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21ST CENTURY TRADE AGREEMENTS: IMPLICATIONS FOR DEVELOPMENT SOVEREIGNTY

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This paper examines the extent to which the emerging world trading regime leaves nations the "policy space" to deploy effective policy for long-run diversification and development and the extent to which there is a convergence of such policy space under global and regional trade regimes. We examine the economic theory of trade and long-run growth and underscore the fact that traditional theories lose luster in the presence of the need for long-run dynamic comparative advantages and when market failures are rife. We then review a "toolbox" of policies that have been deployed by developed and developing countries past and present to kick-start diversity and development with the hope of achieving long-run growth. Next, we examine the extent to which rules under the World Trade Organization (WTO), trade agreements between the European Union (EU) and developing countries, trade agreements between the United States (US) and developing countries, and those among developing countries (South-South, or S-S, agreements) allow for the use of such policies. We demonstrate that there is a great divergence among trade regimes over this question. While S-S agreements provide ample policy space for industrial development, the WTO and EU agreements largely represent the middle of the spectrum in terms of constraining policy space choices. On the far end, opposite S-S agreements, US agreements place considerably more constraints by binding parties both broadly and deeply in their trade commitments.

I. INTRODUCTION

Development is a long-run process of transforming an economy from concentrated assets based on primary products, to a diverse set of assets based on knowledge. This process involves investing in human, physical and natural capital in manufacturing and services and divesting in rent seeking, commerce, and

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unsustainable agriculture.[1] Imbs and Waczairg[2] have confirmed that nations that develop follow this trajectory. They find that as nations get richer, sectoral production and employment move from a relatively high concentration to diversity.[3] They find such a process is a long one and that nations do not stabilize their diversity until they reach a mean income of over $15,000.[4] For many years it has also been known that as countries diversify they also undergo a process of deepening whereby the endogenous productive capacities of domestic firms are enhanced through forward and backward linkages.[5]

This paper examines the extent to which the emerging world trading regime leaves nations the "policy space" to deploy effective policy for long-run diversification and development, and the extent to which there is a convergence of such policy space under global and regional trade regimes. Part I of the paper examines the economic theory of trade and long-run growth and underscores the fact that traditional theories lose luster in the presence of the need for long-run dynamic comparative advantages and when market failures are rife. We then exhibit a "toolbox" of policies that have been deployed by developed and developing countries past and present to kick start diversity and development with the hope of achieving long-run growth but also stress that tools alone are not the recipe for development, that "getting the political economy right" is also of vital importance. In Part II, we examine the extent to which rules under the World Trade Organization (WTO), trade agreements between the European Union (EU) and developing countries, trade agreements between the United States (US) and developing countries, and developing country-developing country trade agreements (or South-South, S-S) allow for the use of such policies. Part III of the paper summarizes our findings and offers conclusions for policy and future research. This paper is intended to assist policy-makers as they choose trade partners that affect their ability to design long-run development strategies.

A. Trade Theory and the Long Run

The traditional trade theory that provides the backdrop and justification for the majority of trade treaties is limited in terms of long-run growth for developing countries. Such theories assume a static approach to technological change and assume that there are no market failures among trading partners,[6] two assumptions that do not hold in the developing country context. This section of the paper provides an overview of trade theory and its limitations and shows how some

1. ALICE H. AMSDEN, THE RISE OF THE REST: CHALLENGES TO THE WEST FROM LATE INDUSTRIALIZING COUNTRIES 2-3 (2001) [hereinafter *AMSDEN*].

2. Jean Imbs & Romain Waczraig, *Stages of Diversification*, 93 AM. ECON. REV. 63, 83, Mar. (2003).

3. *Id.*

4. *Id.*at 69.

5. *See generally* ALBERT HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT (1988) [hereinafter *HIRSCHMAN*]; PAUL KRUGMAN, DEVELOPMENT, GEOGRAPHY, AND ECONOMIC THEORY (1995) [hereinafter *KRUGMAN*]; AMSDEN, *supra* note 1.

6. *See* RICHARD CAVES, JEFFREY A. FRANKEL & RONALD JONES, WORLD TRADE AND PAYMENTS 13-30 (2007) [hereinafter *CAVES*].

countries have used various tools to correct for the theoretical limitations identified.

Neo-classical trade theory demonstrates that liberalizing trade can make all parties better off. The economist David Ricardo showed that because countries face different costs to produce the same product, if each country produces and then exports the goods for which it has comparatively lower costs, then all parties benefit.[7] The effects of comparative advantage (as Ricardo's notion became called) on factors of production were developed in the "Heckscher-Ohlin" model.[8] This model assumes that in all countries there is perfect competition, technology is constant and readily available, there is the same mix of goods and services, that factors of production (such as capital and labor) can freely move between industries, and there are no externalities.[9] In other words, this model is "static" and not "dynamic" and there are no market failures.

Within this rubric, the Stolper-Samuelson theorem adds that international trade can fetch a higher price for the products (and hence lead to higher overall welfare) in which a country has a comparative advantage.[10] In terms of foreign direct investment (FDI), multinational corporations (MNCs) moving to another country) can contribute to development by increasing employment and by human capital and technological "spillovers" where foreign presence accelerates the introduction of new technology and investment.[11] In theory, the gains from trade accruing to "winning" sectors freed to exploit their comparative advantages have the (Pareto) possibility to compensate the "losers" of trade liberalization. Moreover, if the net gains from trade are positive there are more funds available to stimulate growth and protect the environment. In a perfect world then, free trade and increasing exports could indeed be unequivocally beneficial to all parties.

To some, static comparative advantage poses problems for countries who want to sustain long-run growth. Some countries may only have a static comparative advantage in a single commodity where prices are very volatile and where longer-run prices are on the decline relative to industrial goods. What's more, small initial comparative static advantages among countries in the short-run may expand into a growing technology gap between rich and poor nations in the longer-run.[12] If the developed world has a static comparative advantage in innovation, it can continually stay ahead by introducing new products, even if the

7. DAVID RICARDO, ON PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 116-117 (1911).

8. *See* B.G. OHLIN, INTERREGIONAL AND INTERNATIONAL TRADE 1-27 (1967).

9. *Id.*

10. *See* Wolfgang F. Stolper & Paul A. Samuelson, *Protection and Real Wages*, 9 REV. OF ECON. STUD. 58, 65 (1941).

11. *See, e.g.*, Tiru K. Jyaraman & Balgeet Singh, *Foreign Direct Investment and Employment Creation in Pacific Island Countries: An Empirical Study of Fiji*, ASIA-PACIFIC RESEARCH AND TRAINING NETWORK ON TRADE, Working Paper Series No. 35, at 2, May 2007, http://www.unescap.org/tid/artnet/pub/wp3507.pdf.

12. Robert Lucas, *On the Mechanisms of Economic Development*, 22 J. OF MONETARY ECON. 3, 15 (1988), http://www.fordham.edu/economics/mcleod/LucasMechanicsEconomicGrowth.pdf.

developing world eventually catches up and gains a comparative advantage in low-cost production of each old product over time.[13]

In the longer-run then, what matters most is not static comparative advantage at any one moment in time, but the ongoing pattern of dynamic comparative advantage: the ability to follow one success with another, to build on one industry by launching another, again and again. Since the process of technology development is characterized by increasing returns, many models will have multiple equilibria. It is easy to specify a model in which the choice between multiple equilibria is not uniquely determined by history; rather, it becomes possible for public policy to determine which equilibrium will occur.[14] If, in such a model, the multiple equilibria include high-tech, high-growth paths as well as traditional, low-growth futures, then public policy may make all the difference in development.

Neo-classical trade theory also assumes that there are no market failures among trading partners.[15] However, four key market failures plague nations seeking to catch up to the developed world: coordination and information externalities, dynamism and technological change, and human capital formation.[16] "Diversification by definition can mean the creation of whole new industries in an economy and sometimes may require linking new industry to necessary intermediate goods markets, labor markets, roads and ports, and final product markets. For fifty years economic theorists have demonstrated how markets fail at 'coordinating' these efforts."[17] "Coordination failures and the asymmetric distribution of world income has led economists to argue that the nation state should provide 'big push' investments to build scale economies and enhance the complimentary demand and supply functions of various industries" over the long run.[18]

While historically such efforts took the form of large industrial planning efforts and infant industry protection, more recently industrial clustering has taken place where nations focus on the development of specific technologies or sectors in specific geographical regions—especially when facing scale economies.[19] Clustering and export processing zones have been created to attract foreign firms, link them to domestic input providers, and serve as exporting platforms.[20] To support these efforts, nations (most successfully in Asia) provide tax breaks and drawbacks to foreign firms but required them to source from domestic firms and

13. Paul Krugman, *A Model of Innovation, Technology Transfer, and the World Distribution of Income*, 87 J. OF POL. ECON. 253, 254 (1979).

14. Paul Krugman, *History Versus Expectations*, 106 Q. J. OF ECON. 651, 666 (1991).

15. CAVES, *supra* note 6.

16. Nagesh Kumar & Kevin P. Gallagher, *Relevance of 'Policy Space' for Development: Implications for Multilateral Trade Negotiations*, RESEARCH AND INFORMATION SYSTEM FOR DEVELOPING COUNTRIES, Discussion Paper # 120, at 6, Mar. 2007, http://ase.tufts.edu/gdae/ Pubs/ rpRISDiscPaper120Apr07.pdf [hereinafter *Kumar & Gallagher*].

17. *Id.*

18. *Id.* at 7.

19. *See* AMSDEN, *supra* note 1, at 74.

20. *Id.* at 75.

transfer technology.[21] In tandem, the state provides an educated labor force, public R&D, tariff protection, and subsidized credit to support the domestic firms, and provided export subsidies to the domestic firms until they could produce products at the global technological frontier.[22]

Markets also fail at providing the socially optimal amount of "information" to producers and consumers as well—such phenomena are termed information externalities.[23] Technological experimentation through research and development and the inquisitive process of entrepreneurship involve the a process of "self-discovery" regarding which economic activities and product lines will be the most appropriate for a domestic economy.[24] These experimenters who tinker with establishing or inventing new technologies to adapt to local conditions provide enormous social value to a national economy but solely bear the course of failure (and success).[25] These entrepreneurs need to be compensated for their experimental nature through subsidization of exports and credit, temporary tariff protection, patent rewards, and marketing support. Without such incentives, entrepreneurs will be more apt to invest in historically profitable industries in the primary product sectors.[26]

As hinted earlier, related to coordination and information externalities is that trade liberalization and comparative advantage tends to produce static gains but make dynamic gains through technological change more elusive.[27] The static models of the gains from the trade suggest that a country such as Brazil should dismantle its industrial sector in favor of specializing in soy and meat production, and that India should de-emphasize services and heavy manufacturing in favor of textile and apparel specialization.[28] These models, if deployed twenty years ago would have told South Korea and China to focus on rice production. However, following the lead of Japan, the United States, and Europe before them, many nations in East Asia and Latin America fostered more diversified and higher value added sectors over time.[29] Thirty-five years ago if South Korea and China had

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21. *Id.* at 88.

22. *See* Kevin Murphy, Andrei Shleifer & Robert Vishny, *Industrialization and the Big Push*, 97(5) J. OF POL. ECON. 1003, 1025 (1989); John Weiss, *Export Growth and Industrial Policy: Lessons from the East Asian Miracle Experience*, ASIAN DEVELOPMENT BANK INSTITUTE, Discussion Paper No. 26, at 10, 21, 23, Feb. 2005, http://www.adbi.org/files/2005.02.dp26.eastasia.govt.policy.pdf.

23. DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 104-7 (2007).

24. *Id.* at 105.

25. *Id.*

26. *See* ALEXANDER GERSCHENKRON, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE 127 (1966); HIRSCHMAN, *supra* note 5, at 183-201; KRUGMAN, *supra* note 5, at 53.

27. Frank Ackerman & Kevin P. Gallagher, *The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models:A Critical Assessment*, 37 INT'L J. OF POL. ECON. 50, 70 (2008), http://ase.tufts.edu/gdae/Pubs/rp/IJPEShrinkingGains.pdf.

