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Abstract

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

Development is a long-run process of transforming an economy from concentrated assets based on primary products, to a diverse set of assets based on knowledge. This process involves investing in human, physical and natural capital in manufacturing and services and divesting in rent seeking, commerce, and un-sustainable agriculture.[1] Imbs and Waczairg[2] have confirmed that nations that develop follow this trajectory. They find that as nations get richer, sectoral production and employment move from a relatively high concentration to diversity. They find such a process is a long one and that nations do not stabilize their diversity until they reach a mean income of over $15,000. For many years it has also been known that as countries diversify they also undergo a process of deepening whereby the endogenous productive capacities of domestic firms are enhanced through forward and backward linkages.[3]

This paper examines the extent to which the emerging world trading regime leaves nations the "policy space" to deploy effective policy for long-run diversification and development and the extent to which there is a convergence of such policy space under global and regional trade regimes. Part II of the paper examines the economic theory of trade and long-run growth and underscores the fact that traditional theories lose luster in the presence of the need for long-run dynamic comparative advantages and when market failures are rife. We then exhibit a "toolbox" of policies that have been deployed by developed and developing countries past and present to kick start diversity and development with the hope of achieving long-run growth but also stress that tools alone are not the recipe for development, that "getting the political economy right" is also of vital importance. In Part III we examine the extent to which

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

[2] Jean Imbs & R. Waczraig, *Stages of Diversification*, 93(1) AM. ECON. REV. 63, 63-86 (2003).

[3] *See generally* ALBERT HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT (1958); PAUL KRUGMAN, DEVELOPMENT, GEOGRAPHY, AND ECONOMIC THEORY (1995); Amsden, supra note 1.

rules under the World Trade Organization (WTO), trade agreements between the European Union (EU) and developing countries, trade agreements between the United States (US) and developing countries, and developing country-developing country trade agreements (or South-South, S-S) allow for the use of such policies. Part IV of the paper summarizes our findings and offers conclusions for policy and future research. This paper is intended to assist policy-makers as they choose trade partners that affect their ability to design long-run development strategies.

Trade Theory and the Long Run

The traditional trade theory that provides the backdrop and justification for the majority of trade treaties is limited in terms of long-run growth for developing countries. Such theories assume a static approach to technological change and assume that there are no market failures among trading partners,[4] two assumptions that do not hold in the developing country context. This section of the paper provides an overview of trade theory and its limitations and shows how some countries have used various tools to correct for the theoretical limitations identified.

Neo-classical trade theory shows us that liberalizing trade can make all parties better off. The economist David Ricardo showed that because countries face different costs to produce the same product, if each country produces, and then exports, the goods for which it has comparatively lower costs, then all parties benefit.[5] The effects of comparative advantage (as Ricardo's notion became called) on factors of production were developed in the "Heckscher-Ohlin" model. This model assumes that in all countries there is perfect competition, technology is constant and readily available, there is the same mix of goods and services, that factors of production (such as capital and labor) can freely move between industries, and there are no

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[4] RICHARD CAVES, JEFFREY A. FRANKEL & RONALD JONES, WORLD TRADE AND PAYMENTS 13-30 (2007).
[5] *See* DAVID RICARDO, ON PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 108-117 (1817).

externalities.[6] In other words, this model is "static" and not "dynamic" and there are no market failures.

Within this rubric, the Stolper-Samuelson theorem adds that international trade can fetch a higher price for the products (and hence lead to higher overall welfare) in which a country has a comparative advantage.[7] In terms of foreign direct investment (FDI), FDI (in other words, multinational corporations (MNCs) moving to another country) can contribute to development by increasing employment and by human capital and technological "spillovers" where foreign presence accelerates the introduction of new technology and investment. In theory, the gains from trade accruing to "winning" sectors freed to exploit their comparative advantages have the (Pareto) possibility to compensate the "losers" of trade liberalization. Moreover, if the net gains from trade are positive there are more funds available to stimulate growth and protect the environment. In a perfect world then, free trade and increasing exports could indeed be unequivocally beneficial to all parties.

To some, static comparative advantage poses problems for countries who want to sustain long-run growth. Some countries may only have a static comparative advantage in a single commodity where prices are very volatile and where in the longer-run prices are on the decline relative to industrial goods. What's more, small initial comparative static advantages among countries in the short-run may expand into a growing technology gap between rich and poor nations in the longer-run.[8] If the developed world has a static comparative advantage in innovation, it can continually stay ahead by introducing new products, even if the developing

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[6] *See* B.G. OHLIN, INTERREGIONAL AND INTERNATIONAL TRADE 1-27 (Harvard University Press 1967) (1933).
[7] *See* W.F. Stolper & P.A. Samuelson, *Protection and Real Wages*, 9 REV. OF ECON. STUD. 58, 58-73 (1941).
[8] Robert Lucas, *On the Mechanisms of Economic Development*, 22 J. OF MONETARY ECON. 3, 3-42 (1988); G. Grossman & E. Helpman, INNOVATION AND GROWTH IN THE GLOBAL ECONOMY 41-56 (1991).

world eventually catches up and gains a comparative advantage in low-cost production of each old product over time.[9]

In the longer-run then, what matters most is not static comparative advantage at any one moment in time, but the ongoing pattern of dynamic comparative advantage: the ability to follow one success with another, to build on one industry by launching another, again and again. Since the process of technology development is characterized by increasing returns, many models will have multiple equilibria. It is easy to specify a model in which the choice between multiple equilibria is not uniquely determined by history; rather, it becomes possible for public policy to determine which equilibrium will occur.[10] If, in such a model, the multiple equilibria include high-tech, high-growth paths as well as traditional, low-growth futures, then public policy may make all the difference in development.

Neo-classical trade theory also assumes that there are no market failures among trading partners.[11] However, four key market failures plague nations seeking to catch up to the developed world: coordination and information externalities, dynamism and technological change, and human capital formation. Diversification by definition can mean the creation of whole new industries in an economy and sometimes may require linking new industry to necessary intermediate goods markets, labor markets, roads and ports, and final product markets. For fifty years economic theorists have demonstrated how markets fail at "coordinating" these efforts. Coordination failures and the asymmetric distribution of world income has led economists to argue that the nation state should provide "big push" investments to build scale

[9] Paul Krugman, *A Model of Innovation, Technology Transfer, and the World Distribution of Income*, 87 J. OF POL. ECON. 253, 253-266 (1979).
[10] Paul Krugman, *History Versus Expectations*, 106 Q. J. OF ECON. 651, 651-67 (1991).
[11] CAVES, *supra* note 4, at 13-30.

economies and enhance the complimentary demand and supply functions of various industries over the long run.[12]

While historically such efforts took the form of large industrial planning efforts and infant industry protection, more recently industrial clustering has taken place where nations focus on the development of specific technologies or sectors in specific geographical regions—especially when facing scale economies. Clustering and export processing zones have been created to attract foreign firms, link them to domestic input providers, and serve as exporting platforms.[13] To support these efforts nations (most successfully in Asia) provide tax breaks and drawbacks to foreign firms but required them to source from domestic firms and transfer technology.[14] In tandem, the state provides an educated labor force, public R&D, tariff protection, and subsidized credit to support the domestic firms, and provided export subsidies to the domestic firms until they could produce products at the global technological frontier.[15]

Markets also fail at providing the socially optimal amount of "information" to producers and consumers as well--such phenomena are termed information externalities. Technological experimentation through research and development and the inquisitive process of entrepreneurship involve the a process of "self-discovery" regarding which economic activities and product lines will be the most appropriate for a domestic economy.[16] These experimenters

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[12] *See generally* Ragnar, Nurkse, *Some International Aspects of the Problem of Economic Development*, 42(2) American Economic Review 571 (1952); T. Scitovsky, *Two Concepts of External Economies*, 62 J. OF POL. ECON. 143 (1954); HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE (2002); DANI RODRIK, ONE ECONOMICS, MANY RECIPES (2007).
[13] AMSDEN, *supra* note 1, at 75.
[14] *Id.* at 88.
[15] *See* Kevin Murphy, Andrei Shleifer & Robert Vishny, *Industrialization and the Big Push*, 97(5) J. OF POL. ECON. 1003, 1003-26 (1989); AMSDEN, *supra* note 1, at 221; John Weiss, *Export Growth and Industrial Policy: Lessons from the East Asian Miracle Experience* 6-10 (Asian Development Bank Institute, Discussion Paper No. 26, 2005), available at http://www.adbi.org/files/2005.02.dp26.eastasia.govt.policy.pdf.
[16] RODRIK, *supra* note 12, at 104-7.

who tinker with establishing or inventing new technologies to adapt to local conditions provide enormous social value to a national economy but solely bear the course of failure (and success). These entrepreneurs need to be compensated for their experimental nature through subsidization of exports and credit, temporary tariff protection, patent rewards, and marketing support. Without such incentives, entrepreneurs will be more apt to invest in historically profitable industries in the primary product sectors.[17]

As hinted earlier, related to coordination and information externalities is that trade liberalization and comparative advantage tends to produce static gains but make dynamic gains through technological change more elusive. The static models of the gains from the trade suggest that countries such as Brazil should dismantle its industrial sector in favor of specializing in soy and meat production, that India should de-emphasize services and heavy manufacturing in favor of textile and apparel specialization.[18] These models, if deployed twenty years ago would have told South Korea and China to focus on rice production. However, following the lead of Japan, the United States, and Europe before them, many nations in East Asia and Latin America fostered more diversified and higher value added sectors over time.[19] Thirty-five years ago if South Korea and China had relied on comparative advantage we might not be driving Kias and Hyundais, using Haier appliances or typing on Lenovo laptops.

In enabling the technological capacity of new industries, markets do not give the correct investment signals when there are high and uncertain learning costs and high levels of pecuniary

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[17] *See* HIRSCHMAN, *supra* note 3, at 183-201; ALEXANDER GERSCHENKRON, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE 127(1966); Krugman, *supra* note 3, at 44.
[18] Frank Ackerman & Kevin P. Gallagher, *The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models:A Critical Assessment*, INT'L J. OF POL. ECON. (*forthcoming* 2008); AGRICULTURE TRADE REFORM AND THE DOHA DEVELOPMENT AGENDA 1319 (Kym Anderson & William Martin eds., 2005).
[19] DANIEL OKIMOTO, BETWEEN MITI AND THE MARKET: JAPANESE INDUSTRIAL POLICY FOR HIGH TECHNOLOGY 51 (1989); CHANG, *supra* note 12, at 84.

externalities.[20] In other words, technological dynamism that leads to diversification is not guaranteed by market reforms alone. For many of the reasons described earlier: weak capital markets, restrictive intellectual property laws, lack of information, and poor coordination, imperfect competition and the need for scale economies, under-investment in technologically dynamic sectors can occur.[21] Historically, to correct for these market failures nations have encouraged joint venturing with technological transfer agreements with foreign firms to learn technological capabilities, in addition they have invested heavily in higher education and publicly funded research and development. What's more, nations have selectively loosened intellectual property rules to allow for learning and supported innovative firms through government procurement, export subsidies, subsidized capital, and tariff protection.[22]

Although mentioned in each of these previous examples, human capital formation is also essential for dynamic economic growth and diversification. Once again, private markets fall short of supplying human capital at a socially optimal level. There are numerous arguments why markets undersupply education and that governments should intervene to increase the supply of educated workers. Basic literacy and education has positive externalities such as improved health and better participation in democratic processes--in other words the social rate of return on education is higher than personal investment.[23] With respect to learning in private firms, firms

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[20] Pecuniary externalities affect third parties through price fluctuations but not necessarily through the misallocation of resources.
[21] Kenneth J..Arrow, *The Economic Implications of Learning by Doing*, 29(3) REV. OF ECON. STUD. 155, 155 (1962); R.R. Nelson & S. Winter, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 255 (1982); Sanjaya Lall, *Rethinking Industrial Strategy: The Role of the State in the Face of Globalization*, *in* PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND IFIS 59, 59 (Kevin P. Gallagher ed., 2005).
[22] AMSDEN, *supra* note 1, at 3-4; Lall, *supra* note 21, at 60-62.
[23] *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

may under-invest in the training of their workers because of fears of high labor turnover.[24] East Asian tigers—like developed countries before them—spent a great deal of effort providing education and training to their people. This was done by spending a significant amount of funds on education (including providing scholarships to obtain PhDs in developed countries), clustering schools in export processing zones, requiring that foreign firms hire nationals and train them on the job, and subsidizing training programs in domestic firms.[25] Table 1 exhibits an illustrative but far from exhaustive list of trade and industrial policies used by East Asian and other developing economies over a 40 year period and the market failures such policies address. It is this list of policies that will be expanded upon and analyzed in the following section.

