

## The Proliferation of Free Trade Agreements: Bane or Beauty?

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This article explores the policy foundations behind regional and bilateral trade agreements and their application in practice. Critically examining the arguments in support of them, it highlights the virtues and deficiencies of each. It concludes by arguing that international standards should be developed to guide the development of bilateral trade agreements in the future.

The proliferation of bilateral trade agreements has helped to fill a gap in a multilateral trade process that is impeded by the impasse of negotiations in the World Trade Organization (WTO).<sup>1</sup> At the same time, the development of bilateral trade agreements arguably has discouraged some States from engaging in multilateral negotiations.<sup>2</sup> The result is a new genre of trade relations in which bilateral and regional mechanisms are increasingly adopted in substitution for multilateral trade processes.<sup>3</sup> While, bilateral trade agreements diverge significantly in their form and substance, they are having an important, albeit disparate impact upon multilateral trade.<sup>4</sup>

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<sup>1</sup> On the proliferation of bilateral free trade agreements, see <[www.cfr.org/publication/10890/](http://www.cfr.org/publication/10890/)>. On the changing character of the WTO, see Peter Gallagher, *The First Ten Years of the WTO: 1995–2005* (Cambridge: Cambridge University Press, 2005); Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2005).

<sup>2</sup> On the history of global trade negotiations, see, e.g., Thomas R. Howell, Alan W. Wolff, Brent L. Bartlett and R. Michael Gadbaw, *Conflict Among Nations: Trade Policies in the 1990s* (Boulder, CO: Westview, 1993); Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO—the Real World of International Trade Negotiation* (London and New York: Zed Books, 2003).

<sup>3</sup> This sidelining of WTO dispute resolution will include the tendency to direct a greater volume of trade disputes to state courts and regional tribunals. On dispute resolution under the WTO, see Yang Guohua, Bryan Mercurio and Li Yongjie, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (London: Kluwer Law International, 2005); Petros C. Mavroidis and N. David Palmeter, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge: Cambridge University Press, 2004); Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London, The Hague, and Boston: Kluwer Law International, 1997). On regional trade agreements, see, e.g., James H. Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the International Trade Requirement* (The Hague: TMC Asser Press, 2002).

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

This article examines different arguments for asserting that bilateral trade agreements have advanced multilateral trade relations. It poses a variety of questions. To what extent is the development of bilateral trade agreements founded on sound trade principles?<sup>5</sup> Have bilateral trade agreements added value to or detracted from the perceived needs of multilateral trade? Are States subject to suitable guidelines in negotiating bilateral agreements? To what extent are States subject to obligations to redress the practices of recalcitrant States, such as by resort to trade boycotts and other sanctions, in responding to violations of the law governing international trade?<sup>6</sup>

Overriding all these questions is a potential tension between policies over the liberalization of trade. One policy is grounded in principles of *laissez faire*: that States should be comparatively unrestrained in concluding bilateral trade agreements in the interests of promoting the unchecked exchange of goods and services. Another policy holds that States are bound to respect their bilateral agreements and that violating them ought to lead to the censuring of offending States. In support of this latter policy is the claim that States that consent to bilateral agreements both surrender their sovereignty and territoriality bilaterally and subject themselves to international standards of compliance not limited to those embodied in the GATT and its WTO successor.<sup>7</sup>

The first two sections of this article evaluate the reasoning behind the liberalization of trade and the assumptions in favor of bilateral trade agreements. The third section critically evaluates different arguments in favor of negotiating and concluding bilateral trade agreements. The fourth section proposes legal principles and standards to guide the application of bilateral free-trade agreements in the twenty-first century.<sup>8</sup>

## I. A LIBERALIZED TRADE PHILOSOPHY

The post-Second World War era has heralded two significant developments: a commitment by Nation-States to reduce barriers to trade and an effort to establish principles and guidelines for the free flow of goods and services across national boundaries.<sup>9</sup>

<sup>5</sup> For a comprehensive list of Free Trade Agreements (FTAs), see <[www.worldtradelaw.net](http://www.worldtradelaw.net)>.

<sup>6</sup> For a critical view of bilateral trade agreements, see, Robert McMahon, *The Rise in Bilateral Free Trade Agreements*, Council on Foreign Relations (13 June 2006), available at: <[www.cfr.org/publication/10890](http://www.cfr.org/publication/10890)>. But see <[www.bilaterals.org/article.php3?id\\_article=1227](http://www.bilaterals.org/article.php3?id_article=1227)> (a website devoted to the downfall of bilateral free trade agreements).

<sup>7</sup> See, e.g., Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 *World Bank Economic Review* 2 (2005), 287; Chad P. Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 *Rev. Econ. & Statistics* 3 (2004), 811; James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 *International Organization* (2003), 137; Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995); Marc L. Busch and Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, available at: <<http://www.carleton.ca/ctpl/pdf/conferences/REINHARDT-BUSCH195.pdf>>.

<sup>8</sup> For a comprehensive list of publications on global commerce and the WTO, see <<http://henningcenter.berkeley.edu/gateway/wto.html>>.

<sup>9</sup> See section II.A. below. One ought not to overstate the WTO as a knight in shining armor, ready to take on the forces of evil. There are some who worry about the impact of the WTO upon global society, as distinct from the global economy. See, e.g., Kent Albert Jones, *Who's Afraid of the WTO?* (Oxford: Oxford University Press, 2003); Benjamin Heim Shepard and Ronald Hayduk, *From ACT Up to the WTO: Urban Protest and Community Building in the Era of Globalization* (Verso, 2002); Robin Broad, *Global Backlash: Citizen Initiatives for a Just World Economy* (Lanham, MD: Rowman & Littlefield, 2002).

The General Agreement on Tariffs and Trade (GATT) sought to unify multilateral trade practice through a pervasive, transparent and commonly understood set of principles directed at harmonizing trade practice and maximizing cooperation in the global interest.<sup>10</sup> Despite these developments, the liberalization of trade has fallen short of a resounding success. Trade protectionism that marked the era prior to the Second World War has remained a serious impediment to liberalized trade, along with disparities in the power of trading States and the more recent fragmentation of trade along regional and now bilateral lines.<sup>11</sup> While the GATT purported to incorporate within it both bilateral and regional trade practices on grounds that they furthered multilateralism, bilateralism has chipped away at the development of global principles of trade that some viewed as unduly protective of the trading interests of developed States.<sup>12</sup>

Against this background, the tension between bilateralism and multilateralism has re-arisen with a vengeance as States have repeatedly failed to reach multilateral accord on account of their conflicting domestic interests.<sup>13</sup> A by-product of this tension has been the growth of bilateral agreements between selected trade partners on mutually satisfying terms. The result of this by-product has been applauded by those who favor bilateralism,<sup>14</sup> but a source of concern for those who worry about lost opportunities for the multilateral trade process.<sup>15</sup>

## II. MULTILATERALISM INCLUDES BILATERALISM

Despite the inevitable tension between bilateral and multilateral trade interests, international instruments historically have tried to reconcile them. In particular, the

<sup>10</sup> This conception of “cooperation” is perhaps best exemplified by the requirements under the WTO, as distinct from the GATT, that China satisfy three levels of commitment to be admitted as a WTO Member. First, China was obliged to commit itself to the objectives of the WTO, such as to the most-favored-nation clause, national treatment and transparency requirements, as exemplified in the GATT and developed in the ensuing WTO agreements. Second, China had to demonstrate in its accession protocol its commitment to establishing and complying with a series of WTO trade rules applicable in specific sectors, such as in relation to agricultural and textiles, information technology and telecommunications. Third, China had to establish its commitment to its bilateral agreements with its major trading partners, and that it had their support in negotiating its entry into the WTO. See further at notes 42, 43 and 66 below.

<sup>11</sup> On the tension between trade liberalization and protectionism, see Gea M. Lee, *Trade Agreements with Domestic Policies as Disguised Protection*, 71 J. Int. Econ. 1 (2007), 241–259. See, generally, John Howard Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006). But see Judith L. Goldstein and Lisa Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 International Organization (2003), 63.

<sup>12</sup> See further section II.F. below.

<sup>13</sup> Despite the image of a liberalizing trade culture shifting from multilateralism to bilateralism, multilateralism is sometimes quietly resurrected through diplomacy. On the “quiet” resurrection of the Doha Talks through to Hong Kong, see, e.g., recent comments of the US Trade Representative, Susan Schwab, available at: <<http://www.ilt.com/articles/ap/2007/02/23/business/NA-FIN-US-Doha-Talks.php>>. On different WTO negotiation strategies since Doha, see <[http://www.twinside.org.sg/trade\\_1.htm](http://www.twinside.org.sg/trade_1.htm)>. See, too, Robert M. Stern, *Perspectives on the WTO Doha Development*, 5 Global Economy Journal 4 (2005).

<sup>14</sup> In defense of bilateral free trade agreements, see, e.g., Daniel Griswold, “Bilateral Deals are No Threat to Global Trade”, *Financial Times* (27 July 2003); CBO, *The Pros and Cons of Pursuing Free Trade Deals, Congressional Economic and Budget Issue Brief* (Congressional Budget Office, 31 July 2003).

<sup>15</sup> See, e.g., Bryan Mercurio and Simon Lester, *Bilateral and Regional Trade Agreements: Analysis and Commentary* (Cambridge: Cambridge University Press, 2007); Lorand Bartels and Federico Ortino, *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006).

