
Sinic Trade Agreements

Peter K. Yu*

TABLE OF CONTENTS

INTRODUCTION	955
I. CHINA'S ENGAGEMENT WITH THE LESS-DEVELOPED WORLD	956
II. A DIFFERENT KIND OF FTA?	961
A. FTAs and EPAs.....	961
1. Goals and Strengths.....	963
2. Weaknesses.....	976
B. STAs.....	986
1. Natural Resources and Raw Materials.....	987
2. Trade.....	988
3. Foreign Direct Investment	992
4. Diplomatic Ties	992
5. International Goodwill.....	993
6. Market Economy Status	999
III. CHINA'S STA STATECRAFT	1002
A. <i>Sovereignty, Self-Determination, and Non-interference</i>	1003
B. <i>Gradual Evolution</i>	1006
C. <i>Flexibility</i>	1010
D. <i>Not a Legal Transplant</i>	1010
E. <i>Not a Template</i>	1011

* Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law; Visiting Professor of Law, Faculty of Law, University of Hong Kong. An earlier version of this Article was presented at the UC Davis Law Review Symposium on "The Asian Century?" at UC Davis School of Law, in the Workshop on "IP Aspects of Free Trade Agreements in the Asia Pacific Region" at the Centre for Comparative Law and Development Studies in Asia and the Pacific, University of Wollongong, and as public seminars at Victoria University of Wellington and University of Auckland Business School. The Author would like to thank Christoph Antons, Anupam Chander, Susan Corbett, Huang Xiaoming, and Alexandra Sims for their kind invitations and hospitality and to Christoph Antons, Susy Frankel, Henry Gao, Huang Xiaoming, Marc Lanteigne, Jean-Frédéric Morin, and the participants of these events for their valuable comments and suggestions. The Author is grateful to Jonathan Soike and Megan Snyder for excellent research and editorial assistance.

IV. THREE FUTURE BATTLES.....	1018
A. <i>Battle of Consensus</i>	1018
B. <i>Battle of Influence</i>	1022
C. <i>Battle of Isms</i>	1026
CONCLUSION.....	1027

INTRODUCTION

Since the early 2000s, the European Union and the United States have pushed aggressively for the development of bilateral and regional trade agreements.¹ Termed economic partnership agreements (“EPAs”) by the European Union and free trade agreements (“FTAs”) by the United States, these instruments seek to transplant laws from the more powerful signatories to the less powerful ones.² In the intellectual property area, these agreements have been fairly controversial.³ By introducing laws that go beyond the multilateral standards required by the Agreement on Trade-Related Aspects of Intellectual Property Rights⁴ (“TRIPS Agreement”), these agreements have ignored the local needs, national interests, technological capabilities, institutional capacities, and public health conditions of many less-developed members of the World Trade Organization (“WTO”).⁵

Although the use of bilateral and regional trade agreements is not limited to the European Union and the United States,⁶ the scholarly

¹ See Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 392-400 (2004) [hereinafter *Currents and Crosscurrents*].

² The U.S. Trade Act of 2002 provides:

The principal negotiating objectives of the United States regarding trade-related intellectual property are . . . to further promote adequate and effective protection of intellectual property rights, including through . . . ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law

19 U.S.C. § 3802(b)(4)(A)(i)(II) (2006).

³ See, e.g., INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting essays discussing free trade agreements in intellectual property context); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL’Y 259 (criticizing U.S.-Australia Free Trade Agreement); Jean-Frédéric Morin, *Multilateralising TRIPs-Plus Agreements: Is the US Strategy a Failure?*, 12 J. WORLD INTELL. PROP. 175 (2009) (examining U.S. FTA strategy).

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

⁵ Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 828 (2007).

⁶ Japan, for example, has also been active in developing bilateral and regional

literature thus far has focused mostly on these agreements. To fill the void, this Article closely examines the bilateral and regional trade agreements established by China and the strategies used to deploy those agreements. To avoid confusion with the FTAs the United States has initiated and the loaded nature of this specific term, the Article eschews the term “China free trade agreements,” even though the term “free trade agreement” is officially used in the title. Instead, the Article introduces the term “Sinic Trade Agreements”⁷ (“STAs”) to cover China-initiated bilateral or regional agreements.

This Article focuses on the bilateral or plurilateral agreements China has developed with its trading partners at both the bilateral and regional levels. To provide background, Part I examines China’s growing engagement with the less-developed world. Part II examines the goals, strengths, and weaknesses of FTAs and EPAs as well as the underlying goals of STAs. Part III explores the negotiation strategies behind these agreements, noting the differences between the Chinese approach on the one hand and the EU and U.S. approaches on the other. Part IV concludes by highlighting three future battles that the accelerated development of STAs may precipitate.

I. CHINA’S ENGAGEMENT WITH THE LESS-DEVELOPED WORLD

In the past two decades, “China has [played] a leading role in speeding up investments in the Southeast Asia region through the [Greater Mekong Subregional Economic Strategy] and ASEAN+3 [ASEAN (Association of Southeast Asian Nations), China, Japan, and Korea] frameworks.”⁸ Although the China-Japan-South Korea free

trade agreements. See generally Mitsuo Matsushita, *Japanese Policies Toward East Asian Free Trade Agreements: Policy and Legal Perspectives*, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 41 (Ross Buckley et al. eds., 2008) [hereinafter CHALLENGES TO MULTILATERAL TRADE] (discussing FTAs initiated by Japan); Bryan Mercurio, *Japan-Mexico Economic Partnership Agreement*, in BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES 111 (Simon Lester & Bryan Mercurio eds., 2009) (same).

⁷ This term is intentionally chosen to facilitate comparison with FTAs. To a great extent, STAs can be described as FTAs “with Chinese characteristics.” However, I avoid the term for two reasons. First, like “China free trade agreements,” such a term would retain the loaded nature of the term FTAs. Second, in the past two decades, people have stretched the descriptor “with Chinese characteristics” considerably to cover unique arrangements in China. The term has been used so often and so broadly that it now no longer has any clear or identifiable meaning. Virtually anything from China can be described as having Chinese characteristics these days!

⁸ Shalmali Guttal, *Client and Competitor: China and International Financial Institutions*, in CHINA’S NEW ROLE IN AFRICA AND THE SOUTH: A SEARCH FOR A NEW PERSPECTIVE 17, 22 (Dorothy-Grace Guerrero & Firoze Manji eds., 2008) [hereinafter

trade agreement has yet to be established, China remains interested in such a project.⁹ In 2000, China surprised ASEAN members by announcing its interest in developing a free trade area with them within ten years.¹⁰ To date, China has established with ASEAN a framework agreement as well as agreements on trade in goods, services, and investment.¹¹ Together, they established the ASEAN-China Free Trade Area, which will serve important economic, geopolitical, and strategic goals.¹²

Most recently, China established bilateral trade agreements with Chile,¹³ Pakistan,¹⁴ New Zealand,¹⁵ Singapore,¹⁶ Peru,¹⁷ and Costa

CHINA'S NEW ROLE].

⁹ Zhang Yunling & Tang Shiping, *China's Regional Strategy*, in *POWER SHIFT: CHINA AND ASIA'S NEW DYNAMICS* 48, 54-55 (David Shambaugh ed., 2006) [hereinafter *POWER SHIFT*].

¹⁰ See DAVID C. KANG, *CHINA RISING: PEACE, POWER, AND ORDER IN EAST ASIA* 130 (2007).

¹¹ See Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation Between China and ASEAN, ASEAN-China, Aug. 15, 2009, available at <http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf> [hereinafter ASEAN-China Agreement on Investment]; Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People's Republic of China, ASEAN-China, Jan. 14, 2007, available at <http://www.asean.org/19346.htm> [hereinafter ASEAN-China Agreement on Trade in Services]; Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People's Republic of China, ASEAN-China, Nov. 29, 2004, available at <http://www.aseansec.org/16646.htm> [hereinafter ASEAN-China Agreement on Trade in Goods]; Framework Agreement on Comprehensive Economic Co-operation Between ASEAN and the People's Republic of China, ASEAN-China, Nov. 4, 2002, available at <http://www.aseansec.org/13196.htm> [hereinafter ASEAN-China Framework Agreement].

¹² See STEFAN A. HALPER, *THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* 28 (2010) ("Not only did [the ASEAN-China Free Trade Area] help China to secure vital sea lanes and access to raw materials, but it also created a major regional entity that excludes the United States and its major allies.").

¹³ Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, Chile-China, Nov. 18, 2005, available at http://www.sice.oas.org/Trade/CHL_CHN/CHL_CHN_e/chilechinind_e.asp#PDF [hereinafter CCFTA].

¹⁴ Free Trade Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China, Pak.-China, Nov. 24, 2006, available at [http://www.commerce.gov.pk/PK-CN\(FTA\)/Pak-China_FTA_Agreement.pdf](http://www.commerce.gov.pk/PK-CN(FTA)/Pak-China_FTA_Agreement.pdf) [hereinafter PCFTA].

¹⁵ Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China, N.Z.-China, Apr. 7, 2008, available at <http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf> [hereinafter NZCFTA].

Rica.¹⁶ Additional agreements with Australia, the Common Market for Eastern and Southern Africa (“COMESA”), the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates), Iceland, South Africa, and South Africa Customs Union (Botswana, Lesotho, Namibia, South Africa, and Swaziland) are under discussion.¹⁹

In addition, China is exploring greater economic cooperation with India, with the hope of eventually developing a regional trade agreement (“RTA”).²⁰ Between the two countries, “[t]rade volume increased from a paltry \$260 million per year in 1990 to \$18.6 billion in 2005.”²¹ In July 2001, China also established the Shanghai Cooperation Organization with Kazakhstan, the Kyrgyz Republic, Tajikistan, Russia, and Uzbekistan, bringing the country closer to its Central Asian neighbors.²²

Over the years, China has strengthened its diplomatic and economic ties with Africa through the China-Africa Cooperation Forum and the China-Africa Summit.²³ As one commentator observed in 2008:

To date, China has signed trade agreements with 41 African countries, and has set up bilateral economic and trade mechanisms with 37 more. China has also signed bilateral accords for the promotion and protection of investment with 29 African countries as well as bilateral double-tax avoidance

¹⁶ Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Singapore, China-Sing., Oct. 23, 2008, available at http://www.fta.gov.sg/ftas_csfta_legal.asp.

¹⁷ Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Peru, China-Peru, Apr. 28, 2009, available at http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf.

¹⁸ Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Costa Rica, Costa Rica-China, Apr. 8, 2010, available at <http://tradeinservices.mofcom.gov.cn/en/b/2010-04-08/81925.shtml>.

¹⁹ See Joshua Eisenman, *China’s Post-Cold War Strategy in Africa: Examining Beijing’s Methods and Objectives*, in CHINA AND THE DEVELOPING WORLD: BEIJING’S STRATEGY FOR THE TWENTY-FIRST CENTURY 29, 42 (Joshua Eisenman et al. eds., 2007) [hereinafter CHINA AND THE DEVELOPING WORLD]; Henry S. Gao, *China’s Participation in the WTO: A Lawyer’s Perspective*, 11 SING. Y.B. INT’L L. 41, 67-68 (2007); Chen Shu-Ching Jean, *China’s New Brand of Free Trade*, FORBES.COM (Apr. 9, 2008), http://www.forbes.com/2008/04/09/china-nz-fta-markets-econ-cx_jc_0409markets36.html.

²⁰ Jim Yardley, *Indian Leader in China Urges Closer Ties*, N.Y. TIMES, Jan. 16, 2008, at A8.

²¹ Rollie Lal, *China’s Relations with South Asia*, in CHINA AND THE DEVELOPING WORLD, *supra* note 19, at 133, 140.

²² ROBERT G. SUTTER, CHINA’S RISE IN ASIA: PROMISES AND PERILS 255 (2005).

²³ Eisenman, *supra* note 19, at 35.

agreements and tax evasion prevention agreements with nine countries.²⁴

In 2007, “just over 30 percent of China’s total imports [were] derived from African sources, and that will only increase with the recent purchase of oil stakes in West Africa.”²⁵

Within Greater China, the mainland has established Closer Economic Partnership Arrangements (“CEPAs”) with Hong Kong²⁶ and then Macao.²⁷ Although Hong Kong and Macao are special administrative regions within China, they are separate customs territories within the WTO and have been members of the organization since its inception.²⁸ The CEPAs are particularly beneficial to the two regions. The arrangement with Hong Kong, for example, has provided this special administrative region preferred access to the mainland for selected services and reduced tariffs on a wide variety of goods.²⁹

In the past decade, there has also been growing economic cooperation between Taiwan and the Yangzi River Delta. A significant number of China-based factories now involve investment from Taiwan,³⁰ as well as from Hong Kong and the Chinese diaspora.³¹

²⁴ Xu Weizhong, *Sino-African Relations: New Transformations and Challenges*, in CHINA’S NEW ROLE, *supra* note 8, at 69.

²⁵ Chris Alden, *China’s New Engagement with Africa*, in CHINA’S EXPANSION INTO THE WESTERN HEMISPHERE: IMPLICATIONS FOR LATIN AMERICA AND THE UNITED STATES 213, 216 (Riordan Roett & Guadalupe Paz eds., 2008) [hereinafter CHINA’S EXPANSION INTO THE WESTERN HEMISPHERE].

²⁶ Mainland and Hong Kong Closer Economic Partnership Arrangement, June 29, 2003, H.K.-China, *available at* http://www.tid.gov.hk/english/cepa/files/main_e.pdf.

²⁷ Mainland and Macao Closer Economic Partnership Arrangement, China-Mac., Oct. 17, 2003, *available at* http://www.economia.gov.mo/public/docs/CEPA_CEPA_I/index/en/efulltext.pdf.

²⁸ See World Trade Org. [WTO], *Understanding the WTO: The Organization: Members and Observers*, WTO.ORG (July 23, 2008) http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (listing Hong Kong and Macao as founding members of WTO).

²⁹ See David M. Lampton, *China’s Rise in Asia Need Not Be at America’s Expense*, in POWER SHIFT, *supra* note 9, at 306, 313 (noting that CEPA provided Hong Kong with “preferred access to the mainland for eighteen different services, as well as reduce[d] tariffs on 273 categories of goods”).

³⁰ As David Kang points out:

[B]y 2005 over forty thousand Taiwanese companies had made investments in the mainland, employing 10 million people. The Taiwanese central bank estimates that total Taiwanese investment in China is perhaps \$80 billion, with private estimates putting that figure at over \$100 billion. Sixty-seven percent of Taiwanese foreign direct investment went to China in 2004, and

Since the election of President Ma Ying-jeou, the cooperation between the two regions has greatly accelerated. In fact, as Richard Bush observes: “Like it or not, Taiwan has been pulled into the PRC’s economic orbit, and its companies have long since accepted the centrality of the mainland for their future.”³² Most recently, China and Taiwan concluded the new Cross-Straits Economic Cooperation Framework Agreement,³³ which further promotes economic cooperation and integration between Taiwan and the mainland.

In sum, China’s active and energetic engagement with the less-developed world has been one of the most fascinating international developments in recent years. As Eric Heginbotham summarizes:

Chinese diplomacy appears to be taking the developing world by storm. Its leaders seem to be everywhere: signing investment agreements, building roads, forming “strategic partnerships,” and gaining membership in new or expanded regional organizations. It has burnished its image by dispatching blue-helmeted Chinese soldiers and policemen on United Nations . . . peacekeeping missions, donating money and equipment for disaster relief efforts, settling most of its border disputes, and engaging actively in a host of multilateral organizations around the world. It has also overhauled its foreign policymaking machinery, enabling political,

almost 30 percent of total trade, despite rising political tensions. Thirty-eight percent of Taiwanese exports — over \$70 billion — went to China in 2005. Thus the economic future and vitality of Taiwan is increasingly tied to the mainland. Over one million Taiwanese have moved to the mainland since 1985.

KANG, *supra* note 10, at 96-97; *see also* HALPER, *supra* note 12, at 18 (“China has become Taiwan’s largest trading partner while Taiwan has become one of China’s biggest investors. Taiwan’s trade with mainland China totaled \$102.3 billion in 2007, rising 16.1 percent from the previous year. Its exports to China in 2007 totaled \$74.28 billion, an increase of 17.3 percent, reaching a new high in the last three years.”); Richard Bush, *Taiwan Faces China: Attraction and Repulsion*, in *POWER SHIFT*, *supra* note 9, at 170, 174 (“Like it or not, Taiwan has been pulled into the PRC’s economic orbit, and its companies have long since accepted the centrality of the mainland for their future.”).

³¹ *See generally* HUANG YASHENG, *SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA* (2005) (discussing economic interactions within Greater China); WILLEM VAN KEMENADE, *CHINA, HONG KONG, TAIWAN, INC.: THE DYNAMICS OF A NEW EMPIRE* (1998) (same).

³² Bush, *supra* note 30, at 174.

³³ Cross-Straits Economic Cooperation Framework Agreement, China-Taiwan, June 29, 2010, *available at* http://www.moea.gov.tw/Mns/populace/news/wHandNews_File.ashx?news_id=19723&serial_no=6.

bureaucratic, business, and academic experts to function as part of a more seamless whole.³⁴

II. A DIFFERENT KIND OF FTA?

To engage the outside world, China has directed its energies and resources at many different levels — bilateral, plurilateral, regional, and multilateral. While China, like the European Union and the United States, has deployed bilateral, plurilateral, and regional trade agreements, its STAs belong to a different kind. Unlike the EPAs and the FTAs the European Union and the United States established, STAs do not seek to transplant laws from the home country to its less powerful trading partners. Part II.A provides an overview of the bilateral, plurilateral, and regional trade agreements that the United States, the European Union, Japan, and other developed countries have signed. Part II.B focuses on the STAs' unique design.

A. FTAs and EPAs

The recent proliferation of FTAs began when developed countries became frustrated with the slowdown of trade liberalization efforts within the international trading system.³⁵ While the establishment of the WTO and its mandatory dispute settlement process³⁶ in the early 1990s have undoubtedly liberalized trade, the collapse of the Millennium Round of Trade Negotiations in Seattle³⁷ and the

³⁴ Eric Heginbotham, *Evaluating China's Strategy Toward the Developing World*, in CHINA AND THE DEVELOPING WORLD, *supra* note 19, at 189, 189.

³⁵ See generally Yu, *Currents and Crosscurrents*, *supra* note 1, at 392-400 (discussing developed countries' frustrations with international trading system, especially in intellectual property context).

³⁶ See Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, 30 U. PA. J. INT'L L. 1133, 1134 (2009) ("Diplomats and trade negotiators have referred to the DSU as the 'crown jewel' of the WTO system."); William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 32 (2005) ("Dispute settlement is one of the great successes of the WTO."); Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 275 (1997) (noting that two achievements of Uruguay Round are, as title suggests, "Putting TRIPS and Dispute Settlement Together"); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 149-50 (2000) (footnote omitted) ("One of the most celebrated accomplishments of the WTO system is the dispute resolution mechanism which adds legitimacy to the overall design of the new trading system.").

³⁷ See generally Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165 (2000) (discussing failed Seattle Ministerial); David A. Gantz, *Failed Efforts to Initiate the*

premature end of the Fifth WTO Ministerial Meeting in Cancun (“Cancun Ministerial”)³⁸ created a need for alternative strategies to liberalize trade.

One of those strategies is what Fred Bergsten has described as “competitive liberalization,”³⁹ which calls for the development of preferential arrangements to liberalize trade by promoting competition among countries in smaller regional markets.⁴⁰ To facilitate this form of liberalization, the United States pushed for the establishment of FTAs, with a strong focus on trade, investment, and related areas. Similarly, the European Union and Japan pushed for the establishment of EPAs, which are broader and include nontrade issues, such as competition policy, investment, improvement of business environment, cooperation in vocational education and training, labor and product standards, environmental protection, tourism, illegal migration, and the resolution of other non-economic cross-border problems.⁴¹

“Millennium Round” in *Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT’L & COMP. L. 349 (2000) (same); Renato Ruggiero, *Reflections After Seattle*, 24 FORDHAM INT’L L.J. 9 (2000) (same); Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT’L ECON. L. 61 (2001) (same); Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT’L & COMP. L. 257 (2000) (same).

³⁸ See generally Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution*, 7 J. INT’L ECON. L. 219 (2004) (discussing debacle in Cancun Ministerial).

³⁹ Fred C. Bergsten, *Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century* 1 (Inst. for Int’l Econ., Working Paper No. 96-15, 1996), available at <http://www.iie.com/publications/wp/wp.cfm?ResearchID=171>; see also Albert Fishlow, *Brazil: FTA or FTAA or WTO?*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* 277, 277 (Jeffrey J. Schott ed., 2004) [hereinafter *FTA STRATEGIES AND PRIORITIES*] (mentioning United States’s “strategy of ‘competitive liberalization’ ”); J. Clark Leith & John Whalley, *Competitive Liberalization and a US-SACU FTA*, in *FTA STRATEGIES AND PRIORITIES*, *supra*, at 331, 331 (embracing concept of “competitive liberalization,” which author defined as “the idea that a sequence of barrier-reducing preferential initiatives undertaken by the United States and the European Union in competition one with [sic] another for smaller regional markets can serve to spur global trade growth and also sow the seeds for a successful conclusion to the World Trade Organization Doha Round in 2007”); Renato Ruggiero, *Comment*, in *FTA STRATEGIES AND PRIORITIES*, *supra*, at 26, 28 [hereinafter *Comment*] (noting move toward competitive regionalism).

⁴⁰ See Ruggiero, *Comment*, *supra* note 39, at 26 (“[N]ot only are US bilateral and regional agreements valuable contributions to freeing trade in themselves, they also put pressure on other countries to push forward with freeing trade multilaterally at the WTO.”).

⁴¹ See, e.g., Ministry of Foreign Affairs (Jp.), *Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership (Overview)*,

Depending on the number of parties and their regional affiliations, FTAs or EPAs may be set up as bilateral, plurilateral, or regional agreements.⁴² Although there are *some* distinctions between FTAs and EPAs, their goals are rather similar for the purposes of this Article. This section begins by discussing the goals and strengths of bilateral and plurilateral agreements established by developed countries — FTAs and EPAs. The section then explores the weaknesses of these agreements, in particular their adverse impact on less-developed countries and the multilateral trading system as a whole.

1. Goals and Strengths

Developed countries have several goals in mind when they establish FTAs or EPAs. These goals may vary, depending on the bargaining strength of the negotiating partners. For example, an EPA between France and Great Britain (before both became members of the European Union) is likely to be different from the Central America–Dominican Republic Free Trade Agreement,⁴³ which the United States established in 2004 with states in Central America and the Dominican Republic.

When the negotiating partners have equal bargaining strength, the goal of these agreements is to harmonize laws, policies, and standards of, or foster common policy positions among, the participating

MINISTRY FOREIGN AFF. JP. (Sept. 2004), <http://www.mofa.go.jp/region/latin/mexico/agreement/overview.html> (noting that, in addition to liberalizing trade and investments and promoting freer flow of persons for business purposes between Japan and Mexico, the Agreement “aims to promote a comprehensive economic partnership, which includes competition policy, improvement of business environment and bilateral cooperation in such fields as vocational education and training, and support for small and medium enterprises”).

⁴² Although there are no clear distinctions among a plurilateral agreement, a regional agreement, and a multilateral agreement, plurilateral agreements tend to refer to those agreements that are negotiated outside the traditional international or regional organizations or fora. The recently negotiated Anti-Counterfeiting Trade Agreement (“ACTA”) is a good example. See generally Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1624813> [hereinafter *Six Secret Fears of ACTA*] (discussing origins and ongoing negotiation of ACTA). Plurilateral agreements can also have a “loose” regional focus. Simon Lester and Bryan Mercurio, for example, define “‘loose’ regional trade agreements” as “plurilateral agreements among countries which may or may not be in somewhat close proximity to each other, but do not necessarily include all countries from that area.” Simon Lester & Bryan Mercurio, *Introduction to BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES*, *supra* note 6, at 1, 2.

