

## TAKING STOCK: CHINA'S FIRST DECADE OF FREE TRADE

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### ABSTRACT

China has established itself as a global economic power in the past ten years. This article explains one important but overlooked aspect of this rise, China's new free trade agreements (FTAs). After situating China's FTA boom within a framework of international political economy and recent regional rise, this Article probes the question of how China selects its FTA partners, referencing U.S. trade practice and policy as a framework with which to analyze China's own preferences. We then explore the main features of China's FTAs, finding that it has adopted a flexible FTA strategy that both attends to its own socioeconomic prerogatives and closely matches partner expectations. A conclusion discusses the guiding principles of China's FTA strategy and offers concrete proposals to guide the future of China's international economic law and policy.

### 1. INTRODUCTION

China's rise to prominence scarcely needs introduction at this point. Its steady economic growth over the past three decades captures headlines the world over. This success has been attributed largely to China's careful tending of its domestic economy, so many wise policy decisions to attract foreign domestic

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investment, to form joint ventures with leading foreign companies, and to corporatize China's state-owned enterprises. But China's influence stretches far beyond its shores. As a global economic power, China's footprint comprises over a trillion dollars in U.S. treasury bonds,<sup>1</sup> multi-billion dollar investments in Anglo-Australian mining companies,<sup>2</sup> labyrinthine infrastructure projects snaking throughout Africa,<sup>3</sup> and bilateral trade agreements with several Latin American countries.<sup>4</sup> These outward advances have helped position China as the world's second largest economy, and its largest exporter.<sup>5</sup> Scarcely a week goes by without China becoming another country's largest trading partner.<sup>6</sup>

Part of China's transformation from regional player to global power is a growing web of international legal obligations. In the early 1980s, as China took the first steps toward reforming the economy, it played a passive role in international organizations,

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<sup>1</sup> See *Major Foreign Holders of Treasury Securities*, U.S. TREASURY (2011), <http://www.ustreas.gov/tic/mfh.txt> (noting China is the largest holder of U.S. treasury bonds (\$1173.5 billion), ahead of Japan (\$914.8 billion) and the UK (\$352.3 billion).

<sup>2</sup> See *Chinese Investment in Rio Tinto*, BBC NEWS, Feb. 12, 2009, <http://news.bbc.co.uk/2/hi/7885111.stm> (noting that China would double its investments to take an eighteen percent share of the mining giant).

<sup>3</sup> See generally Howard French, *The Next Empire*, ATLANTIC MONTHLY, May 2010, at 59 (describing Chinese investment in oil production, mining, agriculture, and other fields).

<sup>4</sup> These include FTAs with Chile, Peru, and Costa Rica.

<sup>5</sup> See generally *Country Comparison > Economy: GDP (Purchasing Power Parity)*, INDEX MUNDI, <http://www.indexmundi.com/g/r.aspx?t=0&v=65&l=en> (ranking China as having the second highest GDP based upon purchasing power parity based upon statistics generated by the CIA World Factbook) (last updated Jan. 1, 2011); *Country Comparison > Exports*, INDEX MUNDI, <http://www.indexmundi.com/g/r.aspx?c=ci&v=85> (ranking China as the largest exporter based upon statistics generated by the CIA World Factbook) (last updated Jan. 1, 2011).

<sup>6</sup> See, e.g., *China Overtakes the US as Japan's Largest Trading Partner*, JAPAN CORPORATE NEWS NETWORK, Feb. 28, 2008, [http://www.japancorp.net/press\\_release/17232/china\\_overtakes\\_the\\_us\\_as\\_japans\\_largest\\_trading\\_partner](http://www.japancorp.net/press_release/17232/china_overtakes_the_us_as_japans_largest_trading_partner) (reporting that China has become Japan's largest trading partner); Malcolm Moore, *China Overtakes the US as Brazil's Largest Trading Partner*, TELEGRAPH, May 9, 2009, <http://www.telegraph.co.uk/finance/economics/5296515/China-overtakes-the-US-as-Brazils-largest-trading-partner.html> (reporting that trade between China and Brazil reached \$3.2 billion, surpassing the United States' trade with Brazil); Chris Zappone, *China Turns Trade Tables on Japan*, BUSINESS DAY, Nov. 19, 2008, <http://www.theage.com.au/business/china-turns-trade-tables-on-japan-20081119-6b1d.html> (noting that China eclipsed Japan to become Australia's leading trade partner).

such as the United Nations.<sup>7</sup> “[A] comprehensive network of linkages” between China and the rest of the world was not established until the 1980s, when Beijing joined, “practically all important international organizations.”<sup>8</sup> In addition, it played little role in the creation of new groupings.<sup>9</sup> In the 1990s, China took an increasingly extroverted stance in the region, both by establishing new organizations, such as the Shanghai Cooperation Organization (SCO),<sup>10</sup> and by participating more actively in those it had already joined. By acceding to the WTO in 2001, China joined another important multilateral organization and deepened commitments to various forms of economic liberalization, such as phasing out tariffs on key products, opening up its services market to foreign companies, and clarifying its trade rules and regulations.<sup>11</sup> Multilateral settings have thus helped China

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<sup>7</sup> See, e.g., ANN KENT, *BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS & GLOBAL SECURITY* 222-23 (2007) (“In comparison with its attitude to international law and international organizations in the 1950s, 1960s, and even early 1980s, [China’s] acceptance of, and integration into, the international system have been nothing short of extraordinary.”). Kent draws this conclusion based on her systematic analysis of China’s participation in four international legal regimes: security, banking, environment, and human rights. Though China’s compliance in all four regimes improved between 1980 and 2005, there was still significant room for further compliance in the last two categories. See *id.* at 226 tbl. 1 (documenting China’s overall level of compliance with specific organizations and treaties between 1980 and 2005). See generally James V. Feinerman, *Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?*, 141 CHINA Q. 186 (1995) (analyzing China’s increased involvement in international organizations as of the late 1970s).

<sup>8</sup> Samuel S. Kim, *International Organizations in Chinese Foreign Policy*, 519 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 140-41 (1992).

<sup>9</sup> See Michael Yahuda, *China & Regional Co-operation, in CHINA’S PLACE IN GLOBAL GEOPOLITICS: INTERNATIONAL, REGIONAL & DOMESTIC CHALLENGES* 102-04 (Kjeld Erik Brodsgaard & Bertel Heurlin eds., 2002) (noting that after China returned to the U.N. in 1971, the country preferred to only engage in serious foreign relations discussions under a bilateral framework).