28. *Id.* at 55-56; Kym Anderson & Will Martin, *Agriculture Trade Reform and the Doha Development Agenda*, 28 WORLD BANK 1319, 1319-24 (2005)..

29. HA JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 60-61 (2002) [hereinafter *CHANG*]; DANIEL OKIMOTO, BETWEEN MITI AND THE MARKET: JAPANESE INDUSTRIAL POLICY FOR HIGH TECHNOLOGY 51 (1989).

relied on comparative advantage we might not be driving Kias and Hyundais, using Haier appliances or typing on Lenovo laptops.

In enabling the technological capacity of new industries, markets do not give the correct investment signals when there are high and uncertain learning costs and high levels of pecuniary externalities.[30] In other words, technological dynamism that leads to diversification is not guaranteed by market reforms alone. For many of the reasons described earlier: weak capital markets, restrictive intellectual property laws, lack of information, and poor coordination, imperfect competition and the need for scale economies, under-investment in technologically dynamic sectors can occur.[31] Historically, to correct for these market failures nations have encouraged joint venturing with technological transfer agreements with foreign firms to learn technological capabilities, in addition they have invested heavily in higher education and publicly funded research and development.[32] What is more, nations have selectively loosened intellectual property rules to allow for learning and supported innovative firms through government procurement, export subsidies, subsidized capital, and tariff protection.[33]

Although mentioned in each of these previous examples, human capital formation is also essential for dynamic economic growth and diversification.[34] Once again, private markets fall short of supplying human capital at a socially optimal level. There are numerous arguments why markets undersupply education and that governments should intervene to increase the supply of educated workers. Basic literacy and education have positive externalities such as improved health and better participation in democratic processes—in other words the social rate of return on education is higher than personal investment.[35] With respect to learning in private firms, firms may under-invest in the training of their workers because of fears of high labor turnover.[36] East Asian tigers—like developed countries before them—spent a great deal of effort providing education and training to their people.[37] This was done by spending a significant amount of funds on education (including providing scholarships to obtain PhDs in developed countries),

30. Pecuniary externalities affect third parties through price fluctuations but not necessarily through the misallocation of resources.

31. RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 255 (1982); Kenneth J. Arrow, *The Economic Implications of Learning by Doing*, 29 REV. OF ECON. STUD. 155 (1962); Sanjaya Lall, *Rethinking Industrial Strategy: The Role of the State in the Face of Globalization*, *in* PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND IFIS 33, 59 (Kevin P. Gallagher ed., 2005).

32. AMSDEN, *supra* note 1, at 239.

33. *Id.* at 148; CHANG, *supra* note 29, at 60-61.

34. GENE N. GROSSMAN & ELHANAN HELPMAN, INNOVATION AND GROWTH IN THE GLOBAL ECONOMY 122-23 (1991).

35. *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

36. Dani Rodrik, *Conceptual Issues in the Design of Trade Policy for Industrialization*, 20 WORLD DEV'T 309, 310 (1992).

37. Sanjaya Lall, *Technological Change and Industrialization in the Asian Newly Industrializing Economies: Achievements and Challenges*, *in* TECHNOLOGY, LEARNING, AND INNOVATION: EXPERIENCES OF NEWLY INDUSTRIALIZING ECONOMIES 13, 41-46 (Linsu Kim & Richard Nelson eds., 2000) [hereinafter *Kim & Nelson*].

clustering schools in export processing zones, requiring that foreign firms hire nationals and train them on the job, and subsidizing training programs in domestic firms.[38] Table 1 exhibits an illustrative but far from exhaustive list of trade and industrial policies used by East Asian and other developing economies over a 40 year period and the market failures such policies address. It is this list of policies that will be expanded upon and analyzed in the following section.

Table 1. Tools for Correcting Market Failures[39]

Market Failure	Policy Instrument
Coordination Failures	Tariff sequencing Tax drawbacks Infrastructure provision
Information externalities	Administrative guidance Subsidized credit/entrepreneurship Tariff sequencing Patent restrictions
Scale economies/ technological dynamism	Tariff sequencing Technology transfer requirements Joint Ventures Public research and development Compulsory licensing Patent restrictions Government procurement[40]
Human capital formation	Public education Local labor requirements Movement of people

B. Getting the Political Economy Right

Some countries have been fairly successful at deploying policies to create dynamic comparative advantages and to correct for market failures. In the developing world, the recent standouts are Taiwan, South Korea and more recently China. Table 2 exhibits average annual growth rates in GDP per capita for selected regions of the world from 1960 to 2005.

Table 2: Growth in GDP Per Capita for Selected Regions, 1960 to 2005[41]

	1960-1980	1980-2005	2000-2005
High Income	5.7	2.1	2.8
East Asia and Pacific	3.5	6.6	7.2
China	3.4	8.6	8.6
Latin America and the Caribbean	2.9	0.5	1.4

38. *Id.* at 58.

39. Kumar & Gallagher, *supra* note 16, at 8.

40. Although countries have used various controls over government procurement to promote local industry, those measures, for purposes of space and time, remain outside the scope of this paper.

41. *See* WORLD BANK, WORLD DEVELOPMENT INDICATORS 196-200 (2008).

Today's developing nations look to these success stories as possible models for 21st century policy. East Asia experienced 3.5 percent annual per-capita income growth from 1960 to the 1980 and 6.6 percent since 1980—one of the most impressive growth trajectories on record.[42] What is more, such growth has also corresponded with reduction in inequality and improvements in many other social indicators.[43] It is beyond the scope of this paper to explain in detail the literature on development in these nations, but experts attribute East Asian growth to four general categories of policies.[44]

Targeted industrial policy with reciprocal control mechanisms where nations selectively secluded certain industries where they wanted to gain dynamic comparative advantages;

Loose intellectual property rules where nations encouraged learning from foreign nations through government R&D efforts and at times reverse engineering goods from foreign counterparts;

The movement of people across borders for higher education and temporary work. The best students were sent to the US and Europe to earn degrees in science, mathematics, and technology then came home to work in targeted industries or government;

Investment in human capital and public infrastructure where governments invested heavily in education and provided infrastructure such as roads, ports, and so forth.

There is considerable debate regarding the extent to which these policies were the key drivers of growth in some countries. Nevertheless, at this point there is widespread agreement that these policies did have *some* positive effect on economic performance. The debate now centers on what level of effect that was.[45] It is not the purpose of this paper to enter that debate. Nor is it the purpose of this paper to judge the value of those policies for development. Rather, based on the evidence that such policies have had some positive effect, this paper examines whether developing countries are still given (or keeping) the choice to deploy them under existing and proposed trade rules.

Whereas the East Asian nations—such as South Korea and Taiwan—managed their integration into the world economy through gradual liberalization and some degree of government involvement, nations in Latin American in the Caribbean (LAC) rapidly liberalized their economies in a short period of time—along the lines currently being advocated in the Doha Round.[46] As we see in Table

42. *Id.*

43. *Id.*

44. *See, e.g.*, WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY 5-7 (1993) [hereinafter *World Bank 1993*];; Robert Hunter Wade, *Is Globalization Reducing Poverty and Inequality?*, 32(4) WORLD DEV'T 567, 567, 580-81 (2004); AMSDEN, *supra* note 1, at 193-94, 238-39;Kim & Nelson, *supra* note 37, at 1-5 (for useful full length treatments of development in this region and the use of state policy tools).

45. *See* WORLD BANK 1993, *supra* note 44, at 1-6.

46. *Id.* at 22.

2 for LAC, income growth since liberalization began in the 1980s has been barely one percent annually.

Many economists have expressed caution over advising other developing countries to follow the same path as East Asia.[47] First, governments can be pathetic in picking "winners" for industrial policy. Many governments have tried to adopt pro-active policies and have failed miserably—in other words, meeting market failures with government action often leads to government failure.[48] Governments have been criticized for not being able to pick winning sectors to focus on. Indeed, there are many examples of governments picking "losers." South Korea and Taiwan are often cited as success stories but Indonesia, Nigeria, and Brazil have had failures that have received relatively less attention in scholarly circles.[49] In addition, subsidization and government involvement has been shown to accentuate "rent-seeking" behavior that make it additionally difficult for developing country governments to let go of projects that aren't going well or that have already reached maturity.[50]

Market failures are not always easy to identify and once they are identified it isn't just a matter of pulling out a policy toolbox, grabbing a tool from one of these lists, and hammering away. Indeed, while there is a strong theoretical justification for pro-active government policy, development success takes much more than the proper rationale and proper policies. Development success stories from the twentieth century all struck a unique blend between state and markets—they got the *political economy* of industrialization right.

These critiques are quite valid. Without the proper political economy conditions, government intervention can create more problems than they correct. However, the most successful cases in large part circumvented these problems because governments designed policies where state actors were "embedded" in the private sector and where the state enforced discipline on the private sector. I refer to these phenomena as "embedded diagnostics" and "reciprocal control mechanisms."

By definition, the presence of market failures demonstrates the inability of the private sector to interpret the signals and trends it faces in the economy. If firms right in the middle of the marketplace cannot always make the best decisions about products and processes why should governments make better decisions?[51]

To circumvent the "picking winners" problem, political economists have shown that successful industrializers have had states that were "embedded" in the

47. *See id.* at 367; MARCUS NOLAND & HOWARD PACK, INDUSTRIAL POLICY IN AN ERA OF GLOBALIZATION: LESSONS FROM ASIA, 77-83 (2003).

48. *Id.*

49. *See generally* J. BURTON, PICKING LOSERS..."? THE POLITICAL ECONOMY OF INDUSTRIAL POLICY (1983); PETER EVANS, EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION 60-70 (1995).

50. ANN KRUEGER, THE POLITICAL ECONOMY OF TRADE PROTECTION 13 (1996). [ALTERNATE CITATION: Ann Krueger, The Political Economy of the Rent-Seeking Society, 64(3) Am. Econ. Rev. 291 (1974).]

51. BURTON, *supra* note 49, at 7.

private sector while maintaining "autonomy" from sectional elite interests seeking rents.[52] State agencies that are charged with correcting market failures have to maintain constant communication and input with the private sector.[53] Such public-private partnerships help both the private and public sectors "discover" what the most pertinent market failures and other impediments to industrial development are in an economy, and what assets there are in the economy that can be built upon, and to pick activities that will have the largest economy-wide effects.[54]

Having a good toolkit and embedded autonomy is still not enough. In fact, public-private partnerships could become marriages of corruption and rent-seeking. Successful industrial policy has also tamed the tendency of rent seeking. In order for this to work, industrial policy has to be coupled with a good deal of discipline and accountability for both private actors and the state. Alice Amsden has referred to the need for "reciprocal control mechanisms."[55] A control mechanism is "a set of institutions that disciplines economic behavior based on a feedback of information that has been sensed and assessed."[56] For the East Asian success stories, the key principle behind their use of control mechanisms was "reciprocity":

> Reciprocity disciplined subsidy recipients and thereby minimized government failures. Subsidies were allocated to make manufacturing profitable—to convert moneylenders into financiers and importers into industrialists—but did not become giveaways. Recipients of subsidies were subjected to monitorable performance standards that were redistributive in nature and result-oriented. The reciprocal control mechanism thus transformed the inefficiency and venality associated with government intervention into collective good.[57]

In other words, firms have performance requirements that when they are not met lead to a termination of supporting benefits by the state. The most successful industrializers were able to abandon projects that were not performing whereas others where perpetuated because bureaucrats became hijacked by business interests who became dependent on the state. Since public policy may make a difference in development, and, in fact, has been used successfully by some developing nations to increase diversification and related growth, it is important to understand the extent to which such policy space exists today.

II. TESTING FOR POLICY SPACE IN THE WTO AND BEYOND

Of the historical tools for diversity and development, which ones remain available under the new global trading regime? Do bilateral and regional

52. *See* EVANS, *supra* note 49, at 4-20.

53. *Id.* at 81-83.

54. *See* DANI RODRIK, COMM'N ON GROWTH & DEV., NORMALIZING INDUSTRIAL POLICY 20-22 (2008), http://www.wcfia.harvard.edu/sites/default/files/Rodrick_Normalizing.pdf.