Table 1. Tools for Correcting Market Failures[26]

Market Failure	Policy Instrument
Coordination Failures	Export subsidies Tariff sequencing Tax drawbacks Clustering Infrastructure provision
Information externalities	Administrative guidance Subsidized credit Tariff sequencing Subsidized entrepreneurship Selective permission for patents
Scale economies/technological dynamism	Tariff sequencing Technology transfer requirements Joint Ventures

[24] Dani Rodrik, *Conceptual Issues in the Design of Trade Policy for Industrialization*, 20(3) WORLD DEV'T 309, 309-320 (1992).
[25] LINSU KIM & RICHARD NELSON, TECHNOLOGY, LEARNING, AND INNOVATION: EXPERIENCES OF NEWLY INDUSTRIALIZING ECONOMIES 301 (2000); AMSDEN, *supra* note 1, at 214.
[26] Nagesh Kumar & Kevin P. Gallagher, *Relevance of 'Policy Space' for Development: Implications for Multilateral Trade Negotiations* 8 (Research and Information System for Developing Countries Discussion Paper # 120, March 2007).

	Public research and development Compulsory licensing Selective permission for patents Government procurement[27]
Human capital formation	Public education Employment of local personnel Movement of people

Getting the Political Economy Right

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

Table 2: Growth in GDP Per Capita for Selected Regions, 1960 to 2005[28]

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

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

[27] Although countries have used various controls over government procurement to promote local industry, those measures, for purposes of space and time, remain outside the scope of this paper.
[28] WORLD BANK, WORLD DEVELOPMENT INDICATORS 196-258 (2008).

general categories of policies.[29]

- **Targeted industrial policy** with reciprocal control mechanisms where nations selectively secluded certain industries where they wanted to gain dynamic comparative advantages;
- **Loose intellectual property rules** where nations encouraged learning from foreign nations through government R&D efforts and at times reverse engineering goods from foreign counterparts;
- **The movement of people across borders** for higher education and temporary work. The best students were sent to the US and Europe to earn degrees in science, mathematics, and technology then came home to work in targeted industries or government;
- **Investment in human capital and public infrastructure** where governments invested heavily in education and provided infrastructure such as roads, ports, and so forth.

There is considerable debate regarding the extent to which these policies were the key drivers of growth in some countries. Nevertheless, at this point there is widespread agreement that these policies did have *some* positive effect on economic performance. The debate now centers on what level of effect that was.[30] It is not the purpose of this paper to enter that debate. Nor is it the purpose of this paper to judge the value of those policies for development. Rather, based on the evidence that such policies have had some positive effect, this paper examines whether developing countries are still given (or keeping) the choice to deploy them under

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[29] *See, e.g.*, WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY, A WORLD BANK POLICY RESEARCH REPORT 1-26 (1993); Robert Wade, *'Is globalization reducing poverty and inequality?*, 32(4) WORLD DEV'T 567, 567 (2004); AMSDEN, *supra* note 1, at 196; KIM & NELSON, *supra* note 25, at 4 (for useful full-length treatments of development in this region and the use of state policy tools).
[30] World Bank 1993, *supra* note 29, at 9-26.

existing and proposed trade rules.

Whereas the East Asian nations—such as South Korea and Taiwan—managed their integration into the world economy through gradual liberalization and some degree of government involvement, nations in Latin American in the Caribbean (LAC) rapidly liberalized their economies in a short period of time—along the lines currently being advocated in the Doha Round. As we see in Table 2 for LAC, income growth since liberalization began in the 1980s has been barely one percent annually.

Many economists have expressed caution over advising other developing countries to follow the same path as East Asia.[31] First, governments can be pathetic in picking "winners" for industrial policy. Many governments have tried to adopt pro-active policies and have failed miserably—in other words meeting market failures with government action often leads to government failure. Governments have been criticized for not being able to pick winning sectors to focus on. Indeed, there are many examples of governments picking "losers". South Korea and Taiwan are often cited as success stories but Indonesia, Nigeria, and Brazil have had failures that have received relatively less attention in scholarly circles.[32] In addition, subsidization and government involvement has been shown to accentuate "rent-seeking" behavior that make it additionally difficult for developing country governments to let go of projects that aren't going well or that have already reached maturity.[33]

Market failures are not always easy to identify and once they are identified it isn't just a matter of pulling out a policy toolbox, grabbing a tool from one of these lists, and hammering

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[31] *See id.*; M. NOLAND & H. PACK, INDUSTRIAL POLICY IN AN ERA OF GLOBALIZATION: LESSONS FROM ASIA, 77-83 (2003).
[32] *See generally* J. BURTON, PICKING LOSERS…"? THE POLITICAL ECONOMY OF INDUSTRIAL POLICY (1983); PETER EVANS, EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION (1995).
[33] KRUEGER, ANN, THE POLITICAL ECONOMY OF TRADE PROTECTION 13 (1996).

away. Indeed, while there is a strong theoretical justification for pro-active government policy, development success takes much more than the proper rationale and proper policies. Development success stories from the twentieth century all struck a unique blend between state and markets—they got the *political economy* of industrialization right.

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

In the presence of market failures by definition it is hard for the private sector to interpret the signals and trends it faces in the economy. Well, if firms right in the middle of the marketplace can't always make the best decisions about products and processes what makes us think that governments can make better decisions?[34]

To circumvent the "picking winners" problem, political economists have shown that successful industrializers have had states that were "embedded" in the private sector while maintaining "autonomy" from sectional elite interests seeking rents. State agencies that are charged with correcting market failures have to maintain constant communication and input with the private sector.[35] Such public-private partnerships help both the private and public sectors "discover" what the most pertinent market failures and other impediments to industrial development are in an economy, and what assets there are in the economy that can be built upon,

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[34] BURTON, *supra* note 32, at 7.
[35] EVANS, *supra* note 32, at 15.

and to pick activities that will have the largest economy-wide effects.[36]

Having a good toolkit and embedded autonomy is still not enough. In fact, public-private partnerships could become marriages of corruption and rent-seeking. Successful industrial policy has also tamed the tendency of rent seeking. In order for this to work industrial policy has to be coupled with good deal of discipline and accountability for both private actors and the state. Alice Amsden has referred to the need for "reciprocal control mechanisms."[37] A control mechanism is "a set of institutions that disciplines economic behavior based on a feedback of information that has been sensed and assessed."[38] For the East Asian success stories, the key principle behind their use of control mechanisms was "reciprocity":

> Reciprocity disciplined subsidy recipients and thereby minimized government failures. Subsidies were allocated to make manufacturing profitable—to convert moneylenders into financiers and importers into industrialists—but did not become giveaways. Recipients of subsidies were subjected to monitorable performance standards that were redistributive in nature and result-oriented. The reciprocal control mechanism thus transformed the inefficiency and venality associated with government intervention into collective good.[39]

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

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[36] Dani Rodrik, *Normalizing Industrial Policy* 5-8 (John F Kennedy Sch. of Gov't, Harvard Univ., Sept. 2007), available at http://ksghome.harvard.edu/~drodrik/Industrial%20Policy%20_Growth%20Commission_.pdf.
[37] AMSDEN, *supra* note 1, at 8.
[38] Amsden, Alice, *Promoting Industry under WTO Law*, *in* IN PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND IFIS 221, 229 (Kevin P. Gallagher ed., 2005).
[39] *Id*. at 222.

understand the extent to which such policy space exists today.

Testing for Policy Space in the WTO and Beyond.

Of the historical tools for diversity and development, which ones remain available under the new global trading regime? Do bilateral and regional agreements further limit policy space for development? This paper examines four trade-related areas (goods, services, investment and intellectual property) across thirteen agreements. We compare four US agreements (the North American, Dominican Republic-Central American, US-Chile, and US-Singapore Free Trade Agreements), four EU agreements (the EU-Chile, EU- Mexico, EU-Tunisia, and EU-South Africa agreements) and four South-South agreements (the Southern Cone Common Market, the Andean Community, the China Chile agreements and the South Asian Free Trade Agreement) with the WTO trade disciplines to answer this question: to what extent do the various regimes constrain policy space for member nations? In undertaking this analysis, we'll be able to see if there is convergence among the bilateral and regional agreements.[40]

Table 3. Illustrative Tool Box Flexibilities

Policy Instrument	**WTO and Associated Agreements[41]**	**US Agreements**	**EU Agreements**	**South-South Agreements[42]**
Tariff sequencing	√	x	x	√
Tax export incentives	√	x	√	√
Quantitative restrictions/import	x	x	x	x

[40] As a caveat before going forward, the agreements within each trade regime are by no means homogenous. Within each of the principal trade areas, the regimes contain some measure of variation. This paper attempts to draw some generalizations about disciplines under each trade regime. Where the agreements significantly depart from each other, however, the difference is noted.
[41] As with all measures under the WTO, even permitted policies are subject to the two pillars to the WTO: non-discrimination and national treatment. General Agreement on Tariffs and Trade, Art. I, III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]
[42] These South-South arrangements are by far the least uniform. Thus, the designations in this column represent generalizations from the later analysis.

licensing				
Safeguards for injurious imports[43]	√	√	√	√
Control over sensitive services sectors[44]	√	√	√	√
Services quotas	x	x	x	√
Duty of establishment	√	x	√	√
Regulation of services[45]	√	√	√	√
Movement of natural persons	√	x	√	√
Public education	√	√	√	√
Local labor requirements	√	x	√	√
Technology transfer	√	x	√	√
Domestic content[46]	x	x	x	√
Foreign exchange restrictions	x	x	x	√
Infrastructure provision	√	√	√	√
Administrative guidance	√	√	√	√
Subsidized credit/entrepreneurship	√	√	√	√
Early-working permission	√	x	√	√
High disclosure requirements	√	x	√	√
Local production requirements	√	x	√	√
Parallel imports	√	x	√[47]	√

Table 3 expands the illustrative list of development policy tools in Table 1 in the first column and then provides an overview of whether such policies are permitted under various trading arrangements. A "√" signifies that yes the measure is permitted; an "x" implies that a

[43] Although safeguards are permitted, to some degree, under each agreement, US and S-S agreements impose more stringent requirements on safeguarding nations than the WTO, while the EU agreements contain some more and some less stringent rules.

[44] Some amount of control is permitted under all agreements, however the US agreements are the only ones to employ a negative list approach (see *infra* section on Services Trade).

[45] Here, the key difference is whether the balancing test is self-enforcing, as it is under both US and EU agreements, or dependent on further rulemaking, as in the case of the WTO.

[46] This and other policies may be permitted despite violating certain WTO rules if they pass as legitimate public welfare regulations.

[47] Although the EU allows some parallel imports, the rules of exhaustion are regional and thus slightly more difficult to comply with than those in the WTO.

measure is not permitted. We go into this table in great detail below, but what stands out from this partial examination is that there is great variation in the amount of policy space available for developing countries. The S-S and US agreements represent opposite ends of the spectrum, whereas the WTO and EU agreements occupy the middle ground.

An inherent flexibility under all trade regimes lies in the dispute settlement system. There exists no overarching global trade police to punish countries for violations. Rather, trade partners must bring suit against each other to enforce the rules of the agreement – much like a contract between two individuals. Within the WTO, the flexibility is clear: a country may not bring suit under the Dispute Settlement Understanding (DSU) unless the benefits inured to them under the agreement have been "nullified or impaired" by the other country's actions.[48] Even under the EU and US models, however, countries generally will not bring a complaint against a trade partner absent some financial injury, thus leaving very small or poor countries the space to do almost anything permitted by domestic law.[49] Of greater interest here, however, are the true flexibilities in these FTAs—providing countries with legal room to design development policy.

Trade Coverage

Examining trade area coverage provides an initial glance into the trade agreement trends that will be discussed more fully in the following sections. Each trade agreement is unique in its structure and the provisions it contains because each agreement derives from unique negotiations between trading partners. Among the agreements, trade coverage varies widely: from basic

[48] Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, (1994) [hereinafter DSU].