<sup>10</sup> “The Shanghai Cooperation Organization (SCO) is a permanent intergovernmental international organization creation of which was proclaimed on” June 15, 2001 in Shanghai, whose main goals are to promote effective cooperation in various aspects as well as maintaining security and stability through joint efforts by member countries. *Brief Introduction to the Shanghai Cooperation Organization*, THE SHANGHAI COOPERATION ORGANIZATION, <http://www.sectSCO.org/EN/brief.asp> (last visited Oct. 12, 2011).

<sup>11</sup> See BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS & GROWTH* 390-91 (2006) (explaining how China was required to open up in markets to enter into complex multilateral bargaining agreements); see also Icksoo Kim, *Accession into the WTO: External Pressure for Internal Reforms in China*, 11 J. CONTEMP. CHINA 433,

establish a reputation as a regional power with global ambitions, but much of China's diplomatic energy focuses on *bilateral* relations, such as the so-called G-2 with the United States, or with supranational organs such as the EU and ASEAN.<sup>12</sup> Indeed, China's profusion of bilateral investment treaties during the 1990s and 2000s bespeaks its preference for bilateral negotiations.<sup>13</sup> A more recent manifestation of bilateral preferences is its new spate of FTAs.<sup>14</sup>

As of July 2011, China entered into eight free trade agreements or regional trade agreements, with countries as geographically and developmentally diverse as Chile, New Zealand, Pakistan, and Singapore, as well as with regional bodies such as ASEAN. During this same period, China has been negotiating FTAs with neighbors such as India and Korea and more distant countries or organizations such as Australia, the Gulf Cooperation Council, Iceland, and Norway, among others.<sup>15</sup> The emphasis on FTAs reflects a new stage in the ongoing development of China's foreign policy, as well as a growing reliance on international law and legal institutions to cultivate economic relations. In the words of China's Ministry of Commerce, FTAs offer "a new platform to further opening up to the outside and speeding up domestic

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433 (2002) (describing China's entry into the WTO and how it will contribute to a systemic transformation of the Chinese economy); Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL'Y J., JUNE 2000, No. 13 (discussing the implications of the WTO dispute resolution system for East Asian countries in light of cultural differences between East and West); Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699 (2007) (examining "China's participation in international legal regimes").

<sup>12</sup> Yahuda, *supra* note 9, at 103 ("China's leaders have preferred to conduct their serious foreign relations in bilateral rather than multilateral frameworks.").

<sup>13</sup> For a complete list of China's bilateral investment treaties, see *Total Number of Bilateral Investment Treaties Concluded*, U.N. CONFERENCE ON TRADE AND DEV. (June 1, 2011), [http://www.unctad.org/sections/dite\\_pcbp/docs/bits\\_china.pdf](http://www.unctad.org/sections/dite_pcbp/docs/bits_china.pdf). For a history of China's policies on BITs, see generally Guiguo Wang, *China's Practice in International Investment Law: From Participation to Leadership in the World Economy*, 34 YALE J. INT'L L. 575 (2009) (reviewing China's foreign investment laws and policies during the past three decades).

<sup>14</sup> For a detailed discussion of China's bilateral preference, see *infra* Section 3.2.

<sup>15</sup> See CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/english/index.shtml> (last visited Oct. 4, 2011) (outlining the increasing number of Chinese FTA partners and FTAs recently signed by China).

reforms, an effective approach to integrate into [the] global economy and strengthen economic cooperation with other economies, as well as particularly an important supplement to the multilateral trading system."<sup>16</sup>

Despite the importance of this new FTA boom, few scholars in China or the United States have analyzed China's FTAs, or FTA policy, in a rigorous or comprehensive fashion. A handful of working papers address the topic when China first set out on this trajectory,<sup>17</sup> but do not account for the recent surge of FTA activity. Recent scholarship examines the trend from a comparative angle,<sup>18</sup> but fails to address the substance of China's FTAs, as well as underlying policy motivations, in significant detail. This Article contributes to the scholarly discussion by examining FTAs as specimens of Chinese international economic law and articulating a framework through which to analyze the motivations and strategies of China's law and policymakers.

The argument proceeds in five parts. In the first part, we establish the theoretical foundations of free trade agreements, highlighting the dominant methodologies through which to evaluate FTAs. In the second part, we examine China's globalization, paying particular attention to the processes of internationalization and regionalization that China has undertaken over the past twenty years, as well as its participation in bilateral and multilateral organizations. The third part probes the question

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<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., Agata Antkiewicz & John Whalley, *China's New Regional Trade Agreements* (Nat'l Bureau of Econ. Research, Working Paper No. 10992, 2004), available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan022759.pdf> (discussing regional trade agreements China entered after acceding into the WTO); Yang Zerui, *China's FTA Developments*, APEC Study Center/PECC Trade Forum Conference 2004/HSCC/019 (May 2004), [http://www.pecc.org/resources/doc\\_view/135-chinas-fta-developments](http://www.pecc.org/resources/doc_view/135-chinas-fta-developments) (discussing China's FTA policy and strategy); Jiangyu Wang, *China's Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System*, 8 SING. Y.B. INT'L L. 119, 119 (2004), available at <http://law.nus.edu.sg/sybil/downloads/current/jiang.pdf> (examining China's negotiation and signing of regional trade agreements "in the context of the regionalism versus multilateralism debate in international trade law").

<sup>18</sup> See, e.g., Timothy Webster, *Bilateral Regionalism: Paradoxes of East Asian Integration*, 25 BERKELEY J. INT'L L. 434, 457-58 (2007) (comparing Japan's and China's FTA race); Claude Barfield, *The Dragon Stirs: China's Trade Policy for Asia--and the World*, 24 ARIZ. J. INT'L & COMP. L. 93, 93 (2007) (analyzing "the history of Chinese trade policy over the past decade").

of how China selects its FTA partners, referencing U.S. trade practice and policy as a framework by which to analyze China's own preferences. The fourth part investigates three of China's FTAs in light of the theoretical and practical considerations raised earlier. Lastly, the fifth part summarizes the guiding principles of China's trade and concrete proposals that may be applied to China's FTA strategy.