GATT sought to do so as a matter of both policy and practice.<sup>16</sup> Article XXIV of the GATT specifically endorsed customs unions and free-trade agreements between members, noting that, “The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of [those] countries”.<sup>17</sup>

The rationale behind the GATT’s endorsement of regional and bilateral trade agreements was that, by reducing trade barriers between two or more members, the presupposed net result was the enhancement of global trade.<sup>18</sup> The inferred result was a growth in total global trade arising from the accretion of a series of profitable regional and bilateral agreements that exceeded their net cost.<sup>19</sup>

Whether or not the assumptions in Article XXIV are correct depends on a careful scrutiny of the assumptions behind the argument favoring regional and bilateral trade, and an assessment of those arguments in trade practice.<sup>20</sup> What follows is a reflection on the rationale for bilateral trade agreements, followed by a step by step argument in favor of supporting them. The intention is not to gainsay either the principles or the arguments behind GATT Article XXIV, but to apply them to conventional trade practice.

#### A. ASSUMPTIONS BEHIND LIBERALIZED TRADE

The liberalization of trade along bilateral lines is grounded in a set of inter-related political and economic assumptions. The first is that the liberalization of trade law is most effective when States reduce barriers to trade including through bilateral agreements, when buyers and sellers have greater freedom to transact within regional and bilateral free trade zones, and when the cost and prices of goods and services are reduced as a result of lower economies of scale in the production, distribution and sale of such goods and services within such regional or bilateral

<sup>16</sup> On the history of GATT Article XXIV and divisions among developing states over its virtues, see Mathis, as note 3 above; J. Goto and K. Hamada, *Regional Economic Integration and Article XXIV of the GATT*, 7 *Review Int’l. Econ.* 4 (1999), 555–570.

<sup>17</sup> The text of Article XXIV, clause 4, continues that the contracting parties “recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories”. See further at <[http://www.wto.org/english/tratop\\_e/region\\_e/regatt\\_e.htm#gatt](http://www.wto.org/english/tratop_e/region_e/regatt_e.htm#gatt)>.

<sup>18</sup> The rules of the GATT and the WTO provide that, except in relation to free trade areas (which would include bilateral trade agreements), a state may not impose a higher tariff against one member state than another, so that any diminution in a state’s barriers to trade must apply equally to imports from all other member countries. As a result, reducing a state’s barriers to trade supposedly promotes the competitiveness of all imports equally, so that the growth in imports from one state will displace domestic production and not imports from other states.

<sup>19</sup> See Fred C. Bergsten, *Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century*, APEC Working Papers No. 96-15 (Washington, D.C.: Institute for International Economics, 1996). It is through this “competitive liberalism” that GDP is expected to grow.

<sup>20</sup> See, generally, Elhanan Helpman, *The Mystery of Economic Growth* (Cambridge, MA: Harvard University Press, 2004).

markets.<sup>21</sup> A second and related assumption is that trade is more effectively liberalized when barriers to the supply of goods and services between particular States are effectively reduced, including bilateral agreements that have such an effect.<sup>22</sup> A third assumption is that bilateral trade agreements that reduce barriers to trade between specific parties ordinarily liberalize trade multilaterally as well.<sup>23</sup> A fourth qualifying assumption is that bilateral agreements that benefit global trade when the benefit of trade expansion between the bilateral parties more than offsets the loss of trade to other States that are not parties to those agreements.<sup>24</sup> A fifth assumption is that liberalized trade can and should have a positive distributive effect, namely, that part of the wealth produced by trade liberalization can and should be distributed by bilateral trade partners to those of their subjects who are in the greatest need.<sup>25</sup>

These assumptions are best tested in light of the principles underlying global trade and in particular, in their application to trade relationships among States engaged in bilateral, regional and multilateral trade.

#### B. PRINCIPLED GROUNDS FOR TRADE LIBERALIZATION

The renewed interest in bilateral trade is grounded in the interrelated principles of democratic liberalism<sup>26</sup> and economic rationality.<sup>27</sup> Democratic liberalism infers that States ought to empower their subjects to engage in the free flow of goods and services across national boundaries as their entitlement. Such freedom within a liberal democracy also includes the right of individuals to profit from state sponsored trade including bilateral trade. States that liberalize trade bilaterally are also economically rational insofar as they seek to reduce barriers to the free flow of goods and services

<sup>21</sup> Debate over the extent to which global competition promotes the liberalization of trade is long-standing. See, e.g., Edward Montgomery Graham and J. David Richardson, *Global Competition Policy* (Washington, D.C.: Institute for International Economics, 1997); Michael Storper, *The Regional World: Territorial development and global economy* (New York: Guilford Press, 1997); Elhanan Helpman and Paul Robin Krugman, *Market Structure and Foreign Trade Presents a Coherent Theory of Trade in the Presence of Market Structures Other Than Perfect Competition* (Cambridge, MA: MIT Press, 1985).

<sup>22</sup> For the argument that the liberalization of trade through free trade agreements generally benefits multilateral trade, see Emanuel Ornelas, *Endogenous Free Trade Agreements and the Multilateral Trading System*, 67 *J. Int. Econ.* 2 (2005), 471–497.

<sup>23</sup> On the impact of bilateral trade agreements upon non-parties, see e.g. Kyle Bagwell & Robert W. Staiger, *Erratum to Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO*, 67 *J. Int. Econ.* 2 (2004), 268–294. See, too, Ornelas, *ibid.*

<sup>24</sup> This relative decrease in barriers to trade occurs when the parties to bilateral or regional trade agreements erect barriers to trade to non-parties that do not exceed the reduced trade barriers between the parties to those agreements. See, e.g., Helpman and Krugman, as note 21 above.

<sup>25</sup> For an analysis of the distribution effect of trade policy, see e.g. Guido G. Porto, *Using Survey Data to Assess the Distributional Effects of Trade Policy*, 70 *J. Int. Econ.* 1 (2006), 140–160.

<sup>26</sup> In rooting multilateral trade, including bilateral trade agreements in the traditions of a liberal democracy, see, e.g., Daniel Verdier, *Democracy and International Trade: Britain, France, and the United States, 1860–1990* (Princeton, NJ: Princeton University Press, 1995).

<sup>27</sup> See, generally, Wesley C. Mitchell, *The Role of Money in Economic Theory*, 6 *American Econ. Rev.* 1 (1916), 140; Razeen Sally, *Classical Liberalism and International Economic Order: Studies in Theory and Intellectual History* (London: Routledge, 1998). For a criticism of “economic rationality” in trade policy attributed primarily to the United States, see, e.g., Peter Karl Kresl, *The United States, Canada, and the “Market Mentality”*, 14 *J. Interamerican Studies & World Affairs* 1 (1972), 3.

between bilateral parties, thereby rendering that trade more profitable for the benefit of the parties and their subjects.<sup>28</sup> To these principles is added a controversial third principle of equitable treatment, namely that a by-product of the liberalization of trade between States is the promotion of “fairer trade”.<sup>29</sup> Fairer trade connotes a more level playing field of equal opportunity, as when bilateral trade agreements benefit the subjects of such treaties through “preferred” or “most-favored-nation” treatment. Fairer trade is also economically rational in helping to promote future trade between parties who are more equal.<sup>30</sup>

These assumptions are at best generalizations. However much bilateralism may lead to expanded trade, the process of bilateral agreement is inherently selective and exclusionary in its inception, application and operation. However rational States may appear to be and however much they propose to liberalize trade practices bilaterally, they are also rational in acting in their self-interest. Self-interest, in turn, sometimes supports decisions to act inequitably, to restrict trade bilaterally, and to grant access to trade benefits of trade selectively only.<sup>31</sup>

Nevertheless, bilateralism does have a wide appeal. Most States desire to promote economic development, to expand the production, supply, sale and consumption of goods and services, and to render trade across national boundaries more cost-effective and ultimately more profitable. Insofar as bilateral trade furthers these objectives, one would expect States to support them.<sup>32</sup> One would also expect States to act “rationally” in seeking the economic good of other States consistent with furthering their own good.<sup>33</sup> One would also assume that most States would support the “invisible hand” of

<sup>28</sup> The rationale is that states, as rational actors in a competitive market, pursue shared economic ends, such as the reduction and elimination of trade duties and tariffs. The apparent result is a win-win: a win for governments in raising revenue from increased trade, for producers and suppliers who incur reduced costs and are able to produce and sell more with greater efficiency and for consumers in paying less for goods and services. See Roger B. Porter, *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, D.C.: Brookings Institution Press, 2001).

<sup>29</sup> See, generally, Porter, *ibid.* But see Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 *International Affairs* 1 (2001), 15–30.

<sup>30</sup> On the “most-favored-nation” treatment in international trade, see, e.g., Kamal Saggi, *Tariffs and the Most Favored Nation Clause*, 63 *J. Int. Econ.* (2005), 341–368; Andrew F. Daughety and Jennifer F. Reinganum, *Exploiting Future: Settlements: A Signaling Model of Most-Favored National Clauses in Settlement Bargaining*, 35 *RAND J. Econ.* 3 (2004), 467–485; Andrew A. Faye, *APEC and the New Regionalism: GATT Compliance and Prescriptions for the WTO*, 28 *Law & Policy in Int'l. Bus.* (1996), 175–215.