55. AMSDEN, *supra* note 1, at 8-11.

56. Alice Amsden, *Promoting Industry Under WTO Law*, *in* PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND IFIS 216, 221-22 (Kevin P. Gallagher ed., 2005).

57. *Id.* at 222.

agreements further limit policy space for development? This paper examines four trade-related areas (goods, services, investment and intellectual property) across three agreement models. By comparing US-style, EU-style and South-South agreements with the WTO trade disciplines we determine to what extent the various regimes constrain policy space for member nations. In so doing we draw important lessons from the different trade agreement models and evaluate which are best for the purposes of promoting sustainable development in the long-run.[58]

Table 3. Illustrative Tool Box Flexibilities

Policy Instrument	**WTO& Associated Agreements**[59]	**US Agreements**	**EU Agreements**	**South-South Agreements**[60]
Tariff sequencing				
Tax export incentives				
"Non-tariff barriers" in services	X	X	X	
Movement of natural persons				
Public education				
Local labor requirements				
Technology transfer				
Domestic content[61]				
Infrastructure provision				
Administrative guidance				
Subsidized credit/entrepreneurship				

58. As a caveat before going forward, the agreements within each trade regime are by no means homogenous. Within each of the principal trade areas, the regimes contain some measure of variation. This paper attempts to draw some generalizations about disciplines under each trade regime. Where the agreements significantly depart from each other, however, the difference is noted.

59. As with all measures under the WTO, even permitted policies are subject to the two pillars to the WTO: non-discrimination and national treatment. General Agreement on Tariffs and Trade, art. I, III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter *GATT*].

60. These South-South arrangements are by far the least uniform. Thus, the designations in this column represent generalizations from the later analysis.

61. This and other policies may be permitted despite violating certain WTO rules if they pass as legitimate public welfare regulations. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, art. 63, Apr. 15, 1994, 33 I.L.M. 1125, 1221 (1994).

Patent restrictions by origin/industry/duration		X	
Compulsory licensing			

Table 3 expands the illustrative list of development policy tools in Table 1 in the first column and then indicates whether such policies are permitted under various trading arrangements. A "√" signifies that yes the measure is permitted; an "x" denotes that a measure is not permitted. We go into this table in great detail below, but an initial examination reveals that some models provide considerably more policy space for member countries.

Policy space also varies across issue areas. In the following pages, we first discuss the role that bilateral and regional agreements play within the multilateral trading system. We then examine the policy space available in each of four issues: trade in goods, trade in services, investment protection and intellectual property. Although the agreement models are by no means homogenous, we hope to draw some general conclusions about which trade agreements best promote long-term development.

A. Bilateral Agreements in the Multilateral System

Since the signing of the General Agreement on Tariffs and Trade (GATT) in 1947, member countries have attempted to establish a baseline of liberalization for global trade in goods. The creation of the World Trade Organization in 1994 expanded that vision to cover trade in services, intellectual property, and a host of other sub-issues related to trade.[62] Alongside of the multilateral trading system, countries have clamored to sign bilateral and regional accords, broadening and deepening their commitments to trade liberalization.[63] For that reason, most (though not all) free trade agreements (FTAs) and customs unions (CUs) exceed the disciplines of the WTO.

The most favored nation (MFN) clause, requiring that WTO members treat all other members as their most favored trade partner,[64] would seem to make bilateral agreements moot. However, Article XXIV of the GATT, as well as Article V of the GATS make room for these agreements so long as they liberalize "substantially all" trade in goods and services.[65] By fully liberalizing trade between partners,

62. WORLD TRADE ORGANIZATION, WTO LEGAL TEXTS (1994), *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Nov. 11, 2009).

63. Theresa Carpenter, *A historical perspective on regionalism*, *in* MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM. 13, 23 (Richard Baldwin and Patrick Low eds., 2009).

64. GATT *supra* note 59, at art. I.

65. GATT *supra* note 59, at art. XXIV (defining customs unions and free trade areas as a group of countries in which tariffs and other restrictive measures "are eliminated on substantially all the trade between the constituent territories"); General Agreement on Trade in Services art. V, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter *GATS*] (permitting bilateral services

proponents of the multilateral trading system hope that the agreements will act as building blocks toward multilateral free trade.

WTO oversight has met with very limited success, however. Of the hundreds of agreements notified, only one has ever been deemed to meet the terms of Articles XXIV and V.[66] Still, most agreements do exceed the WTO in both breadth and depth. US-style agreements, traditionally the most uniform and comprehensive model, govern everything from goods and services trade to investment protection, intellectual property, and domestic regulation among others.[67] EU-style agreements tend to depend more on the trading partner. While EU-Chile, EU-Mexico and the more recent EU-CARIFORUM agreements resemble the US model,[68] EU-South Africa and EU-Tunisia cover less ground, omitting such issues as financial services, electronic commerce, and labor and the environment.[69]

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agreements provided they have "substantial sectoral coverage" and eliminate "substantially all discrimination . . . between or among the parties").

66. Roberto V. Fiorentino, Jo-Ann Crawford and Christelle Toqueboeuf, *The landscape of regional trade agreements and WTO surveillance*, *in* MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 28, 35 (Richard Baldwin and Patrick Low, 2009).

67. *See, e.g.*, DR-CAFTA (Dominican Republic – Central America FTA) Final Text, Aug. 5, 2004, Office of the United States Trade Representative [hereinafter *USTR*], *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter *DR-CAFTA*]; North American Free Trade Agreement, May, 1993, 32 I.L.M. 605, NAFTA Secretariat, *available at* http://www.nafta-sec-alena.org/en/view.aspx?x=343 [hereinafter *NAFTA*]; Chile FTA Final Text, June 6, 2003, USTR, *available at* http://ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter *US-Chile*]; Singapore FTA Final Text, May 6, 2003, USTR, *available at* http://ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf [hereinafter *US-Singapore*].

68. Agreement establishing an association between the European Community and its Member States, of one part, and the Republic of Chile, of the other part, Nov. 11, 2002, 2002 O.J. (L 352), http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf [hereinafter *EU-Chile*]; Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000 – Joint Declarations Title VI, Mar. 23, 2000, 2000 O.J. (L 157) 10, 25 http://eur-lex.europa.eu/pri/en/ oj/dat/2000/l_157/l_15720000630en00100028.pdf [hereinafter *EU-Mexico Decision 2/2000*]; Decision No 2/2001 of the EU-Mexico Joint Council of 27 Feb. 2001 – implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement, Feb.. 27, 2001, 2001 O.J. (L 70) 7, www.sice.org/Trade/mex_eu/English/ Decisions_Council/2_2001_e.pdf [hereinafter *EU-Mexico Decision 2/2001*]; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, CARIFORUM-E.U., Oct. 30, 2008, 2008 O.J. (L 289/I) 3, *available at* http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf [hereinafter *EU-CARIFORUM*].

69. Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, E.U.-S. Afr., Dec. 4, 1999, 1999 O.J. (L 311) 3, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:311:0003: 0297:EN:PDF [hereinafter *EU-S.A.*], *and* Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, E.U.-Tunis., Mar. 30, 1998, 1998 O.J. (L 097) 2, *available at* http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127986.pdf [hereinafter *EU-Tunisia*].

The 1979 GATT decision on "differential and more favorable treatment" (the "Enabling Clause") makes more room for lesser developed countries to sign bilateral accords without demanding reciprocity or liberalization of "substantially all" trade, as Article XXIV requires. Today, many developing countries enter into FTAs and CUs under the Enabling Clause in order to retain extra flexibility in complying with WTO standards. In part for that reason, many South-South agreements seem skeletal in comparison with the north-south models. The South Asian Free Trade Agreement (SAFTA), for example, effectively contains commitments only in the area of goods trade.[70] On the other hand, the Southern Cone Common Market (MERCOSUR) and the Andean Community (CAN) cover as many issues as some EU agreements.[71] Still, broader issue coverage does not always signify deeper trade commitments. Likewise, depth of coverage within these agreements can act as much to protect developing economies from the outside as to liberalize within. In the next pages, we explore how differences in agreement breadth and depth affect the policy flexibility that countries enjoy within the global trading system.

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70. Agreement on South Asian Free Trade Area, Jan. 6, 2004, *available at* www.saarc-sec.org/data/agenda/.../safta/ SAFTA%20AGREEMENT.pdf [hereinafter *SAFTA*].

71. *See, e.g.*, Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay Annex I, Mar. 26, 1991, 30 I.L.M. 1041, 1050, *available at* http://www.sice.oas.org/trade/mrcsr/mrcsr7.asp [hereinafter *MERCOSUR Goods*]; Montevideo Protocol on Trade in Services of MERCOSUR, Dec. 15, 1997, Securities and Exchange Commission of Brazil, *available at* http://www.cvm.gov.br/port/relinter/ingles/mercosul/montv-e.asp [hereinafter *MERCOSUR Services*]; Protocol on Harmonization of Norms on Intellectual Property in MERCOSUR in Matters of Trademarks, Indications of Source and Appellations of Origin, Aug. 5, 1995, 2145 U.N.T.S. 460, *available at* http://untreaty.un.org/unts/144078_158780/12/10/5009.pdf [hereinafter *MERCOSUR IPRs*]; Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR, Jan. 17, 1994, Securities and Exchange Commission of Brazil, *available at* http://www.cvm.gov.br/port/relinter/ingles/mercosul/coloni-e.asp [hereinafter *MERCOSUR Investment*]; Treaty of Asunción Annex IV, Mar. 26, 1991, 30 I.L.M. 1041, 1059, *available at* http://www.sice.oas.org/trade/mrcsr/mrcsr11.asp [hereinafter *MERCOSUR Safeguards*]; The Commission of the Andean Community, *Decision 563: Official Codified Text of the Andean Subregional Integration Agreement (Cartagena Agreement)*, June 25, 2003, Andean Community, *available at* http://www.comunidadandina.org/ingles/normativa/D563e.htm [hereinafter *Cartagena Agreement*]; The Commission of the Andean Community, *Decision 486: Common Intellectual Property Regime*, Sept. 14, 2000, Andean Community, *available at* http://www.comunidadandina.org/ingles/normativa/D486e.htm [hereinafter *CAN IPRs*]; The Commission of the Andean Community, *Decision 439: General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community*, June 11, 1998, Andean Community, *available at* http://www.comunidadandina.org/ingles/normativa/D439e.htm [hereinafter *CAN Services*]; The Commission of the Cartagena Agreement, *Decision 292: Régimen Uniforme para Empresas Multinacionales Andinas*, Mar. 21, 1991, Andean Community, *available at* http://www.comunidadandina.org/normativa/dec/d292.HTM [hereinafter *CAN Andean Business*]; The Commission of the Cartagena Agreement, *Decision 291: Régimen Común de Tratamiento a los Capitales Extranjeros y so-bre Marcas, Patentes, Licencias y Regalías*, Mar. 21, 1991, Andean Community, *available at* http://www.comunidadandina.org/normativa/dec/d291.HTM [hereinafter *CAN Foreign Investment*].

B. Goods Trade Policies

Countries have employed many policies affecting trade in goods to promote growth and development. Here we explore the flexibilities still available to member countries under bilateral and multilateral trade arrangements, looking specifically at tariff barriers, non-tariff barriers, export incentives and safeguards. Table 4 provides a brief overview of the policy space available under the WTO and two North-South trade agreement models.

Table 4. Goods Checklist

Policy Instrument	WTO & Associated Agreements	US Agreements	EU Agreements
Tariffs			
Quantitative Restrictions/Licensing			
Tax Drawbacks/Deferrals and EPZs			
Safeguards for injurious imports and balance of payments[72]			
Safeguards for shortages[73]	√		

1. Tariffs

Tariffs have long been the preferred trade barriers under the WTO and its predecessor and underlying agreement, the GATT because they are easy to measure, transparent to apply, and straightforward to liberalize progressively over time. Employed carefully, countries can raise and lower tariffs to protect nascent industries until they are ready to face global competition.[74] The WTO implicitly permits such measures, allowing countries to bind their tariff rates at or below the current applied rates – giving little or no room for adjustments upward.[75] Table 5 provides an example, comparing bound and applied rates for photographic paper in rolls wider than 610 mm.[76]

72. The degree of procedural requirements varies greatly between agreements. *See* EU-Chile, *supra* note 62, at arts. 92, 195; EU-Mexico Decision 2/2000, *supra* note 62, at arts. 15, 21.