⁴³ Central America-Dominican Republic Free Trade Agreement, May 28, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dominican-republic-central-america-fta/final-text>.

countries.⁴⁴ Compared to multilateral agreements, which are usually the product of compromise between a large number of parties and therefore have diluted standards,⁴⁵ FTAs and EPAs can be more effective in addressing the individual concerns and circumstances of each party.⁴⁶ For example, FTAs and EPAs can be carefully tailored to specific local needs, interests, conditions, and priorities.⁴⁷ They can also target practices that are problematic for each party and seek

⁴⁴ See Jeffrey J. Schott, *Free Trade Agreements: Boon or Bane of the World Trading System*, in *FTA STRATEGIES AND PRIORITIES*, *supra* note 39, at 3, 13 (noting that FTAs “strengthen trade relations among partner countries and make it easier to build alliances for WTO reforms in areas of common interest”).

⁴⁵ See INTERNATIONAL INTELLECTUAL PROPERTY LAW 223 (Anthony D’Amato & Doris Estelle Long eds., 1997) (noting that “the need to achieve concurrence among so many parties often leads to less stringent standards” and that such standards “may be difficult (if not impossible) to raise through bilateral efforts”); Yu, *Currents and Crosscurrents*, *supra* note 1, at 394 (“Compared to bilateral agreements, multilateral regimes usually result in compromises that contemplate less substantial change.”).

⁴⁶ See PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS 139 (2001) [hereinafter INTERNATIONAL INTELLECTUAL PROPERTY LAW] (noting that lengthy enforcement action plan annexed to 1995 China-U.S. Agreement Regarding Intellectual Property Rights “imposed more detailed procedural obligations than could be provided in a multilateral agreement such as TRIPs”); Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT’L L. & ECON. 327, 339 (1993) (“Bilateral agreements provide the most workable vehicle for addressing the contentious issues surrounding intellectual property protection.”). See generally Michael Aho, *More Bilateral Agreements Would Be a Blunder: What the President Should Do*, 22 CORNELL INT’L L.J. 25 (1989) (discussing bilateral agreements); Max Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 CORNELL INT’L L.J. 1 (1989) (same).

⁴⁷ See Giunta & Shang, *supra* note 46, at 329 (noting that bilateral agreements “can take into consideration the particular phases of development confronting each country, and provide for the gradual inclusion of a developing country into the global economy”); cf. GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 46, at 139 (noting that lengthy enforcement action plan annexed to 1995 China-U.S. Agreement Regarding Intellectual Property Rights “specified particularized enforcement efforts for motion pictures, literary works and software”). Peter Drahos, however, disagrees:

For the United States, there are very strong incentives for a standardization of bilateral treaty standards. So, for example, the BIT [Bilateral Investment Treaty] which the United States signed with Nicaragua in 1995 was based on the prototype that the United States had developed for such treaties in 1994. Similarly, the Free Trade Agreement (FTA) that the United States has negotiated with Jordan will serve as a model for the other FTAs being negotiated with Chile and Singapore.

Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 794 (2001) [hereinafter *BITs and BIPs*].

expeditious resolution of those problems.⁴⁸ As a result, they usually incur lower political costs than multilateral negotiations and can be completed more quickly.⁴⁹

Moreover, by enabling the participating countries to speak with a united and louder voice, FTAs and EPAs can help increase leverage in international negotiations.⁵⁰ Although commentators tend to focus on the benefits of these agreements to less-developed countries,⁵¹ bilateral

⁴⁸ See Giunta & Shang, *supra* note 46, at 340 (noting that empirical evidence has demonstrated that U.S. bilateral agreements “have generally encouraged speedier and more substantial changes in suspect nations” after United States threatened to impose trade sanctions on those countries); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 295 (1991) (“Bilateral negotiations can effectively promote U.S. interests. They can target practices of a particular country offensive to U.S. interests and do so in an expeditious manner. By employing direct trade sanctions against noncomplying countries, the current U.S. bilateral effort coerces problem countries to adopt adequate standards of protection.”); Ashoka Mody, *New International Environment for Intellectual Property Rights*, in INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE: INTERNATIONAL COMPARISONS 203, 225 (Francis W. Rushing & Carole Ganz Brown eds., 1990) (“In the short-run, bilateralism is proving more effective than multilateral efforts in furthering U.S. interests. Bilateralism is quicker and allows more focused and tailored responses.”).

⁴⁹ See Chad Damro, *The Political Economy of Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 23, 37 (Lorand Bartels & Federico Ortino eds., 2006) [hereinafter RTA AND WTO] (“The pursuit of an RTA . . . can be sold more easily by politicians to their constituents because of the reciprocal nature of the agreement. An RTA guarantees compensatory tariff reductions and ensures that ‘economic activity and investment are more balanced’ than they would be under unilateral liberalization.”); see also Andrew Christie et al., *Exporting the DMCA Through Free Trade Agreements*, in INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS, *supra* note 3, at 211, 220 (“[A]n FTA will have a more realistic chance of obtaining the necessary approval if it follows an already established model.”).

⁵⁰ See Damro, *supra* note 49, at 34 (“Developing countries also found regional economic agreements as useful ways in which to leverage more aid from donor states and international organizations. The European Union, for example, is known to encourage regional economic integration as part of its development assistance to the African, Caribbean and Pacific (ACP) and other countries. Therefore, developing countries that promote regional cooperation increase their chance of receiving aid from the EU.”).

⁵¹ See *id.* (“Developing states are also able to increase their negotiating leverage in international organizations by pooling their diplomatic resources with other members of a regional economic agreement. Sharing similar interests in areas affected by the RTA, these states often cooperate quite naturally and effectively vis-à-vis third parties.”); Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 FORDHAM INT’L L.J. 345, 375 (2009) (“A free-trade agreement can level the playing field, for example for Brazil in relation to Mexico and Chile, both of which already have FTAs with the EC. Moreover, there is insurance against trade defense instruments as these are generally less used against

and plurilateral agreements have succeeded in increasing the leverage of developed countries as well. For example, Japan pushed for the development of regional preferential arrangements to “increase [its] leverage within the WTO.”⁵² The negotiation of the Treaty of Rome, which established the European Economic Community (the precursor to the European Union), was “in part motivated by European countries’ desires to increase their leverage against the United States in the upcoming GATT [General Agreement on Tariffs and Trade] talks.”⁵³

When the negotiating partners have unequal bargaining strength, such as in North-South FTAs or EPAs involving developed and less-developed countries, the goal of the agreements is to provide the needed “carrots and sticks” to induce less-powerful countries to change their laws, policies, and standards. Oftentimes, the agreements will lead to transplants from developed countries.⁵⁴ Such transplants will help overcome domestic political resistance within the negotiating partners — whether from factions in the leadership⁵⁵ or from strong industry lobbies.⁵⁶

trade partners.”); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 370 (2008) [hereinafter *Access to Medicines*] (noting that coalition-building strategies “will allow less developed countries to shape a pro-development agenda, articulate more coherent positions, or even enable these countries to establish a united negotiating front” and will “help these countries establish a powerful voice in the international debates on public health, intellectual property, and international trade”).

⁵² JOHN RAVENHILL, *GLOBAL POLITICAL ECONOMY* 123 (2005).

⁵³ *Id.*

⁵⁴ See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (advancing concept of legal transplants); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (questioning concept of legal transplants); Julie Mertus, *Mapping Civil Society Transplants: A Preliminary Comparison of Eastern Europe and Latin America*, 53 U. MIAMI L. REV. 921 (1999) (discussing legal transplants in Eastern Europe and Latin America).

⁵⁵ See MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, *TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION* 41 (1999) (“[A]n international institution such as the WTO can help bolster China’s reform leadership against powerful hard-liners. International institutions can tie the hands of leaders in ways that the ineffectual bilateral relationship is not able to do.”); Michael E. DeGolyer, *Western Exposure, China Orientation: The Effects of Foreign Ties and Experience on Hong Kong*, in *THE OUTLOOK FOR U.S.-CHINA RELATIONS FOLLOWING THE 1997-1998 SUMMITS: CHINESE AND AMERICAN PERSPECTIVES ON SECURITY, TRADE AND CULTURAL EXCHANGE* 299, 300 (Peter Koehn & Joseph Y.S. Cheng eds., 1999) (internal quotations omitted) (“[E]conomic integration would help the reformers tilt the internal Chinese debate in directions that would minimize, if not avoid, future economic conflicts. It would encourage and perhaps accelerate the inevitable transformation of China’s political regime.”); Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. (forthcoming 2011), available at

By imposing international obligations and increasing the costs of policy changes, the agreements will also produce a lock-in effect on domestic reforms.⁵⁷ If the agreements are specifically tailored to the needs, interests, conditions, and priorities of the negotiating partners, they may provide an even stronger lock-in effect. As Bernard Hoekman and Petros Mavroidis point out, these types of agreements “may offer a stronger ‘lock-in’ mechanism for policy reform than the WTO, insofar as the partners involved have stronger incentives to enforce agreements.”⁵⁸ Although commentators tend to see bilateral and plurilateral agreements as gap-fillers,⁵⁹ some regional agreements, such as the Treaty of Rome, have had a “positive long-run impact on the world economy.”⁶⁰

Within the WTO context, the increasing use of FTAs and EPAs will help push for new commitments that are hard to achieve in a multilateral setting. If the agreements are motivated by trade liberalization and are complementary to multilateral reforms, they will help achieve what developed countries cannot through traditional bargaining in the WTO or other international bodies. Some commentators, in fact, have found FTAs and EPAs especially important in view of the increasing difficulty in striking compromises

<http://ssrn.com/abstract=1676558> (manuscript at 43) (arguing that WTO’s recent panel report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, provides reformist factions within Chinese leadership with important push for stronger reforms within country).

⁵⁶ See Helen Milner, *Regional Economic Co-operation, Global Markets and Domestic Politics: A Comparison of NAFTA and the Maastricht Treaty*, in REGIONALISM AND GLOBAL ECONOMIC INTEGRATION: EUROPE, ASIA AND THE AMERICAS 19, 29 (William D. Coleman & Geoffrey R.D. Underhill eds., 1998) (“NAFTA provided a means to lock in the trade liberalization strategy that had been undertaken unilaterally. By joining an FTA, Mexico could not unilaterally change its policies and return to protectionism, at least not without incurring substantial costs. . . . This increased the credibility of its policy moves and hence their effectiveness.”); Schott, *supra* note 44, at 13 (noting that FTAs “help governments to withstand the protectionist demands of their domestic lobbies and deflect pressure to take actions that are politically alluring but economically undesirable”).

⁵⁷ See Schott, *supra* note 44, at 13 (noting that FTAs will make policy reversals “more costly because changes that violate the free trade obligations could trigger retaliation by trading partners”).

⁵⁸ BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS* 59 (2007).

⁵⁹ See Schott, *supra* note 44, at 12 (“As long as countries proceed with WTO reforms in tandem with their FTA initiatives, regional preferences will have a short ‘half-life’ and FTA partners will lack incentives to build regional fortresses designed to shield their economies from foreign competition.”).

⁶⁰ Christine Lagarde, *Multilateralism: The Doha Round and the Hong Kong Declaration*, in CHALLENGES TO MULTILATERAL TRADE, *supra* note 6, at 5, 9.

with less-developed members in international negotiations.⁶¹ As Jeffery Schott acknowledges, “[t]he political economy of trade liberalization and the increasing complexities of negotiating in the WTO seem to require an admixture of bilateral, regional, and multilateral trade initiatives.”⁶²

Moreover, by relying on a “divide and conquer” approach, the developed countries’ use of FTAs and EPAs has greatly enhanced their already strong bargaining positions, thereby helping them to avoid the stalemate found in the WTO negotiation process.⁶³ By using these agreements, the United States and the European Union were able to reward those who were willing to work with them while at the same time undermining the efforts by Brazil, India, and other members of the Group of 20 to establish a united negotiating front for less-developed countries. As former U.S. Trade Representative Robert Zoellick wrote in the *Financial Times*, the United States would separate the “can-do” countries from the “won’t-do,” and it would “move

⁶¹ See Schott, *supra* note 44, at 17 (noting that “WTO deliberations are now the subject of intense coalitional politics” and that “FTAs can reinforce the negotiating dynamics required for a successful WTO round”). As Jeffrey Schott observes, the WTO works quite differently from the GATT, and its complicated negotiation dynamics have made it difficult for developed countries to reach agreement with those in the less-developed world:

Most of the [WTO] members are developing countries; unlike during the GATT era, many of them now have an important stake in international trade and therefore an important stake in getting something out of the trade agreements. Because each country needs to be able to bring home a trophy to justify the concessions that they make to their trading partners, WTO talks have to produce a big package of agreements that accommodates the diverse interests of its large membership. Since the WTO still operates by consensus, the task of crafting a set of agreements that meets the demands of the large and increasingly disparate membership has become much more difficult

The second major problem is that the United States and the European Union have very little left to offer at the negotiating table in terms of market access, except what is very difficult to give — that is, the protection in agriculture and textiles that has survived eight previous rounds of multilateral trade negotiations and that is of major export interest to developing countries. In turn, developing countries seem reluctant to lower their own generally much higher trade barriers without increased and more secure access to industrial markets.

Id. at 16-17.

⁶² *Id.* at 17.

⁶³ See Yu, *Currents and Crosscurrents*, *supra* note 1, at 393 (discussing United States’s use of “divide and conquer” approach to address resistance from less-developed countries).

towards free trade with [only] can-do countries.”⁶⁴ By reducing the number of negotiating parties, the agreements will also enable negotiating partners to offer each other terms that they otherwise would not offer in a multilateral forum.⁶⁵

Regardless of whether the FTAs or EPAs are North-North agreements (those between developed countries) or North-South agreements (those between developed and less-developed countries), these agreements can drive discussion of, or push for, reforms in two areas. Through the introduction of “multilateral-plus” provisions — provisions that exceed those required by the multilateral agreements — FTAs and EPAs can increase the scope and extent of commitments made under existing multilateral agreements. Although multilateral agreements, in particular those in the WTO, have made it costly and difficult for participating countries to roll back commitments, virtually all of the existing agreements were designed as “minimum standards” agreements.⁶⁶ As a result, countries only have minimum obligations, and they are free to increase their commitments, provided those additional commitments do not interfere with the agreements’ most-favored-nations clauses or other countervailing obligations.⁶⁷

In addition to multilateral-plus provisions, bilateral and plurilateral agreements can also introduce “multilateral-extra” provisions that cover reforms that fall squarely outside, or have not been fully covered by, the existing multilateral agreements.⁶⁸ For example, “FTA

⁶⁴ Robert B. Zoellick, *America Will Not Wait for the Won't-Do Countries*, FIN. TIMES, Sept. 22, 2003, at 23.

⁶⁵ See, e.g., Yu, *Currents and Crosscurrents*, *supra* note 1, at 395 (“By changing the forum and reducing the number of negotiating parties, the United States can provide side payments that it would not be able to offer in a multilateral forum, given the diversity of interests the United States has vis-à-vis the contracting states.”).

⁶⁶ See, e.g., TRIPS Agreement, *supra* note 4, art. 1.1 (“Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”); Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 931 (2008) (“[T]he TRIPs Agreement introduced to all WTO member states many uniform minimum standards on which there was no international consensus before.”). Interestingly, WTO members are somewhat reluctant to challenge the bilateral and plurilateral agreements as noncompliant with the WTO rules. As Jeffrey Schott explains, “virtually all WTO members are party to some type of regional agreement, and thus don’t want to throw stones at other pacts lest their own preferential deals come under attack. As a result, the trading system has treated FTAs with benign neglect.” Schott, *supra* note 44, at 4.

⁶⁷ See Yu, *The International Enclosure Movement*, *supra* note 5, at 883 (noting tension between bilateral and plurilateral agreements on one hand and most-favored-nation clauses on other).

⁶⁸ In a previous work, I noted the distinction between TRIPS-plus and TRIPS-extra

provisions have established precedents for broader multilateral accords in areas such as services and electronic commerce.”⁶⁹ Although multilateral-extra provisions look quite similar to multilateral-plus provisions, the distinction between the two is important from the standpoint of dispute resolution. Because the WTO only requires the use of its mandatory process to settle disputes arising under its agreements,⁷⁰ multilateral-extra provisions are technically outside the WTO rules and are, therefore, open to alternative dispute resolution approaches, including unilateral trade sanctions.

The existence of multilateral-extra provisions, indeed, has helped rejuvenate the United States’s section 301 process, which permits the U.S. President to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States’s economic interests.⁷¹ In *United States — Sections 301–310 of the Trade Act of 1974*, the WTO Dispute Settlement Body stated that its rules prohibit its members from taking retaliatory measures before exhausting all of the permissible actions.⁷² Thus, even though the Section 301 process remains intact, its effectiveness has been greatly curtailed. With respect to measures covered by the WTO agreements, this process remains largely reduced to a shaming exercise.

Strategically, FTAs and EPAs provide important entry points into other regional or plurilateral networks.⁷³ In doing so, they allow

provisions in the intellectual property context. *See id.* at 867-70; *see also* HOEKMAN & MAVROIDIS, *supra* note 58, at 59 (noting that reciprocal preferential trade agreements may “involve disciplines on domestic instruments that are not (yet) covered by the WTO, providing a laboratory for countries to explore mechanisms of cooperation on ‘behind the border’ policies with similar or like-minded partners”).

⁶⁹ Schott, *supra* note 44, at 12.

⁷⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994).

⁷¹ 19 U.S.C. §§ 2411-20 (2006). Section 301, in particular, requires the United States Trade Representative to identify foreign countries that provide inadequate intellectual property protection or that deny American intellectual property goods fair or equitable market access. *Id.* § 2242(a)(1)(A). *See generally* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 138-40 (2000) (discussing section 301 process).

⁷² Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, ¶ 8.1, WT/DS152/R (Dec. 22, 1999).

⁷³ *See, e.g.*, Drahos, *BITs and BIPs*, *supra* note 47, at 794 (stating that U.S.-Jordan FTA “will serve as a model for the other FTAs being negotiated with Chile and Singapore”); Sidney Weintraub, *Lessons from the Chile and Singapore Free Trade Agreements*, in *FTA STRATEGIES AND PRIORITIES*, *supra* note 39, at 79, 79 (noting that

developed countries to explore interstate relationships with a smaller number of countries. Such an arrangement helps reduce the complexity and high costs of negotiation with a large number of parties or a complex regional body. The negotiation of the agreements also helps countries test the feasibility of applying specific models to a particular region. In fact, because the agreements involve self-selected parties, they allow parties to avoid negotiation of issues that would require them to make concessions that are important to their domestic constituencies. The exclusion of issues will also quicken the negotiation process, as those issues tend to slow down, if not derail, the negotiations.

Consider, for example, the United States's use of the United States-Morocco Free Trade Agreement⁷⁴ as an entry point to the Middle East and Northern Africa. As Jason Kearns observes:

US Trade Representative Zoellick hoped in particular that an agreement with Morocco would lead to agreements with other countries in Northern Africa, notably Tunisia and Algeria. When he announced his plan to negotiate an agreement with Morocco, he suggested that an FTA would help Morocco 'accelerate its embrace of the modern world'. He also noted that the Administration's commitment to free trade with a leading moderate Arab State 'sends a signal throughout a tempestuous region: of America's support of tolerant, open, and more prosperous Muslim societies'.⁷⁵

According to Professor Kearns, the United States's FTA effort with Morocco reflected "a 'building block' approach: first ensuring that countries accede to the WTO, then negotiating trade and investment agreements with individual countries in the region (such as the Agreement with Morocco), and finally reaching a comprehensive United States-Middle East Free Trade Area."⁷⁶

Such a building block approach is effective because virtually all negotiating parties to an FTA or an EPA belong to other FTAs, EPAs,

U.S. FTAs with Chile and Singapore "are intended to be bellwethers for future FTAs in both regions, some bilateral and others plurilateral, as well as to set the substantive parameters for the hemispherewide Free Trade Area of the Americas").

⁷⁴ United States-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>.

⁷⁵ Jason Kearns, *United States-Morocco Free Trade Agreement*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES*, *supra* note 6, at 144, 145 (footnotes omitted).

⁷⁶ *Id.* at 146.

or regional arrangements.⁷⁷ Through the development of an ever-growing web of agreements, FTAs and EPAs can help establish norms that will eventually be consolidated in a multilateral setting.⁷⁸ As Ruth Okediji points out, countries may seek to “consolidate and (perhaps improve) the gains from bilateralism” once they have developed a network of bilateral agreements that is sufficiently dense for that purpose.⁷⁹ Likewise, Sungjoon Cho acknowledges: “regionalism may contribute to multilateralism under certain circumstances through a ‘laboratory effect’. After experiencing trial and error as well as learning-by-doing in the regional level, countries may feel confident in ratcheting these regional initiatives up to the multilateral forum.”⁸⁰

The development of this web of agreements may even help influence the future development and interpretation of existing multilateral agreements. For example, FTAs and EPAs can become customary international law when a sufficient number of countries have adopted

⁷⁷ See Henry Gao, *The RTA Strategy of China: A Critical Visit*, in CHALLENGES TO MULTILATERAL TRADE, *supra* note 6, at 53, 60 [hereinafter *RTA Strategy*] (discussing China’s focus on negotiations with those who are already members of other regional trade agreements).

⁷⁸ See IQsensato, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Global Policy Implications*, IN FOCUS, June 2, 2008, at 4, available at <http://www.iqsensato.org/wp-content/uploads/InFocus%20-ACTA%20-%20Vol%20%20-Issue%208.pdf> (“What appears as plurilateral in the beginning will quickly become a global standard through FTAs and EPAs and through political and economic pressure.”). Senator Max Baucus, for example, has contended that a bilateral agreement may “provide at least a partial model for a future multilateral agreement.” Baucus, *supra* note 46, at 21-22. As he explains:

By opening markets on a bilateral basis, otherwise insoluble political problems can be attacked incrementally; bilateral agreements might break the political ice for multilateral agreements. Once the first steps have been taken to eliminate a trade barrier or solve an economic problem for one nation, political problems appear less formidable and it is easier to reach similar agreements with other nations. For example, opening the Japanese construction market to the entire world might be extremely difficult politically for Japanese officials. Opening it only to the United States might be somewhat easier. Once the market is opened partially and the Japanese industry and government become accustomed to the new situation, further liberalization will be easier to achieve. Far from derailing the GATT, bilateral agreements can blaze a trail that the GATT can follow.

Id. at 22.

⁷⁹ Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 143 (2004) [hereinafter *Back to Bilateralism?*].

⁸⁰ Cho, *supra* note 38, at 238 (footnote omitted); accord Guy de Jonquières, *Comment*, in FTA STRATEGIES AND PRIORITIES, *supra* note 39, at 32 (noting that FTAs “push forward the frontiers by acting as laboratories for WTO-plus innovations”).

the same provisions in their agreements and have expressly and consistently recognized those provisions as legal norms governing their state conduct.⁸¹ Although legislatures — such as the U.S. Congress — may override these customary laws through legislation, the potential of the agreements to influence the domestic legislative and judicial processes, and their ability to shape international discussion, should not be ignored.⁸²

Moreover, the international agreements and the network of bilateral and plurilateral treaties might affect the country's international obligations by forming context for interpreting treaties it has signed.⁸³ Because of the increasing overlap between intellectual property and other issue areas,⁸⁴ governments and international organizations increasingly look to these agreements as part of the overall framework in an effort to avoid future conflicts in international obligations. In *United States — Section 110(5) of the US Copyright Act*, for instance, the WTO dispute panel noted the need “to seek contextual guidance . . . when developing interpretations that avoid conflicts within this overall framework, except where these treaties explicitly contain different obligations.”⁸⁵ While the panel in *China — Measures*

⁸¹ See Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 56 (2006); Yu, *Currents and Crosscurrents*, *supra* note 1, at 398. As Andrew Guzman observes:

To determine whether BITs evidence a sense of legal obligation on the part of signatories . . . requires an inquiry into the reasons countries sign BITs. If BITs are signed out of a sense of obligation or to clarify a legal obligation, they must be considered evidence of customary international law. On the other hand, if BITs are signed for reasons unrelated, or even contrary, to a country's sense of legal obligation, BITs are not evidence of customary international law.

Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 686 (1998).

⁸² See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .”); Yu, *Anticircumvention and Anti-anticircumvention*, *supra* note 81, at 56.

⁸³ See Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 585, 602-04 (2001).

⁸⁴ See Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 UC DAVIS L. REV. 1021, 1025-27 (2007) (discussing intellectual property “regime complex”); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 9-16 [hereinafter *Intellectual Property Schizophrenia*] (discussing increasing complexity of international intellectual property regime and coining term “international intellectual property regime complex”).

⁸⁵ Panel Report, *United States — Section 110(5) of the US Copyright Act*, ¶ 6.70,

Affecting the Protection and Enforcement of Intellectual Property Rights rejected the use of FTAs as subsequent agreements for the purpose of determining the obligations of WTO members,⁸⁶ the arguments for using FTAs to provide contextual guidance may be strengthened if the web of agreements becomes denser in the future and involves parties appearing before the panel.

Finally, FTAs and EPAs can respond directly to non-economic strategic concerns or provide spillover effects in non-economic areas.⁸⁷ For example, the European Union, which some commentators have called the “granddaddy of RTAs,” came into existence “largely as [a] non-aggression device.”⁸⁸ Likewise, ASEAN was established in 1967 to “create a sense of regional identity as a means to promote conflict prevention and cooperative security.”⁸⁹ As shown in both cases, the negotiation of the agreement has “ma[d]e it easier [for countries] to build alliances . . . in areas of common interest” that lie outside the international trade area.⁹⁰

WI/DS160/R (June 15, 2000). See generally Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001) (discussing dispute); Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93 (2000) (same).

⁸⁶ See Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 7.581, WI/DS362/R (Jan. 26, 2009) (rejecting use of recently negotiated bilateral, plurilateral, and regional trade agreements as relevant subsequent practice for defining term “commercial scale”); Yu, *The TRIPS Enforcement Dispute*, *supra* note 55 (manuscript at 45) (discussing WTO panel’s treatment of FTAs and EPAs).

⁸⁷ See Damro, *supra* note 49, at 24 (“[M]any governments enter into RTAs for important political rather than economic reasons.”); de Jonquières, *supra* note 80, at 30 (noting that, in FTA context, “[p]olitics are at least as important a driving force as economics”).

⁸⁸ Viet D. Do & William Watson, *Economic Analysis and Regional Trade Agreements*, in *RTA AND WTO*, *supra* note 49, at 7, 10; accord Damro, *supra* note 49, at 31 (“The EU has received considerable scholarly attention as a case of regionalism and provides empirical evidence of governments pursuing an RTA in order to attain security via economic means.”).

⁸⁹ Damro, *supra* note 49, at 31; see also RAVENHILL, *supra* note 52, at 122 (stating that ASEAN was established to “promote economic cooperation in an attempt to build confidence and avoid conflict in a region that was the site of armed struggles in the Cold War era.”). See generally MARK BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC: ASEAN, APEC AND BEYOND* 17-36 (2008) (providing in-depth discussion of ASEAN).

⁹⁰ Cf. Schott, *supra* note 44, at 13 (“FTAs strengthen trade relations among partner countries and make it easier to build alliances for WTO reforms in areas of common interest.”).

Like the EU and ASEAN, the United States's establishment of FTAs is equally motivated by non-economic considerations.⁹¹ For example, the United States-Israel Free Trade Agreement "provided the United States [with] a means to display its strong support for Israel without providing additional financial assistance."⁹² In negotiating the United States-Jordan Free Trade Agreement, "President Clinton was looking for a way to reward King Hussein for his cooperation in the Oslo peace process — in particular, for his mediating role between Israel and the Palestinians during negotiations at Camp David," not to mention the United States's strong interest in keeping Jordan in the peace process.⁹³ By sending signals about the United States's "willingness to negotiate FTAs with partners in the Middle East besides Israel and its neighbors,"⁹⁴ the United States-Morocco Free Trade Agreement "illustrates that the impetus for a trade agreement can have more to do with broad foreign policy concerns than with narrow commercial interests."⁹⁵ Some commentators went further to acknowledge that the United States has used FTAs to reward allies for their support in the war on terror.⁹⁶

⁹¹ See Ahmed Galal & Robert Z. Lawrence, *Egypt, Morocco, and the United States*, in *FTA STRATEGIES AND PRIORITIES*, *supra* note 39, at 299, 299 ("[I]t is not surprising . . . that political rather than economic considerations have driven US free trade agreements . . . in the Middle East.").

⁹² Howard Rosen, *Free Trade Agreements as Foreign Policy Tools: The US-Israel and US-Jordan Cases*, in *FTA STRATEGIES AND PRIORITIES*, *supra* note 39, at 51, 61.

⁹³ *Id.* at 62.

⁹⁴ Galal & Lawrence, *supra* note 91, at 327.

⁹⁵ Kearns, *supra* note 75, at 144.

⁹⁶ See Olivier Cattaneo, *The Political Economy of PTAs*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 28, 45 (Simon Lester & Bryan Mercurio eds., 2009) (noting that preferential trade agreements have been used "as an instrument of the 'war on terror' and a reward for countries supporting US efforts in Iraq"); Kearns, *supra* note 75, at 145 ("Morocco and the US agreed to negotiate an agreement just eight months after the terrorist attacks of 11 September 2001. The US was looking to strengthen its relationship with a reform-minded Muslim nation in the Middle East — and to provide economic opportunities in that region as a way to counter terrorism."); Andrew D. Mitchell & Tania Voon, *Australia — United States Free Trade Agreement*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES*, *supra* note 6, at 6, 8 (footnote omitted) ("An unofficial suggestion is that the AUSFTA was 'payback' for Australia's support of the Iraq war: September 11 may have been what finally led the US to agree to the AUSFTA."); David Armstrong, *Aftermath of War*, *S.F. CHRON.*, May 11, 2003, at 11 ("Experts say modern U.S. trade policy has been tightly intertwined with this country's political objectives since the terrorist attacks of Sept. 11. Washington increasingly employs free trade agreements — which lower tariffs and quotas — as a reward to other countries, and threatens trade sanctions, including higher tariffs and quotas, as a punishment for nations that haven't sided with the United States.").

2. Weaknesses

Although bilateral and plurilateral agreements can help drive new norms that will be eventually consolidated in a multilateral setting, they also threaten to undermine the existing multilateral system. Instead of “building blocks,” they can serve as “stumbling blocks” that make it difficult for multilateral organizations to achieve their liberalization goals.⁹⁷ For example, they can make the multilateral system less appealing and thereby undermine its stability and growth. As less-developed countries pointed out in the early days of the Uruguay Round of Trade Negotiations, it was pointless to develop the WTO and the TRIPS Agreement if developed countries continued to rely on unilateral measures, such as the notorious Section 301 process.⁹⁸

The agreements can also alienate a country’s multilateral partners, resulting in distractions, or even disengagement, that impede the progress of multilateral discussions.⁹⁹ The lack of such progress would be a loss to the international community. Multilateral agreements are generally more stable than their bilateral and plurilateral counterparts. They are also more likely to persist in their own right even when the interests of *some* signatory countries have changed.¹⁰⁰

⁹⁷ See Damro, *supra* note 49, at 39-41 (discussing how RTAs can serve as “political stumbling blocks” to WTO multilateralism); Meredith Kolsky Lewis, *The Prisoners’ Dilemma and FTAs: Applying Game Theory to Trade Liberalization Strategy*, in CHALLENGES TO MULTILATERAL TRADE, *supra* note 6, at 21, 23 (“Government statements often emphasize the potential for FTAs to serve as ‘building blocks’ that assist, rather than ‘stumbling blocks’ that hinder, the WTO’s ability to achieve the organization’s multilateral liberalization goals.”).

⁹⁸ See David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT’L L. 893, 909 (1989) (suggesting that states might not accept new multilateral commitments in intellectual property area if they are going to be vulnerable to unilateral actions).

⁹⁹ See Yu, *Six Secret Fears of ACTA*, *supra* note 42 (manuscript at 73) (discussing how ACTA would render future multilateral discussions in area of intellectual property enforcement more difficult); see also Cho, *supra* note 38, at 239 (“The inherent discriminatory nature of bilateralism/regionalism is often blended with an internal power disparity and ultimately begets unilateralism. Unilateralism, which is often clad with extraterritoriality, tends to eclipse international trade law, thereby placing the global trading system at the mercy of bare politics by a handful of powerful states.”); Leaffer, *supra* note 48, at 297 (arguing that bilateral agreements “may run counter to U.S. long-term interests for a healthy, stable trade environment . . . [and] fragment the world trading system . . . [by creating] resentment, particularly among Third World countries who view imposed bilateral agreements as a species of colonialism”).

¹⁰⁰ See Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in INTERNATIONAL REGIMES 115, 138 (Stephen D. Krasner ed., 1983) (noting

From a practical standpoint, FTAs and EPAs can compete directly with the multilateral system by taking away the much-needed time, resources, and energies countries can devote to multilateral negotiations.¹⁰¹ In an ideal world, both the multilateral and bilateral processes should work in tandem to maximize their strengths and effectiveness. Countries, therefore, should continue to negotiate in a multilateral forum while at the same time seeking enhancement through FTAs and EPAs. In reality, however, countries — especially those in the less-developed world — have very limited resources.¹⁰² As a result, they may not have the ability to dedicate efforts to normmaking in a multitude of competing fora. Not even developed countries can devote the same amount of energy and resources to the multilateral process if they also have to negotiate a large number of bilateral and plurilateral agreements.¹⁰³

Even worse, the inherent power asymmetry in the international trading system may create perverse incentives for more powerful

that “[r]egimes may be maintained even after shifts in the interests that gave rise to them”). Professor Stein provided four reasons for such persistence: (1) the delays in recalculation or reassessment of interests; (2) sunk costs involved in international institutions; (3) tradition, legitimacy, and the reluctance to damage reputation by breaking with customary behavior; and (4) the changing mindset from self-maximization to joint-maximization. *Id.* at 138-39.

¹⁰¹ See Ruggiero, *Comment, supra* note 39, at 27 (“Negotiating bilateral and regional agreements can divert attention and effort from the Doha Round. This in turn can create a vicious cycle, whereby a lack of progress at the WTO spurs a greater emphasis on bilateralism and regionalism, which in turn further hampers efforts in Geneva.”).

¹⁰² See Schott, *supra* note 44, at 15-16 (“[C]ountries have limited resources to engage in trade negotiations, and FTAs clearly dilute the effort that can be directed toward WTO initiatives. This resource scarcity problem is particularly constraining for developing countries that have only a few officials to run domestic agencies and participate in bilateral, regional, and WTO talks.”); *see also* Damro, *supra* note 49, at 38 (“Governments have limited resources and, thus, must take care when deciding where to direct those resources. Often following delicate internal political deliberations, they will decide to dedicate resources to negotiations that are more likely to reach a result than those that hold out the prospect of deadlock or minimal returns.”).

¹⁰³ See Schott, *supra* note 44, at 16 (pointing out that resource scarcity equally “affects US negotiators, whose budget is inadequate to meet the extensive demands set out in US Trade Promotion Authority by their congressional masters”); *see also id.* (“If WTO talks face tough sledding, [FTA critics’] counsel is to redouble efforts at MFN reforms rather than to create new distortions via competing preferential regimes.”); Richard N. Cooper, *Comment, in* FTA STRATEGIES AND PRIORITIES, *supra* note 39, at 20, 23 (“The United States ought to devote its negotiating and political energies to getting a successful conclusion to the multilateral negotiations, currently the Doha Round and some unfinished business from the Uruguay Round.”); Damro, *supra* note 49, at 42 (noting that multilateral liberalization could slow down “as governments shift attention and resources toward the negotiation of regional agreements”).

countries to “advance self-interested agendas because they have failed to get them accepted in the WTO.”¹⁰⁴ While competitive liberalization can be beneficial when it accelerates trade liberalization, it can also impede progress by creating agreements or structures that eventually “become an alternative to the multilateral system and not an exception subject to some conditionality under the rules of the WTO.”¹⁰⁵

The second concern involves the growing fragmentation of the international regulatory system. As Jagdish Bhagwati warned us in the mid-1990s, when the new wave of preferential trade agreements began, the push for FTAs and EPAs can lead to the creation of a “spaghetti bowl”¹⁰⁶ — or in the Asian context, the “noodle bowl”¹⁰⁷ or “curry bowl.” Filling this bowl is “a mish-mash of overlapping, supporting, and possibly conflicting, obligations.”¹⁰⁸ Although

¹⁰⁴ de Jonquières, *supra* note 80, at 32.

¹⁰⁵ Ruggiero, *Comment*, *supra* note 39, at 27.

¹⁰⁶ Jagdish Bhagwati, *US Trade Policy: The Infatuation with Free Trade Areas*, in *THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS* 1, 2-3 (Jagdish Bhagwati & Anne O. Krueger eds., 1995).

¹⁰⁷ See Wang Jiangyu, *Association of Southeast Asian Nations-China Free Trade Agreement*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES*, *supra* note 6, at 192, 224 [hereinafter *ASEAN-China FTA*] (noting “‘Asian noodle bowl effect’ as highlighted by officials of the Asian Development Bank”); Richard Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism* 1 (Ctr. for Econ. Policy Research, Discussion Paper No. 5561, 2006), available at <http://www.cepr.org/pubs/dps/DP5561.asp>; Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends and Challenges* 3 (Asian Dev. Bank Inst., Working Paper No. 144, 2009), available at <http://ssrn.com/abstract=1480508> (noting “a ‘noodle bowl’ problem of criss-crossing agreements that potentially distort trade toward bilateral channels, excessive exclusions and special treatment in FTAs, and the possibility that the multilateral trading system may be progressively eroded”).

¹⁰⁸ Lester & Mercurio, *supra* note 42, at 2; accord JAGDISH N. BHAGWATI, *A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION, AND DEMOCRACY* 290 (1999) (“As [preferential trade agreements] proliferate, the main problem that arises is the proliferation in turn of discriminatory access to markets, with a whole maze of trade duties and barriers that vary according to source.”); Do & Watson, *supra* note 88, at 10 (“The reality of RTAs is a certain lumpiness, with the spaghetti tangled in or around four or five discernible clumps — meatballs, perhaps, or maybe it is time to think of a different pasta entirely.”); Leal-Arcas, *supra* note 51, at 375 (“Further proliferation of FTAs results in transaction costs that serve to the detriment of multilateral trade liberalization at the WTO level, thereby provoking a fragmentation of multilateralism.”); Lewis, *supra* note 97, at 25 (“[T]he large number of FTAs has led to a trading system with complicated and sometimes inconsistent rules due to different rules of origin.”); Schott, *supra* note 44, at 14-15 (expressing concern about “domino regionalism” that “fragments the trading system into protectionist blocs or spurs competitive liberalization that reinforces multilateral reforms” and noting that FTAs “can create overlapping sets of trade rules and regulations that make sourcing products to different markets complicated and often more costly”).

fragmentation has some benefits, commentators tend to agree that it would hurt less-developed countries more than it helps them. Eyal Benvenisti and George Downs, for example, describe three ways in which the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries has helped powerful states to preserve their dominance:

First, [fragmentation] limits the ability of weaker states to engage in the logrolling that is necessary for them to bargain more effectively with more powerful states. . . . Second, by creating a multitude of competing institutions with overlapping responsibilities, fragmentation provides powerful states with the opportunity to abandon — or threaten to abandon — any given venue for a more sympathetic venue if their demands are not met. . . . Third, a fragmented system's piecemeal character suggests an absence of design and obscures the role of intentionality. . . . This has helped obscure the fact that fragmentation is in part the result of a calculated strategy by powerful states to create a legal order that both closely reflects their interests and that only they have the capacity to alter.¹⁰⁹

FTAs and EPAs could also lead to what Kal Raustiala has described as “strategic inconsistencies,” which “occur[] when actors deliberately seek to create inconsistency via a new rule crafted in another forum in an effort to alter or put pressure on an earlier rule.”¹¹⁰ The more bilateral and plurilateral agreements there are, the more opportunities there will be for powerful and geopolitically savvy countries to develop such inconsistencies.

The third concern involves the diversion of trade and investment.¹¹¹ Such diversion could hurt society when trade and investment are

¹⁰⁹ Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597-98 (2007).

¹¹⁰ Raustiala, *supra* note 84, at 1027-28; *see also* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 14 (2004) (discussing legal inconsistencies generated by development of counter-regime norms).

¹¹¹ *See* Damro, *supra* note 49, at 24 (“As stumbling blocks, RTAs divert trade and clash with the economic goals of multilateral liberalization.”); Schott, *supra* note 44, at 13-14 (“Critics of FTAs decry the negative impact of regional pacts on global economic welfare as trade and investment are diverted to take advantage of the preferential trading regime, and the distraction — or even disengagement — from multilateral trade negotiations.”). *But see* Jo-Ann Crawford & Sam Laird, *Regional Trade Agreements and the WTO*, 12 N. AM. J. ECON. FIN. 193, 200 (2001) (“[T]he

being diverted to countries that do not provide an efficient system. Scarce resources will be wasted, and society will be worse off.¹¹² For example, “NAFTA caused substantial trade and investment diversion in the textile and clothing sectors from the Caribbean Basin countries as a result of the preferential treatment accorded Mexican industry.”¹¹³ Likewise, by offering preferential treatment to some African countries, the U.S. African Growth and Opportunity Act¹¹⁴ “seems to be having a similar adverse effect on nonbeneficiaries in Africa and elsewhere.”¹¹⁵

The concern over trade diversion was so important that the final report of the Consultative Board to former Director-General Supachai Panitchpakdi called on WTO member states “to show restraint [on the spread of preferential treatment] or risk more damage to the multilateral trading system.”¹¹⁶ After all, “FTAs may beget more FTAs.”¹¹⁷ Because there can be an endless negotiation of bilateral, plurilateral, and regional agreements, the development of FTAs and EPAs can create a vicious cycle that perpetuates harm to the international trading order.

Moreover, a preferential agreement, by definition, discriminates some trading partners against others.¹¹⁸ By developing FTAs and EPAs, countries, therefore, “make[] selected friends but also leave[] a bad taste with other countries, which outnumber those friends by a large margin.”¹¹⁹ As Richard Cooper observes in relation to the U.S. FTA negotiations with Chile: “I have nothing against Chile, but why should the United States discriminate in favor of goods from Chile as opposed to those coming, for example, from the Philippines or Thailand or India? . . . Discrimination means discrimination *against* as well as

overall numbers do not point to clear evidence of diversion away from imports from nonmembers of RTAs.”).

¹¹² See Schott, *supra* note 44, at 11 (noting higher costs and inefficiencies and, therefore, reduced welfare caused by preferential trade arrangements).

¹¹³ *Id.* at 14; see also Weintraub, *supra* note 73, at 84 (noting that main motivation behind U.S. FTAs with Chile and Singapore “is not to obtain reductions in US trade barriers, which already are quite low (or even set at zero for Chile for many products under the US Generalized System of Preferences), but rather to increase their attractiveness to foreign investors”).

¹¹⁴ 19 U.S.C. §§ 3701-41 (2006).

¹¹⁵ Schott, *supra* note 44, at 14.

¹¹⁶ WTO, *THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* 79 (2004).

¹¹⁷ Rosen, *supra* note 92, at 75.

¹¹⁸ See Cooper, *supra* note 103, at 20.

¹¹⁹ *Id.*

discrimination *for*, and on balance such discrimination is bad politics.”¹²⁰

The fourth concern is a direct result of the power asymmetry found in the existing international trading system. Because of such asymmetry, FTAs and EPAs are likely to perpetuate, or even exacerbate, the already highly vulnerable position of less-developed countries.¹²¹ Even worse, by taking away these countries’ ability to form coalitions,¹²² FTAs and EPAs have generally made less-developed countries more vulnerable than in a multilateral setting.¹²³

When countries reach a North-South Agreement, that agreement tends to favor developed countries, leading to transplants of their laws, policies, and standards to less-developed countries. These transplants are harmful for many reasons.¹²⁴ They tend to ignore the local needs, national interests, technological capabilities, institutional capacities, and public health conditions of less-developed countries.¹²⁵ They may also stifle local development, especially when the development path of the recipient countries does not align with that of the source country. Without taking full account of the internal problems, potential conflicts, and lack of correction mechanisms in the recipient countries, these agreements may even bring problems from abroad, making the situation worse than the problems they sought to address.

¹²⁰ *Id.*

¹²¹ See Yu, *The International Enclosure Movement*, *supra* note 5, at 886-92 (discussing how significant disparity in bargaining power between developed and less-developed countries has given less-powerful countries no choice but to adopt harmful rich-country transplants); see also Lagarde, *supra* note 60, at 5, 9 (“Poor countries can be put under the thrall of economic powers.”).

¹²² See generally Yu, *Access to Medicines*, *supra* note 51 (discussing coalition building among less-developed countries in negotiation of international agreements); Peter K. Yu, *Building Intellectual Property Coalitions for Development*, in IMPLEMENTING WIPO’S DEVELOPMENT AGENDA 79 (Jeremy de Beer ed., 2009) (same).

¹²³ See William Davey, *Dispute Settlement in the WTO and RTAs: A Comment*, in RTA AND WTO, *supra* note 49, at 343, 356 [hereinafter *Dispute Settlement*] (“While the same power disparities exist in the WTO, they are more effectively offset, even if they can never be eliminated, in a multilateral setting than in a bilateral one.”); Lewis, *supra* note 97, at 26 (“[F]or developing countries, particularly the smaller and weaker amongst them, their inequality of bargaining power *vis-à-vis* the developed countries is far more pronounced and capable of being exploited in the bilateral negotiation context than in the multilateral setting.”); Schott, *supra* note 44, at 16 (“North-South agreements are more prone to the latter owing to the asymmetric economic and political influence of the larger, industrialized countries.”).

¹²⁴ See generally Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. (forthcoming 2010) (critiquing legal transplants in intellectual property area).

¹²⁵ See Yu, *The International Enclosure Movement*, *supra* note 5, at 828.

Given their many weaknesses, transplant-inducing treaties are likely to form bad precedents for future multilateral efforts¹²⁶ and thereby harm both the individual countries and the larger international trading system.

More problematically, North-South agreements often force less-developed countries to discard many hard-earned bargains they had won through the multilateral negotiation process.¹²⁷ For example, less-developed countries may have to give up procedural and substantive safeguards and flexibilities that had been built into the multilateral system to provide balance and promote the public interest.¹²⁸ The omission of these important safeguards and flexibilities, to some extent, can be compared to a revision of the multilateral arrangement without going through its carefully designed amendment process.¹²⁹ Such revision, in effect, allows the more powerful countries to pick and choose the desirable parts of the multilateral arrangement while abandoning those they adopt reluctantly out of political compromise.