<sup>31</sup> With regard to the debate over the extent to which bilateral trade is selective and exclusionary, see, e.g., Martin Wolf, *Why Globalization Works* (New Haven, CT: Yale University Press, 2004); Jagdish Bhagwati and Arvind Panagariya, *The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends*, 86 *Am. Econ. Rev.* 2 (1996), 82; A. O. Krueger, *Are Preferential Trading Arrangements Liberalizing or Protectionist?*, 13 *J. Econ. Perspective* 4 (1999), 105; Raymond Riezman, *Can Bilateral Trade Agreements Help to Induce Free Trade*, 32 *Can. J. Econ.* (1999), 751; Kyle Bagwell and Robert W. Staiger, *Will Preferential Agreements Undermine the Multilateral Trading System?*, 108 *Econ. J.* (1998), 1162; Philip I. Levy, *An Political-Economic Analysis of Free Trade Agreements*, 87 *Am. Econ. Rev.* (1997) 506.

<sup>32</sup> See, generally, Adam Szirmai, *The Dynamics of Socio-Economic Development: An Introduction* (Cambridge: Cambridge University Press, 2005); Philip David McMichael, *Development and Social Change: A Global Perspective* (3rd edn: Pine Forge Press, 2004); Rourdes Beneria and Savitri Bisnath, *Global Tensions: Challenges and Opportunities in the World Economy* (London: Routledge, 2003).

<sup>33</sup> For example, it is presumably rational for states to use bilateral free trade agreements as ways of “encouraging” recalcitrant states to engage in social reform in the interests of more stable, and mutually profitable, trade over the longer term. See further section II.E. below.

a free market of rational actors in which bilateral agreements reduce barriers to trade, lower the costs of goods and services, and help to promote higher standards of living in partner States.<sup>34</sup>

### C. PERCEIVED BENEFITS OF BILATERALISM

Bilateral trade agreements are by their nature, reciprocal, consensual and inclusive of the parties while being exclusionary of non-parties. As a matter of practice, however, they are also internally different from one another. Some are seemingly all encompassing in their liberalization of trade.<sup>35</sup> Others are distinctly protectionist.<sup>36</sup> Some set clear shields around sensitive industries like education, the media and healthcare.<sup>37</sup> Others do so generically through open-ended protection of “the national interest”.<sup>38</sup> Some bilateral trade agreements resemble treaties of friendship more than instruments of trade liberalization. Others are preoccupied with the full-on trade liberalization.<sup>39</sup> Against such a background of difference,<sup>40</sup> one ought not to expect bilateral agreements to represent comparable patterns of reciprocity, inclusiveness for the parties to such agreements and exclusion for non-parties.<sup>41</sup>

Nor should one expect bilateral trade practice to follow a consistent pathway. For example, China’s interest in bilateral trade has changed with its accession to global markets for exports;<sup>42</sup> yet its bilateral interests remain carefully counterbalanced by its

<sup>34</sup> The conception of the “invisible hand” in the free market is attributed to Adam Smith and his *Wealth of Nations*, although in the two passages in which he refers to the invisible hand of the individual, not the state. See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, paras IV.2.9 and IV.1.10 (Edinburgh, 1776).

<sup>35</sup> The NAFTA is an example of an all-encompassing free trade agreement, although it is not all encompassing in liberalizing trade and the three NAFTA parties. See L.E. Trakman, *Dispute Settlement under the NAFTA: Manual and Sourcebook* (New York: Transnational, 1997); Robert E. Litan and Peter Hakim, *The Future of North American Integration: Beyond NAFTA* (Washington, D.C.: Brookings Institution Press, 2002).

<sup>36</sup> Protectionism is often based on the “infant industry” syndrome, namely, that a state needs to protect an industry that is as yet under-developed and would be undermined by foreign competition in the absence of such protection. Equally often, such protection is girded by the interest of a government in preserving relationships with particular industries, as when a government supports farmers who represent significant voting strength in rural constituencies. On infant industries, see, e.g., *Symposium on Infant Industries: A Comment*, 31 *Oxford Develop. Stud.* 1 (2003), 33; Steven M. Suranovic, *International Trade Theory and Policy*, available at: <<http://internationalecon.com/Trade/Tch100/T100-4.php>>

<sup>37</sup> For instance, the US–Australia Free Trade Agreement. See, e.g., Jeffrey J. Scott, *Free Trade Agreements: US Strategies and Priorities* (Washington, D.C.: Institute for International Economics, 2004); Peter Drahos and David Henry, *The Free Trade Agreement between Australia and the United States*, *BMJ. Com.* 27 (February 2007); P.I. Levy, *A Political-Economic Analysis of Free-Trade Agreements*, 87 *Am. Econ. Rev.* 4 (2003).

<sup>38</sup> Such protectionism is apparent when smaller states wish to protect their “cultural heritage” in negotiating free trade agreements with more powerful trade partners. Both Canada and Mexico under the NAFTA and Australia under the US–Australia Free Trade Agreements were so preoccupied. See, e.g., John A. Ragosta, *The Cultural Industries Exemption From NAFTA—Its Parameters*, 3 *Canada–US L. J.* (1997); Report, *Department of Foreign Affairs and Trade, An Australia–United States Free Trade Agreement* (Canberra: Government of Australian, 2001), available at: <[http://www.dfat.gov.au/publications/aus\\_us\\_fta\\_mon/](http://www.dfat.gov.au/publications/aus_us_fta_mon/)>.

<sup>39</sup> Yet again, the extent of “full on” trade liberalization is itself influenced by disparate philosophical values, notably by changing values associated with democratic liberalism and economic rationality. See section II.B. above.

<sup>40</sup> On the debate over the extent to which states, not limited to developing states, protect their agricultural sectors, see section III.G. below.

<sup>41</sup> On the proliferation of bilateral free trade agreements, see <<http://www.cfr.org/publication/10890/>>.

<sup>42</sup> See, e.g., Gerald Chan, *China’s Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights* (River Edge, NJ: World Scientific, 2006); Yong Deng and Fei-Ling, *China Rising: Power and Motivation in Chinese Foreign Policy* (Lanham, MD: Rowman & Littlefield, 2005).

historical interest in restricting trade that threatens its vulnerable rural economy.<sup>43</sup> Similarly, bilateral trade practices respond differently to the shifting powers of specific trading blocs such as the European Union (EU) and the North American Free Trade Agreement (NAFTA).<sup>44</sup> Bilateral trade practice also varies with the practices of particular trading hubs, such as in Hong Kong and Singapore as each seeks to liberalize trade in its own distinctive way.<sup>45</sup>

Whatever the rhetoric—that bilateral trade agreements are used to liberalize trade and also to protect selected industries from competition—most States recognize that the benefits of bilateral trade are variable at best. Generalizations have their place in underscoring the perceived benefits and disadvantages of free trade zones, such as for the EU or the NAFTA. However, generalizations include exceptions; and exceptions all too often disprove the rule.

It is against the background of exceptions that the benefit of bilateral trade should be measured. However similar many bilateral agreements may appear to be, they assuredly satisfy similar economic interests differently and different interests similarly.<sup>46</sup> However specific their benefits may be for the bilateral partners, their more pervasive benefits for the multilateral trade community depends upon the social, economic, political and legal circumstances in which they arise and to which they are applied.<sup>47</sup> Ascertaining such benefits will be a question of fact that requires moving from generalizations about the economic rationality of bilateral trade to determining how they produce actual benefits in practice. It also demands moving from the idealized belief that trade liberalization is “good” in itself to demonstrating how bilateral trade agreements lead to that “good” in fact.

In determining the “good” of bilateral agreements, it is fitting to evaluate specific challenges to bilateral trade, institutionalized responses to those challenges, and the manner in which those responses have impacted on trade practice.

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<sup>43</sup> See Aimin Chen and Shunfeng Song, *China's Rural Economy After the WTO: Problems And Strategies* (Aldershot: Ashgate, 2006); Deepak Bhattasali and Shantong Li, *China and the WTO: Policy and Poverty After China's Accession to the WTO* (Washington, D.C.: World Bank, 2004).

<sup>44</sup> “Second generation” regional free trade agreements includes those regional agreements that have arisen over the last two decades under the WTO, notably the NAFTA, as distinguished from “first generation” agreements such as the EU, which traces back further. On the history of the EU, see Christopher Stevens and Jane Kennan, *Post Lome WTO Compatible Trading Arrangements*, Economic Paper 45 (Economic Paper Series, Commonwealth Secretariat, 2002); Ernst-Ulrich Petersmann and Mark A. Pollack, *Transatlantic Economic Disputes: the EU, the US, and the WTO* (Oxford: Oxford University Press, 2003).

<sup>45</sup> See, e.g., Ramkishan S. Rajan, Reza Y. Siregar and Rahul Sen, *Singapore and Free Trade Agreements: Economic Relations with Japan and the United States* (Singapore: Institute of Southeast Asian Studies, 2001); Sen Rahul, *Free Trade Agreements in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 2004); John Ravenhill, *The New Bilateralism in the Asia Pacific*, 24 *Third World Quarterly* 2 (2003) 299.

<sup>46</sup> On the significance of complex geopolitical and economic forces within the WTO, see Jawara and Kwa, as note 2 above.

<sup>47</sup> A multilateral trade culture is certainly part of a “legal” culture, but again far from a fixed culture grounded in clear-cut legal principles like freedom of contract and the binding force of agreements. See, generally, Leon E. Trakman, *Legal Traditions and International Commercial Arbitration*, 17 *American Review of Arbitration* 1–43 (Spring 2007), available at: <[http://works.bepress.com/leon\\_trakman/](http://works.bepress.com/leon_trakman/)>; Roger Cotterrell, “The Concept of Legal Culture”, in David Nelken (ed.), *Comparing Legal Cultures*, (Aldershot: Dartmouth, 1997), pp. 13–1; Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 *U. Pa. L. Rev.* (1982), 1121. See also Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973).