## 2. THE THEORETICAL FOUNDATIONS OF FREE TRADE AGREEMENTS

Policymakers, lawyers, and economists have debated intensively the benefits and drawbacks of regionalism vis-à-vis multilateralism, as well as the effects that each might impose on greater global economic integration and multilateral liberalization.<sup>19</sup> Regionalism can be broadly defined as "a tendency towards some form of preferential trading arrangements between a number of countries usually belonging to a particular region."<sup>20</sup> Another definition of regionalism is, "any policy designed to reduce trade barriers between a subset of countries regardless of whether those countries are actually contiguous or even close to each other."<sup>21</sup> But multilateralism is much harder to define. Certain scholars define "multilateralism" as "'coordinating relations among three or more states . . . in [sic] accordance with certain principles' that order relations between them."<sup>22</sup> Moreover,

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<sup>19</sup> See, e.g., Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in NEW DIMENSIONS IN REGIONAL INTEGRATION 22 (Jaime de Melo & Arvind Panagariya eds., 1993) (discussing the relative strengths and weaknesses of regional versus multilateral trade strategies); Robert Z. Lawrence, *Emerging Regional Arrangements: Building Blocks or Stumbling Blocks?*, in FINANCE AND THE INTERNATIONAL ECONOMY 22 (Richard O'Brien ed., 1991) (assessing the impact and future implications of regional trade agreements in the context of the global push towards multilateralism).

<sup>20</sup> Royal Econ. Soc'y, *Regionalism Versus Multilateralism: Will Preferential Agreements Undermine the Global Trading System*, <http://www.res.org.uk/society/mediabriefings/pdfs/1998/July/lahiri.pdf> (last visited Oct. 25, 2011); Sajal Lahiri, *Controversy: Regionalism versus Multilateralism*, 108 ECON. J. 1126, 1126 (1998).

<sup>21</sup> L. Alan Winters, *Regionalism versus Multilateralism* 2-3 (The World Bank, Policy Research Working Paper No. 1687, 1996), available at <http://www.unige.ch/ses/ecopo/demelo/Cdrom/RIA/Readings/Winters96.pdf>.

<sup>22</sup> See Caroline Bouchard & John Peterson, *Conceptualising Multilateralism: Can We All Just Get Along?* 7 (Mercury, E-Paper No. 1, 2010), available at [http://www.mercury-fp7.net/fileadmin/user\\_upload/E\\_paper\\_no\\_1\\_Revised\\_Version.pdf](http://www.mercury-fp7.net/fileadmin/user_upload/E_paper_no_1_Revised_Version.pdf) (quoting John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT'L ORG. 561, 568 (1992)).

they think multilateralism represents a generic institutional form constructed on the basis of certain principles (generalized principles of conduct, indivisibility, and diffuse reciprocity) that differentiate it from other forms of international relations.<sup>23</sup> Particularly, trade multilateralism means, "application of the most-favored-nation principle on a non-discriminatory basis."<sup>24</sup> Accordingly, certain scholars characterize the "[international] rule of law' as the single most important goal of the international system, one upon which all other goals . . . depend."<sup>25</sup> However, not every nation aspires to multilateralism. For example, unilateralists and regionalists stress the threat that multilateralism poses to national autonomy and freedom of action.<sup>26</sup> In contrast to the multilateralism approach, regionalism is another option that is available to countries.<sup>27</sup> Furthermore, there are a few different ways in which regionalism can be achieved;<sup>28</sup> entering into FTAs and forming customs unions are the two most common tools.

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<sup>23</sup> *Id.* (describing how multilateralism differs from other forms of international relations because multilateralism is built on generalized principles of conduct, indivisibility, and diffuse reciprocity).

<sup>24</sup> John Van Oudenaren, *What is "Multilateral"?*, 117 POL'Y REV. 33, 34 (2003).

<sup>25</sup> See Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 331-32 (2008) (characterizing the international rule of law as the preeminent goal of the international system from which all other goals stem from); see also Zhao Jun & Han Xiaoan (赵骏和韩小安), *WTO Fazhi He Zhongguo Fazhi De Dili Yu Hudong (WTO 法治和中国法治的砥砺与互动) [Mutual Encouragement and Interactions between WTO Rule of Law and China's Rule of Law]*, 41 ZHEJIANG DAXUE XUEBAO -RENWEN SHEHUI KEXUE BAN (浙江大学学报—人文社会科学版) [J.ZHEJIANG U. (HUMAN. & SOC. SCI.)] 147, 149 (2011) (characterizing the international rule of law as a reasonable reaction to globalization and describing its influence on legislation, adjudication, and legal implementation).

<sup>26</sup> See Blum, *supra* note 25, at 325 (observing that a proponent of unilateralism may view multilateralism as a threat where it imposes restraints on states' conduct or transfers decision-making power to international governance).

<sup>27</sup> See generally C. O'Neal Taylor, *Regionalism: The Second-Best Option?*, 28 ST. LOUIS U. PUB. L. REV. 155 (2008) (examining whether regionalism meets the expectations, needs and capabilities of developing countries and how this option could be improved to address development issues).

<sup>28</sup> See OECD, *REGIONALISM AND THE MULTILATERAL TRADING SYSTEM* (2003), available at [http://www.bilaterals.org/IMG/pdf/OECD\\_RTAs\\_book\\_jul03.pdf](http://www.bilaterals.org/IMG/pdf/OECD_RTAs_book_jul03.pdf) (studying different approaches to regionalism and their relationship to the multilateral trading system). In fact, the trend that countries use regional trade agreements to counter any unreasonable acts, requests and practices of their trading partners by including internal measures in FTAs that are not usually covered in international treaties, is called "aggressive regionalism." The Korea-

An FTA is a negotiated agreement between two or more countries or economic entities under which they agree to lower tariffs, as well as reduce non-tariff barriers, on goods imported from the other member(s). FTAs constitute a major departure from the most-favored-nation obligation of WTO members, which requires that all members apply the same tariffs to all other countries' products.<sup>29</sup> Because they lower tariffs, FTAs contribute to trade liberalization. Unlike customs unions, members of FTAs maintain their own tariff policies when trading with non-members. To ensure protection of these preferences and prevent exploiting the low tariff rate between FTA members by third parties, FTAs establish "rules of origin"<sup>30</sup> to identify which products are eligible for favorable tariff treatment, and prevent third parties from shipping through a lower-tariff member to a higher-tariff member.<sup>31</sup>

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U.S. FTA offers a typical example. See Won-Mog Choi, *Aggressive Regionalism in Korea-U.S. FTA: The Present and Future of Korea's FTA Policy*, 12 J. INT'L ECON. L. 595, 597-603 (2009) (discussing the major problems in Korea-U.S. trade and their resolution in the Korea-U.S. FTA).