[49] *See, e.g.*, Agreement establishing an association between the European Community and its Member States, of one part, and the Republic of Chile, of the other part Art. 184, Chile-E.U., Oct. 3, 2002, available at http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf [hereinafter EU-Chile]; Decision No 2/2000 of the EC-Mexcio Joint Council of 23 March 2000 Title VI, 2000 O. J. (L157) 10, 25 (EC) [hereinafter EU-Mexico Decision 2/2000].

agreements effectively regulating only goods trade[50] to complex agreements that cover trade in goods, services, investment and intellectual property, as well as technical barriers to trade, sanitary and phyto-sanitary measures,[51] labor measures and environmental protection.[52]

US agreements contain, by far, the most comprehensive and uniform trade disciplines. Each US agreement governs goods trade, rules of origin, customs regulation, technical barriers to trade, trade remedies, government procurement, investment, cross border trade in services, financial services, telecommunications, intellectual property, transparency and dispute settlement.[53] At least three of the four herein studied contain additional provisions on sanitary and phyto-sanitary measures, temporary entry of business persons, electronic commerce, competition policy, labor, and the environment. Where trade coverage is concerned, EU-Chile and EU-Mexico contain many of the same trade areas as US agreements.[54] EU-South Africa and EU-Tunisia, on the other hand, begin to resemble much more closely the WTO structure.[55]

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[50] *See, e.g.*, Free Trade Agreement Between The Government of the People's Republic of China and the Government of the Republic of Chile, China-Chile, Nov. 18, 2005, available at http://www.sice.oas.org/Trade/CHL_CHN/CHL_CHN_e/text_e.pdf [hereinafter China-Chile].
[51] These include measures pertaining to the health of plant and animal life.
[52] *See, e.g.*, Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, Hein's No. KAV 7157 [hereinafter DR-CAFTA].
[53] NAFTA Secretariat, *North American Free Trade Agreement: Table of Contents*, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited July 23, 2008); Office of the United States Trade Representative [hereinafter USTR], *CAFTA-DR Final Text*, http://ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited July 23, 2008); USTR, *Chile FTA Final Text*, http://ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (last visited July 23, 2008); United States-Singapore Free Trade Agreement, Jan. 15, 2003, T.I.A.S. No. 04-36, available at http://ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf [hereinafter US-Singapore].
[54] EU-Chile (including Annexes), *supra* note 49; EU-Mexico Decision 2/2000, *supra* note 49; Decision No 2/2001 of the EC-Mexico Joint Council of 27 February 2001, 2001 O. J. (L70) 7 (EC) [hereinafter EU-Mexico Decision 2/2001].
[55] *Compare* World Trade Organization, *WTO Legal Texts*, http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited July 23, 2008) *with* AGREEMENT on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, E.U.-S. Afr., 1999 O.J. (L311) 3 [hereinafter EU-S.A.]; Euro-Mediterranean Agreement establishing an association between the

Neither agreement covers telecommunications, financial services, temporary entry of business persons, or electronic commerce. Nor does either agreement regulate labor and environmental provisions. A closer look at the substantive provisions (discussed in the remainder of the paper) reveals that trade area coverage does not always signify heightened trade commitments. The South-South agreements look even more skeletal in comparison with the US regimes. The China-Chile Free Trade Agreement (China-Chile) and the South Asian Free Trade Agreement (SAFTA), effectively contain commitments only in the area of goods trade. [56] The Southern Cone Common Market (MERCOSUR) and the Andean Community (CAN) cover as many trade areas as some EU agreements, but, as hinted above, do not necessarily mirror the EU commitments.[57] Examining trade coverage begins to reveal a pattern among FTAs. While S-S

European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, E.U.-Tunis., 1998 O.J. (L097) 2 (EC) [hereinafter EU-Tunisia].

[56] China-Chile, *supra* note 50 (including sections on rules of origin and sanitary and phytosanitary measures, safeguards, technical barriers to trade, and dispute settlement, but omitting commitments in services trade, intellectual property, and investment disciplines); Agreement on South Asian Free Trade Area, Jan. 6, 2004, South Asian Association for Regional Cooperation, available at http://www.saarc-sec.org/data/agenda/economic/safta/SAFTA%20AGREEMENT.pdf [hereinafter SAFTA].

[57] *See, e.g.*, Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay [hereinafter Treaty of Asunción], Annex I, March 26, 1991, available at http://www.sice.oas.org/trade/mrcsr/mrcsr7.asp [hereinafter MERCOSUR Goods]; Treaty of Asunción, Annex IV, March 26, 1991, available at http://www.sice.oas.org/trade/mrcsr/mrcsr11.asp [hereinafter MERCOSUR Safeguards]; Protocol on Harmonization of Norms on Intellectual Property in MERCOSUR in Matters of Trademarks, Indications of Source and Appellations of Origin 460, Aug. 5, 1995, 2145 U.N.T.S. A-37341 [hereinafter MERCOSUR IPRs]; Montevideo Protocol on Trade in Services of MERCOSUR, Dec. 15, 1997, available at http://www.cvm.gov.br/port/relinter/ingles/mercosul/montv-e.asp [hereinafter MERCOSUR Services]; Protocol of Colonia for the Promotion and Reciprocal Protection Of Investments in Mercosur, Jan. 17, 1994, available at http://www.cvm.gov.br/port/relinter/ingles/mercosul/coloni-e.asp [hereinafter MERCOSUR Investment]; Commission of the Andean Community, *Decision 563: Official Codified Text of the Andean Subregional Integration Agreement*, June 25, 2003, available at http://www.comunidadandina.org/ingles/normativa/D563e.htm [hereinafter Cartagena Agreement]; Commission of the Andean Community, *Decision 486: Common Intellectual Property Regime*, Sept. 14, 2000, available at http://www.comunidadandina.org/ingles/normativa/D486e.htm [hereinafter CAN IPRs]; Commission of the Andean Community, *Decision 439: General Framework of Principles and Rules for Liberalizating the Trade in Services in the Andean Community*, June 11, 1998, available at http://www.comunidadandina.org/ingles/normativa/D439e.htm [hereinafter CAN Services]; Commission of the Andean Community, *Decisión 330: Eliminización de Subsidios y Armonización de Incentivos a las Exportaciones Intrasubregionales*, Oct. 22, 1992, available at http://www.comunidadandina.org/normativa/dec/d330.HTM [hereinafter CAN Subsidies]; Commission of the Andean Community, *Decision 292: Régimen Uniforma para Empresas Multinacionales Andinas*, March 22, 1991,

agreements tend to exploit the policy space available under the WTO, US agreements occupy the other end of the spectrum with broad and deep coverage. Meanwhile, the WTO and EU agreements take up the middle ground. In the next pages, the trend emerges more forcefully as we explore the specific trade areas of goods, services, investment, and intellectual property rights.

Goods Trade Policies

Trade in goods constitutes the oldest arena of international trade cooperation and discipline. Within the rules, however, countries have exploited every flexibility they could find to promote growth and development. This section reviews four primary policies affecting goods trade: tariff sequencing, incentives for export, non-tariff barriers, and safeguards. Table 4 provides a summary of our analysis. We show that, in the area of goods trade, N-S agreements have tended to converge, imposing harsher disciplines on policy makers than those imposed under the WTO. However, in some key areas, agreements with the European Union more closely resemble the WTO disciplines than those of US agreements – hinting that two different North-South models may emerge.

Table 4. Goods Checklist

Policy Instrument	WTO and Associated Agreements	US Agreements	EU Agreements
Tariff Sequencing	√	x	x
Tax Drawbacks/Deferrals and EPZs	√	x	√
Quantitative Restrictions/Licensing	x	x	x

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available at http://www.comunidadandina.org/normativa/dec/d292.HTM [hereinafter CAN Andean Business]; Commission of the Andean Community, *Decision 291: Régimen Común de Tratamiento a los Capitales Extranjeros y sobre Marcas, Patentes, Licencias y Regalías*, March 22, 1991, available at http://www.comunidadandina.org/normativa/dec/d291.HTM [hereinafter CAN Foreign Investment].

Safeguards for injurious imports[58]	√	√	√
Safeguards for shortages[59]	√	√	√
Safeguards for balance of payments	√	x	√

Tariff sequencing Tariff barriers have long been the preferred trade barriers under the WTO and its predecessor and underlying agreement, the General Agreement on Tariffs and Trade (GATT) because they are easy to measure, transparent to apply, and straightforward to liberalize progressively over time. Historically, countries have raised and lowered tariffs in accordance with the perceived needs or demands of domestic industry. By raising tariffs on certain manufactured goods and lowering them on inputs for those goods, for example, some countries have encouraged domestic manufacturers without exposing them to global competition before they're ready.[60]

Under the WTO and its associated agreements, most countries initially bind rates significantly higher than their applied rates.[61] This discrepancy gives them the legal right to raise and lower tariff rates at various times to promote industrial development, subject, of course, to the pillars of the WTO: national treatment and most favored nation (MFN) treatment.

In regulating tariff rates, US and EU agreements clearly converge. Under both EU and

[58] The degree of procedural requirements varies greatly between agreements. *See supra* note 54.
[59] Among US and EU disciplines, the rules are not identical across agreements.
[60] CHANG, *supra* note 12, at 84.
[61] *See, e.g.*, WTO, *Chile: Tariff Profile*, available at http://www.wto.org/english/tratop_e/tariffs_e/tariff_profiles_2006_e/chl_e.pdf (May 15, 2006). Take, for example, Chile's tariff profile as provided by the WTO. While the simple average bound is 25.1%, the simple average applied is much lower at 6%. This trend repeats for the countries in this study. WTO, *Current Situations of Schedules of WTO Members* [hereinafter WTO Current Schedules], G/MA/W/23/Rev.3, available at http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm (May 15, 2006).

US treaties, countries generally bind tariff rates at or below[62] the current applied rates – giving little or no room for adjustments upward. Table 5 points out the divergence between tariffs bound under the WTO and those under a North-South regional or bilateral agreement. The table shows that tariff bindings under the regional trade agreements, are largely based on the applied rates in the case of photographic paper in rolls wider than 610 mm.[63] The evidence suggests, then, that countries negotiating with the US or EU bilaterally may have less bargaining power than they do in multilateral negotiations.

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[62] EU agreements also allow for varying transition times to get to the base rate stated in the agreement. *See, e.g.,* EU-Tunisia Schedule in *WTO Current Schedules*, *supra* note 61.

[63] This trend repeats itself over and over again in the countries' individual tariff schedules. Taking a simple average of the bound rates under the RTAs and comparing it to the simple average of the MFN applied rate across all products would prove this conclusively. Unfortunately, we were unable to find a schedules document that would export to a spreadsheet program and take such averages.

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

Country/Agreement	WTO binding[64]	RTA binding	Alternate RTA binding[65]	MFN applied rate (avg)[66]
Chile[67]	25.0	6.0	6.0	6.0
Mexico[68]	35.0	0.0[69]	0.0	11.5
Costa Rica: DR-CAFTA[70]	45.0	10.0	N/A	9.0
Nicaragua: DR-CAFTA[71]	40.0	5.0	N/A	10.0
Honduras: DR-CAFTA[72]	35.0	10.0	N/A	10.0
Guatemala: DR-CAFTA[73]	45.0	10.0	N/A	10.0
Dominican Republic: DR-CAFTA[74]	35.0	8.0	N/A	8.0
US-Singapore[75]	6.5	0.0	N/A	0.0
EU-Tunisia[76]	38.0	0.0	N/A	15.0
EU-South Africa[77]	15.0	0.0	N/A	5.0

Incentives for export (to maintain trade balance) Export incentives constitute another set of policies commonly employed for purposes of development. A country may set up a duty

[64] WTO Current Schedules, *supra* note 61.
[65] This column applies only Chile and Mexico and represents their commitments under their US agreements.
[66] *Id.*
[67] EU-Chile, *supra* note 49, at Annex II, 81; Chile-United States Free Trade Agreement, U.S.-Chile, Annex 3.3, 46, June 6, 2003, available at http://ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file510_3996.pdf.
[68] EU-Mexico Decision 2/2000, *supra* note 49, at Annex II, 153; North American Free Trade Agreement, U.S.-Can.-Mex., Annex 302.2 Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (marking all goods for tariff elimination by January 1, 2008).
[69] This represents a bound tariff after progressive reduction over seven years.
[70] DR-CAFTA, *supra* note 52, at Annex 3.3 (Tariff Schedule of Costa Rica), 55.
[71] DR-CAFTA, *supra* note 52, at Annex 3.3 (Tariff Schedule of Nicaragua), 54.
[72] DR-CAFTA, *supra* note 52, at Annex 3.3 (Tariff Schedule of Honduras), 63.
[73] DR-CAFTA, *supra* note 52, at Annex 3.3 (Tariff Schedule of Guatemala), 55.
[74] DR-CAFTA, *supra* note 52, at Annex 3.3 (Tariff Schedule of the Dominican Republic), 65.
[75] US-Singapore, *supra* note 53, at Annex 2C, 101. To many, Singapore no longer counts as a developing country, though it was once a Newly Industrializing Country that employed many of these policies. We chose the US-Singapore agreement to provide some geographical variation and contrast to the Latin American agreements with the US.
[76] The FTA binding represents a bound tariff after progressive reduction over five years. EU-Tunisia, *supra* note 55, at art. 11, Annex 3.
[77] The FTA binding represents a bound tariff after progressive reduction over five years. EU-S.A., *supra* note 55, at 110.

drawback or tax deferral system for inputs to reward companies or industries that export a certain percentage of their products. Sometimes countries set up these programs within geographical areas called Export Processing Zones (EPZs). Export incentives and processing zones encourage domestic industry to compete on the global scale and aid in maintaining a healthy trade balance for the country. Unlike tariff sequencing, however, disciplines on export incentives hint at the emergence of two different bilateral/regional trade models. While the EU agreements generally take a more permissive stance toward export incentives, US agreements almost universally prohibit, or at least restrict, them.

Since the GATT "does 'not consider duty and indirect tax exemptions or drawbacks for inputs used for export production at the final stages of fabrication and at the earlier stages as export subsidies,' " it permits countries to impose duty drawbacks or deferrals on condition of export.[78] EU agreements, like the GATT, do not directly address the use of duty drawbacks, tax deferrals or EPZs. Both EU-Chile and EU-Mexico (collectively, the Latin American agreements) prohibit the use of taxation to protect domestic industry which could potentially restrict tax-based export incentives.[79] The agreements with Tunisia and South Africa (collectively, the African agreements), on the other hand, implicitly permit drawbacks by

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[78] Yung Whee Rhee, *Instruments for Export Policy and Administration: Lessons from the East Asian Experience* 79 (World Bank Staff, Working Paper No. 725, 1985) quoting BELA BALASSA, DEVELOPMENT STRATEGIES IN SEMI-INDUSTRIAL ECONOMIES 72 (1982). As Rhee implies export subsidies, unlike duty drawbacks and deferrals, are categorically prohibited under each of these regimes. Agreement on Subsidies and Countervailing Measures, Art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994); DR-CAFTA *supra* note 52 at Art. 3.14; US-Chile, *supra* note 67, at Art. 3.16; NAFTA *supra* note 67, at Art. 705. Mexico's *maquiladora* program provides a ready example of such a system. Under NAFTA, however, "*maquila* firms were granted a seven-year phase-in period during which they continued to enjoy duty-free importation benefits." This ended in January, 2001, when NAFTA Art. 303 entered into effect. John Sargent & Linda Matthews, *Combining Export Processing Zones and Regional Free Trade Agreements: Lessons From the Mexican Experience*, 29(10) WORLD DEVELOPMENT 1739, 1741 (2001).

