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Exchanging development for market access?  
Deep integration and industrial policy under multilateral and regional-bilateral trade agreements  

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ABSTRACT  
This paper analyzes the developmental trade-offs involved in multilateral versus regional-bilateral strategies of integration into the international economy. I contrast the regulations that guide policy in the areas of trade, investment, and intellectual property in the World Trade Organization (WTO) and in regional-bilateral agreements between the US and developing countries. Both strategies of integration feature similar trade-offs, in that developing countries gain increased market access and opportunities for specialization in exchange for diminished space for use of industrial policy instruments to create new productive capacities. However, the trade-offs are intensified in the case of regional-bilateral agreements: countries receive more market access, but in exchange make significantly deeper concessions regarding the management of inward investment and intellectual policy. I argue that countries whose integration into the international economy is guided by their obligations as members of the WTO still have opportunities to implement industrial strategies that are designed to alter comparative advantages and achieve upward mobility in the international economic order, but the obligations under the regional-bilateral strategy greatly circumscribe these options. The paper thus points to the need for new terms of reference in the debate over ‘policy space’ in the international political economy. In analyzing contemporary development strategies, the most useful contrast is not between the alternatives that countries have under the WTO and the alternatives that countries had in the past under the WTO’s predecessors, but between a constraining multilateral environment and even more constraining regional and bilateral environments that condition increased market access on the sacrifice of the very tools that countries have historically used to capture the developmental benefits of integration into the international economy.

KEYWORDS  
Regionalism; WTO; NAFTA; trade; investment; IPRs.
The contemporary international political economy presents developing countries with choices between different forms of integration into the international economy. At the same time as multilateral trade negotiations continue in the World Trade Organization (WTO), many countries are also involved in negotiations over regional and bilateral agreements with the United States and the European Union. The policy options are clear: developing countries can anchor their strategies of integration to the multilateral framework of the WTO or to regional-bilateral arrangements with the US and EU. In this paper I analyze the developmental trade-offs of these two alternative strategies of integration by contrasting the constraints and opportunities in the areas of trade, investment, and intellectual property. Regional and bilateral agreements promise greater market access and can attract additional foreign investment. Yet by advancing so much beyond the WTO in deep integration and thus moving toward regulatory harmonization, regional-bilateral agreements may have serious implications for developing countries’ capacities for achieving upward mobility in the international economy.

I focus on a subset of regionalism-bilateralism, namely agreements between developed and developing countries (i.e. ‘North–South regionalism’), and within that subset my analysis is limited to agreements that include the United States. Although the European Union also has wide-ranging agreements (Panagariya, 2002), I focus on the US, which has jumped to the forefront of regionalism-bilateralism through a strategy of ‘competitive liberalization’ (Zoellick, 2002; Hilaire and Yang, 2003). Throughout the paper I draw heavily on examples from the North American Free Trade Agreement (NAFTA), which has served explicitly as the template for subsequent regional-bilateral agreements negotiated by the US. Notwithstanding the prominence given to NAFTA, my analysis is not restricted to either Mexico or the Americas, since, in addition to negotiating NAFTA-like agreements with countries in Central and South America and the Caribbean, the US has also negotiated (or is negotiating) regional-bilateral agreements with countries in Africa, Asia, and the Middle East.1

Membership in the WTO and the regional-bilateral agreements discussed here entail similar trade-offs. In both cases, greater degrees of shallow integration means that developing countries can receive increased market access for traditional and non-traditional exports, while greater degrees of deep integration means that developing countries accept new constraints regarding the management of inward foreign investment and intellectual property (Haggard, 1995; Lawrence, 1996; Frankel, 1997). However, each side of this basic bargain is magnified in the case of regional-bilateral agreements: in exchange for even greater market access, the carrot that makes these agreements attractive to many countries, developing countries relinquish yet more regulatory instruments.
Though the differences between the trade-offs are more a matter of degree and intensity than a matter of kind, the implications of these two distinct strategies of integration are critically important. The reasons for this importance is that the additional constraints imposed by regional-bilateral agreements are most threatening to the remaining vestiges of industrial policy in developing countries. Countries whose integration into the global economy is guided by their obligations as members of the WTO retain the rights and opportunities to use policy instruments that are designed to create new productive capacities, alter comparative advantages, and, hopefully, achieve upward mobility in the international economic order. In contrast, regional-bilateral accords encourage specialization and pursuit of competitiveness via exploitation of existing comparative advantages. Thus, the price to be paid for increased market access under regionalism-bilateralism is that countries must relinquish many of the very tools that historically have been used to capture the developmental benefits of integration in the international economy.

The paper underscores how discussions of contemporary ‘trade’ policies risk masking a range of production-based policy domains that can have critically important effects on countries’ positions in the international economy. Most assessments of trade agreements are based on how such agreements affect trade and investment flows. Indeed, a number of trade economists have addressed the issues in this paper, but they typically do so using estimates of trade creation versus trade diversion as the instrument for evaluation, with the underlying point being that the object of trade policy is (or should be) to increase efficient use of resources and thereby maximize exchange (e.g. Frankel, 1997; Panagariya, 1999, 2002; Dee and Gali, 2003; Hilaire and Yang, 2003; Schiff and Winters, 2003). Yet we need to be careful not to allow attention to exchange to obscure concerns with production (Amsden, 1997). Different strategies of engagement with and integration into the international economy affect national capacities for industrial upgrading. How countries manage inward investment and intellectual property, for example, affect their ability to harness the benefits of the international economy for national development purposes – to make integration not the end but rather a constituent part of a development strategy.

The analysis calls for a reassessment of the WTO and the adoption of new terms of reference in assessing the international political economy of development. While a number of studies point to the strong limitations that the new WTO arrangements place on developing countries’ policy choices (e.g. UNDP, 2003; Wade, 2003), I emphasize the leeway that countries still have as WTO members. Significant opportunities for policy innovation remain under the multilateral framework, especially when contrasted against the even more limited opportunities available in regional-bilateral agreements. In analyzing contemporary development
strategies, the most useful contrast is not between the alternatives that countries have now under the WTO and the alternatives that countries had in the past, but between a constraining multilateral environment and even more constraining regional-bilateral environments. The greatest source of concern for development analysts should not be the WTO, but rather the proliferation of regional-bilateral agreements that threaten to freeze an unequal international division of labor based on static comparative advantages.