## D. CHALLENGES TO BILATERAL TRADE RELATIONSHIPS

The conduct of bilateral trade is often presented in its historical context, namely, as a victory for globalization—more pervasive, effective, reliable and predictable trade relations than in centuries past.<sup>48</sup> Starkly presented, modern bilateral trade agreements are concluded in more stable times: they are not threatened by the acts of privateers who sail the oceans ravaging and plundering the wealth of targeted States. Despite this rhetoric, conventional bilateral agreements function within a multilateral trade environment that is fraught with the risks of an inventive modern piracy, including acts of state expropriation and confiscation,<sup>49</sup> or less directly but equally profitably, state sanctioned infringements of intellectual property rights.<sup>50</sup>

A further challenge to the effective, reliable and predictable conduct of bilateral trade is in the muting of legal sanctions against recalcitrant States. Nor only are recalcitrant States sometimes corrupt or at least inefficient in concluding, interpreting and applying regional or bilateral agreements.<sup>51</sup> Otherwise compliant States resist sanctioning such recalcitrance, not least of all to protect their trade relationships or by reason of their own trade protectionism.<sup>52</sup> The result is that, however efficient bilateral trade agreements might seem to be, they are subject to subversion, as when they exclude redress for anticompetitive practices, or where such provisions are included in bilateral agreements but are not enforced. The practical reality, too, is that identifying and isolating instances of bad state practice is often difficult when recalcitrant States hide their deceptive practices behind the veil of state sovereignty, while partner States condone those practices by acquiescence.<sup>53</sup>

<sup>48</sup> See, e.g., Michael N. Barnett and Raymond Duvall, *Power in Global Governance*, 98 Cambridge Studies in Global Governance (2005); Jagdish Natwarlal Bhagwati, In *Defence of Globalization* (Oxford: Oxford University Press, 2004); Bernard M. Hoekman and Philip Aaditya Mattoo, *Development, Trade and the WTO: A Handbook* (New York: World Bank, 2002). On applauding the apparatus supporting the GATT and WTO systems, including the public servants that maintain the offices of multilateral trade institutions, see Yi Chong Xu and Patrick Weller, *Governance of World Trade: International Civil Servants and GATT/WTO* (Cheltenham: Edward Elgar, 2004).

<sup>49</sup> See, e.g., James E. Anderson and Oriana Bandiera, *Traders, Cops and Robbers*, 70 *J. Int. Econ.* 1 (2006), 197–215.

<sup>50</sup> See, generally, Donald D. Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the Trips Agreement* (Armonk, NY: M.E. Sharpe, 2004); Will Martin and Mari Pangestu, *Options for Global Trade Reform: A View from the Asia-Pacific* (Cambridge: Cambridge University Press, 2003); *Intellectual Property in the Global Marketplace*, 3 *Economic Perspectives*, An Electronic Journal of the US Information Agency 3 (May 1998); Keith Eugene Maskus, *Intellectual Property Rights in the Global Economy* (Washington, D.C.: Institute for International Economics, 2000); Mitchell B. Wallerstein, Mary Ellen Moguee and Roberta A. Schoen, *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington, D.C.: National Academies Press, 1993). See generally <<http://www.cid.harvard.edu/cidtrade/issues/ipr.html>>.

<sup>51</sup> For the argument that some developing states have dubious public institutions which, in turn, has important implications for the design of monetary policies and institutions, see Haizhou Huang and Shang-Jin We, *Monetary Policies for Developing Countries: The Role of Institutional Quality*, 70 *J. Intl. Econ.* 1 (2006), 239–252.

<sup>52</sup> On trading with allegedly recalcitrant states, see, e.g., Dilip Das, *Globalization and the Anti-Globalization Lobby: Investigating Two Sides of One Veracity* (April 2005), available at <<http://www.cid.harvard.edu/cidtrade/Papers/das-aaa.pdf>>.

<sup>53</sup> It remains to be seen how bilateral agreements can constrain rogue behavior by states. The most apparent constraint is in states declining to enter into bilateral agreements with such rogue states, or in concluding such agreements but on less preferable terms. To the author's knowledge, the former practice is most likely common, although it is unlikely to appear in published sources. The latter practice by which free trade agreements grant disparate concessions may, based on a state's human rights record, become apparent in bilateral practice, but is not self-evidently so at this early stage. But see, e.g., McMahon, as note 6 above.

Finally, any attempt to ensure that bilateral and regional trade agreements are applied in a manner that promotes “good” practice raises, not only the question of what constitutes “bad practice”, but how to deal with “bad” practice in fact. For one thing, GATT Article XXIV is difficult to enforce because it requires consensus among States to establish principles and guidelines to deal with dubious trade practices.<sup>54</sup> For another thing, the multilateral community may avoid imposing sanctions in their bilateral and regional trade relations because the cost of imposing compliance may be perceived to be greater than the benefit.<sup>55</sup> The result may well be that trade sanctions, available or not, will not be invoked. Worse still, they may be ineffective in stemming “bad” practice by recalcitrant States that are willing to endure trade sanctions and boycotts rather than change the way they do business. The stark reality is that, however much bilateral and regional trade agreements may include provisions that condemn “bad” trade practice, those provisions may be comparatively meaningless if they cannot be enforced.

#### E. INSTITUTIONALIZED RESPONSES

An idealized response to “bad” state practice is to invoke institutional trade remedies to deal with allegedly illegal trade action. For example, a global response is to rely on the sanctioning force of the WTO. A regional response is to draw on the agreements and practices that bind the EU,<sup>56</sup> ASEAN in the Asia Pacific,<sup>57</sup> and the NAFTA in North America.<sup>58</sup> A bilateral response to “bad” state practice is to draw on trade sanctions within bilateral trade agreements.<sup>59</sup>

However, one should not overemphasize either the authority or the consistency of these institutional responses. First, institutions diverge in their responses to aberrant state practice as the institutions themselves change. For example, far from being fixed in its responses to aberrant state conduct, the global response of the multilateral community has varied markedly from the 1947 General Agreement on Tariffs and

<sup>54</sup> For the reasons why the drafts of the GATT included Article XXIV, see notes 16 and 17 above. On Article XXIV of the GATT generally, see Mathis as note 3 above.

<sup>55</sup> Studiously avoiding trade conflict is an old strategy in multilateral trade relationships. For Canadian perspectives including foreign policy on conflict avoidance, see, e.g., Philippe G. Le Prestre, *Role Quests in the Post-Cold War Era: Foreign Policies in Transition* (Montreal: McGill University Press, 1997); Duncan Cameron, *The Free Trade Papers* (Ottawa: Lorimer, 1986).

<sup>56</sup> On a history of EU trade policy, see Stevens and Kennan, as note 44 above; and Petersmann and Pollack, as note 44 above. See, too, Gary P. Sampson and Stephen Woolcock, *Regionalism, Multilateralism, and Economic Integration: The Recent Experience* (Tokyo: United Nations University Press, 2003).

<sup>57</sup> On the ASEAN Free Trade Area, see <<http://www.us-asean.org/afsa.asp>>; and <<http://www.aseansec.org/economic/afsa/afsa.htm>>. See also Vinod K. Aggarwal, *The Political Economy of a Free Trade Area of the Asia-Pacific*, 14 *Bus. Asia* 2 (February 2007); Jamus Jerome Lim, *The Dimensions of Regional Trade Integration in Southeast Asia*, 23 *ASEAN Economic Bulletin* 3 (2006), 395–396; Vinod K. Aggarwal and Min Gyo Koo, *The Evolution of APEC and ASEM: Implications of the New East Asian Bilateralism*, 4 *European J. East Asian Stud.* 2 (2005), 222–264.

<sup>58</sup> On the NAFTA, see Trakman, as note 35 above. See also Andrew D.M. Anderson, *Seeking Common Ground: Canada–US Trade Dispute Settlement Policies in the Nineties* (Boulder, CO: Westview Press, 1995); David A. Gantz, *Resolution of Trade Disputes under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 *Law & Policy Int'l. Bus.* 3 (1998).

<sup>59</sup> On trade sanctions, see e.g. *Resource Book on TRIPS and Development* (Cambridge: Cambridge University Press, 2005); Panos Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart, 2001).

Trade (GATT), to the WTO,<sup>60</sup> and from the Uruguay Round in 1994 to Seattle in 1999 to Doha in 2001 to Cancún in 2003 and to Hong Kong in 2005.<sup>61</sup> Regional and bilateral responses to dubious state practices are subject to mass-political change, such as arose out of the democratization of Eastern Europe and China's entry to the WTO.<sup>62</sup> They are susceptible to gradualism, too, such as to China's gradual realignment of political-economic relations within its neighborhood<sup>63</sup> and at a more micro level, to trading hubs such as Singapore imbedding themselves as trading gateways between East and West.<sup>64</sup>

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

<sup>60</sup> See, generally, John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000); Mike Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance* (Cambridge: Cambridge University Press, 2003); John Micklethwait and Adrian Woolridge, *A Future Perfect: The Challenge and Hidden Promise of Globalization* (New York: Crown, 2000).

<sup>61</sup> Andrew G. Brown, *Reluctant Partners: A History of Multilateral Trade; Cooperation, 1850–2000* (Ann Arbor, MI: University of Michigan Press, 2003); Bernard Hoekman and Michel Kosteki, *The Political Economy of the World Trading System, From GATT to WTO* (Oxford: Oxford Scholarship Online, 2001).