[79] EU-Chile *supra* note 49, at Art. 63; EU-Mexico Decision 2/2000 *supra* note 49, at Art. 13.

limiting the amounts to that of the original tax.[80]

By contrast, US almost universally prohibit duty drawback or deferrals on condition of certain performance requirements.[81] NAFTA prohibits drawbacks and deferrals provided on condition that goods are "subsequently exported to the territory of another Party, [] used as material in the production of another good that is subsequently exported . . ., or [] substituted by an identical or similar good used as a material in the production of another good that is subsequently exported . . ." in a specified amount.[82] Parties to NAFTA also must not "refund, waive or reduce" specified non-tax duties on condition of export.[83] US-Chile and DR-CAFTA, differ slightly, in that they proscribe parties from adopting new customs duties waivers, or continuing an existing waiver conditioned on performance requirements. "Performance requirements" under these agreements include export level or percentage requirements, domestic product substitution requirements, domestic goods preference, domestic content requirements, and foreign exchange restrictions.[84] Thus, US agreements represent a separate model from that of the EU (drawn from the GATT) that more tightly constrains policy-makers.[85]

Non-tariff barriers and restrictions Unlike tariffs, non-tariff barriers (NTBs) have been

[80] EU-Tunisia *supra* note 55, at Art. 22; EU-S.A. *supra* note 55, at Art. 21. This provisions seems to be aimed at prevent hidden export subsidies – payments called "drawbacks" or "deferrals" by the government, but which actually exceed the amount of the tax.
[81] The one exception here is US-Singapore. NAFTA, *supra* note 67, at Art. 303; US-Chile, *supra* note 67, at Art. 3.8; DR-CAFTA, *supra* note 52, at Art. 3.4.
[82] NAFTA, *supra* note 67, at Art. 303.
[83] *Id.*
[84] This does not include conditions, however, that the good be subsequently exported and other such rules as required under NAFTA Art. 303.1. US-Chile, *supra* note 67, at Art. 3.24; DR-CAFTA, *supra* note 52, at Art. 3.31. This does not include conditions, however, that the good be subsequently exported and other such rules as required under NAFTA Art. 303.1
[85] According to Sargent and Matthews a second aspect of bilateral agreements may lower the ability of a country to create export incentives. Rules of origin, present in all US agreements and most EU agreements may lower the ability of export oriented firms to compete with local firms for intra-regional trade since export firms have the propensity to have non-regional inputs. Sargent & Matthews, *supra* note 78, at 1741. This negative externality of the rules of origin may have a lesser effect within EU arrangements since the EU encompasses many countries – creating more regional options for acquiring inputs.

strongly disfavored under almost all modern international trading regimes. Some common NTBs include quantitative restrictions (quotas), import licensing, and import and export price requirements. GATT Article XI prohibits both "instituting" and "maintaining" quantitative restrictions except to prevent or relieve shortages of food or essential products, to apply local standards for "classification, grading or marketing of commodities in international trade," or to enforce certain measures governing the domestic production of agricultural or fisheries products.[86] WTO disciplines also make allowances for quotas in the case of a country's balance of payments difficulties.[87] The WTO treats import licenses as quantitative restrictions, and has a separate annex governing the use of licenses in cases where they are permitted.[88] Finally, Article XI mentions "other measures" that act as a prohibition or restriction on import – potentially leaving room for disputes about non-quota, non-license measures.[89]

Here again, US and EU agreements diverge enough to hint that two different models of NTB disciplines are emerging. EU agreements contain substantially WTO-equivalent language. The more comprehensive agreements, such as EU-Chile and EU-Mexico, prohibit quotas, import licensing and "other measures" just as in GATT Article XI.[90] The African agreements, on the other hand, prohibit only quotas explicitly.[91]

US agreements also contain WTO-equivalent language, but with an added prohibition on import and export price requirements. Both US-Chile and DR-CAFTA go further to prohibit import licenses conditioned on performance requirements while also forbidding voluntary export

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[86] GATT, *supra note* 41, at Art. XI.
[87] *Id.* at Art. XII. *See infra* Section IV.B.4. (discussing the availability of safeguard measures).
[88] *See* Agreement on Import Licensing Procedures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter WTO Import Licensing].
[89] GATT, *supra* note 41, at Art. XI.
[90] EU-Chile, *supra* note 49, at Art. 76; EU-Mexico Decision 2/2000, *supra* note 49, at Art. 12.
[91] EU-S.A., *supra* note 55, at Art. 19; EU-Tunisia, *supra* note 55, at Art. 19.

restraints.[92] Although slight, the trend toward additional constraints on policy flexibility in US agreements is present within the disciplines against non-tariff measures.

Safeguards A final set of goods trade policies aimed at development, safeguards have long been employed by countries facing sudden injurious levels of imports, balance of payments difficulties, and critical food shortages. GATT Articles XII and XIX place some constraints on safeguards by subjecting them to detailed procedural requirements. Safeguard measures under the WTO may include initiating prohibitions or restrictions on imports, suspending scheduled tariff concessions or raising tariff rates.[93] The Agreement on Safeguards, further permits that they be maintained for a maximum of four years with a maximum extension of four additional years.[94] First codified within the global trading regime, bilateral and regional agreements have adopted safeguard provisions with similar conditions. EU and US agreements differ, however, in both their treatment of quantitative restrictions and the availability of transitional safeguards.

Like the WTO, EU agreements permit safeguards for injurious imports, balance of payments difficulties and shortages.[95] In the Latin American agreements, the EU mirrors GATT Article XII, permitting suspension of tariff concessions, increasing tariff rates and imposing quantitative restrictions as safeguards.[96] At the same time, the agreements are careful to ensure that safeguard measures do not "exceed what is necessary to remedy the difficulties which have

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[92] US-Chile, *supra* note 67, at Art. 3.11(2); DR-CAFTA, *supra* note 52, at Art. 3.8(2). DR-CAFTA also expressly incorporates the WTO Agreement on Import Licensing, and imposes an additional notification requirement. *Id.* at Art. 3.9

[93] GATT, *supra* note 41, at Arts. XII:1, XIX:1(a).

[94] Agreement on Safeguards, Art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter WTO Safeguards].

[95] The Latin American agreements allow safeguards in all three of these cases. EU-Chile, *supra* note 49, at Arts. 92, 93, 195; EU-Mexico Decision 2/2000, *supra* note 49, at Arts. 15, 16, 21. The African agreements, however circumscribe the application of safeguards somewhat more. EU-Tunisia, *supra* note 55, at Arts. 25-26 (excluding express safeguards for balance of payments); EU-S.A., *supra* note 55, at Arts. 24, 26 (no allowance for goods trade safeguards for balance of payments difficulties or shortages).

[96] EU-Chile, *supra* note 49, at Art. 92; EU-Mexico Decision 2/2000, *supra* note 49, at Art. 15.

arisen,"[97] and they give priority "to those [measures] which least disturb the functioning of" the agreement as a whole.[98] Also, while the EU-Chile agreement constrains safeguard use to situations where the injured Member has a "substantial interest" in the injured industry,[99] other agreements seem to broaden the scope of the WTO rules and allow safeguards even to protect against "serious deterioration of economic situation."[100] The African agreements also permit transitional safeguards, which are more lenient than others and may be imposed solely to protect infant industry.[101]

US agreements, on the other hand, permit safeguard measures to protect against injurious import levels as well as to protect against balance of payments difficulties.[102] Safeguard measures may include suspending concessions or raising duties *but not* imposing quantitative restrictions.[103] For safeguards imposed for more than a year, with the exception of NAFTA, the agreements impose mandatory progressive elimination. Furthermore, US agreements require that, in the case of injury by imports, the imports not only *cause serious injury or threat thereof* (GATT language), but that they be the *substantial* cause of that injury – a higher legal standard.[104] Thus, once more, the US model seems to place greater constraints on policy-makers

[97] *Id.*
[98] The legal standard imposed varies among EU agreements. While the EU-Chile agreement constrains safeguard use to situations where the injured Member has a "substantial interest" in the injured industry, other agreements seem to broaden the scope of the WTO rules and allow safeguards even to protect against "serious deterioration of economic situation." EU-Chile, supra note 49, at Art. 92; EU-Tunisia, *supra* note 55, at Arts. 25, 27.
[99] EU-Chile, *supra* note 49, at Art. 92.
[100] EU-Tunisia, *supra* note 55, at Art. 25.
[101] EU-Tunisia, *supra* note 55, at Art. 14; EU-S.A., *supra* note 55, at Art. 25.
[102] Since the agreements mention nothing about shortages, safeguards to protect against them is presumed prohibited.
[103] US-Singapore, *supra* note 53, at Art. 7.1; US-Chile, *supra* note 67, at Art. 8.1; DR-CAFTA, *supra* note 52, at Art. 8.1; NAFTA, *supra* note 67, at Art. 801.
[104] US-Singapore, *supra* note 53, at Art. 7.1; US-Chile, *supra* note 67, at Art. 8.1; DR-CAFTA, *supra* note 52, at Art. 8.1; NAFTA, *supra* note 67, at Art. 801. The only US agreement to take special consideration of developing countries, DR-CAFTA Art. 8.1(4) places limitations on imposing safeguards against developing countries.

aiming to diversify and develop.

Bilateral models and south-south responses Each of these trade regimes have tied policy makers' hands in different ways and to different extents. The above examples demonstrate conclusively that the global trading regime under the WTO and its associated agreements have, thus far, preserved more policy space in goods trade for developing nations than have most bilateral and regional arrangements – in particular those with the global north. Taking the analysis further, however, shows that, rather than converge, US and EU agreements have formed two distinct models of trade discipline – the latter allowing more flexibility in public policy than the former. In addition to these two models, developing countries have responded to their desire for public policy space by joining together to form more development-oriented trading blocs. Several arrangements studied here offer examples of provisions that leave open even more policy options for diversification and development.

To allow tariff sequencing, both the South Asia Free Trade Agreement (SAFTA) and the Southern Cone Common Market (MERCOSUR) provide for "sensitive lists" or wholesale exceptions to the general liberalization program.[105] Under SAFTA, even quantitative restrictions need not be eliminated for products on the "sensitive lists".[106] SAFTA also recognizes the special needs of lesser developed countries, allowing "greater flexibility . . . in continuation of quantitative and other restrictions provisionally and without discrimination in critical circumstances by the Least Developed Contracting States."[107] Furthermore, in order to promote exports, the S-S arrangements often do not bind party-states to avoid tax drawback or deferral programs. In fact, in the China-Chile Agreement, Article 101 acts as a general clause exempting

[105] SAFTA, *supra* note 56, at Art. 7.3; MERCOSUR Goods, *supra* note 57, at Art. 6
[106] SAFTA, *supra* note 56, at Art. 7.5.
[107] *Id.* at Art. 11(b).

all tax issues from coverage by the agreement leaves the contracting states plenty of freedom to use tax incentives for industrial and other development.[108]

Notably, these agreements fairly tightly constrain the use of safeguards against fellow developing states. The Andean Community (CAN) permits safeguards for injurious imports only when the Trade Liberalization Program causes or threatens "serious economic damage" – but prohibited as against certain products.[109] The CAN General Secretariat acts as a gatekeeper, regulating the use of safeguards.[110] MERCOSUR allows them for injurious imports "only in exceptional cases" and fails to mention safeguards for balance of payments or critical shortages.[111] SAFTA permits them (except for shortages) but contains a special consideration for Lesser Developed Countries, limiting safeguards against them.[112] This provision may hold the key to why south-south arrangements seem to limit safeguard clauses – largely because safeguards would allow more advanced members to impose safeguards on the imports of their lesser developed counterparts.

Trade in goods has ceased to be the most important area of trade regulation, however. Global trade disciplines have increased in scope in the past 15 years to impose constraints on services trade regulation, treatment of foreign investment, and intellectual property protection, among others. The following sections explore these trade-related policy areas and the extent to which trade agreements impact policymakers' decisions today.

Trade in Services

Since the Uruguay Round, global trade in services has increased drastically both in

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[108] China-Chile, *supra* note 50, at Art. 101.
[109] Cartagena Agreement, *supra* note 50, at Arts. 96, 99.
[110] *Id.* at Arts. 85, 95.
[111] MERCOSUR Safeguards, *supra* note 57, at Art. 1.
[112] SAFTA, *supra* note 56, at Art. 16.8.

quantity and importance. Some of the fastest growing sectors, like computer-related services, legal, advertising and technical service jobs, other business activities, and research and development grew between 70 and 250 percent from 1994 to 2004. Of 54 bilateral and regional agreements with services trade provisions, only five predate the Uruguay round.[113] Prior to the Uruguay Round, countries were able to retain control over sensitive sectors, impose quota equivalents for services, require joint ventures from foreign service suppliers, control the establishment of foreign service suppliers, impose safeguards, and employ domestic regulation to control the impact of the services trade.