73. Among US and EU disciplines, the rules are not identical across agreements.

74. CHANG, *supra* note 29, at 66.

75. *See, e.g.*, WORLD TRADE ORGANIZATION, CHILE: TARIFF PROFILE, *available at* http://www.wto.org/english/tratop_e/tariffs_e/tariff_profiles_2006_e/chl_e.pdf (May 15, 2006). Take, for example, Chile's tariff profile as provided by the WTO. While the simple average bound is 25.1%, the simple average applied is much lower at 6%. This trend repeats for the countries in this study. WORLD TRADE ORGANIZATION, CURRENT SITUATIONS OF SCHEDULES OF WTO MEMBERS (Mar. 17, 2009), *available at* http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm (May 15, 2006) [hereinafter *WTO CURRENT SCHEDULES*].

76. This trend repeats itself over and over again in the countries' individual tariff schedules. Taking a simple average of the bound rates under the RTAs and comparing it to the simple average of the MFN applied rate across all products would prove this conclusively. Unfortunately, we were unable

Table 5. Illustrative Tariff Comparison: Photographic paper, in rolls wider than 610 mm (%)

Country/Agreement	WTO binding[77]	Bilateral Agreement binding	MFN applied rate (avg)[78]
Chile: US and EU[79]	25.0	6.0	6.0
Mexico: US and EU[80]	35.0	0.0[81]	11.5
Costa Rica: DR-CAFTA[82]	45.0	10.0	9.0
Nicaragua: DR-CAFTA[83]	40.0	5.0	10.0
Honduras: DR-CAFTA[84]	35.0	10.0	10.0
Guatemala: DR-CAFTA[85]	45.0	10.0	10.0
Dominican Republic: DR-CAFTA[86]	35.0	8.0	8.0
US-Singapore[87]	6.5	0.0	0.0
EU-Tunisia[88]	38.0	0.0	15.0
EU-South Africa[89]	15.0	0.0	5.0

to find a schedules document that would export to a spreadsheet program and take such averages.

77. WTO CURRENT SCHEDULES, *supra* note 92.

78. *Id.*

79. EU-Chile, *supra* note 62; *See* US-Chile, *supra* note 67, at annex 3.3

80. EU-Mexico Decision 2/2000, *supra* note 62; NAFTA, *supra* note 67.

81. This represents a bound tariff after progressive reduction over seven years. NAFTA, *supra* note 67.

82. DR-CAFTA, *supra* note 67, at annex 3.3 (Tariff Schedule of Costa Rica), 56 (HS8 37031000).

83. DR-CAFTA, *supra* note 67, at annex 3.3 (Tariff Schedule of Nicaragua), 54 (HS8 370231000).

84. DR-CAFTA, *supra* note 67, at annex 3.3 (Tariff Schedule of Honduras), 63 (HS8 37031000).

85. DR-CAFTA, *supra* note 67, at annex 3.3 (Tariff Schedule of Guatemala), 56 (HS8 37031000).

86. DR-CAFTA, *supra* note 67, at annex 3.3 (Tariff Schedule of the Dominican Republic), 66 (HS8 37031000).

87. US-Singapore, *supra* note 67. To many, Singapore no longer counts as a developing country, though it was once a Newly Industrializing Country that employed many of these policies. We chose the US-Singapore agreement to provide some geographical variation and contrast to the Latin American agreements with the US.

88. The FTA binding represents a bound tariff after progressive reduction over five years. EU-Tunisia, *supra* note 63, at art. 11, annex 3.

89. The FTA binding represents a bound tariff after progressive reduction over five years. EU-S.A., *supra* note 63, at art. 12.

2. Non-tariff barriers

In addition to tariffs, countries have employed other trade restrictions (non-tariff barriers or NTBs) to protect domestic industry and promote development. Unlike tariffs, however, all modern trading regimes strongly disapprove of NTBs, generally prohibiting quantitative restrictions (quotas), import licensing, and import and export price requirements.[90] Under the WTO, however, countries may introduce NTBs to address food shortages and balance of payments difficulties, or enforce certain local standards and regulations.[91]

EU-style agreements generally mimic WTO standards and incorporate both the balance of payments and shortages exceptions for imposing NTBs.[92] Still, EU treaty language tends to vary with the treaty partner. EU-CARIFORUM, for example, contains an exception for balance of payments difficulties, but none for shortages.[93] Meanwhile, EU-Tunisia and EU-South Africa expressly prohibit only quotas.[94] US-style agreements likewise mirror the WTO standard for NTBs. Few US-style FTAs, however, make the same room for exceptional circumstances. Only one of six treaty partners under DR-CAFTA retained a shortages exception, and most recent agreements have eliminated the exception for balance of payments.[95]

3. Incentives for export

Another way countries have encouraged development is through export incentive programs to reward companies, industries and even regions for export performance.[96] Taking the form of duty drawbacks, tax deferrals and export processing zones (EPZs), these measures can promote a healthy trade balance and enable local industry to compete globally.[97] The WTO places no restraints on export incentive policies ad seems to prefer them to more direct subsidy

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90. *See* Raj Bhala, *World Agricultural Trade in Purgatory: the Uruguay Round Agriculture Agreement and its Implications for the DOHA Round,* 79 N.D. L. Rev. 691, 732 (2003).

91. GATT, *supra* note 59, at art. XII; *see infra* Section II.B.4. (discussing the availability of safeguard measures). The WTO treats import licenses as quotas, and has a separate annex governing the use of licenses in cases where they are permitted. *See* Agreement on Import Licensing Procedures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter *WTO Import Licensing*].

92. EU-Chile, *supra* note 62, at art. 76; EU-Mexico Decision 2/2000, *supra* note 62, at art. 12.

93. EU-CARIFORUM, *supra* note 62, at art. 240.

94. EU-S.A., *supra* note 63, at art. 19; EU-Tunisia, *supra* note 63, at art. 19.

95. US-Chile, *supra* note 67, at art. 3.11(2); DR-CAFTA, *supra* note 67, at art. 3.8(2). DR-CAFTA also expressly incorporates the WTO Agreement on Import Licensing, and imposes an additional notification requirement. *Id.* at art. 3.9. However, neither NAFTA, US-Singapore, US-Peru, nor US-Colombia have any exceptions for balance of payments difficulties or shortages.

96. *See generally* Bela Balassa, *Export incentives and export performance in developing countries: A comparative analysis*, 14(1) REV. OF WORLD ECON. 24 (1978). Export incentives based on geography are often called Export Processing Zones (EPZs). The International Labour Organization, *InFocus Initiative on Export Processing Zones*, Feb. 18, 2008, http://www.ilo.org/public/english /dialogue/sector/themes/epz.htm.

97. *See* Balassa, *supra* note 77.

programs.[98] Likewise, EU agreements incorporate the WTO standard here, omitting explicit discipline on the subject.[99]

The US model, on the other hand, almost universally prohibits such incentives.[100] Under NAFTA, member states may not provide drawbacks or tax deferrals on condition that goods are exported or used as material for another exported good.[101] US-Chile and DR-CAFTA, also prohibit new or continuing duties waivers based on certain "performance requirements," which include export level or percentage requirements as well as other production performance measures.[102]

4. Safeguards

Despite the current controversy surrounding the Special Safeguard Mechanism for agriculture at Doha, the WTO actually retains a fair amount of safeguard flexibility for by countries facing sudden injurious levels of imports, balance of payments difficulties, and critical food shortages.Under the WTO, countries may address these problems temporarily by imposing NTBs, suspending tariff concessions or raising tariff rates.[103]

Based largely on the WTO model, EU agreements provide the same flexibilities for countries addressing harmful levels of imports, balance of

98. Yung Whee Rhee, *Instruments for Export Policy and Administration: Lessons from the East Asian Experience* 79 (World Bank Staff, Working Paper No. 725, 1985) quoting BELA BALASSA, DEVELOPMENT STRATEGIES IN SEMI-INDUSTRIAL ECONOMIES 72 (1982), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/07/08/000178830_98101903431389/Rendered/PDF/multi0page.pdf. Rhee implies that, export subsidies, unlike duty drawbacks and deferrals, are categorically prohibited under each of these regimes. Agreement on Subsidies and Countervailing Measures, art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994); DR-CAFTA, *supra* note 67, at art. 3.14; US-Chile, *supra* note 67, at art. 3.16; NAFTA, *supra* note 67, at art. 705. Mexico's *maquiladora* program provides a ready example of such a system. Under NAFTA, however, "*maquila* firms were granted a seven-year phase-in period during which they continued to enjoy duty-free importation benefits." This ended in January, 2001, when NAFTA article 303 entered into effect. John Sargent & Linda Matthews,*Combining Export Processing Zones and Regional Free Trade Agreements: Lessons From the Mexican Experience*, 29(10) WORLD DEVELOPMENT 1739, 1741 (2001) [hereinafter *Sargent & Matthews*].

99. Several EU-style treaties prohibit the use of taxation to protect domestic industry, which could indirectly restrict tax-based export incentives. EU-Chile *supra* note 62, at art. 63; EU-Mexico Decision 2/2000 *supra* note 62, at art. 13; EU-CARIFORUM *supra* note 62 at art. 13. By contrast, EU agreements with several African nations implicitly permit drawbacks by limiting the amount to that of the original tax. EU-Tunisia *supra* note 63, at art. 22; EU-S.A. *supra* note 63, at art. 21. This provisions seems to be aimed at preventing hidden export subsidies – payments called "drawbacks" or "deferrals" by the government, but which actually exceed the amount of the tax.

100. The one exception here is US-Singapore. NAFTA, *supra* note 67, at art. 303; US-Chile, *supra* note 67, at art. 3.8; DR-CAFTA, *supra* note 67, at art. 3.4.

101. NAFTA, *supra* note 67, at art. 303.

102. This does not include conditions, however, that the good be subsequently exported and other such rules as required under NAFTA, *supra* note 67, at art. 303.1. US-Chile, *supra* note 67, at art. 3.24; DR-CAFTA, *supra* note 67, at art. 3.31.

103. GATT, *supra* note 59 at arts. XII:1, XIX:1(a).

payments difficulties and, in some cases, shortages.[104] Taking it a step further to promote development, some EU treaties also permit transitional safeguards, which may be imposed solely to protect infant industry.[105]

Once more, US agreements close in on the policy space otherwise available, not allowing safeguard measures in the case of shortages.[106] The agreements also do not allow countries to introduce new NTBs as safeguard measures and they require that, in the case of injury by imports, the imports not only *cause serious injury or threat thereof* (GATT language), but that they be the *substantial* cause of that injury—a higher legal standard.[107]

5. North-south models and south-south responses

North-south trade agreements generally constrain policy space more tightly than the WTO and its associated agreements. However, some developing countries have begun to make their own room for public policy by joining together to form south-south trading blocs that leave open even more policy options for diversification and development. Some South-South agreements, for example, allow member countries wholesale exceptions to the general liberalization program. These "sensitive lists" are often safe from both tariff concessions and the elimination of NTBs.[108] Furthermore, by excluding certain issues, such as tax, from the agreement terms, South-South arrangements make room for members to provide export and other incentives.[109]

Notably, these agreements disfavor safeguards except in "exceptional cases" and limit their use to situations with injurious levels of imports. Lesser-developed countries seem to worry that industrialized trade partners would use safeguards against them, injuring their exports. SAFTA hints at this concern by making a

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104. The EU agreements in Latin America allow safeguards in all three of these cases. EU-Chile, *supra* note 62, at arts. 92, 93, 195; EU-Mexico Decision 2/2000, *supra* note 62, at arts. 15, 16, 21. The EU agreements with Tunisia and South Africa, however circumscribe the application of safeguards somewhat more. EU-Tunisia, *supra* note 63, at arts. 25-26 (excluding express safeguards for balance of payments); EU-S.A., *supra* note 63, at arts. 24, 26 (no allowance for goods trade safeguards for balance of payments difficulties or shortages). EU-CARIFORUM, *supra* note 62, at arts. 25, 240 (making no room for safeguards for shortages).