In the first section I provide a brief discussion of development strategies and industrial policies in the global economy. I then present the trade-offs involved in the multilateral strategy of integration, focusing on the trade, investment, and intellectual property rights (IPRs) provisions of the WTO. I then illustrate how these trade-offs are intensified in the case of regional-bilateral integration, by examining the same policy areas in such agreements with the US. I draw largely on NAFTA, which has served as the template for subsequent agreements. In the conclusion I synthesize the key points of the article and suggest avenues for future research.

DEVELOPMENT STRATEGIES IN THE GLOBAL POLITICAL ECONOMY

Development strategies are constellations of policies and practices that mediate a country’s relationship with the international economy. We can conceive of development strategies as consisting of instruments that are intended to exploit comparative advantages and instruments intended to generate new comparative advantages. In this paper I am particularly interested in the latter instruments, sometimes labeled ‘industrial policies’, which aim to create new productive capacities and thereby achieve upward mobility in the international economy.

In the decades after World War II, countries used a variety of instruments to upgrade industrial capacity. Developing countries used import controls and subsidies to channel investment into new sectors, for example, they used regulations on foreign investment to spur backwards linkages and technology transfer, and they shaped their intellectual property regimes to encourage imitation and facilitate local diffusion of foreign innovations. Though the details of development strategies obviously differed across countries, and within countries over time, the underlying objective was to develop productive capacities in new industrial sectors (Amsden, 2001). In doing so, successful development strategies altered countries’ comparative advantages and their positions in the international division of labor.

Of course, not all development strategies were successful. Efforts to steer the course of economic activity had diverging effects throughout the developing world, and even in the most successful late developing countries
some question the contribution of industrial policies per se (World Bank, 1993). But while attempting to create new capacities does not guarantee success, the paucity of evidence of countries that have achieved upward mobility without use of industrial policy suggests that we should pay careful attention to what sorts of activities countries can and cannot undertake in the contemporary global economy.

The contemporary global economy severely restricts the capacity of states to design and implement development strategies. Many conclude that the globalization ‘straitjacket’ now compels developing countries to follow uniform models of integration into the international economy, based on free trade, deregulated investment, uninhibited capital movements, and strong protection of IPRs. This depiction, applauded by some and assailed by others, understates the amount of choice that countries – even developing countries – still have within contemporary global development regimes.

It is undeniable that the contemporary international political economy limit the range of options available to developing countries, and it is correct that today’s developing countries are being deprived of opportunities to use many of the policy instruments that more developed countries used at similar levels of income (Chang, 2002). But developing countries still have the policymaking space and legal rights to make strategic interventions that can alter their comparative advantage – not just for increasing specialization but for fostering new productive capacities. The continued existence of significant alternatives is critical for scholars of development and international political economy: if a range of alternatives still exists, and not trivial alternatives but rather a significant range of alternatives in the sense that different choices are likely to have meaningful effects on economic and social outcomes, then it is worth considering seriously what options remain available to developing countries under different sorts of international arrangements.

Of course, there exists a considerable degree of disagreement with regard to developing countries’ policy space. Writing about the WTO, for example, Amsden and Hikino (2000) and Tussie (1997) emphasize that developing countries have significant degrees of discretion for autonomous policy formulation, while Rodrik (2001), UNDP (2003), and Wade (2003) depict a considerably more restrictive environment. One reason for the disagreement is derived from the difference between formal degrees of flexibility granted by the WTO and effective degrees of flexibility enjoyed by developing countries. These are often not the same, particularly given the pressures that many developing countries face to exceed their WTO obligations. Such pressures are applied directly by more powerful governments such as the US and EU, which require countries to sacrifice some of their WTO-authorized flexibilities (Shadlen, 2004), and international financial agencies such as the International Monetary Fund and World Bank, whose
conditionalities also tend to push countries beyond their WTO obligations; and such pressures are applied indirectly through the market via competition among countries for inflows of foreign capital. If the external setting systematically discourages countries from taking advantage of options available as WTO members, then it is hardly surprising that some qualify the contemporary global political economy as ultra-restrictive. In any case, as we shall see, while the room for policy innovation under the WTO may be open to conflicting interpretations, the diminished opportunities for innovation under regional-bilateral agreements is uncontestable.

DEVELOPMENT STRATEGIES UNDER THE WTO

The Uruguay Round of trade negotiations, which began in the mid-1980s and concluded in 1994, significantly widened the scope of global governance in the area of ‘trade’. The new organization created during the Uruguay Round, the WTO, has a remit that greatly exceeds that of the General Agreement on Tariffs and Trade (GATT), which it absorbed. WTO regulations extend to a variety of new, ‘trade-related’ activities: in addition to a new set of agreements on trade in goods (the GATT itself), the Uruguay Round included additional accords, such as the Agreement on Trade-Related Intellectual Property Rights (TRIPS), the General Agreement on Trade in Services (GATS), and an Agreement on Trade-Related Investment Measures (TRIMs).

The expansion of the WTO’s scope means that key dimensions of countries’ core regulatory schemes that affect how national economies operate become subject to stricter multilateral disciplines. Many of the issues now covered by the WTO were not previously subject to multilateral surveillance on the grounds that they were not defined as ‘trade-related’. Regulations on inward foreign investment, for example, historically had not been viewed as trade policy, and subsequently not within the competency of the GATT. Other elements of the WTO’s new agenda had previously been addressed in multilateral fora, but existing guidelines typically placed limited conditions on countries’ actions. For example, in the area of IPRs, parties to the Paris Convention simply pledged to abide by a basic norm of non-discrimination (i.e. they would not treat patent applications and patents differently depending on the country of origin), but they could vary the standards and levels of patent protection by type of products and they retained almost complete leeway with regard to how they granted and regulated patent rights.

The Uruguay Round did not simply introduce new rules for economic policy, but also new mechanisms for enforcing these rules, in the form of the WTO’s binding dispute settlement mechanism (DSM). The GATT also had a system for resolving disputes, but one with limited utility, since any
individual country could block proceedings. The existence of a more effective DSM that is difficult to avoid means that the WTO’s rules have teeth. And because the teeth take the form of diminished access to export markets, the WTO has sharp teeth, especially for trade-dependent countries.

The following sub-sections examine how membership in the WTO affects three policy areas that constitute pillars of national development strategies: trade, investment, and IPRs. Because the Uruguay Round was treated as a ‘single undertaking’, countries needed to accept (or reject) the package of agreements in its entirety. This meant that for developing countries to take advantage of the expected benefits of the WTO, such as increased market access and a rules-based system for adjudicating international disputes, developing countries would have to accept the more intrusive elements as well – however much they opposed them during the course of the Uruguay Round.