Today, however, the new global trading regime and bilateral and regional agreements circumscribe their efforts to varying degrees. In many ways, disciplines over trade in services are more uniform among trade regimes than are other areas of trade. Table 6 provides a general picture of where the three primary regimes studied here converge and diverge. The following discussion explains the practical constraints that services agreements place on developing country governments, and demonstrates to what extent two different models of bilateral or regional agreements may emerge.

Table 6. Services Checklist

Policy Instrument	WTO and Associated Agreements	US Agreements	EU Agreements
Maintaining control over sensitive sectors[114]	√	√	√
Services Quotas and Restrictions	x	x	x

[113] Oshani Perera, *The Globalisation of Services and its Implications for Sustainable Development: A Preliminary Discussion Document* 3 (International Institute for Sustainable Development, 2007).
[114] While some amount of control is permitted under all agreements, US agreements employ a negative list rather than the positive list approach of the GATS and EU agreements.

Organization type requirements	x	x	x
Duty of establishment	√	x	√
Withholding right of establishment	√	x	x[115]
Safeguards	√	x	x
Freedom to regulate foreign service supply[116]	√	√	√
Movement of natural persons	√	x	√

Retaining control over sensitive sectors Many countries have desired to maintain control over certain sectors of their services economy. These sectors may include "essential services, network infrastructure services, and financial services."[117] Theoretically, countries have broad capacity to maintain control over sensitive sectors throughout the negotiation process. The most significant difference between the agreements, however, among regimes lies in the method by which sectors are bound.

The multilateral trading system adopts what has been called a "positive-list approach," which means that protection is the rule rather than the exception.[118] Thus, unless the country wants a sector on the list, it can remain unbound. The WTO's General Agreement on Trade in Services (GATS) Articles IV and XIX also make special allowances for lesser developed countries (LDCs), permitting them to liberalize later.[119] The GATS even defines "public

[115] Here, the EU agreements could be evolving to look more like US agreements but the rules are not consistent across the four treaties.
[116] The difference here is that the balancing test for regulations is self-enforcing under the EU and US agreements, while enforcement under the WTO requires further rulemaking.
[117] ActionAid, Christian Aid & Oxfam, *The EU's Approach to Free Trade Agreements: Services* 2, EU FTA MANUAL, BRIEFING 4 (Feb. 2008), available at http://www.oxfam.org.uk/resources/policy/trade/downloads/fta4_services.pdf [hereinafter Oxfam Services].
[118] Mario Marconini, *Regional Trade Agreements and their impact on services trade* 12 (ICTSD Policy Paper on Trade in Services and Sustainable Development (Draft), 2006), available at http://www.ictsd.org/dlogue/2006-02-28/marconini.pdf.
[119] General Agreement on Trade in Services, Arts. IV, XIX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATS].

services" so that they are not bound by the rules of the agreement.[120] Although this method seems broadly permissive, the WTO inherently contains the expectation of full liberalization across sectors.[121]

The EU agreements, likewise, have adopted a positive-list approach.[122] And like the WTO, with the exception of EU-Tunisia, these agreements call for the eventual elimination of "substantially all remaining discrimination between the parties" in all sectors and all modes of supply.[123] Some EU agreements, represented by the EU-Mexico arrangement, pronounce a standstill on future measures inconsistent with liberalization, and include a most-favored-nation provision that prohibits Mexico from deciding "with which regions [it] would like to integrate most or first."[124]

The pivotal difference between the US and the EU models is that the US agreements employ a negative list approach – making liberalization, not protection, the rule.[125] Practically speaking, this means that countries have to negotiate for every sector they want to protect, making it more negotiation intensive for nations to maintain control over their sensitive sectors. At the same time, US-based agreements also permit countries (theoretically) to make reservations to the MFN principle, to reserve room for future measures that are inconsistent with the agreement, and to select whole sectors to be untouched (permanently) by the agreement,

[120] *Id.* at Art. I:3.
[121] *Id.* at Annex on Article II Exemptions.
[122] Although the four EU agreements studied here contain actual services commitments only to varying degrees, each contains a reference to the positive list approach stated in their negotiating mandate at the very least. EU-Mexico Decision 2/2001, *supra* note 54, at Art. 7.3; EU-Chile, *supra* note 49, at Art. 99; EU- S.A., *supra* note 55, at Art. 29.1; EU-Tunisia, *supra* note 55, at Art. 32.1.
[123] EU-Mexico Decision 2/2001, *supra* note 54, at Art. 7.3; EU-Chile, *supra* note 49, at Art. 100; EU-S.A., *supra* note 55, at Art. 30.1.
[124] Oxfam Services, *supra* note 117, at 5; EU-Mexico Decision 2/2001, *supra* note 54, at Arts. 5, 7.
[125] Marconini, *supra* note 118, at 12.

options which are less available under an EU or WTO framework.[126] What has yet to be seen is whether the commitment to complete liberalization will come to completion under any of the EU trading arrangements. If so, developing countries that seek EU trade preferences for the policy flexibility they provide may end up with more policy restrictions than they originally bargained for, twenty or thirty years down the road.

"Non-Tariff Barriers" in Services: quota equivalents for services trade Just as in goods trade, countries have often attempted to protect a domestic services industry or control the behavior of service suppliers by imposing limits on the number of service suppliers, the total value of service transactions or assets, the number of service operations or quantity of service output, or the number of people employed in a particular sector. For the most part, these measures are no longer permitted under any international trading regime. The GATS sets out the template for treatment of services trade in this area. It prohibits service supplier quotas, service transaction or asset restrictions, service output quotas, and service employment limitations.[127] These limitations are prohibited whether they come "in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test."[128] The only relief for member countries is found in sectors where market access commitments were not undertaken.

Modern trade agreements take a largely harmonized approach to services quota regulation. The EU-Latin American agreements employ GATS-identical language when it comes to services quotas.[129] The African agreements mention no such limitations directly, but

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[126] *Id.* at 8; NAFTA, *supra* note 67, at Art. 1206; DR-CAFTA, *supra* note 52, at Art. 11.6; US-Chile, *supra* note 67, at Art. 11.6; US-Singapore, *supra* note 53, at Art. 8.7.
[127] GATS, *supra* note 119, at Art. XVI. This section also prohibits two other measures: requiring a certain organization type for service suppliers and foreign capital participation limits – both of which will be addressed in the coming sections.
[128] *Id.* at Art. XVI:2.
[129] EU-Chile, *supra* note 49, at Art. 97; EU-Mexico Decision 2/2001, *supra* note 54, at Art. 4.

the Parties incorporate "strict observance of the [GATS]."'[130] With the exception of NAFTA, US agreements also employ GATS language, prohibiting the same behavior with and exception for existing non-conforming measures set out in the schedules.[131] Here, as in the previous section, the distinct binding approaches of the two models make the difference. While under the EU arrangements, only those sectors committed are bound by the rules of market access, under US agreements, all is bound except sectors explicitly excluded.

Joint venture requirements Countries have also, historically, controlled the behavior of foreign service suppliers by organization-type requirements and limits on foreign capital participation. This forces foreign services or suppliers to partner with a local company or person, thus allowing local nationals to control the direction of the company and necessarily transferring some technology and know-how into the domestic economy. Today, however, joint venture requirements, like quotas, are almost universally prohibited under international services agreements.

As above, the GATS provides the textual template for this discipline stating that where market commitments are undertaken member countries may not impose "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service."[132] It also prohibits placing limits on foreign capital participation.[133] The EU-Latin American agreements again mimic the GATS disciplines prohibiting both legal entity

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[130] EU-S.A., *supra* note 55, at Art. 29; EU-Tunisia, *supra* note 55, at Art. 32.1.
[131] DR-CAFTA, *supra* note 52, at Art. 11.4; US-Chile, *supra* note 67, at Art. 11.4; US-Singapore, *supra* note 53, at Art. 8.5. The exception to many of these rules is NAFTA, since it came about so much earlier – on this subject it states: "The Parties shall periodically, but in any event at least every two years, endeavor to negotiate the liberalization or removal of the quantitative restrictions set out in Annex V pursuant to paragraphs 1 through 3." NAFTA, *supra* note 67, at Art. 1207(4).
[132] GATS, *supra* note 119, at Art. XVI:2(e).
[133] *Id.* at Art. XVI:2(f).

requirements and foreign capital restrictions[134] The African agreements, as mentioned above, incorporate GATS commitments, but make no additional reference to services organization requirements.

US agreements differ slightly from the EU – in that they do not outright prohibit placing limits on foreign capital participation in their services agreements.[135] More important, for purposes of this discussion, US agreements regulate foreign capital participation under the investment rather than the services chapters. The investment chapter governs some amount of foreign participation in domestically located firms by forbidding that countries "materially impair" the ability of the investor to exercise control over its investment.[136] US agreements also provide a universal right of establishment to firms from partner countries, a discipline discussed in more detail below. Both the "material impairment" provision and the right of establishment would effectively proscribe join venture requirements. Furthermore, the investment chapter is not sector-specific and therefore binds even more broadly than the US's negative list approach to service commitments.[137]

Duties and rights of establishment Policies influencing establishment rights represent another area traditionally employed to promote development. Controlling establishment, either by imposing a duty or withholding a right of establishment, allows policy-makers to influence who does business in their territory. By imposing a duty of establishment[138] countries force service

[134] EU-Chile, *supra* note 49, at Art. 97; EU-Mexico Decision 2/2001, *supra* note 54, at Art. 4.
[135] DR-CAFTA, *supra* note 52, at Art. 11.4; US-Chile, *supra* note 67, at Art. 11.4; US-Singapore, *supra* note 53, at Art. 8.5. Once more, NAFTA is the exception to this rule and does not mention either of these disciplines. See *supra* note 131.
[136] DR-CAFTA, *supra* note 52, at Art. 10.10; US-Singapore, *supra* note 53, at Art. 15.9; US-Chile, *supra* note 67, at Art. 10.10; NAFTA, *supra* note 67, at Art. 1107.
[137] Restricting foreign capital participation may also be prohibited through maintaining the right of establishment, present in all US agreements and discussed below.
[138] Also known as the "right of non-establishment."

suppliers “to establish or maintain a representative office or any form of enterprise, or to be resident in its territory as a condition for the cross-border supply of a service.”[139] Withholding a “right of establishment” allows countries to select which services suppliers they want in their territory, and keep out those they do not.

Investment and services agreements rarely regulate the duty of establishment. Neither the GATS nor EU agreements mention such a duty. However, if applied to bound sectors – such measures would likely have to be set out in the schedule for continued liberalization.[140] US agreements, on the contrary, expressly forbid parties from imposing such a duty by prohibiting local presence requirements.[141]

As for the *right* of establishment the GATS likewise does not explicitly require that Member countries impose no requirements on the establishment of investments made by a foreign investor.[142] Yet again, for bound sectors, such measures would likely need to be scheduled for liberalization. Once more, US agreements include as a part of national treatment. that “[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the *establishment* . . . of investments in its territory.”[143]

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[139] NAFTA, *supra* note 67, at Art. 1205.
[140] Marconini, *supra* note 118, at 9.
[141] NAFTA, supra note 67, at Art. 1205; DR-CAFTA, supra note 52, at Art. 11.5; US-Chile, supra note 67, at Art. 11.5; US-Singapore, supra note 53, at Art. 8.6. One author mentions that while the US agreements contain clearer language about the prohibition of duty of establishment clauses, they may not necessarily be “ more forceful in actually putting them into effect.” Marconini, *supra* note 118, at 9.
[142] Marconini, *supra* note 118, at 9. Though this may apply more directly to the trade-related investment measures, services and investment are intricately connected and often treated under the same agreement except in US treaties. Furthermore, the Agreement on Trade-Related Investment Measures (TRIMS) makes no mention of rights of establishment for foreign companies either in the text of the agreement or in the Illustrative List of inconsistent measures. *See* Agreement on Trade Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIMs].
[143] *See, e.g.*, DR-CAFTA, *supra* note 52, at Art. 10.2.

More variation exists among EU treaties. While traditionally, the agreements have not contained a right of establishment, recent agreements have incorporated that right to varying degrees.[144] EU-Chile, for example, contains a separate section (Chapter III) mandating that "with respect to establishment, each Party shall grant to legal and natural persons of legal and natural persons of the other Party treatment no less favourable than that it accords to its own legal and natural persons performing a like economic activity."[145] EU-Mexico makes no mention of establishment in the general services provisions, but explicitly mentions the right of establishment for suppliers of financial services.[146] Under the EU-Tunisia agreement, the parties have not yet reached a decision on the matter of establishment, but have agreed to address it in the future.[147] Some evidence suggests, then, that EU agreements may converge in the area of establishment with disciplines under US agreements.[148] This trend is not prevalent enough, however, to contradict a finding of two different models of establishment disciplines.