<sup>29</sup> See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 160-62 (2d ed. 1997) (stating that most-favored-nation is an obligation to treat activities of a particular foreign country or its citizens at least as favorably as it treats the activities of any other country). The GATT Article XXIV MFN exception for trade groupings applies to three types of associations: a free trade area (defined in Article XXIV, paragraph 8(b)), a customs union (defined in Article XXIV, paragraph 8(a)), and an interim agreement leading to one of the above within a reasonable period of time.

<sup>30</sup> Rules of origin are the criteria needed to determine the national source of a product. See Won-Mog Choi, *Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade*, 13 J. INT'L ECON. L. 111 (2010) (discussing rules of origin within the context of fragmented regional trade agreements); John Coyle, *Rules of Origin as Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the U.S.-Singapore Free Trade Agreement*, 29 YALE J. INT'L L. 545, 546 (2004) (borrowing ideas from political science literature and offering a detailed discussion of "rules of origin" as "necessary components of all bilateral free trade agreements"); Masahiro Kawai & Ganeshan Wignaraja, *Free Trade Agreements in East Asia: A Way toward Trade Liberalization?*, ADB BRIEFS, No. 1, June 2010, at 5 (observing how rules of origin raise transaction and administrative costs in the context of FTAs).

<sup>31</sup> See Moshe Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, 26 FORDHAM INT'L L.J. 572, 572-73 (2003) (describing the aim of rules of origin in determining whether a particular preferential arrangement will be applied to a given product in international trade); Mohammad F. Nsour, *Regional Trade Agreements in the Era of Globalization: A Legal Analysis*, 33 N.C. J.

Countries sign trade agreements for various reasons.<sup>32</sup> Entering into FTAs can underpin strategic alliances, contributing to security arrangements.<sup>33</sup> Smaller countries can also benefit from access to larger markets by signing FTAs with larger countries. Furthermore, FTAs can help bolster exports and secure domestic reforms for economic development, which in turn expedites broader multilateral accords.<sup>34</sup> From a tactical perspective, signing FTAs might help spur broader integration of the member states' economies, political systems, militaries, and so on.<sup>35</sup>

There are a few global issues that we need to bear in mind in analyzing free trade agreements. First, in analyzing the respective comparative advantage of multilateralism and regionalism, we need to understand that achieving the overall welfare of international society might not necessarily overlap with an individual country's objectives. Second, global problems do not necessarily need global solutions.<sup>36</sup>

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INT'L L. & COM. REG. 359, 370 (2008) (differentiating between two kinds of rules of origins).

<sup>32</sup> See John Whalley, *Why Do Countries Seek Regional Trade Agreements?*, in *THE REGIONALIZATION OF THE WORLD ECONOMY* 63, 64 (Jeffrey A. Frankel ed., 1998) (assessing the various impetuses, forces, and influences that lead countries to enter regional trade agreements, with a more general focus on the benefits and drawbacks of a regional trade policies).

<sup>33</sup> The European Union and ASEAN agreements are good examples of this "spillover" effect.

<sup>34</sup> See Jeffrey J. Schott, *Assessing US FTA Policy*, in *FREE TRADE AGREEMENTS: US STRATEGIES & PRIORITIES* 359, 363 (Jeffrey J. Schott ed., 2004), available at [http://www.petersoninstitute.org/publications/chapters\\_preview/375/13iie3616.pdf](http://www.petersoninstitute.org/publications/chapters_preview/375/13iie3616.pdf) (examining U.S. FTA trading policies, with a focus on how FTAs benefit the United States and with recommendations regarding future U.S. FTA partners and agreements).

<sup>35</sup> The EU would be the paradigmatic case of this multidisciplinary integration. What began as an effort to link the steel and coal communities of six western European countries has grown to be an enormous supranational body comprising of 27 states connected by agreements in economic, social, regulatory, financial, labor, and other fields. See *What Does the EU Do?*, EUROPA, [http://europa.eu/abc/12lessons/lesson\\_5/index\\_en.htm](http://europa.eu/abc/12lessons/lesson_5/index_en.htm) (last visited Sept. 20, 2011) (describing the EU's integration in various policy areas).

<sup>36</sup> See, e.g., Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528 (2008) (commenting on how countries have strategically adapted to globalization); Blum, *supra* note 25, 323-26 (observing that the preference for multilateralism is often not based on an informed choice).

### 2.1. Economic Rationality

Economists analyze trade liberalization by considering both short and long-term effects, as well as weighing the social and private costs of adjustment. Long-term effects are most important for successful free trade agreements. The most important long-term gains include increased competition, stimulus to investment and more efficient use of economic resources.<sup>37</sup> The short-term effects of creating a free trade agreement are measured in terms of trade creation and trade diversion.<sup>38</sup>

Jacob Viner initiated the evaluation of preferential trade agreements by assessing the trade creation and trade diversion effects.<sup>39</sup> Trade creation occurs when lower-cost imports from one trading partner replace domestic production in another. Trade creation leads to efficiency gains for each country because each country will shift from a higher-cost domestic source product to a lower-cost foreign product. Each country will eventually begin to specialize in producing those items in which they have a comparative advantage. On the other hand, trade diversion occurs when lower-cost imports from a non-member country are prevented from entering a member country because of tariffs or

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<sup>37</sup> See APEC STUDY CENTRE—MONASH UNIVERSITY, AN AUSTRALIA-USA FREE TRADE AGREEMENT: ISSUES AND IMPLICATIONS (2001), available at [http://www.dfat.gov.au/publications/aus\\_us\\_fta\\_mon/](http://www.dfat.gov.au/publications/aus_us_fta_mon/) (analyzing the impact of an FTA with the US on Australia); Kawai & Wignaraja, *supra* note 30, at 4–5 (stating that FTAs tend to have a net positive benefit).