**Trade**

The WTO potentially introduces significant improvement over the GATT for developing country exporters. For example, the Agreement on Textiles and Clothing (ATC) called for the removal of all developed countries’ quotas by 2005, henceforth subjecting this important sector to new multilateral trade disciplines that are more favorable to poorer countries. Since the 1960s apparel and textiles had been subject to highly protectionist special regimes, outside of the GATT, which placed quantitative restrictions on developing countries’ exports into developed countries (Aggarwal, 1985). By removing these restrictions, and more generally by making it more difficult for developed countries to systematically exclude developing countries’ manufactured exports, the WTO potentially increases many countries’ opportunities for export diversification.4

In assessing the effects of the WTO on developing country trade policy, we need to turn to the array of instruments that countries have typically used to protect national industries and to help fledgling exporters gain a foothold in foreign markets. The GATT was never a ‘free trade’ regime, in that it provided countries with extensive prerogatives to deviate from liberal economic principles for national purposes (Ruggie, 1982). The WTO continues the GATT’s legacy in this regard: members retain a certain amount of leeway that potentially allows them to promote local industrial development.

The most significant change that WTO introduces with regard to import restrictions is to encourage countries to convert non-tariff measures (NTMs), such as licenses and quotas, into tariffs. The WTO does not mandate that countries eliminate tariffs, or even necessarily reduce tariff levels substantially, but first and foremost that NTMs be replaced by tariffs as the principle mechanism for regulating imports.5 WTO members ‘bind’ their
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Tariffs, establishing a maximum level to act as a ceiling for any future tariff increases, above which countries are obligated to provide compensation to injured parties. Yet countries typically bind their tariffs at levels significantly higher than the actual applied levels, thus leaving room to adjust tariffs in support of domestic objectives.

The push towards tariffs and away from NTMs is illustrated with the changing regulations regarding countries’ use of ‘safeguards’. The WTO, like the GATT, allows countries to impose import restrictions in the case of balance-of-payments instability and to preserve foreign reserves (GATT Article XVIII.b). Historically, many countries that were members of the GATT used the safeguards clause more freely, not simply for balance-of-payments reasons but rather as the basis for industrial promotion, and they did so without facing significant opposition from other members (Tussie, 1987: 18–9). The ability to use NTMs in this way is now constrained by the WTO’s rule that limits use of Article XVIII safeguards specifically to proven balance-of-payments difficulties. In short, the WTO does not deprive countries of their ability to exploit the safeguards clauses as broader instruments of industrial promotion, but it makes it more likely that such measures will take the form of increasing tariffs toward the bound levels rather than introducing NTMs.

In some ways countries’ ability to use tariffs to protect local industries is enhanced under the WTO. Although the GATT allowed countries to apply temporary tariff surcharges to protect specific sectors against import surges (Article XIX), the requirement to compensate affected countries meant that few developing countries actually invoked this right (Tussie, 1997: 131–2). Because the WTO eliminates the obligation to compensate countries that are affected by legal safeguards, it potentially makes tariff surcharges more useful. To be sure, the WTO also places time restrictions on how long the safeguards can remain in place (a maximum of eight years, conditional upon continued necessity and with a requirement of gradual liberalization over the course of that period). But it is important to note that the restrictiveness of the time-limits and needs-tests is questionable, since developing countries can simply raise tariffs to their bound levels without regard for these conditions. The upshot, in short, is that if governments in developing countries wish to use tariffs to promote local industry, most can still do so as members of the WTO.6

Subsidies are another important trade issue addressed by the WTO. The Agreement on Subsidies and Countervailing Measures (ASCM) builds on the Tokyo Round’s Subsidy Code by defining distinct classes of subsidies, with different sets of rules applying to each.7 Most importantly, the WTO prohibits export subsidies, either directly to exporters or for domestic suppliers of inputs. Though export subsidies had been prohibited for wealthier countries since the early 1960s, the use of subsidies constituted a crucial part of many developing countries’ industrial strategies throughout the
postwar period (Amsden, 1989, 2001; Wade, 1990). The ASCM also refers to ‘actionable’ subsidies, meaning that they are not necessarily illegal but can be declared as such if another country demonstrates proof of injury. These changes mark an important feature of the new global political economy of development, for universalizing the prohibition on export subsidies and the injury test on actionable subsidies eliminates key elements of the special and differential treatment traditionally afforded to developing countries.

Within these new constraints, however, there are ways of providing subsidy-like support to local firms. For example, countries are allowed to reimburse firms for the taxes they pay on imported goods that are later used in exports. ‘Drawbacks’, as these are called, constitute direct payments to producers, but they are not defined as subsidies under the WTO, and countries may set their own rules and programs. So long as these tax rebates are designed to put exporters on equal footing, these forms of support are acceptable (Tussie, 1997: 130). Governments can also compensate local firms for the higher cost of capital, as the Brazilian government has done effectively with the aerospace giant Embraer (Goldstein, 2002; Schrank and Kurtz, 2005).

Likewise, subsidies for the promotion of research and development and for human capital formation are entirely permissible under the ASCM. This clause potentially provides countries with significant opportunities to develop new capacities and skills in knowledge-based sectors. As Amsden and Hikino (2000: 105) write, under the guise of science and technology, developing countries ‘can continue to support their own industries, to target national champions for government assistance, and to advance the general cause of their national competitiveness’. In fact, these authors enthusiastically note that industries ‘can receive unbounded subsidies for the purpose of strengthening science and technology’ (2000: 110, emphasis added).

While the right to provide ‘unbounded’ subsidies may make eyes sparkle, it should immediately remind us of the fiscal constraints on industrial promotion, since resources are not unbounded. The ability to take advantage of the right to subsidize science and technology is limited not by the WTO per se, but by increased financial integration, another important hallmark of the prevailing development regime. That is, countries are encouraged to liberalize their financial sectors – to remove restrictions on banking (and insurance and other financial services), to remove controls on the entry and exit of capital, and to free foreign exchange. The emphasis on financial openness in a world of volatile financial markets can reduce countries’ abilities to take advantage of the WTO’s permissive rules on subsidizing science and technology by placing limits on taxation and public spending.
The WTO outlaws key investment regulations that have been at the heart of many countries’ development strategies (Chang and Green, 2003; Correa and Kumar, 2003: Chapters 4–5; UNDP, 2003: Chapter 12; Wade, 2003). Among the ‘performance requirements’ that are no longer permitted are local content regulations, which oblige foreign investors to source determined levels of their inputs locally, and trade balancing requirements, which require foreign investors to include sufficiently high levels of domestic inputs in exports to offset imported inputs. Both of these requirements aim to generate backwards linkages from foreign investors to local manufacturers. Foreign exchange balancing, which requires foreign investors to meet foreign exchange needs for imports through exports, rather than by converting local earnings into foreign exchange, is also illegal under WTO law. The TRIMS agreement contained transitional periods of five years for developing countries (through 2000), and seven years for least-developed countries, during which time countries could retain TRIMS, so long as they notified the WTO Council for Trade in Goods. Though these extensions are useful, the bottom line is that the TRIMS agreement takes away developing countries’ ability to use important policy instruments to increase local value-added, employment, and industrial upgrading.