Services safeguards The question of safeguards arises separately under services trade. In general, most of the permitted safeguard measures for goods trade involve tariff levels – a measure not directly applicable to services trade. Here, GATS commitments clearly permit more flexibility than bilateral and regional agreements, and the US exceeds both the GATS and the EU in safeguard disciplines. GATS Article XII allows "[m]embers [to] adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments."[149] Furthermore, Article X

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[144] Oxfam Services, *supra* note 117, at 3.
[145] EU-Chile, *supra* note 49, at Art. 132.
[146] EU-Mexico Decision 2/2001, *supra* note 54, at Art. 12.
[147] EU-Tunisia, *supra* note 55, at Art. 31. The EU-South Africa agreement uniquely does not even contain an agreement to discuss the issue in the future.
[148] Oxfam Services, *supra* note 117, at 3.
[149] GATS, *supra* note 119, at Art. XII:1.

proposes an Emergency Safeguard Mechanism for situations in which waiting the period required under the general safeguard provisions would cause hardship to the country (though this mechanism has not yet been established).[150]

With the exception of EU-Chile, EU agreements generally omit mention of service-related safeguards. The EU-Chile agreement permits parties to "adopt or maintain restrictive measures *with regard to trade in goods and in services* and with regard to payments and capital movements, including those related to direct investment," but only for balance of payments difficulties."[151] The US model more uniformly exclude services safeguards. Where safeguards are mentioned, the types of measures permitted are expressly stated – leaving no room for safeguards in services trade.[152]

Domestic regulation Possibly one of the most domestically invasive sets of provisions in trade agreements addresses the issues of domestic regulation of service suppliers. Traditionally, domestic regulation remained under the purview of the domestic policy-makers (for obvious reasons). However, with international trading partners concerned that other countries would use regulation to discriminate against their goods and services, the GATS, as well as regional and bilateral agreements, impose some limits on the use of domestic regulation. In this way, the EU and US agreements have converged, to some degree, by employing the GATS standard for legitimate regulation while stepping up the binding nature of that standard.

The GATS spells out the universal standard for balancing legitimate regulation with trade liberalization: that "measures of general application affecting trade in services are administered

[150] *Id.* at Art. X.
[151] EU-Chile, *supra* note 49, at Art. 195 (emphasis added).
[152] NAFTA, *supra* note 67, at Arts. 801, 2104; DR-CAFTA, *supra* note 52, at Arts. 8.1, 21.4; US-Chile, *supra* note 67, at Arts. 8.1, 23.4; US-Singapore, *supra* note 53, at Art. 7.1.

in a reasonable, objective and impartial manner," and "that such requirements are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service."[153] The subtle but important difference between the GATS and its bilateral or regional counterparts, however, is that the standards is self-enforcing under the US and some EU agreements. That is, the parties to those treaties must meet those standards or risk violating the agreement.[154] By contrast, the GATS provision acts only as a basis for future rulemaking by the Council for Trade in Services.[155]

Human Capital Development Two key ways that developing countries have attempted to develop local human capital are through the free movement of persons across borders and heavy investments in public education. The GATS governs the former by scheduling commitments to liberalize migration and immigration. This represents one area that developing countries have traditionally liberalized (rather than protected) in order to promote human capital growth. Ironically, US services agreements permit broad-reaching restrictions on the free movement of persons by simply not covering it within the scope of the services provisions.[156] EU trade agreements, do allow for such commitments, but in most cases, the EU offers in this area are

[153] GATS, *supra* note 119, at Art. VI:1, 4.
[154] DR-CAFTA, *supra* note 52, at Art. 11.8; US-Chile, *supra* note 67, at Art. 11.8; US-Singapore, *supra* note 53, at Art. 8.8; NAFTA, *supra* note 67, at Art. 1210; EU-Chile, *supra* note 49, at Art. 102. *But see*, EU-Mexico Decision 2/2001, *supra* note 54, at Art. 8 (containing only a vague "regulatory carve out" for parties wishing to regulate service supply). The EU-South Africa and EU-Tunisia agreements have only a skeletal services section, more of an agreement to agree than a commitment to liberalize services immediately. *See, e,g.*, EU-S.A., *supra* note 55, at Art. 30; EU-Tunisia, *supra* note 55, at Art. 31.
[155] *Id.* at Art. IV:4.
[156] *E.g.*, DR-CAFTA, *supra* note 52, at Art. 11.1.

minimal.[157] In the area of public education, on the other hand, countries are limited only by their domestic political and economic situation.

South-south responses to bilateral services trade convergence Across the board, international trading regimes have limited the policy options available to policy-makers who could use public policy to promote diversification and growth. Furthermore, diminished differences between the trade agreements could lead to a slight trend in services disciplines convergence rather than the emergence of two separate bilateral models. Differences still exist, however, as shown by the varying approaches to binding, the unique way that the US agreements treat investment disciplines, and the simple fact that the US agreements represent a more uniform, comprehensive approach.

Surprisingly, South-South arrangements have done little to either preserve or increase policy space with respect to services measures. Neither China-Chile nor SAFTA includes a section on services, and the CAN, under Secretariat Decision 439, contains only minimal services obligations.[158] As a result, these agreements implicitly retain the flexibilities existent under the WTO and GATS but gain nothing in addition. MERCOSUR's Montevideo Protocol, by far the most comprehensive services section, contains largely GATS-equivalent language, especially as regards market access commitments.[159] The CAN allows safeguards for services trade for "serious external financial or balance of payments problems," but does little else to preserve policy flexibility.[160]

Trade in services has come to mean, in addition to cross-border trade and movement of

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[157] *E.g.*, EU-Chile, *supra* note 49, at Art. 95. Oxfam Services, *supra* note 117, at 5.
[158] CAN Services, *supra* note 57, at Arts. 14-16 (laying a general liberalization process with some vague commitments).
[159] MERCOSUR Services, *supra* note 57, at Art. IV.
[160] CAN Services, *supra* note 57, at Art. 20.

natural persons, the supply of services through commercial presence abroad.[161] Although largely treated under services disciplines within the WTO and EU frameworks, the US has set out a new model for investment disciplines that much more rigidly constrains the use of domestic measures to control foreign investors or service suppliers. The next section demonstrates the distinct models arising out of international investment regulation and shows how developing countries might protect their ability to regulate in spite of these disciplines.

Investment

Closely related to trade in services, in fact, included within many services trade provisions, is treatment of foreign investment. "Investment" in this case includes both foreign capital and foreign companies. Countries have historically had at their fingertips numerous creatively crafted investment measures aimed to protect domestic industry, preserve their current and capital account balances, create local backward and forward linkages, and otherwise strengthen their economy. Many of them address the treatment of FDI, while some place more direct control over foreign capital by governing foreign portfolio investment (FPI). Table 7 lays out the current availability of these measures under the various trading regimes. In the following section, this paper shows conclusively that the US has established model of investment agreements, distinct from and more restrictive than both the WTO disciplines and the EU agreements.

Table 7: Investment Checklist

Policy Instrument	**WTO and Associated Agreements**	**US Agreements**	**EU Agreements**
Domestic content	x	x	x

[161] Designated under the GATS framework as Mode 3. GATS, *supra* note 119, at Art. 1:2.

Trade balancing	x	x	x
Foreign exchange restrictions	x	x	x
Domestic sales restrictions	x	x	x
Domestic regulations, licensing, certifications[162]	√	x[163]	√
Local labor requirements	√	x[164]	√
Local management requirements	√	x	√
Headquarters/Production restrictions	√	x	√
Technology transfer	√	x	√
Research and development	√	x	√
Domestic producer preference	x	x	√[165]
Infrastructure provisions	√	√	√
Subsidized credit/entrepreneurship	√	√	√
Administrative guidance	√	√	√
International transfer/payment restrictions	x	x	x

Direct investment protection and promotion Under the WTO disciplines, member countries have much more freedom to regulate foreign direct investors in an effort to promote development and acquire the industrial know-how of the developed world. The Agreement on Trade Related Investment Measures (TRIMS) lays out an illustrative list of prohibited measures in an appended Annex.[166] The Annex provides examples of measures that violate national treatment and the rules against quantitative restrictions: domestic or local content requirements, trade balancing requirements, foreign exchange restrictions, and domestic sale requirements.[167] Under the TRIMS illustrative annex, governments cannot require that investors "purchase or use

[162] Some of the provisions may be permitted implicitly or by related provisions or simply by omission.
[163] Many of these measures are not permitted under the US rubric, except as a legitimate domestic regulation.
[164] For local labor requirements, local management requirements, headquarters restrictions, technology transfer and research and development, a country may not require them as a condition of entry, but may condition receipt of a benefit on them.
[165] In EU agreements, these measures may be effectively proscribed by other rules.
[166] TRIMs, *supra* note 142, at Annex.
[167] *Id.*

. . . products of domestic origin or from any domestic source" whether by requiring them to use certain products, or a certain value of local products, or that a certain proportion of local production come from domestic products. Governments also may not require that investors only import a certain volume of their local production based on how much they export or based on how much they produce locally.[168] Furthermore, developing country governments may not attempt to balance their capital accounts by only allowing foreign investors to acquire foreign exchange through export.[169] Finally, governments may not restrict the amount an investor exports or sells domestically by requiring domestic sale of certain products, or of a certain value of local production, or of a proportion of the value of local production.[170]

Notably absent from this list are numerous other measures historically applied to promote local development, including requirements to employ local labor, incorporate local management, maintain headquarters or production facilities locally, transfer technology developed locally, and undertake research and development locally. Countries may also provide needed infrastructure, subsidized or directed credit in key industries, and administrative guidance to multinational companies seeking to expand in to local markets. Of course, these measures remain subject to the pillars of national treatment and MFN treatment under the WTO, as do all measures of WTO member countries, but none are mentioned expressly in the agreements.[171] In fact, the GATS permits developing countries to attach some conditions to their services liberalization commitments with development in mind.[172]

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[168] *Id.* at Annex:1.
[169] *Id.* at Annex:2.
[170] *Id.* at Annex:2; *cf.*, CARLOS M. CORREA & NAGESH KUMAR, PROTECTING FOREIGN INVESTMENT: IMPLICATIONS OF A WTO REGIME AND POLICY OPTIONS (2003).
[171] Oxfam Services, *supra* note 117, at 6.
[172] GATS, *supra* note 119, at Art. XIX (stating "There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market

EU agreements contain very little on treatment of foreign investors or investments. As mentioned above, of the agreements studied, only the EU-Chile agreement contains a separate section entitled "Establishment" that applies to the establishment of legal persons within the territory of a party.[173] Thus, the flexibilities existent within the GATS and TRIMS are largely present in EU agreements as well. Just as EU-Chile grants the right of establishment to foreign investors it also states that, subject to the rule on national treatment with respect to establishment, "each Party may regulate the establishment of legal and natural persons."[174] In EU agreements, silence, rather than the presence of permissive provisions, preserves flexibility for developing countries in their domestic regulation of foreign enterprises.

Comparatively, US agreements constrain developing country governments in their policies toward foreign investors to a much greater degree. US agreements prohibit imposing performance requirements "in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory.[175]" These prohibited performance requirements include export level requirements, domestic content requirements, local goods or producer preference, trade balancing, foreign exchange restrictions, domestic sales restrictions, and technology transfer requirements.[176] In addition to prohibiting the above prohibitions, the same provisions prohibit conditioning "the receipt or continued receipt of an advantage" on domestic content,

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access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV").

[173] *See* EU-Chile, *supra* note 49, at Ch. III. While the other EU agreements incorporate sections entitled "Services and Establishment," as mentioned above, they are largely agreements to agree in the future rather than active commitments between the parties.

[174] *Id.* at Art. 133.

[175] NAFTA, *supra* note 67, at Art. 1106; DR-CAFTA, *supra* note 52, at Art. 10.9; US-Chile, *supra* note 67, at Art. 10.9; US-Singpapore, *supra* note **Error! Bookmark not defined.**, at Art. 15.8.

[176] NAFTA, *supra* note 67, at Art. 1106; DR-CAFTA, *supra* note 52, at Art. 10.9; US-Chile, *supra* note 67, at Art. 10.9; US-Singpapore, *supra* note **Error! Bookmark not defined.**, at Art. 15.8.

local goods or producer preference, trade balancing, foreign exchange or domestic sales restrictions.[177]

Some flexibility exists implicitly by noting what is absent from paragraph two – countries may condition receipt of an advantage on export levels, technology transfer, and domestic supply. US treaties also permit countries to condition "the receipt or continued receipt of an advantage . . . on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory."[178] Just as under the WTO and EU agreements, countries retain their affirmative rights to provide infrastructure, directed credit and administrative guidance.[179]

Capital controls and transfer restrictions In addition to governing direct investment, countries have employed capital controls or other international transfer or payment restrictions to promote and stabilize their development. Under the current regimes, however, they may no longer do this. The WTO, EU agreements and US agreements all prohibit international transfer or payment restrictions presumptively.[180] The difference here lies in the exception: both the WTO and EU agreements permit such restrictions only in the case of "serious balance of payments and external financial difficulties or threat thereof," which is the primary purpose for

[177] NAFTA, *supra* note 67, at Art. 1106; DR-CAFTA, *supra* note 52, at Art. 10.9; US-Chile, *supra* note 67, at Art. 10.9; US-Singpapore, *supra* note **Error! Bookmark not defined.**, at Art. 15.8.
[178] NAFTA, *supra* note 67, at Art. 1106; DR-CAFTA, *supra* note 52, at Art. 10.9; US-Chile, *supra* note 67, at Art. 10.5; US-Singpapore, *supra* note **Error! Bookmark not defined.**, at Art. 15.8.
[179] The test is articulated in full in Section B.6.
[180] GATS, *supra* note 119, at Art. XI; DR-CAFTA, *supra* note 52, at Art. 10.8, 11.10; NAFTA, *supra* note 67, at Art. 1109; US-Chile, *supra* note 67, at Art. 10.8; US-Singapore, *supra* note 53, at Art. 8.10, 15.7; EU-Chile, *supra* note 49, at Art. 163; EU-Mexico Decision 2/2001, *supra* note 54, at Title III; EU-Tunisia, *supra* note 55, at Art. 33; EU-S.A., *supra* note 55, at Art. 33. It should be noted that under the EU agreements, Chile reserved a hefty exception for their investment law 600, and Mexico retains an exception for exchange and monetary difficulties in addition to balance of payments.

such measures.[181] The US model diverges from this by omitting a provision that allows payments and transfers restrictions for balance of payments difficulties. Rather than imposing additional affirmative constraints, US agreements limit policy-makers here by omission.