<sup>38</sup> See generally BÉLA BALASSA, THE THEORY OF ECONOMIC INTEGRATION (1961) (analyzing the problems of economic integration among sovereign nations and presenting a unified theory of economic integration that addresses some of these inherent issues); WILLIAM H. COOPER, CONG. RESEARCH SERV., RL 31356, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY (2011), available at <http://www.fas.org/sgp/crs/row/RL31356.pdf> (describing the U.S. implications of FTAs); Richard G. Lipsey, *The Theory Of Customs Unions: Trade Diversion And Welfare*, 24 *ECONOMICA* 40 (1957) (discussing the welfare distributions that result from customs unions); J.E. MEADE, THE THEORY OF CUSTOMS UNIONS (1955) (assessing whether, and how, the removal of trade barriers, via agreements like customs unions, leads to more economic use of global resources); JAROSLAV VANEK, GENERAL EQUILIBRIUM OF INTERNATIONAL DISCRIMINATION: THE CASE OF CUSTOMS UNIONS (1965) (analyzing the global effects of regional trade agreements, with a focus on the impact of customs unions on the world economy); JACOB VINER, THE CUSTOMS UNION ISSUE (1950) (examining the concept, intent, and mode of operation of customs unions in general, from an economic point of view).

<sup>39</sup> See VINER, *supra* note 38, at 5–6 (analyzing the economic impact of trade principles applied on customs unions).

non-tariff barriers. While not banned from entering in the strict sense, they are instead replaced by higher-cost imports from a FTA partner country.<sup>40</sup>

While this basic binary explained the effects that entering into FTAs might cause, scholars have introduced a wide variety of critiques. For example, this basic binary is static in nature, and ignores such factors as economies of scale, spill-over effects, and improved investment climates.<sup>41</sup> In addition, economics cannot fully account for the logic behind FTAs. By including political concerns in the discussion, debates focus on the question of whether FTAs represent “stumbling blocks” or “building blocks”<sup>42</sup> to accomplishing the broader goals of the global trading community.<sup>43</sup>

Support for FTAs stems from the belief that they act as a building block to multilateral trade liberalization.<sup>44</sup> Instead of breaking up global trade into protectionist blocs, FTAs can assist in furthering the cause of multilateral trade negotiations,<sup>45</sup> and stimulate growth within the area. Regional arrangements such as FTAs lead to increased demand for extra-regional goods due to increased investment.<sup>46</sup> Furthermore, FTAs facilitate deeper

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<sup>40</sup> See APEC STUDY CENTRE—MONASH UNIVERSITY, *supra* note 37, at 6 (noting that some countries, such as Australia, would reap wide-ranging benefits from access to larger economies through trade).

<sup>41</sup> See Jason R. Wolff, *Putting the Cart Before the Horse: Assessing Opportunities for Regional Integration in Latin America and the Caribbean*, 20 FLETCHER F. WORLD AFF. 103, 105 (1996) (outlining the strengths and weaknesses of regional integration plans).

<sup>42</sup> These terminologies are elegantly popularized by Robert Lawrence. See Lawrence, *supra* note 19.

<sup>43</sup> See Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419, 430–34 (2001) (discussing the weaknesses inherent in trade agreements that lead to inequalities and inefficiencies in regional trade agreements and outlining potential legal and economic solutions to this growing problem).

<sup>44</sup> See, e.g., JEFFREY A. FRANKEL, *REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM* 227 (1997) (suggesting that appropriately arranged FTAs are “building blocks” for global liberalization).

<sup>45</sup> See Michael Ewing-Chow, *Southeast Asia and Free Trade Agreements: WTO Plus or Bust?*, 8 SING. Y.B. INT'L L. 193, 206 (2004) (concluding that FTAs have facilitated new regional trade rules).

<sup>46</sup> See Lawrence, *supra* note 19 (discussing how regional agreements help boost regional economies, which in turn, carries future implications on the state of multilateral trade).

integration between the member states, which may, in turn, facilitate integration with the rest of the world. Empirical research substantiates this claim.<sup>47</sup> For example, the “gravity equation” approach has been an empirical workhorse in international trade to study the *ex post* effects of FTAs on trade flows.<sup>48</sup>

On the other hand, some oppose FTAs because they undermine the development of the multilateral trading system.<sup>49</sup> Some scholars strongly advocate that national governments should not pursue FTAs at the expense of multilateral negotiations.<sup>50</sup> One fervent multilateralist, Jagdish Bhagwati, points out the “spaghetti bowl” problem of regional trade arrangement (including FTAs) where various idiosyncratic preferential trade agreements, complicated rules, and variable tariffs will increase unnecessary costs and finally defeat the objective in reaching a clean tariff regime under WTO.<sup>51</sup> Moreover, as a result of trade diversion,

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<sup>47</sup> Scott L. Baier & Jeffery H. Bergstrand, *Economic Determinants of Free Trade Agreements*, 64 J. INT'L ECON. 29, 30 (2004) (finding that “pure economic” characteristics, such as distance between two countries, remoteness from the rest of the world, and similarity in economic size, accurately predict eighty-five percent of FTAs).

<sup>48</sup> See, e.g., Tamim Bayoumi & Barry Eichengreen, *Is Regionalism Simply a Diversion? Evidence from the Evolution of the EC and EFTA*, in REGIONALISM VS. MULTILATERAL TRADE ARRANGEMENTS 141, 144–46 (Takatoshi Ito & Anne O. Krueger eds., 1997) (describing the use of the gravity model to examine the effects of FTAs on trade).

<sup>49</sup> Rahul Sen & Sadhana Srivastava, *ASEAN's Bilateral Preferential Trade and Economic Cooperation Agreements: Implications for Asian Economic Integration*, 26 ASEAN ECON. BULL. 194, 212 (2009) (warning that improperly implemented FTAs can create detrimental consequences for economic integration).

<sup>50</sup> See generally JAGDISH BHAGWATI, *THE WIND OF THE HUNDRED DAYS: HOW WASHINGTON MISMANAGED GLOBALIZATION* (2000) (criticizing U.S. policy, particularly under President Clinton, of engaging in preferential trade agreements); Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1 (Jagdish Bhagwati & Anne O. Krueger eds., 1995) (opposing the U.S. policy of entering into FTAs instead of multilateral treaties); Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 L. & POL'Y INT'L BUS. 865 (1995) (arguing that preferential trade agreements discriminate against nonmember parties and add barriers to multilateral trade).

<sup>51</sup> See JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 61–71 (2008) (illustrating how crisscrossing FTAs restrict trade generally).