<sup>62</sup> On China's accession to the WTO, see G. Wen, Huizhong Zhou and Ding Lu (eds), *China's Economic Globalization Through the WTO* (Abingdon: Ashgate, 2003); Shuming Bao, Shuanglin Lin and Changwen Zhao, *The Chinese Economy After WTO Accession* (Abingdon: Ashgate, 2006); Guy Liu Shaojia and Guy Shaojia Liu, *China's WTO Accession and the Impact on Its Large Manufacturing Enterprises* (Singapore: World Scientific, Singapore University Press, 2001); Ching Cheong, Ching Hung-Yee, Cheong Ching and Hung Yee Ching, *Handbook on China's WTO Accession and Its Impacts* (River Edge, NJ: World Scientific, 2003).

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

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

<sup>65</sup> On the differential impact welfare and market access has upon tariff structures, see James E. Anderson and J. Peter Neary, *Welfare Versus Market Access: The Implications of Tariff Structure For Tariff Reform*, 71 *J. Int. Econ.* 1 (2007), 187–205.

## F. BIAS IN FAVOR OF DEVELOPED STATES

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

On occasions, developing States find themselves in an awkward position. They feel compelled to condemn bilateral trade agreements as favoring developed States, while at the same time anxiously trying to conclude bilateral agreements with developed States they otherwise would condemn. In trying to win the confidence of international capital markets, some developing States also risk foregoing sensible domestic economic policies in favor of perverse ones.<sup>67</sup> A related hazard is that wealthy developed States may exploit the vulnerabilities of developing States by extracting excessive trade concessions that developing States can ill afford to sustain over the longer term.

Against this background, opponents of bilateral trade agreements worry that bilateral agreements, however well intended, will fail to redress social deprivation and human rights abuse in developing States; and also that developed States will turn a blind eye to such excesses.<sup>68</sup> A pervasive concern is that, far from liberalizing trade, selectivity in bilateral trade may expand upon the already formidable wealth gap between developing and developed States, institutionalizing the trading advantages of the latter.<sup>69</sup> Coupled with this is the threat of perpetuating a systemic bias in favor of developed States and further marginalizing the competitive hardships faced by developing States.<sup>70</sup>

Added to these risks is the reality that developing States may lack the economic infrastructure to become attractive trade partners for developed States.<sup>71</sup> For example, developing States may feel compelled to comply with international trade standards, such as in relation to labor and the environment, without being able to afford the cost of such compliance. Typifying this problem, Christian aid agencies claim that the cost of trade to Sub-Saharan Africa comes at the price of US\$ 272 billion in compliance with international standards, in aid, loans and debt relief. The argument is such money could have been better spent elsewhere, vaccinating children and providing schooling, shelter and health care.<sup>72</sup> A related concern is that, rather than improve standards of living in

<sup>66</sup> See, generally, Kyle Bagwell and Robert W. Staiger, Multilateral trade negotiations, bilateral opportunism and the rules of GATT/WTO, 63 J. Int. Econ. 1 (2004), 1–29.

<sup>67</sup> See Gea M. Lee, Sharun W. Mukand, *Globalization and the “Confidence Game”*, 70(2) J. Int. Econ. 2 (2006), 406–427.

<sup>68</sup> *Ibid.* See also section II.D. above.

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

<sup>70</sup> See further section III.F. below.

<sup>71</sup> Typical of additional costs to developing states are the communication costs associated with the liberalization of trade, including bilateralism. See, e.g., Carsten Fink, Aaditya Mattoo and Ileana Cristina Neagu, *Assessing the Impact of Communication Costs on International Trade*, 67 J. Int. Econ. 2 (2005), 428–445.

<sup>72</sup> See AfricaFocus Bulletin, *Africa: The Cost of Free Trade* (5 July 2005), available at: <<http://www.africafocus.org/docs05/trad0507.php>>; John Hilary, *The Wrong Model: GATS, Trade Liberalization and Children’s Right to Health* (London: Save the Children UK, 2000).

developing States, those standards will deteriorate further as developing States attempt to comply with international standards in order to attract bilateral trade partners.<sup>73</sup>

Certainly developing States are not legally obliged to agree to terms and conditions in bilateral agreements that accentuate their economic, social and political disadvantages. They are free to decline to contract if doing so does not promote their self-interest.<sup>74</sup> Nor are developing States without legal remedies if the agreements they conclude are violated.<sup>75</sup> However, as a practical matter bilateral trade agreements sometimes resemble adhesion contracts. Powerful States are in the position to dictate the terms of such trade agreements, and weaker States must either adhere to them or sacrifice all benefits associated with bilateral trade.<sup>76</sup>

### III. THE CASE FOR BILATERAL TRADE

The case for bilateral trade is grounded on a series of general and specific arguments. What follows is a brief articulation of each, followed by a critical analysis.

#### A. MORE IS BETTER THAN LESS

The most simplistic argument in favor of bilateral trade agreements is that, all other things being equal, bilateral trade agreements lead to there being more, and that having more is better than having less. States and their subjects that have more can buy and sell more. States can improve standards of living among their populace. They can extend economic benefits like social services, healthcare and education to the less fortunate. Having more allows them to share more.<sup>77</sup>

There are several problems with this analysis. First, bilateral agreements can cause trade to contract, not expand. This occurs when the net creation of trade arising from bilateral agreements is more than offset by the net diversion of trade away from non-

<sup>73</sup> On the compliance obligations imposed on developing states, see, e.g., Yong-Shik Lee, *Reclaiming Development in the World Trading System* (Cambridge: Cambridge University Press, 2006). See also Luis Abugattas Majluf, *Swimming in the Spaghetti Bowl: Challenges for Developing Countries under the "New Regionalism"*, Policy Issues in International Trade and Commodities Study Series No. 27 (New York and Geneva: UNCTAD, 2004), available at: <[http://scholar.google.com/scholar?hl=en&lr=&q=cache:0Q1J0qun6XcJ:www.unctad.org/en/docs/itcdtab28\\_en.pdf](http://scholar.google.com/scholar?hl=en&lr=&q=cache:0Q1J0qun6XcJ:www.unctad.org/en/docs/itcdtab28_en.pdf)>.

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

<sup>75</sup> In addition to their legal remedies for treaty violation, developing states can invoke principles of comity that underscore not only the obligations that are owed to them, but also their historical disadvantage including in relation to international trade. See further section II.B.

<sup>76</sup> But see Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 14 *European J. Intl. L.* 4 (2002), 753–814, available at: <[http://ejil.org/forum\\_tradehumanrights](http://ejil.org/forum_tradehumanrights)>. On guiding principles of contract law, see Leon E. Trakman, *Contracts: Legal: International Encyclopedia of the Social and Behavioral Sciences*, vol. 3 (Elsevier, 2001), 8/102.

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

parties.<sup>78</sup> Second, rather than lead to more, bilateral agreements can produce negative trade distortions, as when trade in agriculture is diverted from developing to developed States.<sup>79</sup> Third, bilateral agreements may lead to there being more, but not necessarily better results. For example, they may produce greater wealth, but lead to less social justice when developing States decline to provide social services and developed States avoid interfering.<sup>80</sup> As the history of colonialism has portrayed, the independence of ex-colonies has not necessarily led either to mass economic development or to sustained social reform in the developing world.<sup>81</sup> Fourth, the wealth derived from there being more trade may be closely held. For example, corporations may distribute little if any of their increased profits from bilateral trade, other than to their shareholders.<sup>82</sup> The net result may be the absence of any increase in aggregate trade benefits or social services arising out of having more.<sup>83</sup>

#### B. BILATERAL TRADE AGREEMENTS FILL GAPS IN THE MULTILATERAL PROCESS

A simplistic argument favoring bilateral trade is grounded in arithmetic logic. All other factors being constant, bilateral trade negotiations involving a few parties with reconcilable interests is more likely to lead to the liberalization of trade between those parties than multilateral agreements involving multiple parties with diverse interests that

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

<sup>79</sup> See OECD, *Agriculture And Development: The Case for Policy Coherence* (Paris: OECD, 2005); World Bank, *Agriculture and the WTO: Creating a Trading System for Development* (New York: World Bank, 2004); Economic Research Service, US Department of Agriculture, *Economic Rationale for Nonreciprocal Preferences* (Washington, D.C.: USDA, 2006), available at: <<http://www.ers.usda.gov/publications/err6/err6b.pdf>>.

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

<sup>81</sup> See James Oliver Gump, *The West and the Third World: Trade, Colonialism, Dependence, and Development*, (review) 11 *J. World History* 2 (Fall 2000), 396. Nor are allegations of economic imperialism confined to colonialism; see D.K. Fieldhouse (ed.), *The Theory of Capitalist Imperialism* (London: Longman, Green, 1967); Francis W. Hirst (ed.), *Free Trade and Other Fundamental Doctrines of the Manchester School* (New York: Augustus M. Kelley, 1968); P.J. Cain, *J.A. Hobson, Cobdenism, and the Radical Theory of Economic Imperialism, 1898–1914*, 31 *Econ. History Rev.* 4 (1978), 565; Michael Freedman, *J.A. Hobson as a New Liberal Theorist: Some Aspects of his Social Thought until 1914*, 34 *J. History of Ideas* 3 (1973), 421.