A different model: South-south investment regulation protection Contrary to the disciplines for services trade, investment provisions in the various trading regimes reveal two distinct models of investment discipline. While the EU, in the main, echoes the commitments of the parties under the WTO and TRIMS, the US has established a model investment provision that limits the policies available to increase diversity and development. In response to this, some developing countries have created south-south trading relationships that protect regional firms and thus promote regional development.

Investment protection disciplines make up the section that exhibits the greatest divergence between regimes. The WTO lays the ground rules with its illustrative list of prohibited measures. EU-Chile begins to add to WTO commitments with its provision on establishment, but the other EU agreements do not seem to be following suit. US agreements impose many heightened restrictions by prohibiting most performance requirements placed on foreign firms and by not allowing capital controls even for balance of payments difficulties. On the other end of the spectrum, some S-S agreements have employed investment liberalization within the region to protect countries against foreign investors from without.

Contrary to what one might expect, the investment disciplines under the CAN and MERCOSUR liberalize extensively[182] while protecting the economic and development interests

[181] EU-Chile, *supra* note 49, at Arts. 166, 195; EU-Mexico Decision 2/2001, *supra* note 54, at Arts. 30-31; EU-S.A., *supra* note 55, at Arts. 32-34; EU-Tunisia, *supra* note 55, at Art. 35. *See also,* GATS, *supra* note 119, at Art. XII.

[182] For example, the MERCOSUR Protocol on Investment Promotion and Protection contains the same national treatment standard as that provided under US agreements. MERCOSUR Investment, *supra* note 57, at Art. 3.

of the region These agreements both echo provisions of N-S agreements and enforce origin and ownership requirements on foreign firms in order for them to qualify for protection under the regime. In CAN Decision 292, for example, companies must be owned at least 60 percent by national investors of two or more Community Members.[183] The same Decision requires that for any country whose investor contributes at least 15 percent of the capital for the enterprise, one of the directors must be a national of that country.[184]

S-S trade agreements exhibit the marriage of substantial liberalization and regional protection. Here, investment liberalization between trading partners has been used to both open up markets and protect nascent industry. The nature of the trading partner makes a difference however, as the bargaining and informational asymmetries between developed and developing countries may lead to N-S arrangements placing undesired constraints on policy-makers. Beyond investment protection, one more area of "trade-related" disciplines has drawn the attention of international human rights groups and developing nations alike. The follow section addresses this fourth set of trade disciplines: intellectual property rules.

International Intellectual Property Protection

An area at least as highly controversial as investment protection provisions, IPRs have been a primary method by which countries have attempted to walk the fine line between global integration and domestic development. In this case, countries have tried to correct informational asymmetries, create financial incentives for inventors, and protect private property. This balance has become particularly contentious when protecting private property leads to making necessary

Likewise. CAN Decision 292 allows multinational enterprises the right to establish subsidiaries, transfer payments freely, and transfer their domicile freely. CAN Andean Business, *supra* note 57, at Art. 15ff.

[183] CAN Andean Business, *supra* note 57, at Art. 1(d) (defining "multinational Andean enterprise" as a firm in which investors of two or more member countries owns more than 60% of the company).

[184] *Id.* at Art. 1(e).

medicines unavailable to populations most in need.[185] Historically, wealthier countries or knowledge exporters have tended to prioritize incentives for knowledge creation, while poor countries or knowledge importers have prioritized incentives for knowledge dissemination.[186]

Today, however, the global trade regime has placed increasing limits on the ability of developing countries to prioritize such dissemination. In the area of patents, for example, countries have a more difficult time protecting traditional knowledge of plants and animals, as well as permitting use of the patent application information for related experimentation. Although countries retain some flexibilities to promote local knowledge and address public needs through compulsory licensing and utility models, the trend, shows increased protection for inventors and additional constraints on policy-makers.

International intellectual property protection rules have come under attack, in part, because of their adverse effect on medicinal availability in the developing world. For that reason, the WTO issued the Declaration on the TRIPS Agreement and Public Health (Doha Declaration), which emphasized the importance of developing country concerns about their access to medicines.[187] Despite the controversy, the US has continued to push for stronger inventor incentives at the expense of policy flexibility. Table 8 provides a broad picture of the policy constraints in this arena and demonstrates how US agreements exceed the rules under other trade regimes.

Table 8. Intellectual Property Checklist

Policy Instrument	WTO and	US	EU

[185] Kenneth Shadlen, *Policy Space for Development in the WTO and Beyond: The Case of Intellectual Property Rights* 23 (Global Dev't and Env't Inst., Working Paper No. 05-06, 2005)
[186] *Id.* at 6.
[187] *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

	Associated Agreements	Agreements	Agreements
Patent restriction by industry/origin	X	x	X
Limitations on patent terms	X	x	X
Patent refusals/revocations	√	√+[188]	√
Limit IP protection for plants/animals	√	x	√+
Permit early-working on patented pharmaceuticals	√	x	√
Compulsory Licensing	√	√+	√
Local production requirement	√	x	√
Parallel imports	√	x	√+
Limiting patent breadth	√	√	√
Utility models	√	√	√
Narrow patentability requirements	√	x	√

Patent restriction by industry, origin or duration In this one question, the three regimes under scrutiny concur. Patent restriction by industry, origin or duration is patently (no pun intended) prohibited under the Agreement on Trade Related Intellectual Property Rights (TRIPS) of the WTO, stating that "patents shall be available for *any* inventions, whether products or processes, *in all fields of technology*, provided that they are new, involve an inventive step and are capable of industrial application."[189] This language is echoed in all US bilateral and regional agreements and likewise incorporated into most EU agreements by reference[190]

Further, under TRIPS, all patents must last for 20 years, at a minimum.[191] Regarding the

[188] A [+] sign indicates that the practice is permitted with some procedural requirements in addition to those under TRIPS.
[189] Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 27.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 [hereinafter TRIPS].
[190] NAFTA, *supra* note 67, at Art. 1709; DR-CAFTA, *supra* note 52, at Art. 15.9; US-Chile, *supra* note 67, at Art. 17.9; US-Singapore, *supra* note 53, at Art. 16.7; EU-Mexico Decision 2/2001, *supra* note 54, at Art. 36(1)(a); EU-Chile, *supra* note 49, at Art. 170(a)(i); EU-S.A., *supra* note 55, at Art. 46.
[191] TRIPS, *supra* note 189, at Art. 33.

length of the patents, only NAFTA mentions the actual minimum while the rest simply assume a 20-year minimum.[192] In addition, some of the agreements restrict a country's ability to revoke patents where they deem necessary or important. Under TRIPS (and, thus, the EU regime), countries may do so in accordance with their national law, so long as they make judicial review of the administrative decision available.[193] US agreements have added to this that "a patent may or canceled only on grounds that would have justified a refusal to grant the patent."[194] The US model once more shows itself distinct by raising the legal standard for patent revocation.

Limited plant and animal protection Patent protection for plants and animals is a relatively new phenomenon. Although plant and animal species are generally found in nature (and therefore not new or innovative), the developed world has sought additional protection for genetically modified plant species – a move that has placed in jeopardy some of the traditional cultural knowledge established by native populations. Under all international intellectual property protection regimes, some protection for plant and animal life is required. TRIPS states that countries may "exclude from patentability . . . plants and animals other than microorganisms."[195] However they must "provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof."[196] Although the provision requires some protection, the phrase "effective *sui generis* system" provides for a lot of theoretical flexibility for developing countries to establish their own plant protection systems – a

[192] NAFTA, *supra* note 67, at Art. 1709(12). This minimum is not even mentioned in DR-CAFTA, US-Chile, or US-Singapore.
[193] TRIPS, *supra* note 189, at Art. 32.
[194] DR-CAFTA, *supra* note 52, at Art. 15.9(4); US-Chile, *supra* note 67, at Art. 17.9(5); US-Singapore, *supra* note 53, at Art. 16.7(4); NAFTA, *supra* note 67, at Art. 1709.8. Although similar, NAFTA contains slightly looser standards for patent revokation.
[195] TRIPS, *supra* note 189, at Art. 27.
[196] *Id.*

flexibility that many countries have exploited.[197]

Typically, EU agreements do not expand much on the provisions of TRIPS. Instead they mention various international conventions that the parties either confirm their obligations under or undertake to become a party of, as part of the requirements for the trade agreement.[198] By incorporating TRIPS, EU agreements seem to retain similar flexibilities. One key difference, however, lies in the frequent EU provision requiring that parties accede to the International Convention for the Protection of New Varieties of Plants (UPOV), either from 1978 or 1991.[199] This represents a slight decrease in policy flexibility by specifying which type of plant protection is acceptable.[200]

Under the US agreements, once more, the disciplines on IPRs are much tighter. All modern agreements required the parties to ratify or accede to the UPOV 1991.[201] Furthermore, most recent agreements demand that contracting states make every effort to impose a plant patenting system at the very least.[202] Under US-Singapore, plant patenting is required automatically and implicitly by excluding the TRIPS provision that allows members to exclude

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[197] Shadlen, *supra* note 185, at 13.

[198] EU-Mexico Decision 2/2001, *supra* note 54, at Art. 36; EU-Chile, *supra* note 49, at Art. 170; EU-S.A., *supra* note 55, at Art. 46; EU-Tunisia, *supra* note 55, at Annex 7. Incorporation of these agreements comes by various means. In some, the parties simply confirm their existing obligations, while, in others, the parties affirmatively undertake to become a party of the convention.

[199] The key difference between the 1978 and 1991 conventions is found in their allowance of third parties "to use protected seeds and plants for breeding new varieties". UPOV 1978, included a farmers exception allowing them to reuse seeds. This exception was eliminated under UPOV 1991, "which provides much stronger rights to breeders." Shadlen, *supra* note 185, at 13.

[200] Under EU-Chile, the parties "continue to ensure an adequate and effective implementation of" UPOV 1978 or UPOV 1991. EU-Chile, *supra* note 49, at Art. 170(a)(v). EU-Mexico likewise contains the flexibility of choosing UPOV 1978 or UPOV 1991 and states that the parties "confirm the importance they attach to" the convention. EU-Mexico Decision 2/2001, *supra* note 54, at Art. 36(2). Under EU-South Africa, the parties also "confirm the importance they attach to" UPOV 1978, and Tunisia has committed to accede to UPOV 1991 by the fourth year "after the entry into force of the Agreement." EU-S.A., *supra* note 55, at Art.46(5)(c); EU-Tunisia, *supra* note 55, at Annex 7(1).

[201] DR-CAFTA, *supra* note 52, at Art. 15.1(5); US-Chile, *supra* note 67, at Art. 17.1(3); US-Singapore, *supra* note 53, at Art. 16.1(2). NAFTA, largely because of when it was negotiated and signed, required only the UPOV 1978. NAFTA, *supra* note 67, at Art. 1701.2.

[202] DR-CAFTA, *supra* note 52, at Art. 15.9(2); US-Chile, *supra* note 67, at Art. 17.9(2).

plants from patentability.[203]

Permitting use of patent application information Another technique to promote knowledge dissemination employed by some countries is to establish strict information disclosure requirements to make more information readily available to generics producers or to domestic inventors trying to build off the patented invention, or to allow some early working on patented pharmaceuticals. TRIPS provides countries with more flexibility than with US agreements in deciding how much information to require.[204] All WTO members must "require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art."[205] Additionally, countries "*may* require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date."[206]

Some US agreements, by contrast, (possibly those where domestic patent regimes do not protect US interests satisfactorily) lower the amount of information that may be demanded. Under DR-CAFTA, for example, parties to the agreement may not ask more of the patent applicant than the "information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date."[207]

Early working or "Bolar" provisions permit "firms to develop, test, and apply for registration of generic versions of patented drugs, to be put on the market once the protected drugs' patent terms expire."[208] Under TRIPS early working is permitted so long as it's not for

[203] US-Singapore, *supra* note 53, at Art. 16.7(a).
[204] TRIPS, *supra* note 189, at Art. 28
[205] *Id.* at Art. 29.1.
[206] *Id.* (emphasis added).
[207] DR-CAFTA, *supra* note 52, at Art. 15.9(9).
[208] Shadlen, *supra* note 185, at 19.

commercial production or stockpiling purposes.[209] The actual text states only vaguely that member states must protect data whose origin "involves considerable effort . . . from unfair commercial use."[210] EU agreements, for reasons stated previously incorporate the same legal language and, presumably, the same legal standard. The US model, however, more specifically proscribes early-working by specifically by protecting submitted data for regulatory approval for five years "against both disclosure and reliance.[211] As Shadlen notes, this applies irrespective of patenting – since information protection exists for any product requiring approval before marketing.