FTAs may create new interest groups whose economic survival depends upon the maintenance of trade preferences.<sup>52</sup>

## 2.2. Political-Economic and Institutional Analysis

Regionalism is an enduring feature of the multilateral trading regime and “a natural path of human civilization.”<sup>53</sup> Certain scholars find “the preference for bilateralism or multilateralism in international lawmaking is often determined not by an informed choice but by an instinctive association of political schools or bureaucratic affiliations with different forms of international regulation.”<sup>54</sup>

With the development of institutional analysis, no bright line exists between economic analysis and political analysis, as the difference is only a matter of degree. Relatively speaking though, political analysis tends to be a more values-driven discipline whereas economic analysis strives to be values-neutral.<sup>55</sup> Public

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<sup>52</sup> See David Quartner, *Public Choice Theory, Protectionism and the Case of NAFTA*, 26 *ECON. AFF.* 59, 59 (2006) (suggesting that trade policy is especially susceptible to special interest groups).

<sup>53</sup> Cho, *supra* note 43, at 419 (proposing that regional alliances should be formed in an effort to expand commercially and enhance both economic and political integration).

<sup>54</sup> Blum, *supra* note 25, at 323 (arguing that forming treaties solely based on common ideologies can be detrimental to international goals). Accord Kyle Bagwell & Robert W. Staiger, *Domestic Policies, National Sovereignty, and International Economic Institutions*, 116 *Q. J. ECON.* 519, 522 (2001) (explaining the inefficiencies introduced when policies determine market access); Robert C. Feenstra & Tracy R. Lewis, *Negotiated Trade Restrictions with Private Political Pressure*, 106 *Q. J. ECON.* 1287, 1287 (1991) (asserting that politics influence a country's trade policies).

<sup>55</sup> Indeed, value judgments appear to be increasingly driving political analysis, a shift which has been referred to as “normative political analysis.” See generally Lewis A. Dexter, *Political Processes and Judgments of Value*, 40 *AM. POL. SCI. REV.* 294 (1946) (arguing that value-judgments are relevant to political analysis); John Gerring & Joshua Yesnowitz, *A Normative Turn in Political Science?*, 38 *POLITY* 101 (2006) (discussing the shift in political science towards more normative approaches which are less value-neutral). On the other hand, the discipline of economics purports to be value-free, particularly with respect to individual economists' personal inclinations. See Murray N. Rothbard, *Value Implications of Economic Theory*, 17 *AM. ECONOMIST* 35, 35 (1973) (opining that the science of economic theory should “purge itself of all vestiges of the unsupported value judgment”); Israel M. Kirzner, *The Anatomy of Economic Advice: Part I*, *FREEMAN*, July/Aug. 2006, at 28, 30–33 (discussing the view that economists should be objective and detached from their personal values when conducting economic analyses).

choice theory could be regarded as a tradeoff between political institutions and legal institutions.<sup>56</sup> “Public choice theory suggests that the political process has an in-built tendency to promote protectionist measures favoured by organised interest groups rather than trade liberalisation that would benefit society as a whole.”<sup>57</sup>

Moreover, certain scholars have used a political economy framework to analyze the viability of FTAs between countries—as well as the desired form that they will take—by emphasizing the interaction between industry special interest groups and political institutions.<sup>58</sup>

### 3. CHINA’S GLOBALIZATION

China’s recent FTAs must first be situated within its rising influence in regional and global affairs. The boom began along mainland China’s border: Hong Kong, Macau, ASEAN, and Pakistan. It now spans both coasts of the Asia-Pacific: New Zealand, Chile, Singapore, and Costa Rica. To understand China’s FTA partnerships, we must understand how China has engaged its neighbors over the past two decades. China’s diplomatic efforts to cultivate good relations with its neighbors are indivisible from its present strategy of entering FTAs with them.<sup>59</sup> After discussing

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<sup>56</sup> See Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280, 312 (1990) (advocating the use of safeguards to combat the influence of public interest groups on government regulation); Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 745, 745 (1995) (positing that public choice theory is a useful tool for explaining the effect of economics on lawmaking). See generally ALAN PEACOCK, PUBLIC CHOICE ANALYSIS IN HISTORICAL PERSPECTIVE (1992) (emphasizing the influence of the political process on government expenditure). But see generally Cynthia R. Farina & Jeffrey J. Rachlinski, *Getting Beyond Cynicism: New Theories of the Regulatory State: Foreword: Post-Public Choice?*, 87 CORNELL L. REV. 267 (2002) (surveying recent scholars’ varied theories on the pros and cons of public choice).

<sup>57</sup> Quartner, *supra* note 52, at 59.

<sup>58</sup> See, e.g., Gene M. Grossman & Elhanan Helpman, *The Politics of Free-Trade Agreements*, 85 AM. ECON. REV. 667, 668 (1995) (propounding a model in which a nation’s trade agreements are a direct result of the relative influence of its special interest groups).

<sup>59</sup> The notion that free trade agreements, whether bilateral or multilateral, distort international trade has been a key tenet of international economics for much of the past century. But it is also clear that countries sign FTAs for reasons unrelated to economics, such as for political goodwill, security arrangements

China's regionalization strategy, we take up its preferences for bilateral relationships. This sets the stage for discussing the narrow question of how China selects its FTA partners.

### 3.1. Dense Institutionalization

We have used the term "dense institutionalism" to describe China's recent engagement with its neighbors.<sup>60</sup> More specifically, dense institutionalism refers to China's policy of increased interaction with neighboring countries by actively participating in regional organizations, as well as establishing new ones. This section highlights the important changes in China's foreign policy, beginning in the early 1990s, when China took its first steps toward regional integration by joining regional bodies such as ASEAN and APEC. By the end of the 1990s, China took a more extroverted stance towards its immediate neighbors in Southeast, East, and Central Asia, and the Asia Pacific region more generally, by more actively engaging regional bodies, as well as establishing its own regional body, the Shanghai Cooperation Organization (SCO). After joining the WTO in 2001, China's integration policy had important spillover effects; relationships built on political and security concerns—such as those with ASEAN and SCO—gradually gave way to economic agreements covering trade, investment, and services. Presently, all of China's FTA partners are either bordering countries or members of regional institutions in which China participated during the past two decades.