FTAs and EPAs also increase pressure on those who fail to join the network of agreements. Given the asymmetrical international trading system, few less-developed countries would be able to reject an offer to enter into an agreement with their more powerful trading partners.¹³⁰ Many, in fact, fear that they will be left out, creating what Chad Damro has described as the “marginalization syndrome.”¹³¹ As

¹²⁶ See Schott, *supra* note 44, at 16 (“FTA critics charge that North-South agreements are more prone to [yielding bad precedents] owing to the asymmetric economic and political influence of the larger, industrialized countries.”).

¹²⁷ See Okediji, *Back to Bilateralism?*, *supra* note 79, at 129 (lamenting that bilateral FTAs threaten to “roll back both substantive and strategic gains” won by less-developed countries in multilateral process).

¹²⁸ See Yu, *Six Secret Fears of ACTA*, *supra* note 42 (manuscript at 70).

¹²⁹ See *id.* (discussing how plurilateral agreement like ACTA would revise TRIPS Agreement without going through carefully designed multilateral amendment process laid out in article 71.2 of Agreement).

¹³⁰ See ROBIN GROSS, IP JUSTICE, IP JUSTICE WHITE PAPER ON THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) 2 (2008) (noting that “few countries will have the muscle to refuse an ‘invitation’ to join [ACTA]”).

¹³¹ Damro, *supra* note 49, at 30. As Damro elaborates:

[S]tates will enter into RTAs because they fear being left out, or marginalized, from important international economic and political developments. This marginalization syndrome encourages policy-makers to join negotiations and ultimately sign onto regional agreements that they might otherwise have ignored or avoided.

Typically countries that are politically weak, geographically isolated, and/or economically dependent are the most likely to succumb to this syndrome. These countries are already concerned with their vulnerable position in the

Michael Moore, former Director-General of the WTO, observes: “Despite all I’ve written about the perils of unilateralism and bilateralism, I’d be doing it if I were in government. There’s a terrible cost to being left out.”¹³²

In light of this marginalization syndrome, FTAs and EPAs are generally considered less legitimate than agreements negotiated through a multilateral process, even though countries have made a conscious decision to bind themselves to the negotiated agreements. As William Davey points out in the dispute settlement context, “WTO dispute settlement is viewed as more legitimate because it is less power-based and more rule-based than RTA dispute settlement. While RTAs may be concluded between trading partners of roughly equal size and power, they often include parties that vary to a great degree in relative size and power.”¹³³ To be certain, the appropriateness of some multilateral agreements, such as the widely criticized TRIPS Agreement,¹³⁴ remains highly questioned. However, were less-developed countries and commentators given a choice between an FTA and EPA on the one hand or the TRIPS Agreement on the other, most of them are likely to consider the latter a more legitimate bargain, especially when they consider the new developments in the Doha Development Round of Trade Negotiations.¹³⁵

Finally, because the international trading system does not provide the same type of safeguards and accountability as normally found in a domestic process, powerful countries that succumb to pressure from domestic trade groups may introduce provisions that are considered

international system and will view new regional agreements as potentially making them even more vulnerable unless they participate. As a result, the syndrome can create a fear-inspired, band-wagoning mentality in vulnerable governments that do not want to be left behind.

Id.; see also Cattaneo, *supra* note 96, at 42 (“[T]he proliferation of bilateral/regional trade agreements is driven by the race for leadership for some, and the fear of exclusion for others.”).

¹³² Mike Moore, *Preferential, Not Free Trade Deals*, GULF NEWS, Apr. 23, 2007, <http://gulfnews.com/opinions/columnists/preferential-not-free-trade-deals-1.173593>, quoted in Lewis, *supra* note 97, at 31; see also Lewis, *supra* note 97, at 21-22 (discussing how WTO member states “are experiencing a prisoner’s dilemma, in which their dominant strategy is to pursue FTAs even though their payoff would improve by pursuing a more focused multilateral strategy”).

¹³³ Davey, *Dispute Settlement*, *supra* note 123, at 356 (footnote omitted).

¹³⁴ See generally Peter K. Yu, *TRIPs and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369 (2006) (critiquing TRIPS Agreement).

¹³⁵ See generally Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 511-15 (2009) (discussing developments in Doha Round).

highly unpopular at home.¹³⁶ In fact, depending on the political structure, politicians may pursue bilateralism and plurilateralism “to increase their chances of being re-elected.”¹³⁷ Domestic political payoffs, therefore, may create perverse incentives that ultimately undermine the integrity and health of the existing multilateral system. As Dr. Damro laments:

The domestic demand for reciprocity may lead governments to pursue RTAs for narrow domestic political gain. They will pursue RTAs based on their own political horizons — i.e., when is the next election? These domestic political calculations are not consistently tied to the potential long-term benefits of the liberal, multilateral trading system.¹³⁸

Although multilateralism can create the same perverse effects, FTAs and EPAs greatly increase these effects and the risks of having such effects. Because of reduced complexity, a more narrow focus, and the self-selected nature of the negotiating process, it is usually easier to communicate the benefits of an FTA or an EPA to domestic constituents than it would be to communicate identical or equivalent benefits of a multilateral agreement.¹³⁹ As a result, politicians may “pursue regional liberalization at the expense of multilateral liberalization.”¹⁴⁰ They may also “try to preempt the ‘erosion’ of their margins of preference by dragging their feet on WTO reforms.”¹⁴¹

¹³⁶ See Peter K. Yu, *The Political Economy of Data Protection*, 84 CHI.-KENT L. REV. 777, 788-91 (2010) [hereinafter *Political Economy*] (discussing policy laundering and backdoor lawmaking).

¹³⁷ Damro, *supra* note 49, at 37; see also Milner, *supra* note 56, at 30 (citations omitted) (“The [U.S.] administration was counting on [NAFTA] as ‘a vote-winner for President Bush’. The prospect of increased growth, competitiveness and jobs motivated political leaders. Domestic politics also shaped the Canadian government’s attitudes: ‘Like President Bush, Mr Mulroney is expected to use positive features of the trade agreement in his own bid for reelection.’”).

¹³⁸ Damro, *supra* note 49, at 37.

¹³⁹ See *id.* (“The pursuit of an RTA . . . can be sold more easily by politicians to their constituents because of the reciprocal nature of the agreement. An RTA guarantees compensatory tariff reductions and ensures that ‘economic activity and investment are more balanced’ than they would be under unilateral liberalization.”); see also Christie et al., *supra* note 49, at 211, 220 (“[A]n FTA will have a more realistic chance of obtaining the necessary approval if it follows an already established model.”).

¹⁴⁰ Damro, *supra* note 49, at 24; see also *id.* at 37-38 (“[I]f the deliverables of RTAs are more easily communicated to domestic constituents than the deliverables of multilateral agreements, then it is possible that RTAs could be more important for re-election than multilateral agreements. Under such circumstances, politicians would likely prefer regional liberalization via RTAs over multilateral liberalization via the

Even worse, the lack of accountability and the political payoffs of a successful international agreement may tempt politicians to engage in what I have called “backdoor lawmaking” — “a process of outsourcing the legislative process to an international forum of unelected representatives in an effort to create laws that the domestic legislature would not have otherwise enacted.”¹⁴² Through this backdoor process, the administration can present to the legislature a *fait accompli* in an attempt to make an end run around the domestic deliberative process. The new-found international obligation will greatly increase the likelihood of having the laws enacted, even though those laws would not have been enacted based on evaluation of local needs alone. After all, the country’s international reputation is now on the line, and the stake of not adopting laws to implement the agreement is much higher.

Due to power asymmetry in the international trading system, FTAs and EPAs may also lead countries to adopt provisions that are considered controversial or legally shaky in the source country.¹⁴³ Some good examples are the Digital Millennium Copyright Act of the United States¹⁴⁴ and the efforts to push for greater criminal enforcement through the second EU Intellectual Property Rights Enforcement Directive, or the so-called IPRED2.¹⁴⁵ Despite strong criticisms and opposition of both measures in the European Union and the United States, the proposed Anti-Counterfeiting Trade Agreement seeks to incorporate norms from both sets of unpopular

WTO.”).

¹⁴¹ Schott, *supra* note 44, at 14.

¹⁴² Yu, *Anticircumvention and Anti-anticircumvention*, *supra* note 81, at 54-55. See generally David Banisar, *Stopping Science: The Case of Cryptography*, 9 HEALTH MATRIX 253, 282-86 (1999) (discussing policy laundering); Ian Hosein, *The Sources of Laws: Policy Dynamics in a Digital and Terrorized World*, 20 INFO. SOC’Y 187, 188-89 (2004) (same); Yu, *Political Economy*, *supra* note 136, at 788-91 (same); *Introduction: The Problem of Policy Laundering*, POL’Y LAUNDERING PROJECT, <http://www.policylaundering.org/PolicyLaunderingIntro.html> (last visited Jan. 28, 2009) (same).

¹⁴³ See Yu, *Currents and Crosscurrents*, *supra* note 1, at 395-96; Yu, *Six Secret Fears of ACTA*, *supra* note 42 (manuscript at 35-38).

¹⁴⁴ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

¹⁴⁵ See Lassi Jyrkkiö, *Smooth Criminal Harmonisation: ACTA, EU and IPR Enforcement*, INTELL. PROP. WATCH (Apr. 8, 2010), <http://www.ip-watch.org/weblog/2010/04/08/smooth-criminal-harmonisation-acta-eu-and-ipr-enforcement/> (discussing in ACTA context challenges to harmonizing intellectual property-related criminal provisions within European Union). IPRED2 is named after IPRED, the first EU Intellectual Property Rights Enforcement Directive. Council and Parliament Directive 2004/48, On the Enforcement of Intellectual Property Rights, 2004 O.J. (L 157) 45.

provisions.¹⁴⁶ Thus, one cannot help but wonder whether those provisions would have been included in the first place had the provisions first gone through the domestic legislative process of all the negotiating parties.

In sum, FTAs and EPAs have both strengths and weaknesses. Whether they will be beneficial ultimately depends on “how the [agreements] are crafted and the volume of trade covered, who participates, and whether significant progress on multilateral reforms proceeds in tandem in the WTO” or other multilateral regimes.¹⁴⁷

B. STAs

The negotiation of STAs, alongside Japan’s EPAs,¹⁴⁸ has paved the way for a new push of regional trade agreements within Asia, which were rare until recently. As Simon Lester and Bryan Mercurio observe:

Regionalism remained a competing model, as nations in Europe, North America, South America and elsewhere all formed trading blocs during this period. East Asia was the only region to eschew regionalism, while Western Europe was the clear leader in terms of both the timing and the scope of its economic integration, with other regions following a bit behind.¹⁴⁹

¹⁴⁶ See Yu, *Six Secret Fears of ACTA*, *supra* note 42 (manuscript at 38).

¹⁴⁷ Schott, *supra* note 44, at 4-5; see also *id.* at 16 (“FTAs can be trade creating or diverting, can build support for or divert attention from multilateral trade negotiations, can enhance or dilute (or both) negotiating resources, and can foster good and bad precedents for other trade initiatives.”).

¹⁴⁸ See sources cited *supra* note 6.

¹⁴⁹ Lester & Mercurio, *supra* note 42, at 1; accord Kawai & Wignaraja, *supra* note 107, at 3 (describing East Asia as “a relative latecomer to using FTAs as a trade policy instrument”); Schott, *supra* note 44, at 5-6 (“The biggest policy shift has occurred in East Asia, where until recently Japan, South Korea, and China had totally abstained from regional trade arrangements.”). As Jeffrey Schott explains:

Several factors explain this new interest in regionalism by East Asian countries. First, the incremental integration of China into the regional economy has simultaneously created new opportunities for trade and investment in a huge, underdeveloped market and fierce new competition from China-based producers. China is rapidly becoming Korea’s top trading partner and hosts substantial Korean and Japanese foreign direct investment. Second, Korean and Japanese trade initiatives reflect growing concerns in those countries about the drift in multilateral negotiations and the prospects for achieving their objectives in the Doha Round without a significant change in their protectionist farm policies. Third, the Asian financial crisis of 1997-98 demonstrated the economic linkages between the countries in the

Unlike FTAs or EPAs, agreements that a middle-income country, like China, establishes are likely to be different. In previous works, I have explained the important distinction between North-South agreements (those established between developed and less-developed countries) and South-South agreements (those established between less-developed countries).¹⁵⁰ While the former are a direct result of power asymmetry in the international trading system, the latter better promote the mutual interests of less-developed countries.

Technically, STAs are not South-South agreements. They are not attempts to promote South-South or Third World solidarity. They are also not altruistic or humanitarian gestures. At best, they are East-South agreements (an intermediate category that falls between North-South and South-South agreements). This section outlines six of STAs' non-exhaustive goals. The first three goals focus on economic considerations, while the rest involves either non-economic considerations or a combination of both economic and non-economic considerations.

1. Natural Resources and Raw Materials

STAs seek to bring to China its much-needed energy resources, metals, minerals, raw materials, and foodstuffs. Although China is a large country with phenomenal economic growth, it unfortunately has a very limited amount of natural resources. As Nicholas Lardy points out:

On a per capita basis, China is poorly endowed with most natural resources. Per capita availability of arable land, for example, is only 0.095 hectares, 60 percent below the world average; per capita availability of water is 75 percent below the world average; and per capita availability of most key mineral resources is well under half the world average. The only important natural resource of which China's per capita availability is relatively high is coal.¹⁵¹

region, as well as each country's vulnerability to economic problems that beset its neighbors.

Id. at 6.

¹⁵⁰ See Peter Bosshard, *No Harmonious Global Society Without Civil Society*, in CHINA'S NEW ROLE, *supra* note 8, at 246, 246-47 (discussing benefits of South-South cooperation); Yu, *Access to Medicines*, *supra* note 51, at 374-75 (discussing benefits of South-South Agreement).

¹⁵¹ C. FRED BERGSTEN ET AL., CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER 33 (2006) [hereinafter THE BALANCE SHEET].

In the past two decades, China's rapid economic growth has further exacerbated this lack of natural resources. As Lardy continues:

Between 1995 and 2005, China's energy consumption rose 80 percent, even as domestic oil production growth slowed. Consequently, China now relies on imports to meet almost half its petroleum demand. According to the International Energy Agency, while China accounted for under a tenth of global petroleum demand, it accounted for slightly more than a third of incremental world oil consumption over 2002 through 2004, contributing materially to upward price pressure in global markets.¹⁵²

Although most of the media reports thus far focus on petroleum, natural gas, and other energy resources, China also has a very heavy demand for other commodities. As Joshua Eisenman observes: "[I]n 2005, China consumed roughly one-third of total global output of steel, 40 percent of cement, 26 percent of copper."¹⁵³ Today, China is "the biggest consumer of copper, tin, zinc, platinum, steel, and iron ore; the second biggest consumer of aluminum and lead; and the third biggest consumer of nickel."¹⁵⁴ China is also "the world's top consumer of grain and meat In 2004, Chinese consumed 382 million tons of grain and 64 million tons of meat."¹⁵⁵ It remains a major importer of foodstuffs and other agricultural produce from Latin America.¹⁵⁶ These growing demands have created a need for China to better manage its diplomatic relations with key suppliers.¹⁵⁷

2. Trade

STAs seek to facilitate trade between China and the signatory countries, increasing its export volume and foreign reserves while

¹⁵² *Id.*

¹⁵³ Eisenman, *supra* note 19, at 39-40.

¹⁵⁴ Teng Chung-chian, *Hegemony or Partnership: China's Strategy and Diplomacy Toward Latin America*, in *CHINA AND THE DEVELOPING WORLD*, *supra* note 19, at 84, 91.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 92-93; *see also* R. EVAN ELLIS, *CHINA IN LATIN AMERICA: THE WHATS AND WHEREFORES* 33 (2009) ("[The Southern Cone] is rapidly becoming the 'breadbasket' of China, with Argentina and Brazil alone supplying some 29 percent of all Chinese food imports — principally soy products."); *id.* at 38 ("Chile, together with Peru, supplies 80 percent of all of the PRC's imports of fishmeal, a major staple of the Chinese diet.").

¹⁵⁷ *See* Heginbotham, *supra* note 34, at 194 ("Economic growth has . . . driven a voracious appetite for raw materials, driving a new need for intensified management of diplomatic relations with key suppliers.").

providing diversity through access to multiple markets.¹⁵⁸ Since China's reopening to trade with the outside world in the late 1970s, trade has supported its continuous growth. According to Beijing's figures:

Between 1979 and 2005 . . . China's GDP increased from less than \$150 billion to \$1.65 trillion; its foreign trade climbed from \$20.6 billion to \$1.15 trillion; per capita income rose from \$190 to more than \$1200; and its share of the global economy grew from about 1 percent to nearly 4 percent.¹⁵⁹

Today, China is the world's second largest economy, exporter, and trading nation,¹⁶⁰ up from the thirty-second largest trading nation when the country was first reopened to Western trade.¹⁶¹ Its factories "make 70 percent of the world's toys, 60 percent of its bicycles, half its shoes, and one-third of its luggage. . . . [China also] builds half of the world's microwave ovens, one-third of its television sets and air conditioners, a quarter of its washers, and one-fifth of its refrigerators."¹⁶² Exports have increasingly driven the Chinese economy, and China "accounted for about 12 percent of the growth of global trade" in 2005.¹⁶³

Like most countries, China "encourages exports because export sales contribute to a favorable trade balance and can earn United States dollars or other forms of hard currency."¹⁶⁴ While Chinese companies were content to serve as original equipment manufacturers for foreign firms a decade ago, they have now moved into high-end technology

¹⁵⁸ See ELLIS, *supra* note 156, at 13 ("[W]ith the global economic crisis of 2008, the economies of the United States and Europe began to contract. The PRC has recognized the need to diversify away from its declining traditional markets in order to maintain its growth."); *id.* (quoting Jiang Shixue, Chair, Latin American Studies Department, Graduate School of the Chinese Academy of Social Sciences) ("[E]xpanding its market share in Latin America has been a part of China's objective to reduce its dependence upon the United States, Japan, and Europe.").

¹⁵⁹ Joshua Eisenman et al., *Introduction* to CHINA AND THE DEVELOPING WORLD, *supra* note 19, at xiii, xiv.

¹⁶⁰ C. FRED BERGSTEN ET AL., CHINA'S RISE: CHALLENGES AND OPPORTUNITIES 9 (2009) [hereinafter CHINA'S RISE].

¹⁶¹ Tahirih V. Lee, *Volume Introduction* to FOREIGNERS IN CHINESE LAW, at xiv (Tahirih V. Lee ed., 1997).

¹⁶² ODED SHENKAR, THE CHINESE CENTURY: THE RISING CHINESE ECONOMY AND ITS IMPACT ON THE GLOBAL ECONOMY, THE BALANCE OF POWER, AND YOUR JOB 2-3 (2005).

¹⁶³ BERGSTEN ET AL., THE BALANCE SHEET, *supra* note 151, at 73.

¹⁶⁴ Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U. L. REV. 203, 214 (2006).

markets, such as those for cars and regional jets.¹⁶⁵ In 2005, China was one of the world's five largest vehicle manufacturers, providing 5.71 million cars and trucks.¹⁶⁶ Meanwhile, China also tries hard to maintain its competitive edge over low-cost products.¹⁶⁷ It is, therefore, no surprise that some commentators have suggested that China's export-driven economic growth will likely lead to greater confrontations with the United States.¹⁶⁸

To be certain, Chinese products may be "of higher quality and cost than local products" from some of its less-developed trading partners.¹⁶⁹ However, these products "are still much cheaper than Korean, Japanese, Russian, or U.S. items, and thus represent a reasonable purchase for [their] consumers."¹⁷⁰ Moreover, "[a]s a developing country, China can offer products and technical advice that are well suited to the needs of other developing countries. China's growing demand for agricultural and mineral products is [now] boosting the prices of commodities on the world market, and the growth rates in exporting countries."¹⁷¹

STAs are important from the standpoint of trade facilitation. As Henry Gao points out, "with the exception of ASEAN and Australia, none of China's existing RTA partners are [its] major trade partners."¹⁷² Many of these agreements, therefore, will provide the

¹⁶⁵ See *id.* at 207-08; SHENKAR, *supra* note 162, at 161-62.

¹⁶⁶ Loren Brandt et al., *International Dimensions of China's Long Boom*, in CHINA'S RISE AND THE BALANCE OF INFLUENCE IN ASIA 14, 28 (William W. Keller & Thomas G. Rawski eds., 2007) [hereinafter BALANCE OF INFLUENCE].

¹⁶⁷ See SHENKAR, *supra* note 162, at 161-62; Chow, *supra* note 164, at 207-08.

¹⁶⁸ See PETER NAVARRO, THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON 3 (2007).

¹⁶⁹ Matthew Oresman, *Repaving the Silk Road: China's Emergence in Central Asia*, in CHINA AND THE DEVELOPING WORLD, *supra* note 19, at 60, 71.

¹⁷⁰ *Id.*; see also IAN TAYLOR, CHINA'S NEW ROLE IN AFRICA 180 (2009) ("African consumers are benefiting — particularly those with limited incomes. And much of Africa's manufacturing industry collapsed long ago, well before Chinese imports appeared on the scene."); Lucy Corkin, *China's Strategic Infrastructural Investments in Africa*, in CHINA'S NEW ROLE, *supra* note 8, at 134, 136 ("Africa consumers are more likely to be swayed by the price tag than the brand name of products on the shelves."); Stephanie Rupp, *Africa and China: Engaging Postcolonial Interdependencies*, in CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 65, 69 (Robert I. Rotberg ed., 2008) [hereinafter CHINA INTO AFRICA] (quoting elderly man from Cameroon: "I have worked as a warder with the government of Cameroon for over forty-three years, but my meager salary could not allow me to buy a television set. Today, with my pension allowance, I have bought a cheap Chinese-made television, which if I handle well will serve me for some time.").

¹⁷¹ Bosshard, *supra* note 150, at 246.

¹⁷² Gao, *RTA Strategy*, *supra* note 77, at 60. He also explains the significant benefits

needed building blocks for greater trade relationships with other countries or regions. As Professor Gao continues:

So far, China has concluded FTAs, or entered into negotiations, with almost every major region in the world, including Europe, America, Middle East, Africa, East and South East Asia, South Asia and Oceania. In each region, China usually selects one trade partner to start the negotiations. . . . One thing all these RTA partners share in common is that they are either RTA themselves, such as the ASEAN and Gulf Cooperation Council, or are members of another RTA deal. For example, Iceland is a member of the European Free Trade Association (EFTA), which has free trade relationship with EU via the European Economic Area (EEA); Chile is an associate Member of both the MERCOSUR and the Andean Community; while India and Pakistan are both Members of South Asian Association for Regional Cooperation (SAARC).¹⁷³

By taking advantage of preexisting regional or plurilateral arrangements and using them as entry points, STAs, like FTAs and EPAs, effectively and efficiently enable China to tap into new markets.

to establishing FTAs with these non-major trade partners:

China is always one of the top five trade partners with these economies. Thus, while China could afford to ignore these economies, none of them could afford to ignore China. With such an asymmetric trade relationship, China could have more bargaining power in the RTA setting than at the multilateral level. This is very important for China as it does not have much experience in trade negotiations. By focusing on RTAs with those economies which are of minor importance to China, China could divert some of the trade with its major trading partners, so that it could further balance and diversify its import sources and export markets and would not be overtly reliant on one or several economies. At the same time, these RTA partners will have a lot of their trade diverted to China. This would further increase their reliance on China and further strengthen China's bargaining power and political clout.

Id. at 60-61.

¹⁷³ *Id.* at 60; accord Monica Hirst, *A South-South Perspective, in CHINA'S EXPANSION INTO THE WESTERN HEMISPHERE*, *supra* note 25, at 90, 100 ("Some analysts argue that [China's] agreement with Chile has allowed this country to become a 'platform' for trade and services with the Southern Cone.").