105. EU-Tunisia, *supra* note 69, at art. 14; EU-S.A., *supra* note 63, at art. 25.

106. Since the agreements mention nothing about shortages, safeguards to protect against them is presumed prohibited.

107. US-Singapore, *supra* note 67, at art. 7.1; US-Chile, *supra* note 67, at art. 8.1; DR-CAFTA, *supra* note 67, at art. 8.1; NAFTA, *supra* note 67, at art. 801. The only US agreement to take special consideration of developing countries, DR-CAFTA article 8.1(4), places limitations on imposing safeguards against developing countries.

108. Both the South Asia Free Trade Agreement (SAFTA) and the Southern Cone Common Market (MERCOSUR) contain "sensitive lists" within the agreement, and SAFTA even permits countries to maintain NTBs on such sensitive products. SAFTA, *supra* note 70, at arts. 7.3, 7.5; MERCOSUR Goods, *supra* note 71, at art. 6.

109. Article 101 of the China-Chile Agreement, for example, exempts all tax issues from coverage by the agreement. Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, Chile-P.R.C., Nov. 18, 2005, Asia Regional Integration Center, *available at* http://aric.adb.org/fta.php?id=79&ssid=3&title= People's%20Republic%20of %20China-Chile%20Free%20Trade%20Agreement [hereinafter *China-Chile*].

special consideration for lesser-developed members, limiting safeguards against them.[110]

Since 1994, global trade disciplines have increased in scope to cover services trade regulation, treatment of foreign investment, and intellectual property protection, among others. The following sections explore these trade-related policy areas and the extent to which trade agreements impact policymakers' decisions today.

C. Trade in Services

Since the Uruguay Round, global trade in services has increased drastically. Some of the fastest growing sectors such as computer-related services, legal services, and advertising and technical service jobs grew between 70 and 250 percent from 1994 to 2004.[111] Of 54 bilateral and regional agreements with services trade provisions, only five predate the Uruguay round.[112] Prior to the formation of the WTO, countries retained substantial freedom in regulating services trade so long as the measures didn't interfere with goods trade as well.[113] Today, however, the new multilateral trading system and bilateral agreements circumscribe their efforts to varying degrees. Table 6 compares the policy space available for certain measures affecting services trade. In the following discussion, we detail the practical constraints that today's trade agreements place on member country governments.

Table 6. Services Checklist

Policy Instrument	**WTO& Associated Agreements**	**US Agreements**	**EU Agreements**
Control over sensitive sectors[114]			
"Non-tariff barriers in Services			
Duty of establishment			
Withholding right of establishment			
Domestic regulation[116]			

110. SAFTA, *supra* note 64, at art. 16.8.

111. OSHANI PERERA, THE GLOBALISATION OF SERVICES AND ITS IMPLICATIONS FOR SUSTAINABLE DEVELOPMENT: A PRELIMINARY DISCUSSION DOCUMENT 3 (International Institute for Sustainable Development 2007), http://www.iisd.org/pdf/2008/globalisation_services_sd.pdf.

112. *Id.*

113. *Id.*

114. While some amount of control is permitted under all agreements, US agreements employ a negative list rather than the positive list approach of the GATS and EU agreements.

115. Here, the EU agreements could be evolving to look more like US agreements but the rules are not consistent across the four treaties.

116. The difference here is that the balancing test for regulations is self-enforcing under the EU and US agreements, while enforcement under the WTO requires further rulemaking.

Movement of natural persons	
Investments in public education	√

1. Sensitive sectors

Many countries have retained control over sensitive sectors such as "essential services, network infrastructure services, and financial services" within their economy in order to promote economic stability.[117] Theoretically, countries may continue to protect these sectors under any FTA through the negotiation process. However, the process differs significantly depending on the trade agreement model. The WTO adopts what has been called a "positive-list approach," meaning that protection is the rule rather than the exception.[118] Thus, unless the country specifically commits a sector, it remains unbound. The WTO's General Agreement on Trade in Services (GATS) also permits lesser developed countries (LDCs) to liberalize later and carve out public services from coverage so that they are not bound by the rules of the agreement.[119]

Like the GATS, EU agreements have adopted a positive-list approach.[120]Some EU agreements pronounce a general standstill on future measures inconsistent with liberalization, indirectly binding even unbound sectors. However, recent agreements such as EU-CARIFORUM do not contain such a clause, indicating that standstill provisions may not become a permanent trend in EU-style treaties.[121] The pivotal difference between the US model and GATS-based models is found in the negative list approach to liberalization - making protection the exception rather than the rule.[122] Practically speaking, this means

117. ACTIONAID, CHRISTIAN AID & OXFAM, EU FTA MANUAL, BRIEFING 4: THE EU'S APPROACH TO FREE TRADE AGREEMENTS: SERVICES 2 (Feb. 2008), http://www.oxfam.org.uk/resources/policy/trade/downloads/fta4_services.pdf [hereinafter Oxfam Services].

118. MARIO MARCONINI, REGIONAL TRADE AGREEMENTS AND THEIR IMPACT ON SERVICES TRADE 12 (ICTSD Policy Paper on Trade in Services and Sustainable Development (Draft) 2006), http://www.ictsd.org/dlogue/2006-02-28/marconini.pdf.

119. GATS, *supra* note 65, at arts. IV, XIX (demanding "appropriate flexibility for individual countries Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at acheiveing the objectives referred to in Article IV."); *Id.* at art. I, para. 3 (excluding "services supplied in the exercise of governmental authority" from coverage). It is important to note, however, that the WTO contains inherently the expectation of full liberalization across sectors eventually. *Id.* at Annex on Article II Exemptions.

120. Although the four EU agreements studied here contain actual services commitments only to varying degrees, each contains a reference to the positive list approach stated in their negotiating mandate at the very least. EU-Mexico Decision 2/2001, *supra* note 62, at art. 7; EU-Chile, *supra* note 62, at art. 99; EU- S.A., *supra* note 63, at art. 29.1; EU-Tunisia, *supra* note 63, at art. 32.1. And like the WTO, with the exception of EU-Tunisia, these agreements call for the eventual elimination of "substantially all remaining discrimination between the parties" in all sectors and all modes of supply. EU-Mexico Decision 2/2001, *supra* note 62, at art. 7; EU-Chile, *supra* note 62, at art. 100; EU-S.A., *supra* note 63, at art. 30.1.

121. Oxfam Services, *supra* note 117, at 5; EU-Mexico Decision 2/2001, *supra* note 62, at arts. 5, 7.

122. Marconini, *supra* note 118, at 12.

that countries must negotiate for every sector they want to protect – a highly negotiation intensive process.

In theory, US agreements permit countries to make reservations to the MFN principle, to reserve room for future measures that are inconsistent with liberalization, and to protect whole sectors from the agreement. These options seem unavailable under an EU or WTO framework.[123] Both EU-style agreements and the GATS expect eventual full liberalization across sectors.[124] If such comprehensive liberalization results, developing countries that seek multilateral or EU-style trade preferences for the policy flexibility they provide may end up with more restraints than they bargained for, twenty or thirty years down the road.

2. "Non-Tariff Barriers" in Services: quota equivalents for services trade

Just as in goods trade, countries have introduced quantitative and qualitative restrictions on trade in services to promote domestic industry and control the behavior of service suppliers. For the most part, these measures are no longer permitted under any international trading regime. GATS provides a template for such restrictions, prohibiting service supplier quotas, transaction or asset restrictions, output quotas, employment limitations, organization-type requirements (such as joint ventures) and limitations on foreign capital participation by any means.[125]Only in sectors where countries did not undertake market access commitments do they have policy flexibility. The same applies to US and EU-style agreements. Some employ GATS-equivalent language (EU-Chile, EU-Mexico, EU-CARIFORUM, US agreements),[126] while others simply incorporate the terms of GATS by reference (EU-Tunisia, EU-S.A.).[127]

Two differences stand out between the trade agreement models, however: the binding approach and the type of agreement coverage. As mentioned above, under the GATS and EU treaties, countries must specifically bind sectors to market access rules, while the US model binds all sectors except those expressly excluded. More importantly, the US model regulates foreign capital participation and joint ventures under the investment chapter rather than the services section of the agreement. Since the investment chapter is not sector-specific, it binds even more broadly than the US's negative list approach to service commitments.[128]

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123. *Id.* at 8; NAFTA, *supra* note 67, at art. 1206; DR-CAFTA, *supra* note 67, at art. 11.6; US-Chile, *supra* note 67, at art. 11.6; US-Singapore, *supra* note 67, at art. 8.7.

124. GATS, *supra* note 65, at Annex on Article II Exemptions.

125. GATS, *supra* note 65, art. XVI (prohibiting two other measures: requiring a certain organization type for service suppliers and foreign capital participation limits – both of which will be addressed in the coming sections).

126. EU-Chile, *supra* note 62, at art. 97; EU-Mexico Decision 2/2001, *supra* note 62, at art. 4; DR-CAFTA, *supra* note 67, at art. 11.4; US-Chile, *supra* note 67, at art. 11.4; US-Singapore, *supra* note 67, at art. 8.5. The exception to many of these rules is NAFTA, since it came about so much earlier – on this subject it states: "The Parties shall periodically, but in any event at least every two years, endeavor to negotiate the liberalization or removal of the quantitative restrictions set out in Annex V pursuant to paragraphs 1 through 3." NAFTA, *supra* note 67, at art. 1207, ¶ 4.

127. EU-S.A., *supra* note 63, at art. 29, ¶ 1; EU-Tunisia, *supra* note 63, at art. 32, ¶ 1.

128. Restricting foreign capital participation may also be prohibited through maintaining the right of establishment, present in all US agreements and discussed below.

3. Duties and rights of establishment

Policy makers have also introduced policies influencing establishment rights to control the quantity and quality of service suppliers. A duty of establishment,[129] forces service suppliers to establish a local place of business or become a resident in order to provide their service.[130] By contrast, a "right of establishment" provides foreign services suppliers with a presumptive right to establish themselves in the partner countries.

The text of the GATS mentions neither a duty nor a right of establishment for foreigners. At the same time, specific commitments by some countries maintain a duty of establishment in certain sectors. In bound sectors, such measures would likely have to be set out in the schedule for continued liberalization.[131] EU-style agreements look much like the GATS with regard to maintaining an establishment duty; however, they vary widely in their treatment of establishment *rights*.[132] EU-Chile, for example, mandates national treatment with respect to establishment, for both legal and natural persons of agreement partners[133] The agreement with Mexico provides an express right of establishment for financial service suppliers only.[134] Meanwhile, EU-CARIFORUM carves out a narrow right of establishment for maritime services.[135]

Unlike the GATS and EU agreement models, the establishment commitments in US agreements are neither sector- nor partner-specific. Countries that partner with the US may not impose any duties on foreign services suppliers or investors to establish a local commercial presence.[136] Likewise, they must extend a universal right of establishment to all US legal entities who desire entry into their country.[137] The standardized US approach, therefore, allows little wiggle room for countries seeking policy options for development.

4. Domestic regulation

Possibly one of the most domestically invasive and yet universally accepted provisions in trade agreements addresses the issues of domestic regulation of service suppliers.As countries have expressed concern that their trading partners

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129. Also known as the "right of non-establishment."

130. NAFTA, *supra* note 67, art. 1205.

131. Marconini, *supra* note 118, at 9.

132. Oxfam Services, *supra* note 117, at 3.

133. EU-Chile, *supra* note 62, art. 132.

134. EU-Mexico Decision 2/2001, *supra* note 62, art. 12.

135. EU-CARIFORUM, *supra* note 62, at art. 109(5). The agreement also indirectly refers to "establishment" in Article 224 on General Exceptions, however, the context would indicate that the word means "direct investment" rather than any general right of establishment. *Id.* at art. 224(1) ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . ., or a disguised restriction on trade in goods, services or establishment . . .").