In the 1980s, China was still relatively inward looking. Deng Xiaoping cautioned that China should not seek leadership (*buyao dangtou*) and repeatedly warned the Chinese political establishment against playing a role in regional or international affairs.<sup>61</sup> ASEAN led a campaign to engage China, instead of

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(U.S.-Israel FTA), or larger political goals (such as the creation of a modern supranational organization in the form of the EU). The fundamental issue of free trade agreements, as Paul Krugman put it, is "a question of political economy rather than of economics proper." See Paul Krugman, *The Move Towards Free Trade Zones*, 76 *ECON. REV.* 5, 14–15 (1991) (arguing that regional FTAs tend to undermine the interests of the international trading world as a whole).

<sup>60</sup> See Webster, *supra* note 18, at 440 (describing China's recent integration with countries in the region's various regional organizations).

<sup>61</sup> See DENG XIAOPING (邓小平), DENG XIAOPING WENXUAN DISANJUAN (邓小平文选-第三卷) [SELECTED WORKS OF DENG XIAOPING] 321 (1993) (advising that China

ostracizing it.<sup>62</sup> Leaders in Beijing reacted warmly and joined ASEAN, first as a guest in 1991, then as a consultative partner to the ASEAN Regional Forum in 1994, and finally as a member of the ASEAN + 1 framework in 1997.<sup>63</sup> During the Asian Financial Crisis of 1997, China earned additional goodwill from Southeast Asia by not devaluing its currency, despite pressure to do so.<sup>64</sup> Since that time, China has signed several treaties and other diplomatic documents on security, diplomacy, and territorial matters with ASEAN<sup>65</sup>, creating a bedrock of goodwill upon which to build closer economic relationships. In 2000, Zhu Rongji's proposal to explore further cooperation in free trade with ASEAN further built upon the diplomatic efforts of the previous decade.<sup>66</sup> In 2010, the trade-in-goods portion of the FTA went into effect.<sup>67</sup>

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maintain the political and economic positions which pervaded there during the 1980s).

<sup>62</sup> See David Shambaugh, *Return to the Middle Kingdom?: China and Asia in the Early Twenty-First Century*, in *POWER SHIFT* 23, 27 (David Shambaugh ed., 2005) (describing China's shift from suspicion to support for multilateral trade organizations).

<sup>63</sup> See Lee Lai To, *China's Relations with ASEAN: Partners in the 21st Century?*, 13 *PACIFICA REV.* 61, 64-65 (2001) (outlining China's gradual progression towards engagement with ASEAN).

<sup>64</sup> See *Pro-Active Policies by China in Response to Asian Financial Crisis*, MINISTRY OF FOREIGN AFF. OF CHINA (Nov. 17, 2000), <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18037.htm> (detailing the actions China took during the 1997 financial crisis that helped stabilize the region's economy).

<sup>65</sup> See e.g., Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues, ASEAN-China Documents Series 1991-2005, at 60 (Nov. 4, 2002), available at <http://www.asean.org/13185.htm> (establishing an agreement between China and the ASEAN countries to jointly combat terrorism and other security threats); Memorandum of Understanding Between The Governments of the Member Countries of the Association of Southeast Asian Nations (ASEAN) and the Government of the People's Republic of China On Cooperation in the Field of Non-traditional Security Issues (Jan. 10, 2004), available at <http://www.asean.org/15647.htm> (introducing a specific security agenda pursuant to the Joint Declaration).

<sup>66</sup> See Wang Xiangjiang, Si Jiuyue & Zhu Changdu (王湘江、司久岳和朱昌都), *Zhu Rongji Chuxi Zhongguo Dongmeng Lingdaoren Huiwu* (朱镕基出席中国—东盟领导人会晤) [*Zhu Rongji Attended the Meeting of the Leaders from China and ASEAN*], *GUANGMING RIBAO* (光明日报) [*GUANGMING DAILY*], Nov. 26, 2000, <http://www.gmw.cn/01gmr/2000-11/26/GB/11%5E18616%5E0%5EGMA1-207.htm> (outlining Premier Zhu's plan for continued economic cooperation in the region).

<sup>67</sup> See *China-ASEAN Free Trade Area Starts Operation*, *CHINA VIEW* (Jan. 1, 2010, 1:13:26 PM), [http://news.xinhuanet.com/english/2010-01/01/content\\_12739017.htm](http://news.xinhuanet.com/english/2010-01/01/content_12739017.htm) (announcing the start of the China-ASEAN free trade zone).

China has also reached out to its regional neighbors through membership in the Asia-Pacific Economic Cooperation (APEC), an intergovernmental consultative body aimed at promoting intraregional trade and investment.<sup>68</sup> Though APEC has not instituted formally binding measures to lower tariffs or other trade barriers, it has provided the major and minor powers of the Pacific Rim a forum to discuss international economic issues outside of bilateral exchanges. China's participation in APEC not only burnished its regional image,<sup>69</sup> but also promoted linkages with countries beyond its immediate borders. China thickened ties to current FTA partners like New Zealand, Chile, and Peru, and potential FTA partners like Mexico through these meetings.

In 1996, China made its strongest commitment to regional multilateralism by establishing, with four other countries, the Shanghai Cooperation Organization (SCO). SCO initially aimed to ease military tension among China, Russia, Kazakhstan, Kyrgyzstan, and Tajikistan through confidence-building measures and force reductions along the border.<sup>70</sup> Since then, China has played a leading role in the organization by setting up and underwriting a permanent secretariat in Beijing.<sup>71</sup> China is also pushing the agenda from its traditional focus on security towards economic cooperation, improving the investment environment,

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<sup>68</sup> See *About APEC*, ASIA-PACIFIC ECON. COOP., <http://www.apec.org/About-Us/About-APEC.aspx> (last visited Sept. 20, 2011) (explaining that the Asia-Pacific Economic Cooperation is a multi-national group, the purpose of which is to promote trade, growth, and economic cooperation in the Asia-Pacific region).

<sup>69</sup> Yahuda, *supra* note 9, at 110 ("Membership of APEC has also helped China's leaders to promote their country's image as a responsible member of the region.").

<sup>70</sup> David Shambaugh, *China's Military Views the World: Ambivalent Security*, 29 INT'L SEC 52, 72 (2000) (explaining that China and Russia have demilitarized their border region and taken other measures to increase their mutual security, and that China, Russia, Kazakhstan, Tajikistan, and Kyrgyzstan agreed to reduce their military forces in the region by signing agreement).