3. Foreign Direct Investment

STAs seek to attract foreign direct investment (“FDI”) from the signatory countries. As Peter Navarro wrote in 2007, “[s]ince 1983, FDI [in China] has grown from less than \$1 billion a year to more than \$60 billion, and it is projected to soon reach \$100 billion annually.”¹⁷⁴ Today, China is already one of the world’s largest recipients of FDI with capital inflows of about \$50 billion, behind the United States and the United Kingdom (as well as Germany according to some studies).¹⁷⁵ As Robert Sutter observes in the ASEAN context: “By the end of 1991, the ASEAN states had committed \$1.41 billion in 1,042 projects approved by Beijing. Singapore led the ASEAN states in trade and investment in China. By mid-1994, Singapore became China’s fifth-largest overseas investor after Hong Kong, Taiwan, the United States, and Japan.”¹⁷⁶ The influx of FDI not only provides China with the foreign capital needed for economic modernization, but also results in technology transfer, job creation, development of human capital, and generation of tax revenues.¹⁷⁷ Although economists have pleaded for caution in considering the benefits of FDI to recipient countries,¹⁷⁸ there is no denial that the influx of foreign capital has contributed to China’s recent rise to emerging superpower status.

4. Diplomatic Ties

STAs seek to strengthen China’s diplomatic ties with the signatory countries. These strengthened ties are particularly important in light of the dispute over China’s territorial and historical claims to Taiwan and questions concerning the autonomy of Tibet. Through the negotiation of these agreements, China ensures that the signatory countries adhere to a “One China Policy” that was designed to isolate Taiwan and promote Taiwan’s unification with the mainland. The closer cooperation also helps ward off attempts to provide external

¹⁷⁴ NAVARRO, *supra* note 168, at 13.

¹⁷⁵ Daniel Chow, *The Role of Intellectual Property in Promoting International Trade and Foreign Direct Investment*, in 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 187, 198 (Peter K. Yu ed., 2007) [hereinafter INTELLECTUAL PROPERTY AND INFORMATION WEALTH].

¹⁷⁶ SUTTER, *supra* note 22, at 184.

¹⁷⁷ See ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 191-99 (1990).

¹⁷⁸ See Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT’L L. 109, 147-48 (1998).

support to separatists in Tibet and Xinjiang.¹⁷⁹ Moreover, strong diplomatic ties with the STA partners will become readily available when China is criticized for its disturbing human rights records, low environmental standards, or inhumane treatment of ethnic minorities. Within the increasingly complex and fragmentary international regulatory environment,¹⁸⁰ strengthened diplomatic ties will also bring China more bargaining power, a louder voice, and a greater number of allies in the relevant fora. Such ties, in turn, would help alleviate China's "peculiar siege mentality and . . . persisting sense of insecurity."¹⁸¹

5. International Goodwill

STAs seek to cultivate goodwill among China's neighbors and to respond to concerns about the security and economic threats that emerged as a result of its rise in power.¹⁸² In the late 1990s, Chinese leaders and policymakers developed the concept of a "peaceful rise" (*heping jueqi*) to "reassure the world that [China] will pursue a different development path than did Germany and Japan in the late nineteenth and early twentieth centuries — a path based not on aggressive changes to the international order, but instead on

¹⁷⁹ See BERGSTEN ET AL., *THE BALANCE SHEET*, *supra* note 151, at 120 (noting that, in recent years, China developed relations with Central, South, and Southeast Asia, and Middle East in effort to reduce "cross-border influence into its western-most ethnic minority regions, particularly Xinjiang" and to "prevent encouragement of 'separatism'"); Adama Gaye, *China in Africa: After the Gun and the Bible . . . A West African Perspective*, in *CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE* 129, 138 (Chris Alden et al. eds., 2008) [hereinafter *CHINA RETURNS TO AFRICA*] (noting "China's quest to get diplomatic support in Africa" and stating that "[c]onsolidating the positions it has built over the recent years, reversing Taiwan's diplomatic gains obtained in the mid-1990s and enhancing Beijing's new global geopolitical ambition are the main reasons behind the more dynamic foreign policy pursued across the continent").

¹⁸⁰ See generally Benvenisti & Downs, *supra* note 109 (discussing increasingly complex and fragmentary international regulatory environment); Yu, *Intellectual Property Schizophrenia*, *supra* note 84, at 13-21 (same).

¹⁸¹ Wang Fei-Ling, *Self-Image and Strategic Intentions: National Confidence and Political Insecurity*, in *IN THE EYES OF THE DRAGON: CHINA VIEWS THE WORLD* 21, 31 (Deng Yong & Wang Fei-Ling eds., 1999).

¹⁸² See generally *CHINA'S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT* (Ted Galen Carpenter & James A. Dorn eds., 2000) (discussing so-called China threat); BILL GERTZ, *THE CHINA THREAT: HOW THE PEOPLE'S REPUBLIC TARGETS AMERICA* (2000) (same); STEVEN M. MOSHER, *HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD* (2000) (same); NAVARRO, *supra* note 168 (same).

benevolent principles of mutual benefit.”¹⁸³ Further reinforcing this concept are the country’s strategy of “peace and development” in the early 1980s,¹⁸⁴ its emphasis on the development of a multipolar world in the early 1990s following the disintegration of the Soviet Union,¹⁸⁵ the introduction of a “new security concept” in the late 1990s,¹⁸⁶ and the use of slogans like “becoming friends and partners with neighbors” or an “amicable, tranquil, and prosperous neighborhood.”¹⁸⁷

To some extent, the active development of the “benevolent power” image by the present Chinese leadership reminds one of Deng Xiaoping’s plea for practicing self-restraint in the early 1990s. As he reportedly said after the protests in Tiananmen Square in 1989: “[W]atch and analyze developments calmly; secure our own positions; deal with change with confidence; conceal our capacities; be good at keeping a low profile; never become the leader.”¹⁸⁸ Like Deng, Chinese leaders have stated explicitly and frequently that China is not interested in achieving “regional hegemony or international leadership (except perhaps in the context of promoting the interests of the developing world).”¹⁸⁹ According to Wen Jiabao, the current Chinese

¹⁸³ BERGSTEN ET AL., *THE BALANCE SHEET*, *supra* note 151, at 121; see also David Shambaugh, *Return to the Middle Kingdom? China and Asia in the Early Twenty-First Century*, in *POWER SHIFT*, *supra* note 9, at 23, 29-41 [hereinafter *Return to the Middle Kingdom?*] (discussing factors that affect Beijing’s new proactive diplomacy around its periphery). See generally STEVE CHAN, *CHINA, THE US AND THE POWER-TRANSITION THEORY: A CRITIQUE* (2007) (explaining why China is unlikely to provoke United States despite its rising power).

¹⁸⁴ See Kurt M. Campbell, *Foreword* to *CHINA AND THE DEVELOPING WORLD*, *supra* note 19, at ix, x.

¹⁸⁵ See BERGSTEN ET AL., *THE BALANCE SHEET*, *supra* note 151, at 128-29.

¹⁸⁶ Teng, *supra* note 154, at 88-89.

¹⁸⁷ Michael A. Glosny, *Stabilizing the Backyard: Recent Developments in China’s Policy Toward Southeast Asia*, in *CHINA AND THE DEVELOPING WORLD*, *supra* note 19, at 150, 150.

¹⁸⁸ Teng, *supra* note 154, at 88 (“[W]atch and analyze developments calmly [*lengjing guancha*]; secure our own positions [*chenzhuo yingfu*]; deal with change with confidence [*wenzhu zhenjiao*]; conceal our capacities [*taoguang yanghui*]; be good at keeping a low profile [*shanyu shouzhuo*]; never become the leader [*juebu dantou*].”). In the context of China’s foreign policy, the oft-misinterpreted phrase “*taoguang yanghui*” has been particularly controversial. See Verna Yu, “*China Threat*” Hangs on a Phrase, *S. CHINA MORNING POST*, Oct. 2, 2010, at 4.

¹⁸⁹ BERGSTEN ET AL., *THE BALANCE SHEET*, *supra* note 151, at 121; see also William W. Keller & Thomas G. Rawski, *Asia’s Shifting Strategic and Economic Landscape*, in *BALANCE OF INFLUENCE*, *supra* note 166, at 3, 6 (“Some may suggest that China’s policy of economic engagement and commercial diplomacy in Asia is merely tactical, a ‘charm offensive’ designed to buy time until China is economically and militarily powerful enough to exert regional hegemony.”); Robert I. Rotberg, *China’s Quest for Resources, Opportunities and Influence in Africa*, in *CHINA INTO AFRICA*, *supra* note 170,

premier, China is more correctly seen as “a friendly elephant”¹⁹⁰ (*youhao de daxiang*) — a well-crafted image that is appropriate for a “status quo power” that poses no threat to its neighbors despite its enormous size.¹⁹¹ It is, therefore, no surprise that some commentators have questioned whether China could eventually become a vocal leader of the less-developed world, like Brazil and India have been.¹⁹²

at 1, 2 [hereinafter *China's Quest*] (“Despite what Washington may believe, China is not using its engagement with Africa primarily to humble the United States or Europe, or to score political points in the ongoing battle for global hegemony.”); Xiang Lanxin, *An Alternative Chinese View*, in *CHINA'S EXPANSION INTO THE WESTERN HEMISPHERE*, *supra* note 25, at 44, 44 (“[I]n Washington, there is a growing suspicion that China has a well-thought-out design or grand strategy to undermine the traditional U.S. dominance in [Latin America]. In reality, however, China has yet to define the nature of its relationship with [the region].”).

¹⁹⁰ KANG, *supra* note 10, at 131.

¹⁹¹ *Id.* at 80.

¹⁹² See BERGSTEN ET AL., *CHINA'S RISE*, *supra* note 160, at 224 (“China’s interest in keeping a relatively low profile, focusing inward, and reassuring the world about the implications of its rise has led to a reluctance to take the lead in developing new global institutions or challenging old ones for fear of attracting unwanted attention and taking on new responsibilities that will create unnecessary distractions for itself.”); Leal-Arcas, *supra* note 51, at 398-99 (footnote omitted) (“China plays a rather timid role both in the Doha Round as well as in the WTO’s dispute settlement system. China has brought only two cases before the WTO as complainant, compared to more than fifteen cases brought by India and more than twenty by Brazil.”); Sylvia Ostry, *WTO Membership for China: To Be and Not to Be — Is That the Answer?*, in *CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM* 31, 38 (Deborah Z. Cass et al. eds., 2003) (“[I]t is unlikely that China will replace India as a ‘leader’ of a southern block. Rather, . . . China will be pragmatic and carefully weigh the costs and benefits for China.”). *But see* Peter Drahos, *Developing Countries and International Intellectual Property Standards-Setting*, 5 J. WORLD INTELL. PROP. 765, 765 (2002) (questioning whether “India and Brazil are prepared to provide the general leadership on intellectual property issues that they once did”); Keller & Rawski, *supra* note 189, at 3-4 (“China is . . . emerging as a voice for East Asian economic, political and security interests.”); Yu, *Access to Medicines*, *supra* note 51, at 353 (“In the years to come, China is likely to become a very important player in the WTO, even if it does not become as vocal a leader as Brazil or India.”).

It is worth noting that the interests of the less-developed world do not always coincide with those of China. As Henry Gao points out:

Agriculture is one such example [where the interests do not coincide]: as China imports a large quantity of agricultural products, it is actually not in China’s interest to follow the position of most developing economies and demand the elimination of export subsidies. Trade facilitation, one of four ‘Singapore Issues,’ is another such example: as China exports a lot, it is actually in the interest of China to push for the inclusion of trade facilitation in the WTO framework to make the customs process more efficient and cheaper.

In addition to these new concepts, phrases, images, and policy formulations, China has taken proactive measures to reach out to its neighbors to assuage their fears. For example, in 2000 Premier Zhu Rongji offered to establish a free trade area between China and ASEAN, to the surprise of Southeast Asian leaders.¹⁹³ As one Southeast Asian diplomat recalled: “We were shocked that the Chinese would come up with a deal.”¹⁹⁴ During the Asian financial crisis, China also helped Thailand, Indonesia, and other Asian neighbors — countries that have been largely ignored by the United States.¹⁹⁵ Today, many Asian leaders still express their appreciation for China’s assistance at this critical point in time and its decision not to exacerbate the crisis by devaluing the *renminbi*.¹⁹⁶ Such devaluation would have harmed the affected countries by creating fiercer competition from cheaper Chinese products.

Furthermore, STAs and the preferential tariff schemes under the “Early Harvest Programs” (*zaoqi shouhuo*) in these agreements offer to its neighbors more generous terms than China is required to under an arm’s-length negotiation between an emerging power and its less powerful neighbors. Such terms not only help China alleviate

Gao, *RTA Strategy*, *supra* note 77, at 64.

¹⁹³ See JOSHUA KURLANTZICK, CHARM OFFENSIVE: HOW CHINA’S SOFT POWER IS TRANSFORMING THE WORLD 95 (2007).

¹⁹⁴ *Id.*

¹⁹⁵ See *id.* at 33-36; SUTTER, *supra* note 22, at 178. More problematically, the United States has chosen to provide assistance to Mexico a few years before the Asian financial crisis. As one commentator laments:

Unwisely, the United States turned its back on Thailand when its currency collapsed, triggering the crisis, even though Washington had extended help to Mexico when the peso crashed in 1994. This contrasting behavior seriously undermined confidence in the United States and convinced Asians that no non-Asian power or institution can be counted on to help.

Ellen L. Frost, *China’s Commercial Diplomacy in Asia: Promise or Threat?*, in BALANCE OF INFLUENCE, *supra* note 166, at 95, 105.

¹⁹⁶ See Gao, *RTA Strategy*, *supra* note 77, at 57 (“China’s decision to not devalue its currency was widely appreciated among ASEAN States as an important factor in helping them go through the period: anyway, should China decide to float the Yuan, the ASEAN States would face more fierce competitions from cheaper Chinese products, and this could have greatly exacerbated their problems.”); see also SUTTER, *supra* note 22, at 178 (“Beijing’s careful responses to the crisis, including its pledges to maintain economic growth, eschew devaluation of the Chinese currency, support IMF rescue efforts, and provide supplementary support of \$1 billion to Thailand and a reported several billion dollars to Indonesia, were well received in the region.”); Glosny, *supra* note 187, at 155 (noting that ASEAN was highly “appreciative of China’s steadfast refusal to devalue the Renminbi, which would have set off another round of competitive devaluations and done more damage to ASEAN”).

concerns about its dramatic rise, but also help spread the country's goodwill while improving its global image.¹⁹⁷ Together with the "[g]overnment-sponsored infrastructure development, language schools, educational exchanges, and other forms of aid and assistance," these strategies have greatly increased China's soft power¹⁹⁸ at a time when the United States's soft power was in dramatic decline during the Bush administration following the wars in Afghanistan and Iraq.¹⁹⁹ Joshua Kurlantzick, therefore, describes these strategies as China's "charm offensive."²⁰⁰ Meanwhile, Chinese commentators consider them a mere reflection of the country's emerging great power mentality (*daguo xintai*).²⁰¹

To some extent, China's recent encounter with the less-developed world reminds one of its imperial tributary system.²⁰² Under this

¹⁹⁷ KURLANTZICK, *supra* note 193, at 95; Eisenman et al., *supra* note 159, at xiii.

¹⁹⁸ "Soft power" is defined as "the ability to get desired outcomes because others want what you want." ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 220 (3d ed. 2001). To some extent, soft power is quite similar to the teaching of Sun Tzu: "[S]upreme excellence consists in breaking the enemy's resistance without fighting." SUN TZU, THE ART OF WAR 23 (James Clavell ed. & trans., Penguin Books 1981) (c. 600 B.C.E.), *quoted in* Juliana W. Chen, Comment, *Achieving Supreme Excellence: How China Is Using Agreements with ASEAN to Overcome Obstacles to Its Leadership in Asian Regional Economic Integration*, 7 CHI. J. INT'L L. 655, 655 n.3 (2007).

¹⁹⁹ See Eisenman et al., *supra* note 159, at xiii. *But see* BERGSTEN ET AL., CHINA'S RISE, *supra* note 160, at 229 ("The United States . . . arguably still has a greater reservoir of global respect and appreciation than does China, which is a nascent player on the world stage with an uncertain future.").

²⁰⁰ KURLANTZICK, *supra* note 193; *see also* THOMAS LUM ET AL., CONG. RESEARCH SERV., RL 34310, CHINA'S "SOFT POWER" IN SOUTHEAST ASIA 1 (2008), *available at* <http://www.fas.org/sgp/crs/row/RL34310.pdf>.

²⁰¹ See KURLANTZICK, *supra* note 193, at 36.

²⁰² Lillian Craig Harris made a similar observation more than two decades ago. As she observed: "Under the influence of its historical legacy, the PRC finds itself in one sense modeling its Third World behavior on an idea that is practically as old as China itself." LILLIAN CRAIG HARRIS, CHINA'S FOREIGN POLICY TOWARD THE THIRD WORLD 9 (1985). In essence, the imperial tributary system was a "hierarchical system of 'international relations' . . . [that was] based on an extension of the Confucian idea of proper relations between individuals." IMMANUEL C.Y. HSÜ, THE RISE OF MODERN CHINA 130 (6th ed. 2000). As historian Immanuel Hsü describes:

During Ming and Ch'ing times, tributary relations had been refined into a highly ritualistic performance, with clearly defined rights and duties on the part of each participant. To China fell the duty of keeping proper order in the East and Southeast Asian family of nations. It recognized the legitimacy of tributary kings by sending envoys to officiate at their investitures and by conferring on them the imperial patents of appointment. It went to their aid in times of foreign invasion, and sent relief missions and commiserative

system, China, or the Middle Kingdom, occupied the position of leadership, while its neighbors — Korea, the Ryukyus, Annam (Vietnam), Siam (Thailand), Burma, Laos, and a host of other peripheral states in Southeast and Central Asia — accepted the status of junior members. These junior members were expected to “[honor] China as the superior state by sending periodic tribute, by requesting the investiture of their kings, and by adopting the Chinese calendar, i.e. recording events of their countries by the day, month, and year of the reign of the Chinese emperor.”²⁰³ In return, China offered aid in times of foreign invasion, sent relief missions and commiserative messages in times of disaster, and generally provided more gifts to its less powerful neighbors than it received from them during tributary missions.²⁰⁴

Although China is very unlikely to resurrect this tributary system,²⁰⁵ or have the intention to do so, Chinese leaders are unlikely to forget this piece of imperial history when contemplating relations with other

messages in times of disaster. On their part, the tributary states honored China as the superior state by sending periodic tribute, by requesting the investiture of their kings, and by adopting the Chinese calendar, i.e. recording events of their countries by the day, month, and year of the reign of the Chinese emperor.

The size, frequency, and route of the tributary mission were fixed by China — usually the closer the relationship the larger and more frequent the mission. For instance, Korea paid tribute four times a year, presenting it all at the end of the year, Liu-ch’iu [the Ryukyus] twice every three years, Annam once every two years, Siam every three years, and Burma and Laos every ten years.

Id. at 131. Although the system originated as “a policy of ‘peace and kinship’ [to] appeas[e] nomad leaders with lavish gifts, entertainment, and even betrothal to Han princesses,” the system was converted over time “to frame the ritual exchanges as a barbarian ‘tribute’ to the superior (virtuous) Chinese empire.” Derek Mitchell & Carola McGiffert, *Expanding the “Strategic Periphery”: A History of China’s Interaction with the Developing World*, in *CHINA AND THE DEVELOPING WORLD*, *supra* note 19, at 3, 8. During the Ming and Qing Dynasties — the time shortly before the doors of China were forced open to Western trade — “[t]ributary states received trade benefits, and, in some cases, security guarantees, while China got strategic peace of mind, reaffirmation of its self-regard, and an effective means of saving the cost of maintaining a large standing army to patrol all its borders.” *Id.* at 9.

²⁰³ HSÜ, *supra* note 202, at 131.

²⁰⁴ See Mitchell & McGiffert, *supra* note 202, at 8.

²⁰⁵ See KANG, *supra* note 10, at 82-83 (discussing how changing power dynamics and conditions in Asia have made resurrection of tributary system very unlikely); WILLIAM H. OVERHOLT, *ASIA, AMERICA, AND THE TRANSFORMATION OF GEOPOLITICS* 183 (2007) (discussing why ASEAN countries find it unappealing to become tributary of China).

Asian countries. Moreover, as Chan Heng Chee, Singapore's ambassador to the United States, reminded us: "Dynastic China's relations with Southeast Asia were to a large extent based on 'soft power.' . . . It was China's economic power and cultural superiority that drew these countries into its orbit and was the magnet for their cultivation of relations."²⁰⁶ The goodwill and soft power China has earned in recent years undoubtedly have made the country attractive to its neighbors for greater and closer trade relationships.

6. Market Economy Status

STAs seek to improve China's position within the WTO. When China joined the WTO, it made significant concessions. To the Chinese, joining the WTO is not only an economic issue, but one that affects national pride; it concerns China's rightful place in the world after "a century of humiliation."²⁰⁷ As Zhang Yunling and Tang Shiping acknowledge: "Chinese leaders since Sun [Yat-sen]'s time have always believed that China rightly belongs to the 'greater power' (*da guo*) club by virtue of its size, population, civilization, history, and, more recently, its growing wealth."²⁰⁸ Thus, China is willing to make significant sacrifices to join the WTO — or, as Samuel Kim puts it, "to gain WTO entry at almost any price."²⁰⁹ Now that China has become a member of this exclusive club and has greatly improved its international standing, it is understandable why it wants to use its bargaining leverage and emerging power status to "renegotiate" some of these WTO-related concessions.

Just as developed countries are eager to develop FTAs or EPAs to achieve political or other non-economic goals,²¹⁰ China is eager to develop STAs with those who are willing to recognize its status as a market economy, which is important to China for both economic and non-economic reasons. Economically, such a status "will enable [the country] to better resist anti-dumping actions in [the] WTO."²¹¹ For

²⁰⁶ KANG, *supra* note 10, at 3 (quoting Chan Heng Chee, Singapore's ambassador to United States).

²⁰⁷ See generally Hsü, *supra* note 202, at 139-219, 295-350, 387-406 (providing in-depth discussion of century of humiliation).

²⁰⁸ Zhang & Tang, *supra* note 9, at 48-49.

²⁰⁹ Samuel S. Kim, *China in World Politics*, in DOES CHINA MATTER? A REASSESSMENT: ESSAYS IN MEMORY OF GERALD SEGAL 37, 49 (Barry Buzan & Rosemary Foot eds., 2004) [hereinafter DOES CHINA MATTER?].

²¹⁰ See discussion *supra* notes 87-96.

²¹¹ Barry Sautman & Yan Hairong, *Friends and Interests: China's Distinctive Links with Africa*, in CHINA'S NEW ROLE, *supra* note 8, at 87, 104. As Professor Gao explains:

example, in recognizing China as a market economy, New Zealand has agreed to “waive discriminatory [anti-dumping] measures under . . . China’s WTO accession protocol.”²¹² As Professor Gao points out, China’s strategy is quite clear: “As more and more economies recognize China’s market economy status, there would be mounting pressures on those who still deem China as a non-market economy to do just the same.”²¹³

Outside the economic realm, it is also important for China to acquire market economy status. Such a status will help China develop its emerging identity while providing the country with the much-needed recognition of its economic progress. In particular, the status would acknowledge the rapid, enormous, and continuous economic reforms China has undertaken in the past two decades. By elevating China to *full* membership of the WTO, the market economy status would eliminate the impression that China remains a second-class citizen in the international trading order. Such an impression would directly address the humiliation Chinese leaders and the populace feel, especially when viewed against the background of semicolonial rule in the nineteenth and early twentieth centuries.²¹⁴

As China is an economy with a long history of government planning in economic development, during its accession process, many WTO Members suspected that the Chinese government still interfered with micro-economic activities and thus doubted that the market data in China was really reliable. Thus, Section 15(a) of the Accession Protocol allows WTO members to deem China as a non-market economy in antidumping investigations. The first step in antidumping investigations involves the determination of the existence of dumping, which is derived by comparing the export price and normal value. Normal value is usually the sale price of the product in the exporting economy. This provision, however, would allow WTO Members to disregard the domestic sale price in China and use the prices from some surrogate economies or a constructed price. Because the comparative advantages of China mostly come from the low costs of its factors of production, this provision makes it more likely for other WTO Members to arrive at a higher normal value and thus easier to determine the existence of dumping. This mechanism is available to WTO Members for up to 15 years after China’s Accession.