136. NAFTA, *supra* note 67, at art. 1205; DR-CAFTA, *supra* note 67, at art. 11.5; US-Chile, *supra* note 67, at art. 11.5; US-Singapore, *supra* note 67, at art. 8.6. One author mentions that while the US agreements contain clearer language about the prohibition of duty of establishment clauses, they may not necessarily be "more forceful in actually putting them into effect." Marconini, *supra* note 118, at 9.

137. *See, e.g.*, DR-CAFTA, *supra* note 67, at art. 10.3 (emphasis added).

would use regulation as veiled discrimination, the GATS, followed by regional and bilateral agreements, imposes some limits on the use of domestic regulation.

The GATS spells out the universal standard for balancing legitimate regulation with trade liberalization: that general policy measures are administered reasonably, objectively and impartially manner, that the regulations are based on "objective and transparent criteria, . . . not more burdensome than necessary . . . [and] not in themselves a restriction on the supply of the service."[138] EU and US-style agreements mirror that same standard while stepping up the binding nature of that standard. The GATS provision acts only as a basis for future rulemaking by the Council for Trade in Service, however, the standard in US and some EU agreements is self-enforcing – the parties must meet those standards or risk violating the agreement.[139]

5. Human Capital Development

The most direct way for countries to improve their services sectors is through local human capital development. Countries have employed numerous means to this end, including opening their borders to migration and immigration and investing heavily in public education. In the case of opening borders, it is the developing countries that favor liberalization over protection, and the developed world that resists. Under the GATS, countries may schedule commitments to remove barriers to migration and immigration.[140] EU-style agreements also allow for such commitments, but in most cases, the EU offers only minimal liberalization of their own borders.[141]US agreements simply omit border liberalization from the scope of the services provisions, permitting all kinds of restrictions on th free movement of persons.[142]

International trade agreements rarely interfere with government investments in public education. Where WTO members recognize the licensing of schools and teachers of another member, those countries must give other members a chance to negotiate recognition of their own licensing procedures.[143] However, the WTO does not require that countries harmonize their domestic licensing standards or automatically recognize that of other trade partners. Instead, such licensing is subject to the same standard of reasonableness, objectivity, and impartiality as all other domestic regulation mentioned in the previous section.[144] The biggest

138. GATS, *supra* note 65, at art. VI, ¶¶ 1, 4.

139. *Id.* at art. VI, ¶ 4; DR-CAFTA, *supra* note 67, at art. 11.8; US-Chile, *supra* note 67, at art. 11.8; US-Singapore, *supra* note 67, at art. 8.8; EU-Chile, *supra* note 62, at art. 102; NAFTA, *supra* note 67, at art. 1210. *But see* EU-Mexico Decision 2/2001, *supra* note 62, at art. 8 (containing only a vague "regulatory carve out" for parties wishing to regulate service supply). The EU-South Africa and EU-Tunisia agreements have only a skeletal services section, more of an agreement to agree than a commitment to liberalize services immediately. *See, e.g.*, EU-S.A., *supra* note 63, at art. 30; EU-Tunisia, *supra* note 63, at art. 31.

140. GATS, *supra* note 65, at art. VI, ¶¶ 1, 4.

141. *E.g.*, EU-Chile, *supra* note 62, at art. 95; Oxfam Services, *supra* note 117, at 5.

142. *E.g.*, DR-CAFTA, *supra* note 67, at art. 11.1.

143. GATS, *supra* note 65, at art. VII.

144. Consequently, as mentioned above, EU and US agreements maintain the same standard for such licensing, with potentially stronger enforcement abilities.

obstacles to public education investments, however, come from the domestic political and economic situation within the developing countries. Where they have no money to invest, or where the money is poorly used or inequitably distributed, countries may not be able to build up their human capital effectively.

6. Services commitments and South-south complacence

Across the board, international agreements in services trade have limited the policy options available to countries directing public policy toward diversification and growth. Surprisingly, South-South arrangements have done little to either preserve or increase policy space in this area. Services commitments are relatively new in the arena of free trade agreements they are often negotiated once an agreement on goods is in place. Consequently, many south-south agreements, such as China-Chile and SAFTA have not yet concluded a section on services, and the CAN, under Secretariat Decision 439, contains only minimal services obligations.[145]

MERCOSUR's Montevideo Protocol, by far the most comprehensive south-south services agreement, contains largely GATS-equivalent language, especially as regards market access commitments.[146] As a result, these agreements retain the flexibilities existent under the WTO and GATS but nothing more. Trade in services has come to mean, in addition to cross-border trade and movement of natural persons, the supply of services through commercial presence abroad – also known as foreign direct investment.[147] Although the WTO and EU frameworks treat most investment provisions as services disciplines, the US addresses it in a separate investment chapter that more rigidly constrains the use of domestic measures to control foreign investors as well as foreign capital. The next section discusses the various policy limits on foreign investment regulation imposed by modern trading regimes.

D. Investment

Countries have historically had at their fingertips numerous creatively crafted investment measures aimed to protect domestic industry, preserve their current and capital account balances, create local backward and forward linkages, and otherwise strengthen their economy. These measures address both foreign direct and portfolio investment – that is, both companies, and capital. Table 7 lays out the current availability of these measures under trade agreement models.

145. CAN Services, *supra* note 65, arts. 14-16 (laying a general liberalization process with some vague commitments).

146. MERCOSUR Services, *supra* note 65, at art. IV.

147. Designated under the GATS framework as Mode 3. GATS, *supra* note 65, at art. 1, ¶ 2.

Table 7: Investment Checklist

Policy Instrument	WTO& Associated Agreements	US Agreements	EU Agreements
Domestic content requirements			
Trade balancing requirements			
Foreign exchange restrictions			
Domestic sales restrictions			
Domestic producer preference	X	X	
Local management requirements			
Technology transfer			
Local labor requirements			
Headquarters/Production restrictions			
Research and development obligations			
Infrastructure provisions			
Subsidized credit/entrepreneurship			
Administrative guidance			
International transfer/payment restrictions			

1. Performance requirements for foreign direct investment

The WTO treats foreign direct investment (FDI) under two different schemes: goods and services. Investment measures related to trade in services are covered under the GATS.[150] With respect to investment measures related to trade in goods, the WTO provides a baseline of prohibited measures under two broad WTO principles.

The Agreement on Trade Related Investment Measures (TRIMS) prohibits any measures that violate national treatment (Article III) or the general obligation to eliminate quantitative restrictions (Article XI). It then lays out an illustrative list

148. In EU agreements, these measures may be effectively proscribed by other rules.

149. For local labor requirements, local management requirements, headquarters restrictions, technology transfer and research and development, a country may not require them as a condition of entry, but may condition receipt of a benefit on them.

150. Since the policy flexibilities and constraints of the GATS are discussed above (Trade in Services), this section focuses on WTO treatment of investment measures related to trade in goods.

of prohibited measures in an appended Annex.[151] Under TRIMS, countries may not require that foreign investors achieve a certain level of domestic content in their goods or prefer domestic producers or products in their production process.[152] They may not limit foreign investors' imports in relation to their local production or export levels.[153] They may not require investors to acquire foreign exchange only through export, and they may not demand that investors sell a certain amount of their product within the domestic market (2).[154] Furthermore, WTO members may not create incentives for by requiring any of the above as a condition for receiving economic advantages.[155]

EU-style agreements treat FDI as the supply of a service through commercial presence (Mode 3 of the GATS framework). The EU-Chile agreement contains a separate section entitled "Establishment" that protects the establishment of foreign investors within the territory of a party.[156] EU-CARIFORUM also covers commercial presence separately from other modes of supply, protecting foreign investors from measures violating national treatment, MFN and imposing quantitative restrictions.[157] All this, however, adds virtually nothing to the basic WTO standards already in place.

Modern north-south trading regimes can be divided into two camps: TRIMS and TRIMS+. While the EU generally maintains the TRIMS standard in its trade agreements, the US tacks on several "plus" provisions that put additional limits on government policy-makers. In addition to domestic content, trade balancing, foreign exchange, preference for domestic producers and domestic sales obligations, US agreements forbid export level requirements, technology and knowledge transfer demands, local supply exclusivity and management nationality pre-requisites.[158]

The "plus" provisions in US agreements help to shed light on the policy flexibility available under the TRIMS model. The more permissive model allows countries to impose numerous measures historically applied to promote local development, including requirements to export a certain level or percentage of goods, to transfer technology developed locally, supply exclusively from the territory, and hire local management.[159] Of course, these measures remain subject

151. Agreement on Trade-Related Investment Measures, Annex, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter *TRIMs*].

152. *Id.* at Annex, ¶ 1.

153. *Id.* at Annex, ¶¶ 1-2.

154. *Id.* at Annex, ¶ 2.

155. *Id.* at Annex, ¶¶ 1-2; *see also* CARLOS M. CORREA & NAGESH KUMAR, PROTECTING FOREIGN INVESTMENT: IMPLICATIONS OF A WTO REGIME AND POLICY OPTIONS 76-77 (2003).

156. *See* EU-Chile, *supra* note 62, at pt. IV, tit. III, ch. III. While the other EU agreements incorporate sections entitled "Services and Establishment," as mentioned above, they are largely agreements to agree in the future rather than active commitments between the parties.

157. EU-CARIFORUM, *supra* note 62, at arts. 67-68, 70.

158. NAFTA, *supra* note 67, at art. 1106; DR-CAFTA, *supra* note 67, at art. 10.9; US-Chile, *supra* note 67, at art. 10.9; US-Singapore, *supra* note 67, at art. 15.8.

159. *Compare* NAFTA, *supra* note 67, at arts. 1106-07 *with* TRIMS *supra* note 151, at annex.

to the pillars of national treatment and MFN treatment under the WTO, as do all measures of WTO member countries.[160] Additionally, the GATS permits developing countries to attach some conditions to their services liberalization commitments with development in mind.[161]

Even under TRIMS+ some flexibilities that countries have employed with varying success to promote development.Members of US-style agreements may continue to create incentives for export, technology transfer and backward and forward linkages by providing advantages to companies that comply with certain standards. US treaties also permit countries to condition advantages on compliance with requirements "to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory."[162]

Certain other measures lay outside of the scope of these investment provisions, making them available to all countries that have the capacity to impose and enforce them. Members of both TRIMS and TRIMS+ agreements may still invest in local infrastructure to promote direct investment. Countries may also provide directed credit in key industries to draw investors into specific sectors, and administrative guidance to multinational companies seeking to expand in to local markets.[163]

2. Capital controls and transfer restrictions

Countries have also attempted to regulate capital flows and other international transfers and payments to promote and stabilize their development. Restrictions on foreign portfolio investment (FPI), however, are generally disfavored within modern trade agreement models. The WTO, EU agreements and US agreements all prohibit international transfer and payment restrictions presumptively.[164] The difference here lies in the exceptions. The WTO employs the positive list approach to bind only those sectors with specific liberalization commitments. The WTO model, mirrored here by most EU agreements, also provides an exception in the case of "serious balance of payments and external financial difficulties," which is the primary purpose for such measures.[165]

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160. Oxfam Services, *supra* note 117, at 4.

161. GATS, *supra* note 65, at art. XIX ("There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.").

162. NAFTA, *supra* note 67, at art. 1106; DR-CAFTA, *supra* note 67, at art. 10.9; US-Chile, *supra* note 67, at art. 10.5; US-Singapore, *supra* note 67, at art. 15.8.

163. The test for domestic regulation is articulated in full in Section C.4.

164. GATS, *supra* note 65, at art. XI; DR-CAFTA, *supra* note 67, at arts. 10.8, 11.10; NAFTA, *supra* note 67, at art. 1109; US-Chile, *supra* note 67, at art. 10.8; US-Singapore, *supra* note 67, at arts. 8.10, 15.7; EU-Chile, *supra* note 62, at art. 163; EU-Mexico Decision 2/2001, *supra* note 62, at art. 29; EU-Tunisia, *supra* note 63, at art. 33; EU-S.A., *supra* note 63, at art. 33. It should be noted that under the EU agreements, Chile reserved a hefty exception for their investment law 600, and Mexico retains an exception for exchange and monetary difficulties in addition to balance of payments.