While TRIMS outlaws particular policies, it is a rather thin and elementary agreement. It extends traditional GATT norms calling for nondiscrimination and prohibiting quantitative restrictions to the realm of investment, but it neither offers a precise definition of a ‘trade-related investment measure’ nor establishes clear criteria for identifying such measures. TRIMS simply provides examples of prohibited regulations in the form of an ‘illustrative list’ in the appendix to the agreement, requiring countries to notify the WTO of such measures and eliminate these measures pending termination of transition periods. Yet beyond the measures explicitly included in the appendix, TRIMS leaves developing countries with the right to determine what is and what is not a ‘trade-related investment measure’, which of their investment measures are WTO compatible or not, and thus what they are obligated to report to the WTO (UNDP, 2003: 236).

Investment measures that do not violate national treatment or impose quantitative restrictions are legal. Thus, states can require foreign firms to transfer technology to local firms, and states can demand joint ventures. And states can regulate foreign investors’ hiring practices, with the aim of enhancing development of human capital and skills. Such measures, also standard instruments of postwar development strategies, remain acceptable under WTO rules. As are tax incentives. Foreign firms do not have a ‘right of establishment’, which means that states can restrict (or even prohibit) foreign investors’ participation in particular sectors of the economy. And so long as foreign investors do not automatically qualify
for national treatment, they can be held to different standards. To be sure, such instruments may not be practical in all cases (though that is equally true of now-prohibited measures such as domestic content requirements), and many analysts question their effectiveness, but the present discussion is limited to demonstrating their legality. Even under the more restrictive international regime on investment, developing countries can continue to use standard and time-honored investment regulations as instruments of industrial promotion.

**Intellectual property rights**

Where deep integration under WTO’s framework is most constraining regards countries’ new obligations for the treatment of intellectual property. For the purposes of this paper, the most important aspects of IPRs are patents, which grant exclusive rights on inventions. A country’s patent regime – the constellation of laws and practices that affect the application, granting, enforcement, and licensing of patents – has important effects on the acquisition, development, and diffusion of technologies throughout the economy. TRIPS establishes new global standards regarding the granting and protection of patents (along with other forms of IPRs), and these standards have vitally important implications for developing countries (Correa, 2000a; Maskus, 2000; CIPR, 2002). As in the case of investment, the new rules on IPRs include transition periods for implementation.

In the period since the conclusion of the Uruguay Round, the relationship between TRIPS, stronger patent protection, and access to medicines in developing countries has gained considerable attention (Shadlen, 2004). This concern is not surprising, given that one of the major changes introduced by TRIPS was the requirement that all countries offer patents on pharmaceutical products. Prior to the Uruguay Round many developing countries did not issue pharmaceutical patents, so to prevent the cost of essential medicines from escalating. The new requirement, then, has significant implications for public health in the developing world.

Yet the implications of stronger patent protection go far beyond the area of public health. Historically countries’ management of intellectual property has constituted a cornerstone of development strategy, closely related to but distinct from investment regulations. Given that most patentable innovation occurs in wealthier countries, developing countries’ patent regimes essentially set the terms by which foreign ideas are acquired and put to use locally. Because patent regimes affect the pace of technological development and dissemination, they play crucial a role in the process of late industrialization. Indeed, for late developing countries, by definition not at the technological frontier, industrialization is a process of learning, of borrowing and improving upon technologies created in more industrialized countries (Amsden, 2001; Lall, 2001; Chang, 2002). Thus, developing countries’ patent regimes have typically included instruments to restrict
the private rights of (largely foreign) patent holders and create more opportunities for local firms to access foreign innovations. By facilitating local users’ access to cutting-edge knowledge, developmental patent regimes aimed to encourage learning and technological progress via imitation.

TRIPS places much greater limitations on how developing countries configure their patent regimes than was the previously the case. Whereas countries could previously deny patents to certain types of inventions so to encourage reverse-engineering and lower the barriers to entry in technologically intensive sectors, now countries must offer patents in virtually all fields. Whereas countries could offer patents of short duration and include extensive exceptions to patent-holders’ monopoly rights so to facilitate broad access to patented knowledge, TRIPS requires uniform twenty-year patent terms and significantly strengthens the rights of patentees to control access and use of patented information during these extended periods. And whereas countries could make enjoyment of the monopoly rights conferred by patents conditional upon local production or licensing and transferring technology to local users, TRIPS limits how governments’ regulate patent-holders.

Thus, TRIPS makes it more difficult for developing countries to gear the management of IPRs toward speeding the pace of local technological diffusion and spurring indigenous technological development.14 Because TRIPS focuses primarily on establishing incentives for innovation and technology-generation, activities which occur disproportionately in developed countries, it limits developing countries’ rights to design patent regimes designed to encourage imitation and technological learning. Indeed, one of the objectives of TRIPS was precisely to extend the amount of time before new innovations become standard, mass-produced commodities where firms compete more on cost, and thereby provide technology sectors in OECD countries a mechanism for adjusting to rising competition from lower-cost producers in the developing world (Fisch and Speyer, 1997; Ryan, 1998).