Gao, *RTA Strategy*, *supra* note 77, at 61.

²¹² Gary Clyde Hufbauer & Yee Wong, *Prospects for Regional Free Trade in Asia* 9 (Inst. for Int’l Econ., Working Paper No. 05-12, 2005), available at <http://www.iie.com/publications/wp/wp05-12.pdf>.

²¹³ Gao, *RTA Strategy*, *supra* note 77, at 61.

²¹⁴ See generally Hsü, *supra* note 202, at 139-219, 295-350, 387-406 (discussing semicolonial rule in China in nineteenth and early twentieth centuries and many “unequal treaties” China was forced to sign).

New Zealand was the first developed country to sign a STA, because it is “the first industrialized country to grant China market economy status.”²¹⁵ Likewise, China signed the first STA in Latin America with Chile²¹⁶ and initiated discussions with Iceland,²¹⁷ because both countries were the first to grant China market economy status in their respective continents.²¹⁸ To date, virtually all of China’s STA partners are countries that have recognized China’s market economy status.²¹⁹

²¹⁵ HUFBAUER & WONG, *supra* note 212, at 9.

²¹⁶ Chile “was the first nation in South America to establish formal diplomatic relations with China, doing so in January 1971. The watershed event actually had its antecedents in the formation of Latin America’s first bilateral cultural friendship association, between Chile and China in 1952.” ELLIS, *supra* note 156, at 35. Economically, Chile ranks the highest in the global competitive index among Latin American countries. As a resource-exporting country, Chile also matches well with China’s needs. See Riordan Roett & Guadalupe Paz, *Introduction: Assessing the Implications of China’s Growing Presence in the Western Hemisphere*, in CHINA’S EXPANSION INTO THE WESTERN HEMISPHERE, *supra* note 25, at 1, 17 (“Natural-resource-exporting economies like Chile and Peru are among the most complementary vis-à-vis China and have thus experienced big windfalls.”).

Interestingly, Chile was also the first Latin America country to sign a bilateral agreement with the United States. *Id.* at 12 (“Santiago was pessimistic about the prospects for Mercosur . . . and increasingly put off by the fiery anti-American rhetoric of Venezuela and the obstructionist tactics of Brazil and others, so it seized an opportunity to conclude an agreement with the United States.”).

²¹⁷ As Marc Lanteigne explains:

The Iceland negotiations permitted Beijing to engage a European economy in PTA [preferential trade agreement] talks while bypassing the complexities of the EU itself. The small island state’s role in the European economy is distinct, as while Iceland remains hesitant to join the EU, it is a member of the European Economic Area, a single market for European goods and services as well as labour. Reykjavik also implemented the EU’s Schengen Agreement in 2001, which abolishes border controls with most Union members. Iceland therefore has acted as a useful window, or as one Reykjavik official termed it, an “ice-breaker,” for China’s commercial diplomacy in Europe without committing Beijing to complex deals with the European Union. At the same time, the conclusion of a PTA with Iceland would offer Beijing a lofty vantage point from which to view the rest of the European economy, providing greater understanding of the Union’s liberalized trade preferences while discovering the potential challenges to greater Chinese engagement with the EU economy.

Marc Lanteigne, *Northern Exposure: Cross-Regionalism and the China-Iceland Preferential Trade Negotiations*, 202 CHINA Q. 362, 370-71 (2010) (footnotes omitted) (providing up-to-date and excellent discussion of China’s ongoing bilateral discussions with Iceland).

²¹⁸ Jiang Yang, *China’s Free Trade Agreements and Implications for the WTO*, http://www.allacademic.com/meta/p250869_index.html (last visited Nov. 7, 2010).

²¹⁹ Chen, *supra* note 19. From the diplomatic standpoint, recognition can be quite

It is, therefore, logical to consider awarding China such a status and accepting China's claims to Taiwan as implicit preconditions for beginning STA negotiation.²²⁰

In sum, STAs serve a number of different strategies. Yet, they do not seem to reflect the existence of any grand unified theory. Rather, as Kurt Campbell points out, "China's strategy toward the developing world remains largely a work in progress."²²¹ The six different goals outlined in this Part are by no means exhaustive, and new goals are likely to be added as China continues to grow and as countries pay more attention to bilateral and plurilateral agreements.

III. CHINA'S STA STATECRAFT

While there are both similarities and differences between the underlying goals of STAs and those of FTAs and EPAs, the strategies China thus far has deployed to develop these agreements are rather different. The nature and content of the agreements and China's different negotiating approaches, undoubtedly, have dictated some of these differences. However, a key factor seems to be China's vehement rejection of the United States's aggressive demands for drastic internal reforms and China's intention to place these demands in a negative light.²²² China's reaction to these demands is understandable. Being a middle-income country, China is sandwiched between the European Union and the United States on the one hand and other less-developed countries on the other. Although its dramatic rise has created both economic and security-related concerns among its neighbors, it continues to face significant pressure from the European Union and the United States. As a result, STAs have different characteristics. This Part examines five of these characteristics and the different approaches used to negotiate STAs.

important. For example, former U.S. Trade Representative Robert Zoellick acknowledged that "Morocco 'was the very first nation to recognize the sovereignty of a newly independent United States.'" Kearns, *supra* note 75, at 145 (quoting Robert Zoellick, U.S. Trade Rep.).

²²⁰ See Heginbotham, *supra* note 34, at 199; Jiang, *supra* note 218, at 10; see also Uche Ewelukwa Ofodile, *Trade, Empires, and Subjects — China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?*, 41 VAND. J. TRANSNAT'L L. 505, 533 (2008) ("Regarding Taiwan, China has not hidden the fact that one of the reasons for pursuing relations with African states is to influence the relationship of those states with Taiwan.").

²²¹ Campbell, *supra* note 184, at xi.

²²² See discussion *infra* Parts III.A, III.D, III.E.

A. *Sovereignty, Self-Determination, and Non-interference*

STAs tend to be governed by the principles of national sovereignty, self-determination, and non-interference in the internal matters of others. China's policy of nonintervention grew partly out of its past history as a semicolonial state and partly out of concerns about the foreign powers' intervention in its internal matters. As a Chinese diplomat chortled: "Non-intervention is our brand, like intervention is the Americans' brand."²²³ The policy of non-interference, indeed, may explain why STAs and aid and assistance packages from China often come without any condition of internal reforms. The terms in STAs contrast significantly with those in other agreements or aid packages from the United States, the European Union, the World Bank, the International Monetary Fund, and other traditional donors or lenders. Those donors or lenders would require the recipient countries to introduce political and economic reforms, such as "restrictions on macroeconomic policy, reductions in public spending and commitments to transparency as well as, in some cases, the holding of democratic elections."²²⁴ As Shalmali Guttal points out: "What China argues for is the sovereign rights of governments to shape their own development strategies and to make decisions about projects and policies regardless of social, environmental and governance implications."²²⁵ Such an approach is particularly appealing considering the fact that many of the reforms advocated by the traditional donors or lenders have not greatly alleviated poverty in the less-developed world.²²⁶

²²³ CHRIS ALDEN, CHINA IN AFRICA: PARTNER, COMPETITOR OR HEGEMON? 60 (2007).

²²⁴ *Id.* at 105; see also Sautman & Hairong, *supra* note 211, at 104-06 (discussing different approaches involving tied and untied aid in Africa).

²²⁵ Guttal, *supra* note 8, at 17, 32; see also Gaye, *supra* note 179, at 138 ("We don't believe that human rights should be above sovereignty issues." (quoting He Wenping, Director of Africa Department of Chinese Academy of Social Sciences)); Denis M. Tull, *The Political Consequences of China's Return to Africa*, in CHINA RETURNS TO AFRICA, *supra* note 179, at 111, 118 (noting that "unconditional respect for national sovereignty [that] makes any attempt to interfere into the domestic affairs of a state illegitimate"). *But see* Guerrero & Manji, *Introduction to CHINA'S NEW ROLE*, *supra* note 8, at 1, 3 ("Just like Western powers, China has used aid strategically to support its commercial and investment interventions in Africa.").

²²⁶ As Shalmali Guttal continues:

A fact unpalatable to traditional donors and lenders in Africa and Asia is that it is their own unbending insistence on destructive neoliberal policy reforms and dismal track records in alleviating poverty that have rendered China a welcome alternative source of development capital among many developing countries. . . . China's 'win-win' strategy is attractive for many developing

This strategy has backfired on China's interests, however, sometimes coming at a high cost to China's international standing. For example, during the attacks on shops owned by ethnic Chinese in Indonesia toward the end of the Suharto administration, Chinese leaders were put into a Catch-22 situation in which they had a difficult time developing a response. If they did not intervene, they would not have been able to protect the interests of Chinese nationals abroad. If they did, however, their intervention would lead to the erosion of the principle of non-interference. In the end, China stayed put, and its reaction to the attacks contrasted significantly with the approach it took during the Mao era. As Joshua Kurlantzick recounts:

During the Maoist period in the mid-1960s, when some Indonesian rioters had targeted Chinese Indonesians, Beijing had stepped in, offering refuge for ethnic Chinese fleeing the archipelago. . . . Th[e] callous approach [China recently took in response to the recent attacks therefore had] alienated some diaspora Chinese, but, as interviews with Chinese officials suggest, it was part of a strategy by Beijing to assure its neighbors that it would not intervene in their affairs.²²⁷

Similarly, China has to make difficult choices concerning how to address charges of genocide in the western region of Darfur, Sudan, the atrocities in which have "claimed the lives of more than 300,000 Sudanese, with two million others driven from their homes and forced into refugee camps, all at the hands of government soldiers and allied

country governments that are simply fed-up with jumping through endless hoops for aid and credits from traditional donors that are slow to arrive and conditioned on the adoption of a failed development model.

Guttal, *supra* note 8, at 26-27; *see also* HALPER, *supra* note 12, at 11 (noting "Beijing's transformative, leading role in the rise of a Chinese brand of capitalism and a Chinese conception of the international community, both opposed to and substantially different from their Western version"); *id.* at 31 (describing China model as "an 'exit option' from the often intrusive demands of global lenders like the World Bank and the IMF in areas such as good governance, human rights, transparency, and pro-Western political and market reforms"); Alden, *China's New Engagement with Africa*, *supra* note 25, at 225 ("African governments welcome the arrival of a new strategic partner to diversify their array of external partners or, in specific cases, to counter Western influence.").

²²⁷ KURLANTZICK, *supra* note 193, at 123. *See generally* CHINA AND THE THIRD WORLD: CHAMPION OR CHALLENGER? (Lillian Craig Harris & Robert L. Worden eds., 1986) (providing historical discussion of China's engagement with Third World); JOHN K. COOLEY, EAST WIND OVER AFRICA; RED CHINA'S AFRICAN OFFENSIVE (1965) (same); HARRIS, *supra* note 202 (same); PETER VAN NESS, REVOLUTION AND CHINESE FOREIGN POLICY: PEKING'S SUPPORT FOR WARS OF NATIONAL LIBERATION (1971) (same).

Arab militias — the Janjaweed, in particular.”²²⁸ Although China “support[ed] the idea of a UN peacekeeping mission . . . [and] pressur[ed] the Sudanese government to negotiate with rebel forces . . . , [it] refus[ed] to accept sanctions against the regime . . . and insist[ed] that forces should only be deployed with the Sudanese government’s consent.”²²⁹ By rejecting unilateral action and insisting that peacekeeping operations be approved by the U.N. Security Council, China successfully used multilateral rules and its veto in the Security Council to promote its self-interests.²³⁰

Nevertheless, human rights activists and the larger international community have heavily criticized China’s support of the Sudanese and other similarly-situated governments.²³¹ As they claimed with respect to Sudan, Zimbabwe, and other problematic regimes, China’s support of these regimes has diluted the Western pressure on those governments to address problems within their countries.²³² Its failure to embrace higher social and environmental standards has also led to growing resistance among African civil society groups.²³³

²²⁸ Hany Besada, *The Implications of China’s Ascendancy for Africa* 28 (Ctr. for Int’l Governance Innovation, Working Paper No. 40, 2008), available at http://www.cigionline.org/sites/default/files/Paper_40-web.pdf.

²²⁹ MARK LEONARD, WHAT DOES CHINA THINK? 128 (2008).

²³⁰ See *id.*

²³¹ See TAYLOR, *supra* note 170, at 89-112 (discussing China’s efforts in Africa as they relate to human rights protection); Rotberg, *China’s Quest*, *supra* note 189, at 12 (noting that human rights advocates have criticized China’s refusal to intervene on behalf of peace and human rights in Sudan, Kenya, and Zimbabwe as “perverse and obstructionist”).

²³² See, e.g., HALPER, *supra* note 12, at 75-101 (discussing “China effect” in which Beijing’s aid policies and commercial practices “progressively undermine the ability of American policy makers to shape the international agenda, as well as the faltering efforts of Western financial institutions to demand better governance from the non-Western world”); TAYLOR, *supra* note 170, at 165 (“[T]he explicitly hands-off approach effectively privileges the principles (or lack thereof) of a host country’s elites, who determine where the receipts from increased oil revenues go.”); Anabela Lemos & Daniel Ribeiro, *Taking Ownership or Just Changing Owners?*, in AFRICAN PERSPECTIVES ON CHINA IN AFRICA 63, 64 (Firoze Manji & Stephen Marks eds., 2007) [hereinafter AFRICAN PERSPECTIVES] (“China’s weak social and environmental requirements, disregard for human rights protections, lack of transparency and policy of non-interference in internal affairs of the countries they lend to has resulted in some African governments being shored up with funds while allowing them to avoid local and international pressure to clean up corruption.”); John Rocha, *A New Frontier in the Exploitation of Africa’s Natural Resources: The Emergence of China*, in AFRICAN PERSPECTIVES, *supra*, at 15, 16 (“[B]ecause China does not insist on commitment to democracy, good governance and respect for human rights as a precondition for development assistance, Western pressure to that effect is diluted.”).

²³³ See Deborah Brautigam, *China’s Foreign Aid in Africa: What Do We Know*, in

Unfortunately, China is unlikely to abandon its approach quickly. After all, it embraced the principle of non-interference, in part due to concerns about foreign intervention in its own domestic matters.

B. Gradual Evolution

STAs evolve gradually. Although China's economy has been growing at a breakneck pace, there are few dramatic internal reforms.²³⁴ Indeed, the development in the country, as fast as it has taken place, contrasts significantly with the arguably failed "shock therapy" approach Russia and other former Soviet republics took following the collapse of the Soviet Union.²³⁵ With a development strategy that deemphasizes change in dramatic steps and a highly patient attitude toward negotiation, China developed STAs in a way that added obligations slowly in small increments. Instead of trying to make a great shock-therapy leap, China takes the pragmatic path of "groping for stones to cross the river" (*mozhe shitou guohe*) that Deng Xiaoping endorsed.²³⁶

CHINA INTO AFRICA, *supra* note 170, at 197, 213 ("[T]he lack of social and environmental safeguards is beginning to create resistance among African civil society groups.").

²³⁴ Accord Robert Devlin, *China's Economic Rise*, in CHINA'S EXPANSION INTO THE WESTERN HEMISPHERE, *supra* note 25, at 111, 129 ("The Chinese have been very pragmatic in introducing policy reforms. Radical swings in policy are rare. Rather, reforms tend to be introduced cautiously, gradually, and in an evolutionary way.").

²³⁵ As Joseph Fewsmith explains:

Chinese intellectuals who in the late 1980s had looked in envy upon Gorbachev's perestroika and glasnost, found themselves looking fondly upon incremental reform as the Soviet Union broke apart, lost its superpower status, and saw its economy and living standards decline. Whereas many intellectuals believed that China in the late 1980s stood at the brink of completing its process of 'crossing the river by feeling the stones,' even if what lay on the other side was only vaguely defined, by the early 1990s they had largely jettisoned their earlier romantic notions and come to accept the fact that reform was a longer, more complicated process than they had ever imagined. Incrementalism became the new mantra.

Joseph Fewsmith, *The Politics of Economic Liberalization: Are There Limits?*, in BALANCE OF INFLUENCE, *supra* note 166, at 74, 77-78; see also OVERHOLT, *supra* note 205, at 114 ("[S]hock therapy imposed horrible traumas wherever it was tried, and its partial implementation in Russia was responsible for turning the economy over to a dozen billionaires and various groups of gangsters.").

²³⁶ JOSHUA COOPER RAMO, THE BEIJING CONSENSUS 4 (2004), available at <http://fpc.org.uk/fsblob/244.pdf>. Nevertheless, as William Overholt reminds us:

Chinese incrementalism did not mean slow reform One-sixth of the world's people were restored to family farms from dismantled communes in part of a decade. State enterprise employment declined by 60 million people

Consider China's incremental approach in its development of the ASEAN-China Free Trade Area ("ACFTA").²³⁷ The development began in November 2000 when Premier Zhu Rongji announced China's intention to develop a free trade area that would foster greater economic integration and closer regional cooperation in East and Southeast Asia. In the ASEAN-China summit in Phnom Penh in November 2002, China and members of ASEAN signed the Framework Agreement on Comprehensive Economic Cooperation,²³⁸ stating that a free trade area between China and ASEAN would be fully implemented in 2010 for the original ASEAN-6 members (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand), and by 2015 for its newest members (Vietnam, Laos, Myanmar, and Cambodia).²³⁹ As the largest regional agreement in Asia and the largest agreement among less-developed countries, ACFTA is expected to cover "a market of 1.85 billion consumers and a combined gross domestic product of almost US\$2.5 trillion."²⁴⁰ The Agreement was slightly revised through an amendment protocol adopted in Bali less than a year later.²⁴¹

In November 2004, China and ASEAN signed the Agreement on Dispute Settlement Mechanism²⁴² as well as the Agreement on Trade in Goods²⁴³ in Vientiane, Laos. They also agreed to implement an "Early Harvest Program" to provide for the early opening of markets for

in a decade. Manufacturing employment declined by 25 million in a decade. The top levels of government were cut by half in less than a decade. Incrementalism meant that the leaders thought about each step and generally field-tested each before acting, but they then acted very decisively.

OVERHOLT, *supra* note 205, at 114.

²³⁷ This incremental approach is attributed as much to the Chinese preference as it is to the ASEAN way, which one commentator describes as "accommodating the slowest ship in the convoy." BEESON, *supra* note 89, at 32.

²³⁸ ASEAN-China Framework Agreement, *supra* note 11.

²³⁹ Dorothy-Grace Guerrero, *China's Rise and Increasing Role in Asia*, in CHINA'S NEW ROLE, *supra* note 8, at 191, 193.

²⁴⁰ *Id.*

²⁴¹ Protocol to Amend the Framework Agreement on Comprehensive Economic Co-operation Between the Association of South East Asian Nations and the People's Republic of China, ASEAN-China, Oct. 6, 2003, available at <http://www.aseansec.org/15157.htm>.

²⁴² Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People's Republic of China, ASEAN-China, Nov. 29, 2004, available at <http://www.aseansec.org/16635.htm>.

²⁴³ ASEAN-China Agreement on Trade in Goods, *supra* note 11.

specific goods and services.²⁴⁴ The Program “grant[ed] three-year duty-free entry for ASEAN goods into the Chinese markets” and subsequent tariff-free access of selected Chinese manufactured goods to Southeast Asian markets.²⁴⁵ This arrangement provides a win-win outcome for all the signatory parties: while China opens up its market to ASEAN members and allows them to pool scarce resources and aggregate markets,²⁴⁶ ACFTA secures China’s access to the region’s raw materials while removing barriers to its exports.²⁴⁷

In 2007, China and ASEAN signed an Agreement on Trade in Services, covering such issues as tourism.²⁴⁸ They also adopted

²⁴⁴ As one commentator observes:

The modality on tariff reduction and elimination, including the EHP [Early Harvest Program] especially, is thus far undoubtedly the jewel in the crown of the ACFTA. The EHP has given ASEAN exporters significant advantage over other WTO members in the trade of agricultural goods with China. In the first half year after the EHP was implemented, ASEAN exports of fruits and vegetables increased by 30 per cent. According to the statistics released by the government of Malaysia, Malaysia’s exports to China under the EHP reached RM514 million and RM540 million in 2004 and 2005 respectively. During the same period, it imported only RM14 million from China.

Wang, *ASEAN-China FTA*, *supra* note 107, at 198 (footnote omitted); *see also* Gao, *RTA Strategy*, *supra* note 77, at 63 (footnote omitted) (“[E]ven though many commentators have doubted the economic benefit to China from an ASEAN-China FTA, as the two are competitors on many products, China has adopted the guideline of ‘give a lot while demand little’ in FTA negotiations because the political significance of such an FTA greatly outweighs economic considerations.”).

²⁴⁵ Guerrero, *supra* note 239, at 193. As Claude Barfield describes:

Under this provision, tariffs on a group of eight categories of agricultural products (about 600 individual products) will be reduced ahead of schedule, in most instances achieving zero tariffs by the end of 2006. This gave ASEAN exporters of fruits and vegetables a strong leg up on other WTO Members, and in 2004, after the reductions had been implemented, exports of these products from ASEAN countries to China increased by 40%.

Claude Barfield, *The Dragon Stirs: China’s Trade Policy for Asia — And the World*, 24 *ARIZ. J. INT’L & COMP. L.* 93, 114 (2007).

²⁴⁶ *See* John Wong & Sarah Chan, *China-ASEAN Free Trade Agreement: Shaping Future Economic Relations*, 43 *ASIAN SURV.* 507, 508 (2003) (“For ASEAN, an FTA with China offers the Southeast Asian states a useful route to overcome the disadvantage of smallness by pooling resources and combining markets. It is anticipated that with the establishment of the China-ASEAN FTA, an economic region of 1.7 billion consumers will enjoy a regional gross domestic product (GDP) of US\$2 trillion, while total trade is estimated to reach \$1.23 trillion.”).

²⁴⁷ *See* Guerrero, *supra* note 239, at 193.

²⁴⁸ ASEAN-China Agreement on Trade in Services, *supra* note 11.

memoranda of understanding on agricultural²⁴⁹ and sanitary and phytosanitary cooperation.²⁵⁰ Most recently, in August 2009, China and ASEAN signed the ASEAN-China Investment Agreement,²⁵¹ completing the negotiation process as set forth in the Framework Agreement.²⁵² The two trading partners also signed memoranda of understanding on cooperation in the fields of intellectual property and standards, technical regulations, and conformity assessment.²⁵³

While this incremental approach reflects the Chinese leadership's preferred pace of reform (as well as ASEAN's preference for gradual harmonization), it also promotes the focus on moderation and flexibility in China's recent foreign policy. As Robert Sutter explains:

According to senior party strategists and other officials, Chinese leaders reviewed the negative experiences of China's past confrontations with neighbors and other powers, and the negative experiences of earlier rising powers, such as Germany and Japan in the twentieth century, to conclude that China cannot reach its goals of economic modernization and development through confrontation and conflict. As a result, they incorporated the moderate features of China's recent approach to Asia and the world into their boarder definition of China's peaceful rise.²⁵⁴

To some extent, the incremental approach China has taken reflects its sensitivity to the peculiar needs of its Asian neighbors, in a large part to avoid confrontation.