<sup>82</sup> On trenchant criticism of corporate “abuses” of global trading benefits, see, e.g., Lori Wallach and Michelle Sforza, *The WTO: Five Years of Reasons to Resist Corporate Globalization* (New York: Seven Stories Press, 2000).

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

cannot easily be reconciled.<sup>84</sup> Instead of requiring the consent of around 150 States with diverse and often conflicting cultural, social, economic and political priorities, bilateral negotiations allow fewer States with fewer differences to reach common ground.<sup>85</sup>

This seemingly compelling logic is not really compelling at all because in addressing only the greater likelihood of States reaching bilateral rather than multilateral agreements, it does not address the quality of the bilateral agreements actually concluded. Indeed, a bilateral trade agreement may provide few tangible benefits for one or even both parties, and certainly may disadvantage non-parties more than it benefits the parties.<sup>86</sup> The negotiation of bilateral agreements may disadvantage parties that negotiate more effectively in larger groups, particularly in dealing with powerful economic blocs like the EU.<sup>87</sup> They may also disadvantage developing States that depend on bloc support in order to secure trading concessions from developed States generally.<sup>88</sup>

The conclusion might be that, all other factors being constant, bilateral trade agreements often are better able to satisfy the immediate interests of parties than multilateral agreements. Whether the economic and social benefit of these bilateral agreements extends to the multilateral community at large is, at best, conjectural.<sup>89</sup>

### C. BILATERAL AGREEMENTS CAN ENRICH MULTILATERAL TRADE

A further arithmetic argument favoring bilateral agreements is that the cumulative benefits of a plethora of bilateral agreements constitutes a net gain for the global economy.<sup>90</sup> Illustrating this benefit is the observation that a series of individually negotiated bilateral agreements can overcome obstacles to concluding multilateral trade agreements, such as arise with regard to complex issues relating to customs traffic, the environment, labor and electronic trade.<sup>91</sup>

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

<sup>85</sup> See, e.g., Bagwell and Staiger, as note 66 above.

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

<sup>87</sup> On strategies employed in WTO and related negotiations, including by economic blocs, see, e.g., Barnett and Duvall, as note 48 above; Vinod K. Aggarwal and Edward Fogarty (eds), *EU Trade Strategies: Between Regionalism and Globalism* (Basingstoke: Palgrave Macmillan, 2004); Andrew G. Brown, *Reluctant Partners: A History of Multilateral Trade Cooperation, 1850–2000* (Ann Arbor, MI: University of Michigan Press, 2003). See also Niels M. Blokker, *International Regulation of World Trade in Textiles: Lessons for Practice, A Contribution to Theory* (The Hague: Martinus Nijhoff, 1990).

<sup>88</sup> On the disparities between multilateral and bilateral trade interests, see Sampson & Woolcock, as note 56 above.

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

<sup>90</sup> See, e.g., *The Spread of Bilateral and Regional Trade Agreements*, available at: <<http://www.gurn.info/topic/trade/>>.

<sup>91</sup> Daniel Griswold proposes that “[n]egotiating with one nation or a small group of like-minded countries can allow more meaningful liberalization . . . Those talks can blaze a trail for wider regional and multilateral negotiations.” Griswold, as note 14 above.

Certainly it is worthwhile to analyze trade agreements in order to identify how their reduction in barriers to trade between particular parties can be replicated among other States. As Daniel Griswold has argued, “FTAs can provide useful templates for broader negotiations”.<sup>92</sup> The problem is that, absent the capacity to measure the results of such a rationale, it remains speculative at best. To conclude that bilateral agreements that liberalize trade between particular States will encourage other States to follow suit may be inspirational, but it need not lead to concrete results.

#### D. BILATERAL AGREEMENTS CAN CONSOLIDATE REGIONAL ECONOMIES

A related argument is that bilateral trade agreements not only consolidate the economies of the parties; they also lead to the more efficient production, finance, transportation and supply of goods and services.<sup>93</sup> Illustrating the efficiencies arising from such consolidation are regional agreements such as under the NAFTA,<sup>94</sup> and bilateral agreements between a superpower like the United States and its trade partners in Latin America, Europe, Africa, Asia and the Middle East.<sup>95</sup>

There is also ample evidence of the success arising out of such regional integration, including a lengthy literature that lauds the economic growth of the EU<sup>96</sup> and also the NAFTA.<sup>97</sup> There is also a more recent but less pervasive history of economic integration arising from bilateral trade agreements.<sup>98</sup>

However, determining whether and how trade agreements lead to greater efficiencies in the production, distribution and consumption of goods and services hinges upon a careful scrutiny of the application of particular trade agreements in

<sup>92</sup> Ibid. CBO, as note 14 above, states that FTAs “also offer a way to continue making headway toward the goal of free trade in the face of difficulties that have slowed progress in the Doha Round of WTO negotiations.” See also note 77 above.

<sup>93</sup> For arguments along these lines, see, e.g., Sampson and Woolcock, as note 56 above; International Confederation of Free Trade Unions, *The Spread of Bilateral and Regional Trade Agreements*, at: <[http://www.gurn.info/topic/trade/icftu\\_0604.pdf](http://www.gurn.info/topic/trade/icftu_0604.pdf)>.

<sup>94</sup> See, e.g., Litan and Hakim, as note 35 above; Joseph A. McKinney, *Created from NAFTA: The Structure, Function, and Significance of the Treaty's Related Institutions* (New York and London: M.E. Sharpe, 2001); Robert A. Pastor, *Toward a North American Community: Lessons from the Old World for the New* (Washington, D.C.: Institute for International Economics, 2001).

<sup>95</sup> Typifying the growth of bilateral free trade agreements is the push by the Bush Administration to extend US free trade relationships. Following its FTA with Israel in 1985, the United States concluded 10 FTAs: first with Canada and then with Canada and Mexico under the NAFTA, followed by FTAs with Jordan, Chile, Singapore, Australia, Morocco, El Salvador, Nicaragua, and Honduras. Four further FTAs are approved by Congress, namely with Costa Rica, Bahrain, the Dominican Republic and Guatemala. Three additional FTAs with Colombia, Oman, Peru and Colombia are under consideration by Congress. The United States has also conducted bilateral free trade talks with 11 others, seeking either bilateral agreements or to create a customs union. The United States has also signaled its intention to negotiate a regional free trade agreement with the 34 members of the Free Trade Agreement of the Americas (FTAA), and has engaged in bilateral trade talks with ten members of the Association of Southeast Asian Nations (ASEAN), including Vietnam which is seeking entry into the WTO. While not all these bilateral and regional agreements are likely to materialize—e.g., the FTAA is currently stalled—they do indicate the extent to which a major power that traditionally relied on its muscle at the WTO has now embraced the bilateral trade process.

<sup>96</sup> See note 44 and 88 above.

<sup>97</sup> See notes 35 and 58 above.

<sup>98</sup> See, generally, note 6 above.



specific social, economic and political contexts. The conclusion that economic consolidation leads to greater efficiency does not speak for itself.

#### E. BILATERAL AGREEMENTS CAN AID DEVELOPMENT

A win-win case can be made for “aid for trade”. Through “aid for trade”, developed States can make short-term economic sacrifices in favor of developing States, while both parties can arrive at a more sustainable economic benefit in the longer term.<sup>99</sup> The anticipated “good” is the leveling of an uneven playing field leading to a more vibrant global trading community<sup>100</sup> that includes a growing demand for goods and services.<sup>101</sup>

The problem is that the rhetoric behind “trade for aid” speaks louder than the practice. For example, non-reciprocal preferences known as “special and differential treatment (SDT)”, readily available to developing States under the GATT,<sup>102</sup> have only limited currency today. Controversial in nature and often extended to the least developed states only, SDTs have lost the higher moral ground they enjoyed in decades past.<sup>103</sup> More recent WTO “Aid for Trade” programs are also considered to be poorly defined.<sup>104</sup> Lacking sustained support, they have failed to provide deprived economic systems with the necessary structural change.<sup>105</sup>

Equally apparent is the fact that developed states tend to accord a higher priority to protecting their immediate market interests than using aid to build markets in developing states in the longer term. Coupled with this is the conflict within developed states between support for social reform in developing states and protecting foreign markets for goods and services.<sup>106</sup> Expressing such protectionism in relation to domestic labor markets is the controversial statement by US Senator Charles Schumer

<sup>99</sup> This is the central argument behind “aid for trade”. See, e.g., Stiglitz and Charlton, as note 101 below.

<sup>100</sup> See Caroline Dommen, “The WTO, International trade, and Human Rights”, in Michael Windfuhr (ed.), *Mainstreaming Human Rights in Multilateral Institutions* (Geneva: Trade—Human Rights—Equitable Economy (3D), 2004).

<sup>101</sup> For illustrations of bilateral aid for trade programs, see Joseph E. Stiglitz and Andrew Charlton, *Aid for Trade*, A Report for the Commonwealth Secretariat (March 2006), available at: <<http://www.uneca.org/atpc/documents/May/stiglitz%20on%20aid%20for%20trade.pdf>>. On the EU’s new commitment to aid for trade, see <[http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr161006\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr161006_en.htm)>.

<sup>102</sup> For a detailed study on these STDs, their origins and how they have fared, see Dilip K. Das, *Evolution in the International Trade Regime: Refining and Developing the Special and Differential Treatment*, available at: <<http://www.cid.harvard.edu/cidtrade/Papers/das-emtr.pdf>>. See also Institute for Agriculture and Trade Policy, Trade and Global Governance Program, *Can Aid Fix Trade: Assessing the WTO’s Aid for Trade Agenda*, available at: <<http://www.tradeobservatory.org/library.cfm?refid=89070>>.