Notwithstanding the very real constraints set by TRIPS, a critically important (though frequently overlooked) point is it still leaves significant room for national variation in how countries treat intellectual property. Countries may exhibit substantial variation in their patent regimes, all while being compliant with TRIPS; and there is room within TRIPS for countries to develop dynamic patent regimes (Reichman, 1997; CIPR, 2002). To quote a prominent IPR scholar (and strong critic of TRIPS), ‘Developing countries were able in the pre-TRIPS era to define patent policies with a great degree of freedom. This has changed dramatically, but it is still possible to design patent laws taking into account broader developmental objectives and, particularly, the creation of a legal environment to promote innovation and technology transfer’ (Correa, 2000a: 97). By imposing stringent rules on disclosure and subsequently granting
narrow patents, for example, or by allowing for wide-ranging research exceptions, countries can provide local actors with opportunities to ‘invent around’ patents without risking litigation for infringement. Or take the case of compulsory licenses, where the host government allows a local entity (a private firm and/or government agency) to produce and distribute a good under patent, with or without the consent of the patentee. Compulsory licenses have historically been part and parcel of countries’ patent regimes, and countries have granted compulsory licenses in a wide range of situations (Reichman and Hasenzahl, 2002). Despite efforts by the US in the Uruguay Round to radically circumscribe their use (Watal, 2000: 320), TRIPS continues to leave countries with a significant degree of autonomy in this regard. Although TRIPS stipulates some of the conditions to be met for governments to issue compulsory licenses, it leaves the grounds for doing so as matters of national policy. Thus, by making ‘refusal to deal’ and restrictive licensing arrangements grounds for compulsory licenses, as China does, developing countries can help local firms gain access to patented knowledge on better terms; or by requiring patent-holding firms to manufacture their inventions locally in order to retain exclusive rights, as Brazil does, developing countries can encourage the transfer of non-codified (i.e. tacit) knowledge that only occurs via the localization of manufacturing operations.15

Reassessing the multilateral WTO space

There is no disputing the fact that the WTO’s regulations significantly reduce developing countries’ policy options: the multilateral WTO environment is clearly less permissive than the pre-WTO environment. Yet it is important to look carefully at what is and is not permitted under global economic regimes. I have highlighted the new balance between opportunities for increased market access and constraints on industrial policies designed to generate new comparative advantages, but at the same time I have drawn attention to the remaining industrial-policy options available for developing countries. The WTO presents developing countries with a menu of available policy options that is certainly more restricted than in the pre-Uruguay Round environment, but a significant range of options for development strategies exists in the multilateral framework.

It might be that both of the assessments cited previously with regard to the WTO are correct. Rodrik (2001: 59) is correct to note that a country attempting to emulate some aspects of Korean and Taiwanese industrial strategy would ‘run afoul’ of WTO rules, but Amsden and Hikino (2000) are also correct in explaining that such a country still has recourse to other mechanisms to accomplish the same developmental ends. Developing countries no longer have recourse to some of the specific mechanisms that have been used in the past to promote indigenous
industries – they cannot directly subsidize exports to help higher cost local producers establish footholds in foreign markets, they cannot use local content requirements to encourage the creation of local supply chains, and they cannot declare specific types of inventions ineligible for patenting to facilitate reverse engineering and imitation. But under multilateral rules they nevertheless do retain the capacity to intervene in ways that can potentially generate new productive capacities and new areas of comparative advantage (Schrank and Kurtz, 2005).

Lastly, and to conclude this section, the discussion of the changing international constraints on regulating inward foreign investment and managing intellectual property point to the importance of distinguishing between trends and outcomes. The trend – an alarming trend not to be taken lightly – is towards developing countries having reduced policy discretion in both of these arenas. Yet the current outcome remains one where a range of significant alternatives continues to exist for countries to use foreign capital, knowledge, and technology in support of national development goals.16

THE INTENSIFIED TRADE-OFFS OF REGIONALISM-BILATERALISM

The fundamental bargain at the heart of the WTO, enhanced market access in exchange for more extensive constraints on industrial policy, is intensified in the case of regional-bilateral integration. To demonstrate this, in this section I examine the trade, investment, and IPR provisions of regional-bilateral agreements negotiated with the US. While I draw heavily on the case of NAFTA, the trilateral agreement between Mexico, Canada, and the US that entered into force in 1994, the key points are generalizable to all regional-bilateral agreements involving the US.

Trade

Regional-bilateral agreements bring special benefits to developing countries’ exports that are unavailable under the WTO. NAFTA, for example, provides Mexico with preferential access to the US market, for US tariffs on goods produced in Mexico (and Canada) are lower than tariffs on goods produced elsewhere. In other words, access to the US market under regional-bilateral agreements is better than the ‘most favored nation’ treatment available to WTO members.17 In fact, such agreements are also better than traditional trade-preference schemes, such as the General System of Preferences (GSP), for a number of reasons. Regional-bilateral agreements offer lower tariffs than the GSP, and thus more-preferred market access. The agreements are also more comprehensive, extending these enhanced concessions to significantly broader ranges of goods and services. For example, many ‘sensitive’ agricultural and light-manufacturing products that
are excluded from GSP schemes are usually included in regional-bilateral agreements.\textsuperscript{18} And finally, and perhaps most importantly, because these are international agreements, rather than unilateral concessions, the trade preferences are more difficult for the US to revoke or attach additional conditions onto than is the case with trade preferences granted under GSP. In the case of Mexico, for example, nearly nine percent of total exports in 1993 entered the US under unilateral (and thus unstable) preferential trading arrangements. In 1994, NAFTA’s first year, less than one percent of Mexico’s total exports entered the US under such schemes.\textsuperscript{19} The importance of these benefits cannot be understated: securing expanded and stable forms of preferential market access is a carrot that attracts countries to regional-bilateral agreements with the US.

With regard to import protection, regional-bilateral agreements clearly limit developing countries’ abilities to shield local producers from international competition. The reason for this, of course, is that the agreements typically bind tariffs on more goods and at levels that are below WTO levels, i.e. unlike under GSP, trade liberalization is symmetrical. In the case of Mexico, import liberalization occurred in the mid-1980s, well before entering into NAFTA. In 1985, in the wake of the prolonged recession brought about by the debt crisis, licensing requirements were removed from nearly half of imports and Mexico began entry into the GATT, which it joined in 1986. The following year, in December 1987, virtually all license requirements were eliminated and the maximum applied tariff rate was set at twenty percent (Ten Kate, 1992). Mexico’s obligations under the WTO were to bind its tariffs. With NAFTA, however, Mexico commits not to binding but rather further reducing and eventually \textit{eliminating} tariffs on goods from Canada and the US, Mexico’s largest trading partner.\textsuperscript{20} To be sure, NAFTA also includes an agreement on safeguards, and Mexico retains the right to raise tariffs temporarily in response to balance-of-payments crises, a flexibility in the agreement it exploited in 1995. But once tariffs are reduced to zero, which will be the case across the board by 2009, the conditions for re-imposing them are more stringent than under the WTO. On the import side, then, membership in a regional-bilateral agreement means that Mexico sacrifices some of the room for maneuver that is available under the WTO.