²⁴⁹ Memorandum of Understanding Between the Association of Southeast Asian Nations (ASEAN) Secretariat and the Ministry of Agriculture of the People's Republic of China on Agricultural Cooperation, ASEAN-China, Jan. 14, 2007, *available at* <http://www.aseansec.org/19286.htm>.

²⁵⁰ Memorandum of Understanding Between the Association of Southeast Asian Nations and the Government of the People's Republic of China on Strengthening Sanitary and Phytosanitary Cooperation, ASEAN-China, Nov. 20, 2007, *available at* <http://www.aseansec.org/21089.pdf>.

²⁵¹ ASEAN-China Agreement on Investment, *supra* note 11.

²⁵² Press Release, ASEAN Secretariat, ASEAN and China Ink Investment Agreement (Aug. 15, 2009), *available at* <http://www.aseansec.org/PR-ASEAN-China-Ink-Investment-Agreement>.

²⁵³ ASEAN Secretariat, Chairman's Statement of the 12th ASEAN-China Summit (Oct. 24, 2009), *available at* http://www.15thaseansummit-th.org/PDF/24-13_7.2ASEAN-ChinaChairman%27sStatement.pdf.

²⁵⁴ SUTTER, *supra* note 22, at 266.

C. Flexibility

The terms in STAs tend to be flexible. Such flexibility is common in the area of private law. To many Chinese, contracts — or, in this case, international agreements — are the beginning of a working relationship.²⁵⁵ Rather than serving as a rigid, legalistic document that parties rely on in courts, they memorialize the stages of negotiation between the parties²⁵⁶ and lay down key principles that govern future relationships.²⁵⁷ Borrowing from that negotiation mindset, it is therefore no surprise that many of the terms in STAs are vague, flexible, and laden with notions of friendship, cooperation, and mutual recognition.²⁵⁸ Indeed, some Chinese commentators have used the Early Harvest Programs and the phased-in tariff reductions to illustrate China's flexible approach to STA negotiations.²⁵⁹

D. Not a Legal Transplant

Unlike FTAs or EPAs, STAs do not seek to transplant Chinese laws onto the soil of other countries. In fact, China did not develop a greater respect for the rule of law until recently.²⁶⁰ Although laws have

²⁵⁵ See HAROLD CHEE WITH CHRIS WEST, MYTHS ABOUT DOING BUSINESS IN CHINA 111 (2004) (noting that “in China, signing on the dotted line is only the beginning of your real negotiations, not the end of it”); LUCIAN W. PYE, CHINESE NEGOTIATING STYLE: COMMERCIAL APPROACHES AND CULTURAL PRINCIPLES, at xvi (1992) (“[T]he Chinese do not treat the signing of a contract as signaling a completed agreement; rather, they conceive of the relationship in longer and more continuous terms, and they will not hesitate to suggest modifications immediately on the heels of an agreement.”); RICHARD H. SOLOMON, CHINESE NEGOTIATING BEHAVIOR: PURSUING INTERESTS THROUGH “OLD FRIENDS” 183 (1999) (“For many Chinese businesspersons, a contract resembles a prenuptial agreement. It defines who will get what if the marriage breaks down. It should not attempt to regulate daily interaction within the marriage.”).

²⁵⁶ See Kim Newby, *Doing Business in China: How the State of 1.3 Billion Can Tap the Nation of 1.3 Billion*, 19 ME. B. J. 238, 240-41 (2004).

²⁵⁷ See PYE, *supra* note 255, at 49-54 (discussing Chinese negotiating tactic of first seeking agreement on general principles); SOLOMON, *supra* note 255, at 71-75 (discussing Chinese negotiators' emphasis on principles).

²⁵⁸ See SOLOMON, *supra* note 255, at 72 (noting distinction between “principles” and “concrete arrangements”).

²⁵⁹ See Glosny, *supra* note 187, at 158 (citing Li Qingsi who pointed out that Early Harvest Programs provide “an example of China's flexible (*linghuo*) position in the negotiations”).

²⁶⁰ See generally JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2009) (discussing rule-of-law developments in China); RANDALL P. PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002) (same); THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner et al. eds., 2000) (same).

been denounced during the Mao era, “[t]oday, more and more things are being done in the name of a rights discourse, as opposed to political privileges, moral duties and class status.”²⁶¹ Notwithstanding these recent developments, China has yet to see laws as a major export like the United States.²⁶² Thus, instead of transplanting laws abroad, STAs seek to ensure that Chinese laws and the Chinese ways of life are compatible with those found in the other signatory countries. Put differently, STAs focus more on accommodation than conversion.

E. Not a Template

China is less interested in using STAs as a template for developing a web of bilateral and regional treaties that will be later consolidated into a more comprehensive multilateral agreement.²⁶³ In the intellectual property area, there are significant variations among the different STAs. The New Zealand-China Free Trade Agreement (“NZCFTA”) includes a lengthy chapter on intellectual property protection.²⁶⁴ By contrast, the China-Singapore Free Trade Agreement, which was signed after the NZCFTA, does not mention intellectual property protection at all. Likewise, although the Chile-China Free Trade Agreement mentions the Doha Declaration on the TRIPS Agreement on Public Health²⁶⁵ and identifies as an important goal the prevention of abuse of intellectual property rights and restraints on competition,²⁶⁶ the NZCFTA omits both issues.

To some extent, these variations and the accompanying flexibility illustrate a key difference between STAs and the more template-

²⁶¹ PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 6 (2d ed. 2003).

²⁶² See generally JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980) (offering critical examination of flaws in law development movement); DAVID M. TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT* (2007) (revisiting law and development debate); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179 (1999) (discussing American legal assistance to post-Communist societies); John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT’L L. & COM. REG. 71, 82 (1998) (discussing export of Rule of Law by Western Europe and Northern America); Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 FORDHAM INT’L L.J. 218, 241-48 (2003) (discussing United States’s export of its ideas and concepts).

²⁶³ See Yu, *Six Secret Fears of ACTA*, *supra* note 42 (manuscript at 68).

²⁶⁴ NZCFTA, *supra* note 15, arts. 159-66.

²⁶⁵ World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

²⁶⁶ CCFTA, *supra* note 13, art. 111.

oriented U.S. FTAs, which often include standardized terms to maximize the effectiveness and efficiency of the negotiations. As Peter Drahos describes the United States's approach:

[T]he BIT [bilateral investment treaty] which the United States signed with Nicaragua in 1995 was based on the prototype that the United States had developed for such treaties in 1994. Similarly, the Free Trade Agreement . . . that the United States has negotiated with Jordan will serve as a model for the other FTAs being negotiated with Chile and Singapore.²⁶⁷

The United States uses FTA templates for at least three reasons. First, the U.S. Trade Act of 2002, based on which these FTAs were negotiated, calls on negotiators to develop provisions that “reflect a standard of protection similar to that found in United States law.”²⁶⁸ Although FTA provisions are similar, they were not based on their predecessors, but rather the ultimate template: U.S. laws. Second, such an approach would encourage standardization of protections. In doing so, FTAs would help foster an environment where countries can consolidate negotiation gains through FTAs at the multilateral level. Third, as Andrew Christie, Sophie Waller, and Kimberlee Weatherall note in the intellectual property context:

[A]n FTA will have a more realistic chance of obtaining the necessary approval if it follows an already established model. This is because part of the Congressional approval process involves the review of the text by certain Industry Advisory Committees. At least in relation to IP, the relevant committee has a history of drawing very explicit comparisons with prior

²⁶⁷ Drahos, *BITs and BIPs*, *supra* note 47, at 794; see also Susy Frankel, *Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT'L ECON. L. 1023, 1025 (2009) (“The USA and the EU . . . have ‘template’ intellectual property chapters, which are ‘non-negotiable’ in exchange for other trade concessions.”). Likewise Andrew Guzman observes:

Although the U.S. treaty is, in principle, open to negotiation, BITs signed by the United States are usually very similar to the model treaty. (In fact, looking beyond United States treaties, BITs in place around the world are quite similar to one another.) Although some negotiation is possible on some issues, the United States is committed to the basic structure of the model treaty and will only accept small changes. Typical provisions include terms governing compensation for expropriation, the repatriation of profits, dispute settlement procedures (usually through some neutral forum), national treatment requirements, and “most favored nation” requirements.

Guzman, *supra* note 81, at 639.

²⁶⁸ 19 U.S.C. § 3802(b)(4)(A)(i)(II) (2006).

FTAs. Provisions that are seen to be less IP-protective than provisions in past FTAs attract negative comment.²⁶⁹

The use of templates, therefore, has practical significance: it enhances the possibility for congressional approval.

By contrast, STAs, with their different formats and coverage, seem to be better tailored to the specific conditions of each signatory country. Although these agreements sacrifice the benefits of efficiency and raise negotiation and political costs, they benefit from the inherent features of bilateral or plurilateral agreements. By directly addressing the individual concerns and circumstances of each contracting party, the agreements more successfully “take into consideration the particular phases of development confronting each country, and provide for the gradual inclusion of a developing country into the global economy.”²⁷⁰ If the underlying goals are both substantive and diplomatic, the Chinese approach is likely to be more effective.

In sum, China and the United States have used very different approaches to negotiate their bilateral and regional trade agreements. Given the wide criticism of FTAs, it remains to be seen whether less-developed countries will consider STAs more desirable. To its benefit, China’s less-developed country status suggests that “the means and methods employed in Chinese operations . . . are more likely to provide appropriate models and more instructive experiences in the conditions of underdevelopment, lack of basic infrastructures and other current technical incapacities.”²⁷¹ Many countries, businesses, and nongovernmental organizations also consider China “as being highly efficient in delivering rapid results through their projects . . . and being prepared to go to geographical areas and sectors . . . where most Western investors are not prepared to take business (or personal) ‘risks’.”²⁷²

In addition, as a victim of imperialism, China does not have the same historical baggage as most Western countries. Its trading partners, therefore, may see STAs as less threatening than FTAs or EPAs. China’s experience of humiliation and subjugation during the nineteenth and early twentieth centuries also makes the country closer

²⁶⁹ Christie et al., *supra* note 49, at 220.

²⁷⁰ Giunta & Shang, *supra* note 46, at 329.

²⁷¹ Dot Keet, *South-South Strategic Bases for Africa to Engage China*, in *THE RISE OF CHINA AND INDIA IN AFRICA: CHALLENGES, OPPORTUNITIES AND CRITICAL INTERVENTIONS* 21, 28 (Fantu Cheru & Cyril Obi eds. 2010) [hereinafter *RISE OF CHINA AND INDIA IN AFRICA*].

²⁷² *Id.*

to those less-developed trading partners who share similar experiences.

Moreover, China's active engagement with the less-developed world in the past decade successfully filled the "void left by an indifferent Russia, a preoccupied United States, and a divided Europe."²⁷³ Indeed, the Bush administration's undue obsession with terrorism and its strong preference for unilateral measures have alienated many of its past allies in the less-developed world.²⁷⁴ The United States's historical tendency to dismiss attempts by East Asian countries to develop their own institutions and cooperative measures²⁷⁵ and its refusal to provide active assistance during the Asian financial crisis²⁷⁶ also make partnerships with China very appealing.

This tendency, however, has slowly changed under the Obama administration, which has shown greater interest in Asia than its predecessor. For example, Secretary of the State Hillary Clinton chose to visit Asia in her first trip abroad, marking the first time a U.S. Secretary of State selected Asia, as opposed to Europe or the Middle East, as the destination of the first overseas trip.²⁷⁷ In a speech in Tokyo, President Obama also described the United States as an "Asia Pacific nation."²⁷⁸ As he declared: "As a[n] Asia Pacific nation, the United States expects to be involved in the discussions that shape the future of this region, and to participate fully in appropriate organizations as they are established and evolve."²⁷⁹

Notwithstanding the wide appeal of China in the region, many Asian countries still consider China a potential security and economic

²⁷³ Eisenman, *supra* note 19, at 29.

²⁷⁴ See BERGSTEN ET AL., *THE BALANCE SHEET*, *supra* note 151, at 134 (noting that, since September 11, "the United States appeared to view regional affairs entirely through the prism of the war on terrorism, while neglecting the [Asia] region's other interests and challenges"); KURLANTZICK, *supra* note 193, at 186 ("Washington's near-exclusive focus on terrorism in the years after September 11 only adds to alienation overseas.").

²⁷⁵ See KANG, *supra* note 10, at 188 ("[The United States] has historically been dismissive of East Asian regional attempts at creating multilateral institutions and other forms of cooperation, believing that such efforts were both unlikely to succeed, and absent American participation, unlikely to be effective.").

²⁷⁶ See KURLANTZICK, *supra* note 193, at 33-36.

²⁷⁷ See Peter K. Yu, *Remember that China, U.S. Need Each Other*, DES MOINES REG., Feb. 22, 2009, at 4OP [hereinafter *China, U.S. Need Each Other*].

²⁷⁸ Barack Obama, Remarks at Suntory Hall in Tokyo, Japan (Nov. 14, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-suntory-hall>.

²⁷⁹ *Id.*

threat.²⁸⁰ Its rapid rise as an emerging economic superpower has “ushered in a level of insecurity among [countries] unsure of China’s authoritarian system and future national intentions.”²⁸¹ China’s low production and labor costs have also contributed to “an influx of cheap Chinese consumer goods, competition for export markets, . . . growing trade deficit[s],”²⁸² and diversion of foreign direct investments.²⁸³

All of these, in turn, have raised concerns about whether China’s economic growth comes at the expense of its less wealthy and less powerful neighbors.²⁸⁴ “The influx of Chinese workers and businessmen into Africa [for example, has presented] a potentially serious social issue in the context of a continent ravaged by high levels of unemployment.”²⁸⁵ Likewise, “Malaysian and Indonesian workers are . . . complaining about jobs being lost to Chinese workers because of the closing of enterprises that are losing orders to China.”²⁸⁶

As a result, there is growing resentment of China in Africa, Latin America, and Southeast Asia, where countries perceive Chinese exports “as contrary to the interests of the local population.”²⁸⁷ There is also “rising anti-Chinese sentiment in some African countries, where Chinese workers are perceived to be taking jobs away from locals.”²⁸⁸ As Chris Alden observes, this growing resentment is

²⁸⁰ See discussion *supra* note 182.

²⁸¹ Campbell, *supra* note 184, at x.

²⁸² Eisenman, *supra* note 19, at 42; accord ELLIS, *supra* note 156, at 1 (noting “concern at increasing volumes of competitively priced Chinese goods, both contraband and legitimate, that are beating out the goods of Latin American producers in their own countries and displacing them in their traditional export markets”); Alden, *China’s New Engagement with Africa*, *supra* note 25, at 226 (noting “concern posed by the arrival of low-cost consumer goods [from China], which have enabled Africans to purchase basic items formerly beyond their reach but that threaten local manufacturing capacity”); see also TAYLOR, *supra* note 170, at 63-86 (discussing impact of cheap Chinese goods in Africa).

²⁸³ See Glosny, *supra* note 187, at 159-60 (discussing ASEAN’s concerns over diversions of foreign direct investments).

²⁸⁴ See *id.* at 154.

²⁸⁵ Corkin, *supra* note 170, at 147-48; see also Gregor Dobler, *Solidarity, Xenophobia and the Regulation of Chinese Businesses in Namibia*, in CHINA RETURNS TO AFRICA, *supra* note 179, at 237 (describing growing resentment of Chinese businesses in Namibia); Robert I. Rotberg, *Preface to CHINA INTO AFRICA*, *supra* note 170, at vii, viii (“[A]s salutary as competition might be for Africa’s continuing maturation, importing Chinese labor to complete Chinese-organized infrastructural and mining projects inhibits skill transfers and reduces indigenous employment growth.”).

²⁸⁶ Guerrero, *supra* note 239, at 194.

²⁸⁷ Eisenman, *supra* note 19, at 43.

²⁸⁸ Corkin, *supra* note 170, at 148.

essentially “a contemporary version of the ‘yellow peril’ phobia . . . [which is] based on a fear that Chinese numbers, industriousness and ingenuity will swamp Africa.”²⁸⁹

To make things worse, commentators have now begun to question “whether the rapidly growing role of China . . . is one of partnership and cooperation, or more akin to colonial or neocolonial patterns, or reflective of a new imperialism.”²⁹⁰ As Adebayo Adedeji, former head of the Economic Commission for Africa, has noted with respect to growing trade links between Africa and the emerging Asian economies:

The traditional scenario that obtained in our trade with the developed world, whereby our country supplies the former with commodities and imports from there [sic] manufactured products including capital goods, is being reproduced, deliberately or not, in our intra-third world trade. I feel such a situation is completely unacceptable to us.²⁹¹

Interestingly, less-developed countries had similar mixed reactions toward China when the country was first reopened to Western trade. As Harry Harding observed more than two decades ago:

On the one hand, China’s size and resources, its skill at international diplomacy, and its description of itself as a developing country all give it substantial influence in Third World capitals. On the other hand, China’s emergence as a major power is already breeding some apprehension, particularly in the rest of Asia, about Beijing’s longer-term capabilities and intentions; and its growing involvement in

²⁸⁹ Chris Alden, *Africa Without Europeans*, in CHINA RETURNS TO AFRICA, *supra* note 179, at 349, 355.

²⁹⁰ Dot Keet, *The Role and Impact of Chinese Economic Operations in Africa*, in CHINA’S NEW ROLE, *supra* note 8, at 78, 81; accord ELLIS, *supra* note 156, at 1 (noting “concern about the long-term geopolitical ambitions of the PRC and worry about exchanging one form of dependency for another”); TAYLOR, *supra* note 170, at 2 (“Our African partners really have to watch out that they will not be facing a new process of colonization [in their relations with China].” (quoting Karin Kortmann, Parliamentary State Secretary, German Development Ministry)); Fantu Cheru & Cyril Obi, *Introduction — Africa in the Twenty-First Century: Strategic and Development Challenges*, in RISE OF CHINA AND INDIA IN AFRICA, *supra* note 271, at 1, 6 (“[T]here is a growing concern in Africa that the increasing engagement of the Asian giants, in their search for energy and minerals, could, if not managed properly, turn out to be just as bad as the ‘scramble for resources’ that led to the colonization of the continent during the second half of the nineteenth century.”).

²⁹¹ Alden, *Africa Without Europeans*, *supra* note 289, at 354 (quoting Adebayo Adedeji, former head of Economic Commission for Africa).

international economic affairs may make it a competitor with other developing countries for markets and capital.²⁹²

Nevertheless, it is worth noting that “Chinese-African relations were established long before China’s need for raw materials in the mid-1990s.”²⁹³ Moreover, Africa’s exports of raw material and imports of finished products “characterize virtually all of Africa’s bilateral trade relations and, according to many influential analysts, have their roots in the colonial period — when China was wholly absent from Africa.”²⁹⁴

In addition, it is important not to overstate the coordination among government agencies within China or presume a simple top-down decision-making process involving top Chinese leadership.²⁹⁵ As Ian Taylor reminds us:

In analyzing Sino-African relations and the policies that shape and are shaped by them, we must always keep in mind that there are many Chinas and equally, many Africas. Thus the allegation, leveled by Western and African commentators alike, that China is colonizing Africa is inherently misleading, based on the assumption that Chinese foreign policy in Africa follows an overarching grand strategy dictated by Beijing. Rather, it is at best acceptable to state that Beijing’s policymakers have certain aspirations for specific facets of Sino-African ties. The most obvious example concerns China’s state-owned oil corporations and their investments in African resource industries, which are clearly connected to the energy needs and domestic dynamics associated with China’s rise. But even here, rivalries among energy companies point to the fact that the interests of one Chinese actor may not always coincide with those of another, be it state or private.²⁹⁶

Moreover, many commentators note the hypocritical nature of the criticisms from the Western world of China’s dealings in Africa.²⁹⁷

²⁹² Harry Harding, *Foreword* to HARRIS, *supra* note 202, at v, ix.

²⁹³ Li Anshan, *China’s New Policy Toward Africa*, in CHINA INTO AFRICA, *supra* note 170, at 21, 37.

²⁹⁴ TAYLOR, *supra* note 170, at 177-78 (citations omitted).

²⁹⁵ *See id.* at 166 (“Sino-African relations are not part of a centrally directed and controlled plan. In fact, according to one informant, the Ministry of Commerce is often unaware of the presence, never mind the behavior, of various Chinese actors in Africa.”).

²⁹⁶ *Id.* at 161 (citation omitted).

²⁹⁷ *See Africa and China: Then and Now*, in AFRICAN PERSPECTIVES, *supra* note 232, at

They further point out the equally problematic dealings between Western companies and those authoritarian regimes that are major human rights violators.²⁹⁸

IV. THREE FUTURE BATTLES

As this Article has shown, STAs are somewhat different from FTAs or EPAs. If countries continue to rely on bilateral or regional agreements to shape international norms, it will be interesting to see what developments will take place in the near future. One may also question whether the differences between STAs on the one hand and FTAs and EPAs on the other would result in undesirable future “battles” between these two different types of agreements. Although such battles are possible, the different nature of these agreements virtually guarantees that these two sets of agreements will not present any direct conflicts. Instead, the proliferation of these agreements is likely to precipitate indirect conflicts in three different areas.

A. *Battle of Consensus*

The first battle is a battle of consensus — a battle between the Washington Consensus²⁹⁹ and the emerging Beijing Consensus.³⁰⁰

57, 59 (Interview by Patrick Burnett with Kwesi Kwaa Prah, Dir., Ctr. for Advanced Studies of African Soc’y) (“[I]t is a bit hypocritical for Western states to be concerned about how China is approaching Africa when they have had centuries of relations with Africa, starting with slavery and continuing to the present day with exploitation and cheating with subsidies which help the European Economic Community to ridiculous extents so that a cow in the European community gets a subsidy of \$2 a day and 60 per cent of Africa doesn’t get that.”).

²⁹⁸ See HALPER, *supra* note 12, at 76 (“Western countries do not have an unblemished historical record, nor an admirable one today when it comes to doing business with international human rights abusers and malcontents.”); TAYLOR, *supra* note 170, at 164 (“[C]ondemning China’s oil diplomacy while glossing over the duplicity of Western governments and corporations toward Africa’s energy industries is somewhat unpalatable, smacking of a new, simplistic ‘two-whateverism’ (*liangge fanshi*): whatever China does is wrong and whatever the West does is right.”); Stephen Brown, *China’s Role in Human Rights Abuses in Africa: Clarifying Issues of Culpability*, in CHINA INTO AFRICA, *supra* note 170, at 250, 251 (“[T]he United States government and U.S.-based oil companies are closely involved with the authoritarian regime of Equatorial Guinea’s Teodoro Obiang Nguema, among the worst violators of human rights on the continent.”).

