *See also* GIOVANNI ANANIA, *AGRICULTURAL TRADE CONFLICTS AND GATT: NEW DIMENSIONS IN U.S.-EUROPEAN AGRICULTURAL TRADE RELATIONS* (BOULDER, CO: WESTVIEW PRESS, 1994).

<sup>120</sup> *See e.g.* R.C. FEENSTRA & G.H. HANSON, *GLOBAL PRODUCTION SHARING AND RISING INEQUALITY: A SURVEY OF TRADE AND WAGES* (WASHINGTON DC: NATIONAL BUREAU OF ECONOMIC RESEARCH, INC., U.S.A., 2001).

<sup>121</sup> *SEE FURTHER* BERNARD HOEKMAN & WILL MARTIN, *DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA* (OXFORD, UK: BLACKWELL PUBL., 2005); MERLINDA D. INGO, JOHN D. NASH, *AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT* (NEW YORK: WORLD BANK PUBL., 2004); COMMONWEALTH SECRETARIAT, *DEVELOPING COUNTRIES WTO: A COMPELLING CASE FOR FULL PARTICIPATION IN THE NEW ROUND* (COMMONWEALTH SECRETARIAT, 2002); GIOVANNI ANANIA, *AGRICULTURAL TRADE CONFLICTS AND GATT: NEW DIMENSIONS IN U.S.-EUROPEAN AGRICULTURAL TRADE RELATIONS* (BOULDER, CO: WESTVIEW PRESS, 1994). *See too* L.E. Peterson, *supra* note 42, 17-21.

<sup>122</sup> This is the optimistic sentiment of the High Commission for Human Rights. *See* Office of the High Commissioner for Human Rights (OCHCR), *Liberalization of Trade in Services and Human Rights* –

developing states will strive to be socially progressive, especially in regard to human rights, labor and environmental standards so as to promote trade relations with developed states and attract foreign investors.<sup>123</sup> Whether FTAs and BITs have such an impact depends on the discrete trade and investment context, not on the general assumption that developing states will be so impelled in complex global markets.<sup>124</sup>

#### IV. Reflections

In idealized form, FTAs and BITs facilitate, not only the liberalization of trade and investment, but also structural economic, social and political reform. They benefit transitional economies, such as by responding to divergences in trade and investment cycles over time and contributing to the integration between developed and developing economies.<sup>125</sup> FTAs and BITs also help to reconcile economic and political differences among states and investors that cannot be resolved multilaterally, leading to the expansion of trade and investment and facilitating social reform.<sup>126</sup>

Many states undoubtedly appreciate the virtue of regulating trade and investment in order to produce a global good that is greater than the sum of its bilateral parts. However, for such a global good to occur, states need to arrive at a consensus about the virtue of liberalizing trade and investment and attendant policies of economic rationality and social justice. For some, bilateral agreements will create "systemic problems", subjecting multilateral trade and investment relationships to disparate preferences, inconsistent tariff schedules and variable rules of origin.<sup>127</sup> For others,

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Report of the High Commissioner, E/CN.4/Sub.2/2002/9, at [www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2002.9.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2002.9.En?Opendocument) (2002); OHCHR, Human Rights and Trade, Paper prepared for the WTO Ministerial Conference in Cancún (2002), at [www.unhchr.ch/html/menu2/trade/index.htm](http://www.unhchr.ch/html/menu2/trade/index.htm).

<sup>123</sup> See e.g. Louis-Pascal Mahe, *Environment and Quality Standards in the WTO: New Protectionism in Agricultural Trade? A European Perspective*, 24 EU.REV.AGRIC.ECON. 480 (1997); K Bagwell & RW Staiger, *The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues*, J. ECON. PERSPECTIVES (May 2001), at [http://scholar.google.com/scholar?hl=en&lr=lang\\_en&q=cache:7ilj73MruewJ:www.ssc.wisc.edu/~rstai ger/jep-standards05072001.pdf+](http://scholar.google.com/scholar?hl=en&lr=lang_en&q=cache:7ilj73MruewJ:www.ssc.wisc.edu/~rstai ger/jep-standards05072001.pdf+)

<sup>124</sup> See e.g. Kala Krishna & Cemile Yavas, *When Trade Hurts: Consumption Indivisibilities and Labor Market Distortions*, 67(2) J. INT'L ECON. 413 (2005). On the complex apparatus involved in resolving disputes under the WTO, see WORLD TRADE ORGANIZATION, WORLD TRADE ORGANIZATION SECRETARIAT, WORLD TRADE ORGANIZATION LEGAL AFFAIRS DIVISION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (CAMBRIDGE UN. PRESS, 2004); WORLD TRADE ORGANIZATION, WORLD TRADE ORGANIZATION SECRETARIAT; THE WTO DISPUTE SETTLEMENT PROCEDURES: A COLLECTION OF THE RELEVANT LEGAL TEXTS (CAMBRIDGE UN. PRESS, 2001); ROBERT Z. LAWRENCE, CRIMES & PUNISHMENTS?: RETALIATION UNDER THE WTO (INSTITUTE FOR INTERNATIONAL ECONOMICS, 2003).

<sup>125</sup> See César Calderón, Alberto Chong & Ernesto Stein, *Trade Intensity and Business Cycle Synchronization: Are Developing Countries Any Different?*, 71(1) J. INT'L ECON.2 (2007). The authors find that differences in the responsiveness of cycle synchronization to trade integration between industrial and developing countries are explained by differences in the patterns of specialization and bilateral trade.