165. EU-Chile, *supra* note 62, at arts. 166, 195; EU-Mexico Decision 2/2001, *supra* note 62, at

The US model, as well as some recent EU agreements like EU-CARIFORUM, applies the restriction on capital controls across sectors and industries.[166] Foreign capital receives the same treatment as foreign companies here – protection regardless of any specific liberalization commitments. US-style agreements also place one more restraint on policy options by omitting the balance of payments exception.

3. Investor-State Arbitration

The US goes one step further, indirectly binding policy-makers' hands in introducing investment measures through investor-state arbitration. Unlike the WTO and EU-style agreements, which only make room for dispute resolution between treaty partners, the US allows private investors to sue states for interfering with the value of their investment.[167] They rely on general treaty language prohibiting expropriation, discrimination, unfair or inequitable treatment, which has been interpreted broadly by private arbitral tribunals.[168] NAFTA is the only agreement in force long enough to have a history of investor-state disputes and since then a few agreements have attempted to clarify certain treaty standards.[169] However, more recent agreements that contain the same investor-state arbitration provisions do not escape the risk of regulatory chill caused by NAFTA's arbitration history.

4. South-south investment liberalization and protection

In response to the constraints of the US model investment provision, some developing countries have created south-south trading relationships, like MERCOSUR and CAN, that liberalize investment regionally and protect against foreign investors from without.[170] Both MERCOSUR and CAN echo provisions of N-S agreements. MERCOSUR incorporates the US model language for national treatment and CAN prohibits transfer and payments restrictions.[171] However, they

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arts. 30-31; EU-S.A., *supra* note 63, at arts. 32-34; EU-Tunisia, *supra* note 63, at art. 35. *See also,* GATS, *supra* note 65, at art. XII.

166. DR-CAFTA, *supra* note 67, at art 10.8; US-Chile, *supra* note 67, at art. 10.8; US-Singapore, *supra* note 67, at art. 15.7; NAFTA, *supra* note 67, at art. 1109; EU-CARIFORUM, *supra* note 62, at arts. 122-24

167. *Compare* EU-CARIFORUM, *supra* note 62, at Ch. 2 *and* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, (1994) [hereinafter *DSU*] *with* DR-CAFTA, *supra* note 67, at Section B.

168. Gus Van Harten, *Reforming the NAFTA Investment Regime* in THE FUTURE OF NORTH AMERICAN TRADE POLICY: LESSONS FROM NAFTA 59, A Task Force Report (Frederick S. Pardee Center for the Study of the Longer-Range Future, November 2009).

169. Rachel D. Edsall, Note, *Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 B.U. L. REV. 931, 952 (2006).

170. For example, the MERCOSUR Protocol on Investment Promotion and Protection contains the same national treatment standard as that provided under US agreements. MERCOSUR Investment, *supra* note 65, at art. 3. Likewise. CAN Decision 292 allows multinational enterprises the right to establish subsidiaries, transfer payments freely, and transfer their domicile freely. CAN Andean Business, *supra* note 65, at art. 15.

171. MERCOSUR Investment, *supra* note 65, at art. 3; CAN Andean Business, *supra* note 65, at art. 15ff.

enforce strict ownership requirements on foreign firms in order for them to qualify for protection under the regime. Under CAN, for example, companies must be owned at least 60 percent by national investors of two or more Community Members.[172] Additionally, for any country whose investor contributes at least 15 percent of the capital for the enterprise, one of the directors must be a national of that country.[173]

These S-S trade agreements provide an example of how to combine substantial investment liberalization with regional protection of nascent industry. The nature of the trading partner makes a difference however, as bargaining and informational asymmetries between developed and developing countries lead to N-S arrangements with the same terms placing undesired constraints on policy-makers. Beyond investment protection, one more area of "trade-related" discipline has drawn the attention of international human rights groups and developing nations alike: intellectual property rules.

E. International Intellectual Property Protection

Historically, countries have employed intellectual property rules in an attempt to balance global integration with domestic development, correcting informational asymmetries while creating financial incentives for inventors, and protecting private property. This balance has become particularly contentious when protecting private property leads to limiting access to necessary medicines.[174] Wealthier countries, as knowledge exporters, have prioritized incentives for knowledge creation, while poor countries, as knowledge importers have favored incentives for knowledge dissemination.[175]

Today, however, the global trade regime places increasing limits on the ability of developing countries to promote such dissemination. International intellectual property rules have come under attack, in part, because of their adverse effect on medicinal availability in the developing world. For that reason, the WTO issued the Declaration on the TRIPS Agreement and Public Health (Doha Declaration), which emphasized the importance of developing country concerns about their access to medicines.[176] Despite the controversy, the US continues to push for stronger inventor incentives at the expense of policy flexibility. Table 8 provides a broad picture of the policy constraints over IPRS.

172. CAN Andean Business, *supra* note 65, at art. 1(d) (defining "multinational Andean enterprise" as a firm in which investors of two or more member countries owns more than 60% of the company).

173. *Id.* at art. 1(e).

174. KENNETH SHADLEN, POLICY SPACE FOR DEVELOPMENT IN THE WTO AND BEYOND: THE CASE OF INTELLECTUAL PROPERTY RIGHTS 23 (Global Dev't and Env't Inst., Working Paper No. 05-06 2005), *available at* http://www.ase.tufts.edu/gdae/Pubs/wp/05-06PolicySpace.pdf.

175. *Id.* at 6.

176. *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

Table 8. Intellectual Property Checklist

Policy Instrument	WTO and Associated Agreements	US Agreements	EU Agreements
Patent restriction by industry/origin			
Limit IP protection for plants/animals			
Permit early-working on patented pharmaceuticals			
Compulsory Licensing			
Local production requirement			
Parallel imports			
Limiting patent breadth			
Utility models			

1. Patent restriction by industry, origin or duration

The most direct way of intervening in the delicate balance between information dissemination and information protection is by controlling the industries, origins and duration of patent terms. In this one question, these three trade agreement models concur. Patent restriction by industry, origin or duration is patently (no pun intended) prohibited under the Agreement on Trade Related Intellectual Property Rights (TRIPS) of the WTO. TRIPS states that "patents shall be available for *any* inventions, whether products or processes, *in all fields of technology*, provided that they are new, involve an inventive step and are capable of industrial application."[177] This language is echoed in all US trade agreements and likewise incorporated into most EU agreements by reference.[178] TRIPS also requires that all patents last 20 years, minimum, a duration limit adopted by both EU and US agreements.[179]

177. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS] (emphasis added).

178. NAFTA, *supra* note 67, at art. 1709; DR-CAFTA, *supra* note 67, at art. 15.9; US-Chile, *supra* note 67, at art. 17.9; US-Singapore, *supra* note 67, at art. 16.7; EU-Mexico Decision 2/2001, *supra* note 62, at art. 36(1)(a); EU-Chile, *supra* note 62, at art. 170(a)(i); EU-S.A., *supra* note 62, at art. 46.

179. TRIPS, *supra* note 177, at art. 33.; NAFTA, *supra* note 67, at art. 1709, ¶ 12. This minimum is not even mentioned in DR-CAFTA, US-Chile, or US-Singapore, but is implied. The minimum is likewise not mentioned explicitly in EU trade agreements.

2. Limited plant and animal protection

For countries where populations rely heavily on traditional knowledge of plants and animals, limiting protection of such intellectual property ensures that the people will continue to have needed access to food and medicines. Although plant and animal species are generally found in nature (and therefore not new or innovative), the US and other developed countries have sought intellectual property protection for genetically modified plant species—a move that places access of native populations to their traditional knowledge in jeopardy. All international IPR regimes, demand some protection over knowledge derived from plant and animal life. TRIPS allows that countries to exclude plants and animals from patentability, with the exception of micro-organisms, but requires that some [180] effective protection for plant varieties by put into place.[181] This requirements admits some theoretical flexibility for WTO members to establish their own plant variety protection systems – a flexibility that many countries have exploited.[182]

Bilateral north-south trade models have tightened that flexibility down, specifying a minimum type of plant variety protection required to comply with the agreement. EU agreements, for example, often require trade partners who have not yet acceded to the International Convention for the Protection of New Varieties of Plants (UPOV), either from 1978 or 1991,[183] do so within a reasonable time from entry into force and US agreements generally require accession to the latter.[184] The US model also demands that contracting states "make every effort" to impose a plant patenting system.[185] US-Singapore even omits the TRIPS flexibility of excluding plants from the patent system.[186]

3. Information disclosure and "Bolar" provisions

Some countries promote knowledge dissemination by establishing strict information disclosure requirements. They then make the information available to generics producers and domestic inventors who want to piggy back off the patented invention or begin working on generic equivalents before the patent term ends.[187] The TRIPS model requires that patent applicants disclose the information necessary "for the invention to be carried out by a person skilled in the art."[188] It also allows members to demand that applicants "indicate the best mode for

180. TRIPS, *supra* note 177, at art. 27.

181. *Id.*

182. Shadlen, *supra* note 174, at 12-13.

183. The key difference between the 1978 and 1991 conventions is found in their allowance of third parties "to use protected seeds and plants for breeding new varieties". Shadlen, *supra* note 174, at 13. UPOV 1978, included a farmers exception allowing them to reuse seeds. This exception was eliminated under UPOV 1991, "which provides much stronger rights to breeders." *Id.*

184. DR-CAFTA, *supra* note 67, at art. 15.1, ¶ 5; US-Chile, *supra* note 67, at art. 17.1, ¶ 3; US-Singapore, *supra* note 67, at art. 16.1, ¶ 2. NAFTA, largely because of when it was negotiated and signed, required only the UPOV 1978. NAFTA, *supra* note 67, at art. 1701.2.

185. DR-CAFTA, *supra* note 67, at art. 15.9, ¶ 2; US-Chile, *supra* note 67, at art. 17.9, ¶ 2.

186. US-Singapore, *supra* note 67, at art. 16.7, ¶ 1.

187. TRIPS, *supra* note 177, at art. 29.

188. *Id.* at art. 29.1.

carrying out the invention known to the inventor at the filing date."[189] Even on unpatented products, countries often require applicants to submit additional data for regulatory approval.

Early working or "Bolar" provisions build on these disclosure requirements, permitting producers to develop, test, and begin the registration process for generic versions of patented pharmaceuticals before the end of the patent term.[190] Although the text of TRIPS only proscribes "unfair commercial use" of protected data, WTO case law reveals that TRIPS permits early working so long as it does not result in commercial production or stockpiling purposes.[191]

While EU agreements are modeled after the TRIPS standards, the US model favors knowledge creation and protection. US agreements do not allow more than minimum disclosure requirements and they protect data submitted for regulatory approval for at least five years "against both disclosure and reliance.[192]

4. Compulsory licensing

In order to gain access to patented drugs and necessary technology in the absence of a traditionally negotiated license, governments have granted compulsory licenses (CLs) to domestic industry to make and distribute those products.[193] TRIPS establishes the internationally accepted procedural standard for CLs, implicitly adopted by both EU and US trade agreements.TRIPS Article 31 requires that countries consider each license individually, that they attempt to negotiate a license from the patent holder "on reasonable commercial terms" over a reasonable period of time (except in situations of national emergency), that they limit the scope and duration of the license to a specific purpose, that they grant a non-exclusive and non-assignable license, that they grant it only for the domestic market and that they subject it to judicial review, among other procedural requirements.[194]

Countries have also used CLs in order to encourage local production of patented products. Brazil, for example, allows the government to grant CLs to local producers when a patented good is not produced locally within 3 years from the beginning of the patent term. This promotes "the transfer of non-codified, tacit knowledge that occurs via the localization of manufacturing operations."[195] Although these measures have been somewhat controversial, no WTO ruling has outlawed them and they remain available under TRIPS.

Some US agreements have circumscribed the use of CLs beyond the procedural requirements of Article 31 and definitively prohibited such local

189. *Id.* (emphasis added).