<sup>103</sup> On limitations associated with SDTs, see note 102 above.

<sup>104</sup> A related problem is that developing countries often lack the resources to evaluate what trade for aid provides them with most economic benefit. As a result, they sometimes enter into trade for aid relationships that fail significantly because the nature of the aid is unsuitable, however laudable the intent. For interesting discussion in this problem, see <http://queriinternational.com/>

<sup>105</sup> See, e.g., “Can Aid Fix Trade?” *supra* note 102.

<sup>106</sup> See, e.g., Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization—Actors, Processes and Possible Strategies*, 24 *Human Rights Quarterly* 1 (2002); Hilary, as note 72 above.

and Paul Craig Roberts, a former Reagan administration official, that: “Exporting jobs is not free trade.”<sup>107</sup>

#### F. BILATERAL AGREEMENTS CAN ADVANCE FOREIGN POLICY

Linked to “aid for trade” is the proposition that developed States can use bilateral trade agreements to promote foreign policy that includes social reform in developing States. For example, the United States openly acknowledges its foreign policy goals in concluding trade agreements with developing States, emphasizing that it does so to “help such [developing] countries”.

Foreign policy constitutes a second reason for the United States to seek FTAs. Because the proposed free-trade agreements would be of substantial benefit to the economies of small developing countries while having little effect on the US economy (and a beneficial effect at that), they provide a relatively easy way for the United States to help such countries.<sup>108</sup>

However, one should not readily assume that “good” foreign policy would evolve out of trade agreements between developed and developing States. Powerful States understandably are more interested in building robust economic-political alliances than in promoting humanitarian ends, as is apparent in trade agreements between the United States and Middle Eastern States,<sup>109</sup> and quite differently in China’s trade agreement with Iceland aimed at gaining a foothold in Europe.<sup>110</sup>

Whether the foreign policies of developed States promote humanitarianism in fact ultimately will depend on the specific case. However, one should not dismiss humanitarian ends that further foreign policy ends. Aid that is good politics is aid all the same.

<sup>107</sup> See <<http://www.iht.com/search/search.php>; <http://www.brookings.edu/comm/events/20040107.htm>>. On protectionism arising out of safeguarding measures, see M.C.E.J. Bronckers, *Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community and United States Law*, 2 J. Int’l, Econ.Law 4 (1991), 547–566. On the history of protectionism in relation to textiles, see Vinod K. Aggarwal, *Liberal Protectionism: The International Politics of Organized Textile Trade* (Berkeley: University of California Press, 1985).

<sup>108</sup> “Reasons for and Against the Pursuit of Free-Trade Agreements”, in *The Pros and Cons of Pursuing Free-Trade Agreements*, available at: <<http://www.cbo.gov/showdoc.cfm?index=4458&sequence=0>>.

<sup>109</sup> On a proposed US–Middle Eastern Free Trade Area, as articulated by the US Trade Representative, see <[http://www.ustr.gov/Trade\\_Agreements/Regional/MEFTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/MEFTA/Section_Index.html)>. On free trade agreements between the US and different Middle Eastern countries, see, e.g., The US–Oman Free Trade Agreement, available at: <[http://www.ustr.gov/assets/Document\\_Library/Press\\_Releases/2006/January/asset\\_upload\\_file25\\_8774.pdf](http://www.ustr.gov/assets/Document_Library/Press_Releases/2006/January/asset_upload_file25_8774.pdf)>. On US policy in which free trade agreements serve political-strategic ends, see Jeffrey J. Schott, *Free Trade Agreements: US Strategies and Priorities* (Washington, D.C.: Institute for International Economics, 2004); Robert S. Walters, *Talking Trade: US Policy in International Perspective* (Boulder, CO: Westview, 1993).

<sup>110</sup> For a report on the commencement of the China–Iceland free trade talks, see <[http://www.bilaterals.org/article.php?id\\_article=5220](http://www.bilaterals.org/article.php?id_article=5220); <http://yuguangzhou2.mofcom.gov.cn/aarticle/activityheader/200612/20061203938363.html>>.

## G. BILATERAL AGREEMENTS CAN GIVE DEVELOPING STATES A VOICE

Bilateral agreements can provide developing States with a voice they otherwise would lack in multilateral trade negotiations.<sup>111</sup> They can develop regional trade agreements to express their collective will.<sup>112</sup> They can use their collective voice to campaign against global and regional measures that conflict with their own immediate interests.<sup>113</sup> As a result, developing States can form political alliances around key issues like agricultural tariffs, as India has done in the wake of the failed Doha Round.<sup>114</sup> They can build trading blocs to empower them to deal with their more powerful economic partners such as the EU and the United States.

Developing States may use bilateral agreements to uplift fledgling economies. They may also gain an early warning system that is sufficiently astute and robust to respond to their shared concerns.<sup>115</sup>

One should not overstate the capacity of developing States to join forces to offset the power of developed States. First, developed States themselves can form powerful countervailing trading alliances, such as through the EU and the NAFTA.<sup>116</sup> Second, developed blocs can impose import tariffs to protect their own domestic markets in goods like agriculture<sup>117</sup> in respect of which developing States are most threatened.<sup>118</sup> Third, even large blocs of developing States may lack the power to deal effectively with more powerful States that are systemically advantaged by an infrastructure of stringent health and safety, labor, environmental and intellectual property requirements that are too costly for developing States to afford to comply.<sup>119</sup> Developed and developing

<sup>111</sup> See, e.g., the comments of the US Trade Representative, Susan Schwab, at <<http://www.iht.com/articles/ap/2007/02/23/business/NA-FIN-US-Doha-Talks.php>>.

<sup>112</sup> See, e.g., T.N. Srinivasan, *Developing Countries and the Multilateral Trading System After Doha*, Yale University Economic Growth Discussion Paper 842 (2002), available at: <<http://ssrn.com/abstract=301394>>.

<sup>113</sup> On global trade negotiations, including strategies by which to protect the interests of developing countries, see Third World Network, at <[http://www.twinside.org.sg/trade\\_1.htm](http://www.twinside.org.sg/trade_1.htm)>.

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

<sup>115</sup> Even before the Doha Round of trade negotiations, some warned that these issues around agriculture might well lead to the failure of multilateral negotiations. See, e.g., Tim Gosling, *The WTO Agricultural Negotiations: Progress and Prospects*, available at: <<http://www.choicesmagazine.org/2005-2/wto/2005-2-08.htm>>.

<sup>116</sup> The NAFTA is not a perfect example of a free trade zone of developing countries for several reasons. First, unlike the EU, the United States is the dominant party in the NAFTA. Second, while Canada has a developed economy, Mexico has a developing economy. See, generally, note 35 above.

<sup>117</sup> Even barriers to trade devised by developed states against one another, such as between the EU and the United States, often gives rise to collateral damage for developing states who are also subject to resulting restrictions in trade. See, e.g., Petersmann and Pollack, as note 44 above; Vinod K. Aggarwal and Edward Fogarty, *The Limits of Interregionalism: The EU and North America* (with Edward Fogarty), 27 *J. European Integration* 3 (2005), 327–346.

<sup>118</sup> This concern gives rise to related human rights concerns about multilateral trade generally. See, e.g., *Towards Development: Human Rights and the WTO Agenda*, Report of a panel discussion held during the WTO Ministerial Conference in Cancún, September 2003, available at <[www.3dthree.org](http://www.3dthree.org)>.

<sup>119</sup> See *ibid.* Global trade, understandably, has been oriented in favor of the interests of developed states long before developing states were recognized as players in the global trading community. What is less elucidating is the limited effort by the WTO to encourage the resort to bilateral trade agreements to achieve socioeconomic reform in developing states. Global human rights activist, such as Carolyn Dommen, clearly do not believe that the WTO has gone far enough in highlighting human rights. See, e.g., Dommen, as notes 100 and 106 above. See, generally, section II.F. above.

States alike also fall into the trap of negotiating themselves into a multilateral impasse, as is the recurrent fate of both G-20 and G-33 States.<sup>120</sup>

The stark reality is that most developing States are likely to remain disadvantaged *vis-à-vis* the developed world. Developing States lack sufficient political clout to offset their economic, social and political disadvantages *vis-à-vis* developing States. This competitive disadvantage of developing States is further borne out by their marginal gross domestic production and standards of living compared to developed States.<sup>121</sup> Take agriculture, the lifeblood of most developing economies. Not only must developing States compete among themselves to export their undifferentiated agricultural produce to the developed world. They must also endure a formidable array of post-GATT barriers to trade that exclude them from a complex market for sophisticated food processing and distribution systems and a growing demand for high end agricultural goods which developing States do not produce.<sup>122</sup>

#### H. BILATERAL AGREEMENTS CAN ENCOURAGE HUMAN RIGHTS REFORM

A final motivational rationale behind bilateralism is the optimistic assumption that bilateral trade will provide developing States with both the incentive and the means to engage in social and economic reform, such as in healthcare, education and housing.<sup>123</sup> The assumption is that developing States interested in promoting trade relations with developed States will wish to appear both stable and socially progressive, especially in regard to human rights, labor and environmental standards.<sup>124</sup> Certainly, bilateral agreements can have such an effect. Whether they do so in fact depends on the particular context, not by inferring that developing States will be so motivated.