What about export promotion? Recall that duty drawbacks are ‘subsidy-like’ provisions that remain acceptable under the WTO. Mexico’s drawback programs involved providing exporting firms with special tax treatment on imported inputs. One such program was PITEX, the Program for Temporary Importation for Exports, which rebated exporting firms the direct and indirect taxes they paid on imported inputs. Another program, ALTEX, offered even more special tax and administrative treatment for firms with high levels of exports. Yet it is rare for drawbacks to be used in regional arrangements of any sort, and NAFTA, exemplary of the new North-South arrangements discussed in this paper, is no exception. NAFTA requires the
size of the drawbacks to be limited to the lesser of either the Mexican import tariff on the input or the duty paid by the US (or Canadian) importers on the final good. As US and Canadian tariffs on Mexican exports approach zero, then, the duty drawback scheme is phased out.

Importantly, this aspect of NAFTA also affects the treatment of temporary imports that come from countries other than Canada or the US. Article 303 prohibits Mexico from rebating taxes to exporters unless the final goods are also being re-exported outside of the NAFTA zone. While firms in Mexico had been able to import inputs duty-free from Europe or Asia that they could then use in exports to Canada and the US, as of January 2001 firms in Mexico have to pay the full external tariff on these inputs. Thus, nearly all products imported into Mexico receive the same tariff treatment, regardless of whether destined for domestic consumption or for re-export (Álvarez Galván and Dussel Peters, 2001). Given that drawbacks remain one of the key WTO-compatible mechanisms for supporting local exporters, to the extent that regional-bilateral agreements like NAFTA call for the eventual elimination of temporary import programs, they oblige countries to go significantly beyond their obligations as WTO members.

With regard to subsidies, regional-bilateral agreements typically do not depart significantly from the WTO. Export subsidies are prohibited, of course. NAFTA, for example, required Mexico to discontinue preferential energy pricing to local firms as part of the national treatment requirement, but Mexico can still subsidize firms with preferential energy prices – it just cannot discriminate with regard to national ownership. Most importantly, Mexico retains the ability to provide ‘boundless’ subsidies for science and technology and the development of human capital, a key aspect of industrial policy for late developing ‘technological learners’ that remains legal under the WTO (Amsden and Hikino, 2000; Amsden, 2001). Yet the principal obstacle to the use of subsidies, as suggested earlier, is not so much from WTO or NAFTA obligations as from Mexico’s monetary policy and strategy of financial openness. The quest for low inflation and investment-grade credit rating imply constant fiscal discipline, made evident by the insistence on keeping the deficit below one percent of GDP during recession. Given that Mexico collects fewer taxes relative to GDP than virtually any economy in Latin America, there is little to be spent on science and technology. In short, Mexico’s limited ability to take advantage of the opportunities for subsidizing science and technology – opportunities consistent with both multilateral and regional-bilateral commitments – is derived from a limited ability to generate increased tax revenues.

**Investment**

Regional-bilateral agreements such as NAFTA are considerably more restrictive than the WTO in the realm of investment. Whereas the WTO
agreement is ‘narrowly’ focused on investment measures that are deemed ‘trade-related’, regional-bilateral agreements, based on US Bilateral Investment Treaties (BITs), constitute broad-based investment agreements and therefore address foreign investment independently of any measure’s relationship to trade. Indeed, for the US these agreements are important steps toward realizing the long-sought objective of regulatory harmonization, so to ‘enable business activities to operate relatively unencumbered across national boundaries’ (Graham and Wilkie, 1994: 10).

A quick glance at the investment provisions of NAFTA illustrates how investment provisions at regional-bilateral level place more restrictions on the member countries then they would otherwise face in the WTO. For example, the right of pre-establishment means that Mexico can no longer screen and veto foreign (specifically US and Canadian) acquisitions. Only in the case of purchases of extraordinarily high levels, and where foreign owners come to acquire more than forty percent of a Mexican firm, are purchases subject to government authorization. And with the objective of creating a harmonized regulatory regime, NAFTA includes national treatment and thus limits the Mexican government’s ability to treat US and Canadian firms differently than Mexican firms (i.e. ‘NAFTA Investors’ receive equal treatment). Nor can Mexico attempt to influence firms’ hiring and training practices. Also, and in stark contrast to the WTO, regional – bilateral agreements classify finance (e.g. purchase of bonds and local equities) as foreign investment, and thus offer enhanced protection to financial flows as well. NAFTA also calls for unrestricted rights of repatriation of investment capital, payments, profits, and royalties, along with a guarantee of ‘fair’ compensation for expropriation.23

Finally, a key aspect of regional-bilateral agreements regards investor-to-state disputes. In the WTO, only countries can bring cases against other countries. This is because the WTO is an inter-governmental body; private firms are not party to the agreement. NAFTA, however, allows firms to bring cases to arbitration, as do subsequent regional-bilateral agreements with the US.24 Indeed, regional-bilateral accords aim not just to remove investment restrictions (in other words, liberalize) but to provide investment protection, and the means to do so is to create new a hybrid legal regime that applies private commercial law to the public domain (van Harten, 2005). From the perspective of developing countries, of course, that regional-bilateral agreements have extremely broad definitions of both investment and expropriation, combined with the possibility of binding arbitration, can serve as strong incentives to minimize the regulation of inward foreign investment.

**Intellectual property rights**

The goal of harmonizing IPR regulations is an important aspect of US foreign economic policy, one that has advanced further in regional-bilateral
than multilateral settings. Indeed, one of the primary goals of the US in negotiating the IPR sections of regional-bilateral agreements is to induce countries to introduce new legislation and practices that will offer levels of protection in line with what is available in the US (USTR, 2004b). Thus, developing countries that enter into regional-bilateral agreements with the US typically accept obligations in the area of IPRs that go far beyond what is required as WTO members.25

Requirements that signatories offer increased patent protection via ‘pipeline’ protection and extended periods of data exclusivity are standard characteristics of such agreements (Maskus, 1997, 2000; Correa, 2000b; Oxfam, 2004; Wall Street Journal, 2004). With regard to the former, to receive a patent an invention must be ‘novel’. One manifestation of the novelty requirement is that patent offices generally do not issue patents on goods that have already been patented in other countries. But many pharmaceutical companies did not apply for patents in developing countries, frequently because pharmaceutical products were not patentable at the time the invention was made. To provide pipeline protection is to grant patents to products that are not new for the duration of the patent in the first country.26 Though TRIPS does not oblige countries to offer this additional and retroactive protection, regional-bilateral agreements with the US almost invariably do so. The US also insists that signatories to regional-bilateral accords offer patent holders extended periods of exclusivity for test data. When pharmaceutical firms seek approval for drugs from local regulatory authorities, they are ordinarily required to submit test data. If access to this data blocked, then producers of generic medicines – even medicines that are documented as bioequivalent – cannot gain regulatory approval without replicating costly and time-consuming clinical trials.27 Again, while TRIPS places limited obligations on states regarding the treatment of test data, the US invariably pushes for minimums of five years of data exclusivity in regional-bilateral agreements.