190. Shadlen, *supra* note 174, at 18-19.

191. *Id.* at 19; TRIPS, *supra* note 177, at art. 39, ¶ 3. This standard has been determined by WTO case law and is not necessarily clear from the text of the agreement. *Id.*

192. Shadlen, *supra* note 174, at 19; *see, e.g.*, DR-CAFTA, *supra* note 67, at art. 15.10, ¶ 1.

193. Shadlen, *supra* note 174, at 21.

194. TRIPS, *supra* note 177, at art. 31.

195. Shadlen, *supra* note 174, at 22.

production requirements.[196] US-Singapore, for example, only allows CLs to remedy anti-competitive practices, for public non-commercial use or in the case of national emergency.[197] Furthermore, patent term marketing restrictions in agreements such as DR-CAFTA may create an effective ban on compulsory licensing.[198]

US-Peru, on the other hand, incorporates the 2003 Doha Declaration on Public Health, recommitting to Article 31 which emphasizes that countries may establish their own grounds for providing CLs, and allows countries to grant these licenses for export to least developed countries and to countries without production capacity.[199] The recent US-Peru agreement may be evidence of international pressure to improve access to medicines for the poorest populations, and indicate that even bilateral agreements cannot place too many limits on policy space in this area.[200]

5. Patent exhaustion

As an indirect route to promoting access to needed technologies, countries may establish their own exhaustion policies under TRIPS – whether national, regional or international – implicitly permitting parallel imports of goods where the patent holder's rights have been exhausted.[201] Where international exhaustion policies apply, a producer from a developing country could purchase goods from an industrialized country producer, repackage the goods and undersell the industrialized producer in a third country. Developing countries can use this advantage to increase competition and drive down prices, making patented products more affordable.[202]

Since exhaustion is a matter of domestic policy, few trade agreements have addressed the issue. The US applies a national standard of exhaustion which allows patent holders to assert their patent rights against all parallel imports, regardless of their origin.[203] Within the European Community, countries apply a

196. US-Chile, *supra* note 67, at art. 17.9, ¶ 4; DR-CAFTA, *supra* note 67, at art. 15.9(5); US-Singapore, *supra* note 67, at art. 16.7(5). Once more, the early conclusion of NAFTA resulted in a substantially different intellectual property rights regime. Since the conclusion of NAFTA, the US model has evolved and moved further away from the more flexible disciplines in TRIPS.

197. US-Singapore, *supra* note 67, at art. 16.7, ¶ 6.

198. *Id.* at art. 15.10(2); Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health and the Contradictory Trend in Bilateral and Regional Free Trade Agreements* 14 (Quaker United Nations Office Occasional Paper, 2004).

199. World Trade Organization, Declaration on the TRIPS agreement and public health, WT/MIN(01)/DEC/2 (2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (last visited Dec. 8, 2009); Peru TPA Final Text art. 16.13, April 12, 2006, USTR, *available at* http://www.ustr.gov/webfm_send/1031 [hereinafter *US-Peru*].

200. Shadlen, *supra* note 174, at 24.

201. TRIPS, *supra* note 177, at art. 6.

202. Shadlen, supra note 174, at 20.

203. International Association for the Protection of Intellectual Property (AIPPI), United States of America Report Q156 (for the United States Group, Leonard B. Mackey and Andrew H. Simpson) 1, *available at* https://www.aippi.org/download/comitees/156/GR156usa.pdf [hereinafter *AIPPI*].

regional exhaustion policy which protects against parallel imports from outside the Union.[204] A few US agreements, however, have attempted to export the national standard to treaty partners. US FTAs with Morocco and Australia both demand that the countries recognize national exhaustion of patent rights.[205] Although EU agreements have not, thus far, exported their exhaustion policies to their trade partners, regional exhaustion will restrict producers originating outside the Union from competing with EU patent holders by way of parallel imports.

6. Patent alternatives

Unlike the above aspects of patent protection, countries retain flexibility in limiting patent breadth and protecting otherwise unpatentable inventions through "utility models".[206] The latter measures, in particular, provide local residents with room for creative expansion on existing patents and incentives for their own experimentation.

Neither the more permissive WTO model nor US-style agreements address patent breadth or utility models directly. Some EU agreements, however, expressly allow utility models "provided that they are new, involve some degree of nonobviousness and are capable of industrial application."[207] Although it is not clear whether such a provision would increase the use of utility models by mentioning them, or further tie the hands of policy makers by the limiting the conditions under which they are granted, it at least shows promise that the developed world recognizes other types of invention incentives.[208]

7. South-south responses and the US model

For developing countries, intellectual property rights represents a new area of trade-related issues that has yet to be addressed under most south-south agreements. The Andean Community, however, has established a model S-S arrangement that includes intellectual property provisions aimed at promoting the interests of the nations in that region. First of all, the CAN demands that patent applications based on material obtained from traditional knowledge meet the requirements of international law, the Andean Community and domestic law with respect to acquisition of that material.[209] In addition, the Community excludes

204. Prof. Dr. Joseph Straus, *The Present State of the Patent System in the European Union: As compared with the situation in the United States of America and Japan*, available at http://suepo.org/public/docs/2001/straus.pdf; *see also* Ladas and Perry LLP, *II. Preventing parallel imports under trademark law*, Section B, *available at* http://www.ladas.com/IPProperty/GrayMarket/GrayMa02.html#Heading4.

205. Morocco FTA Final Text art. 17.9(4), June 15, 2004, USTR, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text; Australia FTA Final Text art. 15.9(4), May 18, 2004, USTR, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text.

206. Shadlen, *supra* note 174, at 15-16.

207. EU-CARIFORUM, *supra* note 62, at art. 148.

208. Shadlen, *supra* note 174, at 20.

209. CAN IPRs, *supra* note 65, at art. 3.

scientific theories, mathematical methods, an d living things (whatever the size), among other pursuits, from patentability.[210]

Like many developing countries, the Decisions of the CAN Secretariat apply an international standard for exhaustion, making room for the benefits provided by parallel imports.[211] Also similar to Brazil's intellectual property law (see above), the CAN allows compulsory licensing when the patent holder does not exploit the patent locally within three years of the grant of that patent.[212] Finally, the Decision explicitly mentions utility models, which can encourage a lower degree of innovation often "more appropriate for local firms."[213]

The Andean Community model for South-South intellectual property protection demonstrates how developing countries can work together to encourage information dissemination and establish financial incentives for creativity. Unfortunately, as countries seek trade agreements with both the global north and global south, the CAN model has come into conflict with the more restrictive US agreement model.

The US-Peru Trade Promotion Agreement (a comprehensive FTA) entered into force in January of 2009. As a condition of the agreement, Peru must undertake "reasonable efforts" to establish a plant patenting system – a measure that is forbidden under the Andean Community intellectual property regime. The CAN Commission met multiple times to consider this and other conflicts between the agreements and it concluded that Peru (and the other Andean nations) may "develop and deepen" intellectual property protection through trade agreements with the US.[214] If this trend continues, then the flexibilities exploited in south-south regional integration will be short-lived and the US model may become the *de facto* standard for intellectual property protection.

III. SUMMARY AND CONCLUSIONS

Our analysis of various types of trade agreements shows that the current global trade regime substantially curtails the ability of countries to maintain control over various policy tools that traditionally have been deployed as part of long run development paths.[215] Still, under the WTO, despite the constraint on policy space, there remains considerable room to maneuver. Countries may, legally, raise and lower tariffs, provide tax-related export incentives such as

210. *Id.* at art. 15.

211. *Id.* at art. 54; SISULE F. MUSUNGU, SUSAN VILLANUEVA, & ROXANNA BLASETTI, *UTILIZING TRIPS FLEXIBILITIES FOR PUBLIC HEALTH PROTECTION THROUGH SOUTH-SOUTH REGIONAL FRAMEWORKS* 51 (South Centre 2004), *available at* http://www.southcentre.org/index.php?option=com_content&task=view&id=72.

212. CAN IPRs, *supra* note 65, at arts. 61, 65-66.

213. *Id.* at arts. 81-85; Shadlen, *supra* note 174, at 16.

214. Marienella Ramírez, *El Perú logra allanar el camino para TLC con Estados Unidos*, ELCOMERCIO.COM.PE (Aug. 15, 2008), *available at* http://www.elcomercio.com.pe/edicionimpresa/Html/2008-08-15/el-peru-logra-allanar-camino-tlc-estados-unidos.html.

215. Part of the reasons for this is that, with the spread of globalization, no issue is truly "uniquely" domestic. Even though industry standards, licensures, and certifications may be matters of domestic law, they impact foreign companies and, by extension, foreign governments.

drawbacks and deferrals within EPZs, impose certain performance requirements on investors and service providers, and employ domestic patent laws to prioritize information dissemination over incentives for invention. The WTO also makes extra room for developing countries to form bilateral and regional trade agreements under the Enabling Clause.[216]

Despite wide variation among bilateral and regional agreements, policy space under north-south free trade agreements are the most constraining on the traditional industrial development toolkit. Overwhelmingly, among both bilateral agreements and the multilateral trade regime, the trend heads toward demanding increased liberalization and decreased government intervention in the economy. At the same time, some types of agreements continue to make space for the policies aimed at industrial development, while others push for broader and deeper liberalization. As shown above, trade agreements with the EU retain much of the flexibility under the WTO in the areas of investment and intellectual property, and employ the same positive-list approach as the global regime when it comes to services trade. By contrast, the US imposes many additional disciplines on its trading partners—expanding patent protection, mandating investment liberalization, and employing a negative-list approach to services bindings. Since the early 1990s,trade regimes have formed around these principles and US trade policy has become more uniform. Meanwhile, EU trade policy varies by trading partner, indicating a greater willingness to permit certain policies in these areas. Provided this trend continues, countries that are still developing in thirty years will have more opportunity to creatively use their policy space under an EU agreement than under an agreement with the US.

Many S-S agreements are still formally notified to the WTO under Article XXIV; yet they often provide the greatest policy space among the agreements we studied. This flexibility derives not from lacking affirmative trade disciplines but from using trade liberalization between developing countries to protect industries and promote growth regionally. Investment and intellectual property rules under the CAN provide the clearest example here. The CAN rules of origin establish protection for regional firms against extra-regional companies. In addition, the CAN explicitly protects traditional knowledge, tightens patentability requirements and makes room for local, non-patentable innovation.

Still, some policy space remains under even the most restrictive trading schemes. To the extent the state is economically capable, a country may invest heavily in public education, subsidize credit to certain industries, and build up domestic infrastructure. A method employed by developing and developed countries alike, policy makers may also provide administrative guidance—marketing the country, its location, natural resources, and workforce, for example—to investors and traders internationally. This technique may help a

216. WORLD TRADE ORGANIZATION, DIFFERENTIAL AND MORE FAVORABLE TREATMENT: RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES Decision of 28 November 1979 (L/4903), *available at http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf.*

country to target an industry that would transfer technology or provide backward and forward linkages in the economy.

This paper is far from the final word on this subject. Indeed, it may perhaps raise more questions than those that are answered. Each subject could be its own separate paper, pursuing in more depth the implied and actual flexibilities inherent in the global trading regime. For that reason, this paper aims only to give an overview of the policies available to countries today, and point out some significant differences between the various types of trade agreements. Going forward, interesting ideas for further research are numerous. A legal analysis of the dispute settlement cases under each regime would shed more light on the extent to which the rules against selective policies have actually been enforced. Political scientists might explore whether the divergence within international regimes, such as that of the EU-Latin American agreements and the EU-African agreements, is rooted in the geography of the trading partners, their development level, or other factors.

From a policy perspective, it is our hope that negotiators and policy-makers who have or are considering crafting longer run development strategies can use this paper as a reference when deciding under which policy regimes such development strategies would be most permissible. Just shy of 60 percent of the people on the planet live in poverty, measured by the World Bank as less than $2.50 per day. To raise the standard of living for those people, governments seek to put together long-term development strategies that deploy the policy instruments that have proven successful in other settings. This paper catalogues many of the policies deployed by successful developed and developing countries that over a 35+ year period tripled the average incomes of many countries such as the US, Japan, South Korea, Taiwan, and now China. We show that today, however, poorer nations have a more limited toolkit to engage in long-run development strategies, and that the trade arrangements they form will have an influence on the policies they will have available in the future.