<sup>120</sup> On the "success" of trading blocs at negotiating themselves out of deals is the source of extensive debate. See note 2 above. See also Giovanni Anania, *Agricultural Trade Conflicts and GATT: New Dimensions in US-European Agricultural Trade Relations* (Boulder, CO: Westview, 1994).

<sup>121</sup> See, e.g., R.C. Feenstra and G.H. Hanson, *Global Production Sharing and Rising Inequality: A Survey of Trade and Wages* (Washington, D.C.: National Bureau of Economic Research, 2001).

<sup>122</sup> See further Bernard Hoekman and Will Martin, *Developing Countries and the WTO: A Pro-active Agenda* (Oxford: Blackwell, 2005); Merlinda D. Ingo and John D. Nash, *Agriculture and the WTO: Creating a Trading System for Development* (New York: World Bank, 2004); Commonwealth Secretariat, *Developing Countries WTO: A Compelling Case for Full Participation in the New Round* (London: Commonwealth Secretariat, 2002); Anania as note 120 above.

<sup>123</sup> This is the optimistic sentiment of the High Commission for Human Rights. See Office of the High Commissioner for Human Rights (OHCHR), *Liberalization of Trade in Services and Human Rights—Report of the High Commissioner*, E/CN.4/Sub.2/2002/9 (2002), available at: <[www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2002.9.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2002.9.En?Opendocument)>; OHCHR, *Human Rights and Trade*, paper prepared for the WTO Ministerial Conference in Cancún (2002), available at: <[www.unhcr.ch/html/menu2/trade/index.htm](http://www.unhcr.ch/html/menu2/trade/index.htm)>.

<sup>124</sup> See, e.g., Louis-Pascal Mahe, *Environment and Quality Standards in the WTO: New Protectionism in Agricultural Trade? A European Perspective*, 24 *European Rev. Agric. Econ.* (1997), 480; K. Bagwell and R.W. Staiger, *The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues*, *J. Econ. Perspectives* (May 2001), available at: <[http://scholar.google.com/scholar?hl=en&lr=lang\\_en&q=cache:7ilj73MruewJ:www.ssc.wisc.edu/~rstaiger/jep-standards05072001.pdf](http://scholar.google.com/scholar?hl=en&lr=lang_en&q=cache:7ilj73MruewJ:www.ssc.wisc.edu/~rstaiger/jep-standards05072001.pdf)>.

## IV. REFLECTIONS

Bilateral contracts may well help to facilitate, not only trade liberalization, but also the structural reform of economies. They may also benefit transitional economies, such as by responding over time to divergences in trade cycles and trade integration between developed and developing States.<sup>125</sup> However, for such economic liberalization to occur, States need to be willing to conclude supportive bilateral agreements, and also to comply with them. In reality, the combined costs of compliance and enforcement may be too great for many States and prohibitive in relation to poorer ones, particularly in light of the complex apparatus involved in both avoiding and resolving trade disputes.<sup>126</sup>

In the ideal world, too, bilateral agreements may reconcile economic and political differences that cannot be resolved multilaterally, leading to the expansion of trade and facilitating social reform.<sup>127</sup> Whether bilateral agreements accomplish these objectives again will depend, not on either generalities or conjecture, but on how they are concluded and applied in specific cases.

For some, bilateral trade agreements will help trade to expand incrementally.<sup>128</sup> For others, bilateral agreements will create “systemic problems”, subjecting multilateral trade relationships to disparate preferences, inconsistent tariff schedules and variable rules of origin.<sup>129</sup> For yet others, bilateral agreements will lead to social transformation within developing States, while others will view such a result with skepticism.<sup>130</sup>

Bilateral trade agreements certainly can lead to both greater wealth and greater sharing of wealth. States can increase their revenues from expanded trade and also extend their social services. Corporations that pay lower duties as a result of bilateral trade can pass on part of their profits to consumers in the form of lower prices.<sup>131</sup> States,

<sup>125</sup> See e.g. César Calderón, Alberto Chong and Ernesto Stein, *Trade Intensity and Business Cycle Synchronization: Are Developing Countries Any Different?*, 71 J. Int. Econ. 1 (2007), 2–21. The authors find that differences in the responsiveness of cycle synchronization to trade integration between industrial and developing countries are explained by differences in the patterns of specialization and bilateral trade.

<sup>126</sup> See, e.g., Kala Krishna and Cemile Yavas, *When Trade Hurts: Consumption Indivisibilities and Labor Market Distortions*, 67 J. Int. Econ. 2 (2005), 413–427. On the complex apparatus involved in resolving disputes under the WTO, see World Trade Organization, World Trade Organization Secretariat, World Trade Organization Legal Affairs Division, *A Handbook on the WTO Dispute Settlement System* (Cambridge: Cambridge University Press, 2004); World Trade Organization, World Trade Organization Secretariat, *The WTO Dispute Settlement Procedures: a Collection of the Relevant Legal Texts* (Cambridge: Cambridge University Press, 2001); Robert Z. Lawrence, *Crimes & Punishments?: Retaliation Under the WTO* (Washington, D.C.: Institute for International Economics, 2003).

<sup>127</sup> On this aspiration, see, e.g., Griswold, as note 14 above.

<sup>128</sup> Jeffrey J. Schott (2004), *Free Trade Agreements: US Strategy and Priorities*, unpublished manuscript (Washington, D.C.: Institute for International Economics), cited in Vinod K. Aggarwal, *Bilateral Trade Arrangements in the Asia-Pacific: Origins, Evolution, and Implications*, available at: <<http://www.cgp.org/index.php?option=article&task=default&articleid=211>>. Schott holds that bilateralism carries not only benefits in fostering trade, they also help member countries to reform their legal systems to promote economic development.

<sup>129</sup> See, generally, “Why Asia must opt for open regionalism on trade,” *Financial Times*, 3 November 2006; Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2004); Jagdish Bhagwati et al., *The Wind of the 100 Days: How Washington Mismanaged Globalization* (Cambridge, MA: MIT Press, 2001).

<sup>130</sup> Doubt that such trade liberalization will help to transform developing economies is certainly the view of bilateral trade skeptics. See, e.g., Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered* (New York: UNDP, 2001), available at: <<http://ksghome.harvard.edu/drodrik.academic.ksg/UNDPtrade.PDF>>.

<sup>131</sup> Part of the argument against a “corporatized” global order is in the extent to which corporations may selfishly benefit themselves by exploiting the poor nations of the world, contributing to mass deprivation rather than benefit. See, e.g., Wallach and Sforza, as note 82 above. See, generally, Giorgio Barba Navaretti and Anthony J. Venables, *Multinational Firms in the World Economy* (Princeton, NJ: Princeton University Press, 2004).

corporations and individuals alike can lever off gains from trade concessions to shore up their reputations for humanitarianism and philanthropy.<sup>132</sup>

However, even if developing States increase revenue streams from bilateral agreements, even if international corporations promote economic development within developing States and even if bilateral trade leads to lower prices for goods and services, there is still no assurance that States will distribute such economic benefits. Nor do bilateral agreements generally offer compelling enforcement mechanisms to ensure compliance.<sup>133</sup> However commendable coupling bilateral free trade with “aid for trade” may be, governments with dubious human rights records may resist social reform.<sup>134</sup> However well meaning other States may be, many will decline to use bilateral agreements to promote social reform in partner states because it is impolitic so to engage.<sup>135</sup>

Ultimately, the contribution which bilateral trade agreements make to multilateral trade will depend on whether individual States choose to comply with them and failing that, the extent to which they can be compelled to comply. Given how imperfectly States make choices in international trade, global standards governing the negotiation, performance and enforcement of bilateral trade agreements may be necessary to ensure compliance, and to offset disparities in bargaining powers among parties to such agreements and to protect non-parties. How to devise such standards will not be easy.<sup>136</sup> States are likely to resist measures that limit their sovereignty; political and economic alliances will inevitably be formed to work against multilateral accord with which those alliances disagree; and reaching multilateral consensus in the spirit of Article XXIV of the GATT will be illusive at best.

Many States undoubtedly will appreciate the virtue of regulating trade in order to produce a global good that is greater than the sum of its scattered array of bilateral parts. How the multilateral community might pursue that greater good will determine the sustainability of bilateral trade in the ensuing decades.

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<sup>132</sup> In some measure, the philanthropy of multinational corporations has evolved out of the pioneering work of leading foundations and corporations, notably in the United States. See, e.g., *Philanthropy at The Carnegie Corporation*, at <<http://www.carnegie.org/sub/philanthropy/vartan2.html>>. However, philanthropy often is treated as good business practice, indeed as a measure of attracting and satisfying customer needs including in developing countries. See, e.g., *Four Problems: One Solution: Philanthropy*, at <<http://www.exhibitoronline.com/corpevent/article.asp?ID=1035>>.

<sup>133</sup> On some of these concerns, see Jagdish Bhagwati, *US House of Representatives Committee on Financial Services Testimony*, Subcommittee on Domestic and International Monetary Policy, Trade and Technology, 1 April 2003.

<sup>134</sup> See Roger Normand, *Separate and Unequal: Trade and Human Rights Regimes*, Background Paper for the Human Development Report (New York: UNDP, 2002), available at: <<http://hdr.undp.org/publications/papers.cfm>>.

<sup>135</sup> See Rodrik, as note 130 above.

<sup>136</sup> For an argument in favor of interaction and coordination between bilateral and multilateral processes in order to enhance the systematic development of international trade policy, see Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 J. Int'l. Econ. Law (2006), 487–510.