The implications of both points discussed in the previous paragraph are greatest in the area of public health. Pipeline protection and data exclusivity are most relevant with regards to pharmaceuticals, and they are matters of concern because they can make it more difficult for countries to secure access to affordable drugs.28 As discussed earlier, however, the importance of patents goes beyond the areas of public health and has crucial implications for technological learning and industrial development. Although it is clear that developing countries’ IPR obligations under regional-bilateral accords most exceed their obligations as WTO members in dimensions directly affecting public health, regional-bilateral accords also have important implications for industrialization.

Regional-bilateral agreements tend to place greater limits on third parties’ rights to access patented knowledge and they almost uniformly reduce governments’ abilities to use compulsory licensing as a policy instrument
The agreements generally reduce governments’ abilities to issue compulsory licenses to declared states of national emergency, even then require increased levels of prior negotiations with the patent holder, and, in the case of such licenses being granted, the agreement substantially restricts the rights of the licensee. The upshot is that regional-bilateral agreements pick up where the WTO left off in terms of limiting developing countries’ abilities to deploy what historically have been standard tools to regulate patent holders.29 To be sure, regional-bilateral agreements do not prohibit compulsory licenses, but they establish clear and unequivocal biases against their use – biases that are even stronger than in TRIPS.

Finally, a brief comparison across policy areas. It is clear that regional-bilateral agreements entail fewer additional constraints on industrial policy, relative to those imposed by the WTO, in the area of IPRs than investment. This is not surprising, since the Uruguay Round itself went so much further in IPRs than investment. In a sense, from the perspective of OECD business constituencies seeking regulatory harmonization, regional-bilateral agreements compensate for the Uruguay Round’s shortcomings. Yet if we widen our lens and consider broader elements of development, beyond industrialization, e.g. if we focus on public health and biodiversity, then the difference between the two sorts of agreements in IPRs equals or perhaps exceeds what we witness in investment. And if we were to include other aspects of IPRs, e.g. copyrights and the protection of digital information, where US demands have grown exponentially since the early 1990s (Wunsch-Vincent, 2003; Shadlen et al., 2005), it becomes even more evident that regional-bilateral agreements take deep integration in IPRs to new levels, far beyond that projected in the WTO.

Reassessing the intensified Uruguay Round bargain

Regional-bilateral agreements, by bringing stable, preferential market access (and high levels of investor protection), can attract direct foreign investment (DFI) and increase exports.30 But the price of market access is high. In exchange, developing countries relinquish virtually all instruments of industrial policy. However restrictive the WTO may be with regard to developing countries’ abilities to regulate and manage inward foreign investment and intellectual property, regional-bilateral agreements are significantly more so.

It is worth considering the developmental implications of this intensified trade-off, returning to Amsden’s (1997) distinction between exchange and production. Increasing trade and attracting DFI are desirable, few would argue otherwise. However, to the extent that the regional-bilateral strategy entails the sacrifice of instruments that could potentially be used to transform higher levels of trade and investment into higher levels of domestic industrial development, the price of more stable and preferential
market access may be excessive. In this paper I am not assessing economic performance under regional-bilateral agreements, but if we were to do so, the appropriate counterfactual would not be how much trade and DFI a country might receive were regional-bilateral agreements to have different regulations regarding the regulation of investment and management of IPRs. After all, these deep integration aspects are largely what make such agreements appealing to the US, so preferential, stable access to the US market without major concessions on investment and IPRs is not an option. Rather, the appropriate counterfactual would be how much trade and DFI a country might receive as a member of the WTO but without the regional-bilateral agreement, and thus still retaining WTO-compatible instruments for investment regulation, IP management and industrial promotion. The answer is not clear, and space limitations obviously preclude analysis in this article, but I underscore the trade-offs involved in order to raise the possibility that regional-bilateral agreements impose significant dynamic and developmental costs even while delivering static and short-term gains.

CONCLUSION

In this paper I have contrasted how multilateral and regional-bilateral agreements establish different parameters for developing countries’ strategies of integration into the international economy. Both multilateral agreements (e.g. the WTO), and regional-bilateral agreements (e.g. NAFTA and subsequent agreements modeled on NAFTA), involve similar trade-offs: developing countries obtain increased opportunities to pursue their comparative advantages, but they sacrifice the rights to use the array of industrial policies that countries have traditionally used to generate new productive capacity in new sectors.

Although the existence of such a trade-off is not surprising in an international political economy that is informed by neo-classical economic principles, the paper has illustrated how both dimensions of these trade-offs are intensified in regional agreements. That is, by contrasting the specific regulations on trade, investment, and IPRs in the two different types of agreements, we see that developing countries can receive significantly more market access under the regional strategy, but they are left with even less space for industrial policy.

For those skeptical of industrial policy (‘the best industrial policy is no industrial policy’, is a common refrain), such findings are unproblematic, in that states sacrifice little of value in exchange for better market access. Indeed, the implications of this article might be positive, if stronger constraints can prevent countries from damaging their development prospects by taking advantage of WTO loopholes. In contrast, for those skeptical of development prospects in the absence of industrial policy, the findings of
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this paper will increase trepidation and concern regarding the implications of regional-bilateral agreements.

Regardless of one’s perspective on industrial policy, however, the paper points to important areas for future research, two of which can be noted here. First, we need more careful analysis of why countries exhibit differing degrees of enthusiasm for regional-bilateral agreements with the US. Regarding the agreements as commitment technologies that provide strong signals to investors by tying the hands of future governments, a common interpretation of Mexico’s decision to enter NAFTA, for example, makes less sense in the current environment. Mexico negotiated NAFTA when the Uruguay Round was stalled and the WTO did not exist. Thus, strong and binding multilateral agreements to use to anchor a shift in development strategy did not exist. That is no longer the case: the WTO exists and will remain available to fulfill this function. The question is why the WTO is regarded as insufficient—why do some countries choose to exceed their WTO obligations? A second area for subsequent research regards analysis of how countries implement the new obligations that come from either the WTO or regional-bilateral agreements. Leeway is only that, leeway. We need to consider not just how international agreements present countries with diverse opportunities for policy innovation, but how the interaction of changing international and domestic environments affect the diversity of development strategies we continue to witness at the dawn of the twenty-first century.