<sup>126</sup> On this aspiration, see e.g. Deniel Griswald, *supra* note 75.

<sup>127</sup> See generally *Why Asia must opt for open regionalism on trade*, The Financial Times, November 3, 2006; JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (OXFORD UN. PRESS, 2004); JAGDISH BHAGWATI ET AL, THE WIND OF THE 100 DAYS: HOW WASHINGTON MISMANAGED GLOBALIZATION (MIT PRESS, 2001).

bilateral agreements will lead to social transformation within developing states; while yet others will view any such transformation skeptically.<sup>128</sup>

Even states that agree on the liberalization of trade and investment in principle sometimes will consider the combined costs of compliance and enforcement with international measures too great to sustain. Still others will adopt a middle course, seeking to expand trade and investment only selectively and incrementally.<sup>129</sup> Whether bilateral agreements accomplish some greater good will depend, not on generalities or conjecture, but on how they are concluded and applied in fact.

As a economic reality, bilateral trade and investment agreements can lead to both greater wealth and greater sharing of wealth in general. States may increase their revenues from expanded trade and investment and extend their social services. Corporations that pay lower duties as a result of bilateral trade and investment can pass on part of their profits to consumers in the form of lower prices.<sup>130</sup> States, multinational corporations and individuals alike can lever off gains from trade and investment concessions to affirm their commitment to humanitarianism and philanthropy.<sup>131</sup>

However, even if developing states increase revenue streams from bilateral agreements, even if international corporations promote economic development within developing states and even if bilateral trade and investment leads to lower prices for goods and services, there is still no assurance that these benefits will benefit states collectively, nor that state beneficiaries will distribute developments to those in need. Nor do bilateral agreements offer compelling enforcement mechanisms to ensure compliance.<sup>132</sup> However commendable coupling bilateral free trade with “aid for

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<sup>128</sup> This is certainly the view of bilateral trade skeptics. See e.g. Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered*, New York: UNDP, 2001 at <http://ksghome.harvard.edu/~drodrik.academic.ksg/UNDPtrade.PDF>

<sup>129</sup> Jeffrey J. Schott (2004), *Free Trade Agreements: US Strategy and Priorities*, unpublished manuscript, Institute for International Economics, Washington, D.C., cited in Vinod K. Aggarwal *Bilateral Trade Arrangements in the Asia-Pacific: Origins, Evolution, and Implications*, at <http://www.cgp.org/index.php?option=article&task=default&articleid=211>. Scott maintains that bilateralism carries, not only benefits in fostering trade, they also help member countries to reform their legal systems to promote economic development.

<sup>130</sup> Part of the argument against a “corporatized” global order is in the extent to which corporations selfishly benefit themselves by exploiting the poor nations of the world, contribution to mass deprivation rather than benefit. See e.g. LORI WALLACH, MICHELLE SFORZA, THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION, *supra* note 117. See generally GIORGIO BARBA NAVARETTI & ANTHONY J. VENABLES, *MULTINATIONAL FIRMS IN THE WORLD ECONOMY* (PRINCETON NJ: PRINCETON UNIVERSITY PRESS, 2004). But see J.E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, 101 AM.SOC’Y INT’L L. PROC. 3, 4 (2007).

<sup>131</sup> In some measure, the philanthropy of multinational corporations has evolved out of the pioneering work of leading foundations and corporations, notably in the United States. See e.g. *Philanthropy at The Carnegie Corporation*, at <http://www.carnegie.org/sub/philanthropy/vartan2.html> However, philanthropy often is treated as good business practice, indeed as a measure of attracting and satisfying customer needs including in developing countries. See e.g. *Four Problems: One Solution: Philanthropy*, at <http://www.exhibitoronline.com/corpevent/article.asp?ID=1035>

<sup>132</sup> On some of these concerns, see Jagdish Bhagwati (2003), *U.S. House of Representatives Committee on Financial Services Testimony*, Subcommittee on Domestic and International Monetary Policy, Trade and Technology, Tuesday, April 1.

trade” may be, governments may resist social reform.<sup>133</sup> Others may decline to criticize abuse of bilateral agreements by other states because it is impolitic to do so.<sup>134</sup>

Ultimately, the contribution of bilateral trade and investment agreements to multilateral trade and investment depends on whether and how individual states choose to comply with them and failing that, are compelled to conform with applicable principles of international law. Given how imperfectly states make choices in international trade and investment, global standards governing the negotiation, performance and enforcement of bilateral trade and investment agreements are necessary to ensure compliance and offset disparities in powers among negotiating parties, traders and investors. How to devise such standards will not be easy. States are likely to resist measures that limit their sovereign authority, avoiding reaching multilateral consensus and eluding universal principles governing trade and investment under Article XXIV of the GATT.<sup>135</sup>

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<sup>133</sup> See Roger Normand, *Separate and Unequal: Trade and Human Rights Regimes*, Background Paper for the Human Development Report, New York: UNDP, 2002, at <http://hdr.undp.org/publications/papers.cfm>

<sup>134</sup> See Dani Rodrik, *supra* note 129.

<sup>135</sup> For an argument in favor of interaction and coordination between bilateral and multilateral processes in order to enhance the systematic development of international trade policy, see Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 J. INT'L.ECON.LAW, 487 (2006).