²⁹⁹ John Williamson, an economist and a senior fellow of the Institute for International Economics, coined the term “Washington Consensus.” John Williamson, *What Washington Means by Policy Reform*, in LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 7, 7-20 (John Williamson ed., 1990). The Washington Consensus was derived from recommendations in ten different areas: (1)

While the Washington Consensus emphasizes free market reforms as a path to economic prosperity, the Beijing Consensus suggests that economic growth “comes from the state directing development to some degree, avoiding the kind of chaos that comes from rapid economic opening, and thus allowing a nation to build its economic strength.”³⁰¹

Indeed, commentators have equated the battle between the two consensuses as “a US-China ideological struggle, e.g., between a ‘neoliberal Anglo-Saxon credo’ and an Asian-derived ‘socially oriented’ approach.”³⁰² As Joshua Kurlantzick remarks, by emphasizing economic development over political reform, the Chinese model “stands in direct contrast to democratic liberalism, the economic and political model emphasizing individual rights and civil liberties that has underpinned the societies of the West, and of its democratic allies in Asia.”³⁰³

fiscal deficits; (2) public expenditure priorities; (3) tax reform; (4) interest rates; (5) the exchange rate; (6) trade policy; (7) foreign direct investment; (8) privatization; (9) deregulation; and (10) property rights. *Id.*

³⁰⁰ Joshua Cooper Ramo, former foreign editor of *Time*, coined the term “Beijing Consensus.” RAMO, *supra* note 236, at 1. As he explains:

[The Beijing Consensus] is simply three theorems about how to organise the place of a developing country in the world, along with a couple of axioms about why the physics is attracting students in places like New Delhi and Brasilia. The first theorem repositions the value of innovation. Rather than the “old-physics” argument that developing countries must start development with trailing-edge technology (copper wires), it insists that on the necessity of bleeding-edge innovation (fiber optic) to create change that moves faster than the problems change creates. In physics terms, it is about using innovation to reduce the friction-losses of reform.

The second Beijing Consensus theorem is that since chaos is impossible to control from the top you need a whole set of new tools. It looks beyond measures like per-capita GDP and focuses instead of quality-of-life, the only way to manage the massive contradictions of Chinese development. This second theorem demands a development model where sustainability and equality become first considerations, not luxuries. Because Chinese society is an unstable stew of hope, ambition, fear, misinformation and politics only this kind of chaos-theory can provide meaningful organization

Finally, the Beijing Consensus contains a theory of self-determination, one that stresses using leverage to move big, hegemonic powers that may be tempted to tread on your toes.

Id. at 11-12.

³⁰¹ KURLANTZICK, *supra* note 193, at 56.

³⁰² Sautman & Hairong, *supra* note 211, at 87, 101.

³⁰³ KURLANTZICK, *supra* note 193, at 56-57.

Although the Washington Consensus has been around for close to two decades, the Beijing Consensus has been particularly appealing to countries with an authoritarian political system.³⁰⁴ It also attracts rulers who favor the status quo, are strongly reluctant to introduce power transition, or have genuine fears of a potential mess created by such transition. According to Michael Glosny: “For economically backward states with Communist or authoritarian political systems, such as Cambodia, Laos, Myanmar, and Vietnam, China’s development path has become an object of study and emulation.”³⁰⁵ Likewise, Chris Alden writes: “The ‘Beijing Consensus’ challenges [the formula dictated by the Washington Consensus] and may embolden states, even those not recognized as pariahs, to opt out of the complexities that these norms and values introduce to their economic and political programmes.”³⁰⁶

Moreover, as Derek Mitchell explains: “China’s promotion of equality and democracy in international affairs, opposition to external intervention in internal affairs, and support overall for the ‘Five Principles of Peaceful Coexistence’ provide a sense of kinship with developing world leaders.”³⁰⁷ Enshrined in the Bandung Conference of

³⁰⁴ See ALDEN, *supra* note 223, at 60 (“For ‘pariah’ regimes China is a welcome source of stability, a new strategic partner and a provider of development assistance and foreign investment.”); Alden, *China’s New Engagement with Africa*, *supra* note 25, at 226 (“For leaders and regimes facing domestic instability, the stress of economic restructuring and liberalization, or the pull of democratic transformation, China holds up a beacon of hope that all the gains of office need not be lost in the process.”); Glosny, *supra* note 187, at 167 (noting that China’s development path has become “an object of study and emulation” for economically backward states with Communist or authoritarian political systems).

³⁰⁵ Glosny, *supra* note 187, at 167; see also TAYLOR, *supra* note 170, at 23-27 (exploring whether China should serve as model for Africa); Ndubisi Obiorah et al., “Peaceful Rise” and Human Rights: *China’s Expanding Relations with Nigeria*, in CHINA INTO AFRICA, *supra* note 170, at 272, 289 (alterations in original) (quoting Ken Nnamani, Nigerian Senate President) (“China [had] become . . . a good model for Nigeria in its quest for an authentic and stable development ideology. . . . China [was] a lesson to Nigeria on the enormous good that a focused and patriotic leadership can do to realise the dreams of prosperity and security for the citizens.”).

³⁰⁶ Alden, *Africa Without Europeans*, *supra* note 289, at 355. Similarly, Joshua Ramo observes:

China is marking a path for other nations around the world who are trying to figure out not simply how to develop their countries, but also how to fit into the international order in a way that allows them to be truly independent, to protect their way of life and political choices in a world with a single massively powerful centre of gravity.

RAMO, *supra* note 236, at 3.

³⁰⁷ BERGSTEN ET AL., THE BALANCE SHEET, *supra* note 151, at 129.

1954 that sought to promote Asia-Africa solidarity, the Five Principles of Peaceful Coexistence included “mutual respect for territorial integrity and sovereignty, non-aggression, non-interference in internal affairs, equality and mutual benefit, and peaceful coexistence.”³⁰⁸

As China’s soft power increases, its development model earns greater admiration throughout the less-developed world. In recent years, “[g]overnment research teams from Iran to Egypt, Angola to Zambia, Kazakhstan to Russia, India to Vietnam and Brazil to Venezuela have been crawling around the Chinese cities and countryside in search of lessons from Beijing’s experience.”³⁰⁹ Likewise, African analysts point out that “China understands the challenges of governing in areas where the bulk of the population lives in abject poverty.”³¹⁰

While the Chinese model may not promote democratic society and civil liberties, it shows the Chinese leaders’ pragmatic approach and willingness to consider a wide variety of options.³¹¹ As Deborah Brautigam reminds us:

At the end of the day, we should remember this: China’s own experiments have raised hundreds of millions of Chinese out of poverty, largely without foreign aid. They believe in investment, trade, and technology as levers for development, and they are applying these same tools in their African engagement, not out of altruism but because of what they learned at home. . . . These lessons emphasize not aid, *but experiments*; not paternalism, but the “creative destruction” of competition and the green shoots of new opportunities.³¹²

Given China’s success in pursuing these experiments and the hope it offers to other countries, it is no wonder that Mark Leonard observes

³⁰⁸ Mitchell & McGiffert, *supra* note 202, at 14.

³⁰⁹ LEONARD, *supra* note 229, at 122; *see also* HALPER, *supra* note 12, at 31 (noting “a growing number of developing nations that are loosely connected by an admiration for China”); Stephen Marks, *Introduction* to AFRICAN PERSPECTIVES, *supra* note 232, at 11 (citing Nigerians’ appreciation of Chinese model for providing stability and visionary leadership).

³¹⁰ BESADA, *supra* note 228, at 24.

³¹¹ *See* OVERHOLT, *supra* note 205, at 118 (“Chinese leaders . . . do not accept Western democratic ideology, but they accept individual practices, such as village elections, because those practices have specific pragmatic value in reducing corruption. They want to discover and test these things themselves, step by step, rather than succumb to foreign ideological browbeating, but they are willing to consider *nearly everything*.” (emphasis added)).

³¹² DEBORAH BRAUTIGAM, *THE DRAGON’S GIFT: THE REAL STORY OF CHINA IN AFRICA* 311-12 (2010) (emphasis added).

that “[f]or the first time since the end of the Cold War, Europe and America face a formidable alternative: the Chinese model.”³¹³

B. Battle of Influence

The second battle is a battle of influence; it concerns a country’s dominance in Asia, or the Asia-Pacific region. While it remains speculative to discuss whether Asia would play a larger role in the international policy debate, or whether there are any special “Asian values” that this debate needs to take account of,³¹⁴ it is clear that there have been changing dynamics within Asia concerning how international norms are being shaped. Indeed, as one commentator has noted, ACFTA “will strengthen China’s clout by making it the centre of gravity in Asia and surpassing the influence of Japan and the US.”³¹⁵

Indeed, because Japan’s position is closer to that of the European Union and the United States, and because Japan has been a key player in the trilateral trade negotiations (which was instrumental in establishing the TRIPS Agreement and further plurilateral or multilateral efforts in the intellectual property area), the development of a unified Asian position down the road is rather unlikely. Instead, any future Asian position will include conflict and compromise between the ongoing developments in China (and other less-developed Asian countries) and the more advanced system in Japan, with perhaps doses of influence from the United States and the European Union.

Since the explosion of the Chinese economy, commentators have suggested a growing rivalry between China and Japan in Asia,³¹⁶ which

³¹³ LEONARD, *supra* note 229, at 134.

³¹⁴ In the human rights area, “Asian values” were generally attributed to the Bangkok Declaration, which Asian countries adopted at the Asian preparatory regional conference before the World Conference on Human Rights in 1993. Bangkok Declaration, in World Conference on Human Rights, Regional Meeting for Asia, Mar. 29-Apr. 2, 1993, *Report of the Regional Meeting for Asia of the World Conference on Human Rights* ¶¶ 3-7, U.N. Doc. A/CONF.157/PC/59 (Apr. 7, 1993), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/125/95/PDF/G9312595.pdf?OpenElement>. Although the Declaration did not articulate the oft-discussed “Asian values,” it states explicitly that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.” *Id.* ¶ 8. See generally sources cited in Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 UC DAVIS L. REV. 1039, 1142 n.380 (2007) (discussing Asian values and Bangkok Declaration).

³¹⁵ Guerrero, *supra* note 239, at 193.

³¹⁶ See generally BALANCE OF INFLUENCE, *supra* note 166 (providing timely collection of essays on implications of China’s rise for balance of influence in Asia);

dates back to at least the nineteenth century. As the Chinese proverb goes, one mountain cannot hide two tigers — or even three, if the United States also counts as one. The disagreement between China and Japan over the acceptable participants of the 2005 East Asian Summit, for example, has foreshadowed a deepening conflict between the two countries.³¹⁷ Nevertheless, the ongoing push for initiatives under ASEAN+3 and the China-Japan-South Korea free trade agreement seem to suggest that “China understands that the future of the region depends upon a constructive relationship between China and Japan.”³¹⁸ Thus far, both countries have also been rather reluctant to “take the lead in regional integration (indeed, the main activities of each seem to involve forestalling the other from assuming regional leadership).”³¹⁹

In recent years, there has also been growing discussion about the rivalry between China and the United States in Asia. However, policymakers and commentators have largely overstated such rivalry. Even if we ignore the regional nature of China’s primary geopolitical

SUTTER, *supra* note 22, at 125-50 (discussing China’s relations with Japan).

³¹⁷ See Guerrero, *supra* note 239, at 192 (“The rift in the first [East Asian Summit] was the tip of the iceberg that is the Sino-Japanese conflict.”).

³¹⁸ Zhang & Tang, *supra* note 9, at 48, 55.

³¹⁹ William A. Callahan, *Comparative Regionalism: The Logic of Governance in Europe and Asia*, in *THE INTERNATIONAL POLITICS OF EU-CHINA RELATIONS* 231, 242 (David Kerr & Liu Fei eds., 2007). As he explains further:

[B]oth Japan and China are ‘reluctant powers’ that are not willing to take the lead in regional integration (indeed, the main activities of each seem to involve forestalling the other from assuming regional leadership). This reluctance stems from a regional environment that is characterized by fears of Japan’s past (militarism) and of China’s future (hegemonism). The Japanese empire regionalized East Asia during the first half of the twentieth century, and Chinese and Korean memories of this period still stress the violence of Japanese occupation and colonialism. Because of this suspicion of its intentions, Japan repeatedly failed to shape an East Asian regionalism in the 1960s and 1970s.

China has been unable to take the lead in forming regional institutions because its East Asian neighbours worry about the character of Chinese hegemony. Its recent rapid economic growth and military modernization present a potential threat to regional order and stability. Moreover, there are concerns that China’s future leadership will follow the pattern of its imperial past. Some fear that the PRC is modernizing the traditional Sinocentric order, where the Middle Kingdom is surrounded by a periphery of tributary states and barbarians, as a model for its new hegemonic politics.

Id. at 242-43 (footnote omitted).

focus,³²⁰ it remains unclear how Asian countries would respond to China's rise as an emerging superpower. As David Shambaugh points out:

[H]aving to choose between Beijing and Washington as a primary benefactor is the nightmare scenario for the vast majority of Asian states. . . . It is not an exaggeration that all Asian states seek to have sound, extensive, and cooperative relations with *both* the United States and China, and thus will do much to avoid being put into a bipolar dilemma.³²¹

Moreover, economists and commentators have described "a chain-gang relationship" between China and the United States in light of their growing economic interdependence.³²² Some also highlight the G-2 (Group of Two) relationship between the two countries in international matters that range from global economic recovery to climate change.³²³ As a result, while there undoubtedly will be rivalry between the two in the region, the form this rivalry will take is likely to be complex.

Finally, the active developments in India, and the rapidly changing dynamics in its economy and domestic industries,³²⁴ may also present some interesting twists to the future Asian developments. As Robert

³²⁰ See ANDREW J. NATHAN & ROBERT S. ROSS, *THE GREAT WALL AND THE EMPTY FORTRESS: CHINA'S SEARCH FOR SECURITY* 15 (1997) (arguing that China is vulnerable power whose most pressing security problems are powerful rivals at its own borders); Gerald Segal, *Does China Matter?*, *FOREIGN AFF.*, Sept./Oct. 1999, at 24 (pointing out exaggeration of China's importance in global economy and world politics).

³²¹ David Shambaugh, *Introduction: The Rise of China and Asia's New Dynamics*, in *POWER SHIFT*, *supra* note 9, at 1, 17; accord Frost, *supra* note 195, at 95, 105 (noting that Asian countries "do not wish to be forced to choose between Beijing and Washington").

³²² Walden Bello, *Chain-Gang Economics: China, the US, and the Global Economy*, in *CHINA'S NEW ROLE*, *supra* note 8, at 7, 11; see also HALPER, *supra* note 12, at 25 ("[T]he American and Chinese economies are heavily interdependent. America has grown addicted to Chinese credit; China has grown equally addicted to American consumption. The depth of this interdependence creates a relationship that is stabilized in a kind of economic version of *mutually assured destruction*."); Yu, *China, U.S. Need Each Other*, *supra* note 277 (noting this "chain-gang relationship").

³²³ Compare BERGSTEN ET AL., *supra* note 160, at 25 (noting need for China and United States to "develop a very informal but increasingly effective 'G-2' . . . to help guide the global governance process on an increasing number of economic topics"), with HALPER, *supra* note 12, at 216-18 (arguing that U.S.-China relations to bilateral status of special G2 relationship).

³²⁴ See, e.g., Dwijen Rangnekar, *Context and Ambiguity in the Making of Law: A Comment on Amending India's Patent Act*, 10 *J. WORLD INTELL. PROP.* 365, 379-80 (2007) (discussing changing dynamics of Indian pharmaceutical industry).

Kagan puts it, “In Asia . . . it is a three-way, not a two-way, competition.”³²⁵ India has not yet been able to compete effectively against China, in part due to problems with its poor infrastructure, bureaucratic red tape, and its failure to attract a substantial amount of foreign direct investment.³²⁶ Nevertheless, India is catching up fast and possesses strengths that China may not have — a younger workforce with a good command of English, higher population growth, superior capital efficiency, strong investment growth potential, and high entrepreneurship.³²⁷ Some commentators even predict that India’s economy will eventually surpass China’s.³²⁸ Some East Asian nations also found including India in the East Asian Summit desirable and believed such inclusion “might provide a ‘hedge’ against Chinese dominance.”³²⁹

³²⁵ ROBERT KAGAN, *THE RETURN OF HISTORY AND THE END OF DREAMS* 41 (2009); see also BEESON, *supra* note 89, at 88 (“[B]oth India and China have the potential to redefine the balance of influence and power within any grouping of which they are a part and the very definition of the region any new institution claims to represent.”).

³²⁶ See Pete Engardio, *Introduction* to CHINDIA: HOW CHINA AND INDIA ARE REVOLUTIONIZING GLOBAL BUSINESS 7 (Pete Engardio ed., 2006) [hereinafter CHINDIA] (noting “India’s decrepit infrastructure [and] bureaucratic red tape”); *The Rise of India*, in CHINDIA, *supra*, at 45, 49 (“[C]ompared to China with its modern infrastructure and disciplined workforce, India is far behind in exports and as a magnet for foreign investment.”).

³²⁷ See *Why India May Be Destined to Overtake China*, in CHINDIA, *supra* note 326, at 27 (discussing India’s strengths vis-à-vis China); *The Rise of India*, *supra* note 326, at 50 (noting “deep source of low-cost, high-IQ, English-speaking brainpower [that] may soon have a more far-reaching impact on the U.S. than China”). As one commentator observes interestingly:

Chinese analysts argue that because India’s salaries are lower, costs are cheaper, thereby making Indian products more competitive. Language is also a factor. Chinese businessmen fear that U.S. businesses will prefer Indian products because of the Indian facility with English. In a strange turn of events, the Chinese population is now asking whether their market is likely to be flooded with cheap Indian goods.

Lal, *supra* note 21, at 133, 141.

³²⁸ See, e.g., OVERHOLT, *supra* note 205, at 193 (“[T]he second half of the [twenty-first] century could be India’s . . . if it engages in transformative efforts to improve its education and infrastructure.”); *The Rise of Chindia*, in CHINDIA, *supra* note 326, at 13, 14 (“Until now, China has attained dramatically higher growth. But some experts believe India’s superior capital efficiency, higher population growth, and younger workforce mean growth is more sustainable and will enable India to surpass China in economic growth in the coming decades.”); *Why India May Be Destined to Overtake China*, in CHINDIA, *supra* note 326, at 27 (discussing different factors that may enable India to surpass China).

³²⁹ BEESON, *supra* note 89, at 88.

C. *Battle of Isms*

The final battle is a battle of isms — a battle between bilateralism and plurilateralism on the one hand and multilateralism on the other. As I have noted in previous works, bilateralism is one of the five disharmonizing trends in the international intellectual property arena and the larger international trading system.³³⁰ It resonates well with China's traditional approach for diplomacy and its historical mistrust of multilateral institutions. As David Kang recounts: "In the mid-1980s, analyses of Chinese foreign policy emphasized China's preference for bilateral relations and its disdain for multilateral or cooperative institutions."³³¹ Lawrence Freedman also observes that, "until comparatively recently [China] has shown disinterest and often distrust in international treaties and the principles of multilateralism, fearing them as means by which it could be put on the spot."³³²

Since the mid-1990s, China's foreign policy has been changing.³³³ With growing power, the country has now developed a growing interest in participating in multilateral organizations and may be on its way to become what former U.S. Trade Representative Robert Zoellick described as a "responsible stakeholder"³³⁴ or what some Chinese leaders and academics describe as a "responsible great power" (*fuzeren de daguo*).³³⁵ In fact, with growing confidence in its ability to shape the regional environment, China has now become "more active on the global stage, including in multilateral institutions and the security arena."³³⁶

To date, some commentators have even argued that multilateral organizations may greatly benefit China in its disputes with the

³³⁰ See Yu, *Currents and Crosscurrents*, *supra* note 1, at 375-408; Peter K. Yu, *Five Disharmonizing Trends in the International Intellectual Property Regime*, in 4 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH*, *supra* note 175, at 73, 84-88.

³³¹ KANG, *supra* note 10, at 88.

³³² Lawrence Freedman, *China as Global Strategic Actor*, in *DOES CHINA MATTER?*, *supra* note 209, at 21, 22.

³³³ See generally AVERY GOLDSTEIN, *RIISING TO THE CHALLENGE: CHINA'S GRAND STRATEGY AND INTERNATIONAL SECURITY* (2005) (providing recent discussion of China's foreign policy); *NEW DIRECTIONS IN THE STUDY OF CHINA'S FOREIGN POLICY* (Robert S. Ross & Alastair Iain Johnston eds., 2006) (same); ROBERT G. SUTTER, *CHINESE FOREIGN RELATIONS: POWER AND POLICY SINCE THE COLD WAR* (2d ed. 2010) (same).

³³⁴ Robert B. Zoellick, Deputy U.S. Sec'y of State, *Whither China: From Membership to Responsibility?*, Address to the National Committee on U.S.-China Relations in Washington, D.C. (Sept. 21, 2005), available at http://www.ncuscr.org/files/2005Gala_RobertZoellick_Whither_China1.pdf.

³³⁵ Zhang & Tang, *supra* note 9, at 48, 49.

³³⁶ *Id.* at 54.

European Union or the United States. With the support of less-developed countries in the international community, China is likely to prevail in numbers in those international fora where the vote of each country counts. Moreover, as these commentators have noted, China may be able to “use international law as a weapon.”³³⁷ Because international law and multilateral rules serve as political constraints in democracies, they believe “China could turn the United Nations and regional organizations into an amplifier of the Chinese world-view — discouraging the USA from using its might in campaigns like the Iraq War.”³³⁸

It remains interesting to see whether STAs would eventually create a network of trade agreements that may be further consolidated into a single multilateral arrangement. Although commentators have questioned China’s intention to achieve such an arrangement,³³⁹ the development of bilateral and regional trade agreements would no doubt promote multilateralism by facilitating the development of common policy positions among participating states.³⁴⁰

If STAs eventually are consolidated into a multilateral arrangement, China’s influence through STAs is likely to be even more significant. Such influence may justify the existing concerns of the European Union and the United States over China’s different approaches and emphases. While STAs are unlikely to replace FTAs or EPAs as the main driver of future multilateral treaties, they may become equally influential. As Mark Leonard surmises: “If China continues to grow, it is possible to imagine that in the future, demonstrators outside the World Trade Organization will complain about the Beijing Consensus *as well as* the Washington Consensus.”³⁴¹

CONCLUSION

Although there has been a growing use of bilateral and regional trade agreements, the STAs China signed are very different from the EPAs or the FTAs that the European Union and the United States established. While STAs do not seek to export Chinese laws to the signatory countries, China developed the agreements with specific

³³⁷ LEONARD, *supra* note 229, at 107.

³³⁸ *Id.* at 108.

³³⁹ See, e.g., Jiang, *supra* note 218, at 12 (“China does not aim to forge its bilateral FTAs together to form multilateral arrangements.”).

³⁴⁰ See Cho, *supra* note 38, at 238 (noting that “regionalism may contribute to multilateralism”).

³⁴¹ LEONARD, *supra* note 229, at 133 (emphasis added).

objectives and its self-interests in mind. Because China's national interests may be redefined in the near future, its objectives and the accompanying STA strategies may change accordingly. As Kurt Campbell reminds us: "China's strategy toward the developing world remains largely a work in progress. Tensions between different priorities are already apparent, and these are likely to grow more discordant over time."³⁴² Similarly, Eric Heginbotham observes that China's "desire to be recognized as a constructive member of international society bumps up against resource diplomacy that supports autocratic and abusive governments in several corners of the world."³⁴³

Together with the complex economic conditions and uneven development, China's changing goals, interests, and priorities and the potential conflicts STAs will create are likely to provide interesting developments that will affect not only Asia but also the entire international community. As STAs become more complex and influential, they have also become a subject that is worthy of greater attention from both academic researchers and policymakers. This Article, hopefully, provides the needed spark for more active research in the area.

³⁴² Campbell, *supra* note 184, at xi; see also Peter Van Ness, *China and the Third World: Patterns of Engagement and Indifference*, in *CHINA AND THE WORLD: CHINESE FOREIGN POLICY FACES THE NEW MILLENNIUM* 151, 164 (Samuel S. Kim ed., 4th ed. 1998) ("PRC policy toward the Third World is always subject to change, even making 180-degree changes, when Beijing decides to take a different approach to achieving wealth and power in its relations with the most influential states in the system.").

³⁴³ Heginbotham, *supra* note 34, at 190.