Compulsory Licensing Governments grant compulsory licenses (CLs) to domestic industry to make and distribute certain patented products, especially pharmaceuticals, without the consent of the patent holder. They grant them largely to access needed technology where the country cannot obtain access through traditionally negotiated licenses.[212] TRIPS permits CLs subject to certain procedural requirements within Article 31. Article 31 requires that each license be considered individually, that the proposed user make efforts "to obtain authorization from the right holder on reasonable commercial terms" over a reasonable period of time (except in situations of national emergency), that the scope and duration be limited to a specific purpose, that the use be non-exclusive and non-assignable, that it be for the domestic market of the granting government, and that it be subject to judicial review, among other procedural requirements.[213]

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[209] This standard has been determined by WTO case law and is not necessarily clear from the text of the agreement. Shadlen, *supra* note 185, at 18-19.
[210] *Id.* at 19; TRIPS, *supra* note 189, at Art. 39.3.
[211] Shadlen, *supra* note 185, at 19; *see, e.g.*, DR-CAFTA, *supra* note 52, at Art. 15.10(1).
[212] Shadlen, *supra* note 185, at 21.
[213] TRIPS, *supra* note 189, at Art. 31.

On this point, both EU and US agreements largely simply incorporate the terms of Article 31. According to some, bilateral and regional agreements often circumscribe the rights of governments to grant compulsory licenses.[214] Evidence of this can be seen in the texts of US agreements stating that the "subject matter of a subsisting patent to support an application for marketing approval or sanitary permit of a pharmaceutical product . . . shall not be made, used or sold in the territory of the Party other than for purposes related to meeting the requirements of such approval."[215] The US-Singapore agreement even says that, the subject matter of a patent may only be used to remedy anti-competitive practices, for public non-commercial use or in the case of national emergency, thus restricting the use of CLs further.[216]

Additional flexibilities In addition to the above, countries have employed several other measures to encourage national experimentation and promote development. TRIPS allows countries to require patent owners to produce locally thus encouraging "the transfer of non-codified, tacit knowledge that occurs via the localization of manufacturing operations."[217] Both Brazil and India have exploited this flexibility as they aim to promote their industrial development.[218] TRIPS also allows countries to determine their own exhaustion policies – whether national, regional or international – permitting parallel imports as soon as the patent holder loses exclusive privileges.[219] Governments may further narrow the *interpretation* of the

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[214] Shadlen, *supra* note 185, at 24.

[215] DR-CAFTA, *supra* note 52, at Art. 15.9(5); US-Chile, *supra* note 67, at Art. 17.9(4); US-Singapore, *supra* note 53, at 16.7(5). Once more, the early conclusion of NAFTA resulted in a substantially different intellectual property rights regime. Since the conclusion of NAFTA, the US model has evolved and moved further away from the more flexible disciplines in TRIPS.

[216] US-Singapore, *supra* note 53, at Art. 16.7(6).

[217] Shadlen, *supra* note 185, at 22.

[218] *Id.*

[219] Carsten Fink explains the difference between exhaustion policies:

"Under a system of national exhaustion, a title holder can prevent parallel importation of his product from a foreign country, where it is sold either by the IPR's owner himself or by an authorized dealer. In contrast, if rights general patentability requirements – that the invention be new, non-obvious, and useful – such that inventors must reach a higher standard to receive a domestic patent.[220] They may narrow the breadth of the patent so that only a very narrow application is patented, leaving room for creative expansion on existing patents by domestic scientists. Finally, they may allow for "utility models" which provide protection for inventions that may not quite reach the level of patentability but may provide local residents with incentives for experimentation.[221] Since neither patent breadth nor utility models are addressed under TRIPS, countries enjoy the broad freedom to employ them as they like.

Since EU agreements intellectual property provisions only slightly exceed TRIPS disciplines, presumably the same flexibilities exist. What is surprising is that US agreements have little to say on the subjects as well. Governments may interpret "new, non-obvious, and useful" in many ways even under US rules. In addition, neither patent breadth nor utility models have been addressed in US agreements and therefore are fair game for policymakers. A few agreements, however, have begun to infringe on these additional flexibilities. Recent US agreements require a broad interpretation of the term "new," allowing an invention even 12 months old to qualify for the novelty requirement.[222] US agreements also effectively prohibit parallel importation due to its national exhaustion policies.[223]

Additional constraints under US agreements US agreements do not stop there; they seek

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exhaust internationally, the title-holder loses his exclusive privilege after the first distribution of his product, thus allowing parallel imports from abroad. A hybrid between national and international exhaustion is regional exhaustion, whereby parallel trading is allowed within a particular group of countries but parallel imports from countries outside the region are banned." Carsten Fink, *Entering the Jungle: The Exhaustion of Intellectual Property Rights and Parallel Imports*, *in* COMPETITIVE STRATEGIES FOR THE PROTECTION OF INTELLECTUAL PROPERTY 173, 173 (Owen Lippert, ed., 1999).

[220] TRIPS, *supra* note 189, at Art. 27.1.

[221] Shadlen, *supra* note 185, at 15-16.

[222] DR-CAFTA, *supra* note 52, at Art. 15.9(7); US-Chile, *supra* note 67, at Art. 17.9(7).

[223] Shadlen, *supra* note 185, at 20.

additional protection for intellectual property in a number of other ways. All recent agreements establish mandatory patent term extensions in the case of "unreasonable delays."[224] This phrase contains inherent vagueness that could be interpreted to give transnational companies more leverage against host governments. Several other provisions act to effectively extend the patent term by protecting the information in the patent application as well as the subject matter of the patent. With the exception of NAFTA, US agreements require an additional five years of protection for pharmaceutical safety certification data.[225] DR-CAFTA, the most restrictive in terms of patent protection of the US agreements studied, also establishes a five year safe zone for any product patented in another country – allowing notification to the second country within five years.[226] Furthermore, patent term marketing restrictions may create an effective ban on compulsory licensing – though such licenses are internationally recognized – according to some analysts.[227]

South-south responses and the US model Intellectual property protection provides another clear picture of two emerging models of free trade agreements. While the EU agreements add almost nothing to the commitments within TRIPS, the US demands much more of its partnering nations. By restricting early-working, requiring heightened protection for plant species, and effectively extending the terms of patent protection through mandatory extensions and data protection, US agreements represent a distinct model of international IPR discipline.

For developing countries, intellectual property rights, as a new area of trade-related

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[224] US-Chile, *supra* note 67, at Art. 17.9(6); DR-CAFTA, *supra* note 52, at Art. 15.9(6); US-Singapore, *supra* note 53, at Art. 16.7(7).
[225] US-Chile, *supra* note 67, at Art. 17.10(1); DR-CAFTA, *supra* note 52, at Art. 15.10(1)(a); US-Singapore, *supra* note 53, at Art. 16.8(1)).
[226] DR-CAFTA, *supra* note 52, at Art. 15.10(1)(b).
[227] *Id.* at Art. 15.10(2); Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health and the Contradictory Trend in Bilateral and Regional Free Trade Agreements* 14 (Quaker United Nations Office Occasional Paper, 2004).

issues, has yet to be addressed under many of these agreements as well. Neither SAFTA nor China-Chile covers intellectual property rights (IPRs) and MERCOSUR has yet to cover patents, the most important of IPRs for purposes of development. The CAN, however, provides a model S-S arrangement that includes intellectual property provisions that promote the interests of the nations in that region. First of all, the CAN expressly protects biological and genetic heritage and traditional knowledge by subjecting patent applications "on the basis of material obtained from that heritage or that knowledge" to international, Andean Community and national law with respect to acquisition of that material.[228] In addition, the Decision governing IPRs excludes from patentability scientific theories, mathematical methods; living things (whatever the size); literary and artistic works or any other aesthetic creation protected by copyright; plans, rules, and methods for the pursuit of intellectual activities, playing of games, or economic and business activities; computer programs and software, as such; and, methods for presenting information.[229]

In addition to patenting restrictions, the Decisions of the CAN Secretariat apply an international standard for exhaustion, providing maximum opportunity for parallel imports.[230] Compulsory licensing remains available where there is a failure to exploit (either through manufacture or import), in the case of "public interest, an emergency or national security considerations," or in order "to correct anti-competitive practices."[231] Finally, the Decision makes explicit room for utility models, which can encourage a lower degree of innovation often "more appropriate for local firms."[232]

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[228] CAN IPRS, *supra* note 57, at Art. 3.
[229] *Id.* at Art. 15.
[230] *Id.* at Art. 54; Musungu, Sisule F., Villanueva, Susan and Blasetti, Roxana, *Utilizing TRIPS Flexibilities for Public Health Protection through South-South Regional Frameworks* 51 (South Centre 2004), *available at* http://www.southcentre.org/index.php?option=com_content&task=view&id=72.
[231] CAN IPRS, *supra* note 57, at Arts. 61-66.
[232] *Id.* at Arts. 81-85; Shadlen, *supra* note 185, at 16.

In this one trade-related area, more than any other, some developing countries are making strides to protect their traditional knowledge and safeguard their public health. This area also provides clear evidence of the emergence of two distinct trade agreement models. While the EU models have exceeded WTO disciplines on a slight scale, the US imposes multiple additional requirements that prioritize property right protection over information dissemination.

IV. Summary and Conclusions

The analysis of various types of trade agreements shows that the current global trade regime substantially curtails the ability of countries to maintain control over various policy tools that traditionally have been deployed as part of long run development paths.[233] Under the WTO, despite the constraint on policy space, there remains considerable room to maneuver. Countries may, legally, raise and lower tariffs, provide tax-related export incentives such as drawbacks and deferrals within EPZs, impose certain performance requirements on investors and service providers, and employ domestic patent laws to prioritize information dissemination over incentives for invention. The WTO also makes room for countries to form bilateral and regional trade agreements under the GATT.[234]

Despite wide variation among Article XXIV regimes, policy space under North-South free trade agreements is the most constraining on the traditional industrial development toolkit. Among the countries to form bilateral and regional trade arrangements, the US and the EU are the most influential. Overwhelmingly, among both trade agreements and the global trade regime, the trend heads toward increased liberalization and decreased government intervention in

[233] Part of the reaons for this is that, with the spread of globalization, no issue is truly "uniquely" domestic. Even though industry standards, licensures, and certifications may be matters of domestic law, they impact foreign companies and, by extension, foreign governments.
[234] GATT, *supra* note 41, at Art. XXIV (providing for free trade areas and customs unions among GATT contracting parties).

the economy. At the same time, some types of agreements continue to make space for the policies aimed at industrial development, while others push for broader and deeper liberalization. Trade agreements with the EU, for example, retain much of the flexibility under the WTO in the areas of investment and intellectual property, and employ the same positive-list approach as the global regime when it comes to services trade. By contrast, the US imposes many additional disciplines on its trading partners – expanding patent protection, mandating investment liberalization, and employing a negative-list approach to services bindings. Over the past sixteen years, trade regimes have formed around these principles and US trade policy has become more uniform. Meanwhile, EU trade policy varies much more greatly by trading partner, indicating a greater willingness to permit certain policies in these areas. Provided this trend continues, countries that are still developing in thirty years will have more opportunity to creatively use their policy space under an EU agreement than under an agreement with the US.

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

Still, some policy space remains under even the most restrictive trading schemes. As mentioned previously, the self-enforcing nature of dispute resolution allows smaller countries to undertake virtually any policy that does not economically injure its larger trading partners. Furthermore, to the extent the state is economically capable, it may invest heavily in public education, subsidize credit to certain industries, and build up domestic infrastructure. A method employed by developing and developed countries alike, policy makers may also provide administrative guidance – marketing the country, its location, natural resources, and workforce, for example – to investors and traders internationally. This technique may help a country to target an industry that would transfer technology or provide backward and forward linkages in the economy.

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

From a policy perspective, it is our hope that negotiators and policy-makers who have or are considering crafting longer run development strategies can use this paper as a reference when deciding under which policy regimes such development strategies would be most permissible.

Just shy of 60 percent of the people on the planet live in poverty, measured by the World Bank as less than $2.50 per day. To raise the standard of living for those people, governments seek to put together long-term development strategies that deploy the policy instruments that have proven successful in other settings. This paper catalogues many of the policies deployed by successful developed and developing countries that over a 35+ year period tripled the average incomes of many countries such as the US, Japan, South Korea, Taiwan, and now China. We show that today, however, poorer nations have a more limited toolkit to engage in long-run development strategies, and that the trade arrangements they form will have an influence on the policies they will have available in the future.