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NOTES

1 In the Americas, and in addition to Mexico, the US has agreements with Chile and five countries of Central America plus the Dominican Republic, and is negotiating with Panama and also three Andean countries. And, of course, there are negotiations for the hemispheric Free Trade Agreement of the Americas, which involve thirty-four countries (all the sovereign states of the Americas with the exception of Cuba). Outside of the Americas, the list includes (by region), the Southern African Customs Union; Singapore and Thailand; Bahrain, Israel, Jordan, and Morocco. See www.ustr.gov/Trade_Agreements/Section_Index.html

2 Amsden and Hikino (1994) provide an excellent review.

3 An additional explanation for the disagreement, quite simply, is that laws are often ambiguous and only made clear through judicial processes. In the case of the WTO, the new laws have not been in effect for long enough to have gone through that process.

4 This paper focuses on industry, not agriculture, though it is worth noting that despite the much-publicized protection of agriculture in Europe and North
America, here too developing countries received more market access at the Uruguay Round than they had previously.

More significant tariff reduction remains on the agenda of multilateral trade negotiations.

The WTO also continues to allow countries to impose ‘anti-dumping’ duties in response to ‘unfair trade practices’. For countries with liberalized trading regimes, this has become the principal form of protection under the WTO, by both developed and developing countries. According to UNDP (2003: 190–2), from 1995 to 1999 there were more then one thousand anti-dumping cases initiated, of which more then one-half were initiated by developing countries.

In contrast to the Tokyo Round’s Subsidy Code, which was optional, the ASCM is part of the ‘single undertaking’ and therefore binding to all WTO members (with some temporary exceptions for the Least Developed Countries).

As in many dimensions, this speaks to the importance of WTO procedures and the ability of developing countries to use the DSM to defend themselves against spurious claims of injury, and to demonstrate the injurious effects of other countries’ subsidies.

Though officially the clause enabling such subsidies was temporary, to be reviewed in 1999, the scheduled review never occurred, and WTO members appear to have reached an unspoken agreement to accept and not challenge subsidies for R&D and human capital (UNDP, 2003: 196).

During the phase-out period countries could retain WTO-inconsistent TRIMS, but they were not allowed to introduce further illegal restrictions, and any illegal investment measures implemented in the last half of 1994 had to be removed immediately. The agreement also stipulates a wide range of grounds on which countries could request extended transition periods or even exemption from the new rules.

Moran refers to TRIMS as ‘a modest effort’ to establish rules on the treatment of foreign investment (2000: 223). Sell (2003: Chapter 7) contrasts the comparative failure of business groups pushing for broad investment regulations in the Uruguay Round with the success of business groups pushing for increased protection of IPRs. The latter obtained ‘ninety-five percent’ (115) of what they wanted.

While all countries were required to introduce national treatment and non-discrimination immediately into their existing IPR laws, developing countries had until January 2000 to bring their IPR regimes into full conformity with TRIPS, and the least developed countries were given until 2006. Least developed countries can request ten-year extensions of the transition period. The transition periods for pharmaceuticals are longer.

According to data from United States Patent and Trademark Office, less than 5% of patents granted in the United States during the period 1997–2001 regarded pharmaceuticals and biological processes.

The reigning (but not unquestioned) logic underlying the new approach is that increasing the security of IPRs will attract foreign investment and make patent holders more willing to transfer technology via licensing arrangements.

Countries’ ability to condition patent rights on local production is disputed. The US filed a WTO complaint against Brazil over this issue, but the case was dropped in 2001 without a ruling.

Likewise, if future multilateral trade negotiations include across-the-board lowering of bound tariff levels, then developing countries will lose the ability to freely raise tariffs.
Note that as more countries enter into regional-bilateral agreements with the US and thus receive preferential access, this benefit becomes diluted. Of course, individual agreements vary along these two axes, with actual tariff levels and degree of coverage determined in the course of bilateral and regional negotiations. Author’s calculations based on data from World Bank and United States International Trade Commission. The agreement includes ‘freeze’ and ‘snapback’ provisions for import-sensitive sectors. The exception to this is that goods imported for re-export to countries outside of NAFTA zone can still qualify for this treatment, though this constitutes a tiny share of Mexican trade. In the case of Mexico, the largest of the temporary import programs is the maquiladora regime, under which exporters to the US import inputs duty-free and their exports are assessed tariffs in the US on only the Mexican value-added. Though Mexico received an extension on phasing out the maquiladora regime, eventually it will be eliminated by NAFTA.

NAFTA’s investment provisions also extend beyond the WTO’s to address not just manufacturing investment but also services. Though this article does not examine services specifically, a small note of comparison is worthwhile. The General Agreement on Trade in Services (GATS) is based on ‘autonomous liberalization’ and a ‘positive list’. Countries liberalize according to their own schedule, putting sectors up for liberalization. Those sectors that they do not declare are not subject to liberalization. NAFTA’s chapter on services, in contrast, uses a ‘negative list’, in which sectors are liberalized unless specifically exempted.

The standard forum is the World Bank’s International Centre for Settlement of Investment Disputes (ICSID).
This is the area where NAFTA is least indicative as a template for subsequent regional-bilateral accords, for the simple reason that US demands have grown throughout the post-NAFTA period. Take, for example, the question of whether plants and animals are patentable. TRIPS makes this optional (Article 27.3.b), as does NAFTA, yet the USTR, subject to a campaign by biotech industries to ‘close the loophole’, has sought to reduce exceptions in subsequent agreements. The upshot is that NAFTA provides only a minimal and conservative sense of the IPR provisions in most US-based regional-bilateral agreements.

If a patent was applied for in the US in 1991, a country granting pipeline protection would, at the time its new patent law went into effect, offer protection to that product until 2011, at the time the twenty-year patent would expire in the US.

Data exclusivity, thus, can potentially provide firms with market exclusivity even in the absence of patents.

Note that the US rejects this interpretation: ‘Stronger patent and data protection increases the willingness of companies to release innovative drugs in free trade partners’ markets, potentially increasing, rather than decreasing, the availability of medicines’ (USTR, 2004a).

With regard to compulsory licensing, the provisions that the US insists upon in regional-bilateral negotiations are similar to the more restrictive clauses that the US sought to include in TRIPS during the course of the Uruguay Round negotiations (Watal, 2000: 320).

Note that investment agreements alone, without complementary trade provisions, may not have the same effects in terms of stimulating foreign investment (Hallward-Driemeier, 2003).
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