<sup>71</sup> Julie Boland, *Ten Years of the Shanghai Cooperation Organization: A Lost Decade? A Partner for the U.S.?*, 21ST CENTURY DEFENSE INITIATIVE AT BROOKINGS 8 (Jun. 20, 2011) [http://www.brookings.edu/~media/files/rc/papers/2011/06\\_shanghai\\_cooperation\\_organization\\_boland/06\\_shanghai\\_cooperation\\_organization\\_boland.pdf](http://www.brookings.edu/~media/files/rc/papers/2011/06_shanghai_cooperation_organization_boland/06_shanghai_cooperation_organization_boland.pdf) ("The SCO's basic bureaucratic structure consists of two standing bodies: the Secretariat based in Beijing and overseen by a Secretary General who serves a three-year term, and the Regional Anti Terror Structure (RATS) with a staff based in Tashkent.").

and reducing nontariff barriers.<sup>72</sup> In addition, Premier Wen Jiabao proposed a free trade area,<sup>73</sup> though such an agreement has yet to materialize. Still, as in ASEAN, SCO has moved from an organization concerned mostly with security and politics into one that actively promotes economic cooperation. While SCO has yet to lead to an FTA, the organization itself reveals China's aspirations to be a regional leader in the fields of politics, diplomacy, security, and economics. Its incremental approach to building relationships—first tackling matters of common concern before approaching higher levels of interactivity, and recent pursuit of economic interests—speaks to China's regional aspirations.

### *3.2. Bilateral or Multilateral?*

It is worth mentioning a few preliminary issues before diving into China's preference for bilateralism. First, as is well known, multilateral trade negotiations under the WTO are making little progress, such that no feasible alternatives to regionalism or bilateralism have emerged. The bilateral approach has been adopted by many major trading powers, including the United States and the EU.<sup>74</sup> The adoption of bilateralism is thus not particular to China.

Second, China is also responding to other countries' efforts to sign FTAs, what we might call the "peer pressure" theory of FTAs.

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<sup>72</sup> See SHANGHAI COOPERATION ORG., JOINT COMMUNIQUÉ OF THE COUNCIL OF THE GOVERNMENTAL HEADS (PRIME MINISTERS) OF SHANGHAI COOPERATION ORGANIZATION MEMBER STATES, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 23, 2004), available at <http://www.fmprc.gov.cn/eng/wjdt/2649/t162437.htm> (approving an "outline on the multi-lateral economic and trade cooperation among the member states of Shanghai Cooperation Organization" by addressing economic, cultural, and technological cooperation among members states).

<sup>73</sup> See Chris Devonshire-Ellis, *The Shanghai Cooperation Organizations Growing Trade Influence*, 2POINT6BILLION.COM, Nov. 10, 2010, <http://www.2point6billion.com/news/2010/11/10/the-shanghai-cooperation-organizations-growing-trade-influence-7957.html> (explaining that Wen Jiabao proposed a long-term goal of establishing a free trade area in the Shanghai Cooperation Organization at a 2003 SCO member meeting).

<sup>74</sup> See, e.g., Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT'L L. & BUS. 39, 43 (2006) ("[T]he United States and the European Union are reenacting their interwar mercantile rivalry by rushing to form preferential blocs (European Union and Free Trade Agreement of the Americas), rather than pursuing multilateral trade liberalization.").

If everyone else is signing FTAs and China is not, its exports and investments correspondingly suffer.<sup>75</sup> China certainly does not want to be left out of the economic integration through regional arrangements. Signing FTAs ensures a level playing field between China and other large economies like the United States and Japan.

Third, multilateral treaties and bilateral treaties are both necessary components of the international law infrastructure,<sup>76</sup> even as they promote different goals.<sup>77</sup> In reality, a global solution might not be the best solution for certain global issues. Indeed, China's policymakers seem to agree on this point in their pursuit of the bilateral approach (evinced in the FTA boom) and multilateral approach (evident in China's WTO negotiations and rule-making process) as complements to one another.<sup>78</sup>

In the debate between multilateralists and bilateralists, China, like other countries, is aiming to maximize its welfare while observing international obligations. China has struck a middle ground of combining multilateral and bilateral approaches. Membership in various international organizations enhances China's power and status, but also gives China the opportunity to demonstrate that it will honor its commitments and actively participate in the making of new international rules.<sup>79</sup> On the other

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<sup>75</sup> By way of example, like many other countries, South Korea is in a dilemma: on one hand, it wants to sign an FTA with China urging the liberalization of China's markets. On the other hand, it needs to protect its agricultural products at home.

<sup>76</sup> See *supra* Section 3.1. (providing a detailed discussion about multilateralism versus regionalism); see also Blum, *supra* note 25, at 333 (arguing that while laws often need to be multilateral in nature in order to establish a transnational society, the numerous rules governing and complicating the making of treaties sometimes make bilateral treaties a more practical alternative).

<sup>77</sup> See *supra* Section 3.1 (detailing China's developing relationship with both regional and international powers in the last century).

<sup>78</sup> See *Buzhang Fangtan: Yi Xiaozhun Buzhang Tan Zhongguo zai Quyu Jingji Hezuo Daqushi xiade Jueze yu Zuowei* (部长访谈: 易小准副部长谈中国在区域经济合作大趋势下的抉择与作为) [Interview with Minister: Vice Minister Yi Xiaozhun Discussed China's Choice and Performance against the Backdrop of Regional Economic Cooperation], MINISTRY OF COMMERCE OF CHINA (May 5, 2007, 5:26 PM) [hereinafter *Interview with Vice Minister Yi Xiaozhun*], <http://yixiaozhun.mofcom.gov.cn/aarticle/speeches/200705/20070504725234.html> (last visited Oct. 2, 2011) (explaining that the Shanghai Cooperation Organization and other cooperation mechanisms have strengthened Central Asia's cohesion).

<sup>79</sup> Qingjiang Kong, *China's WTO Accession and the ASEAN-China Free Trade Area: the Perspective of a Chinese Lawyer*, 7 J. INT'L ECON. L. 839, 843, 846 (2004) (arguing that by forming the ASEAN-China Free Trade Agreement (ACFTA),

hand, for various economic and political reasons, China has actively sought out bilateral FTAs.

Nevertheless, it is clear that China *prefers* bilateralism, which offers many advantages vis-à-vis multilateralism.<sup>80</sup> While scholars have generated a laundry list of generic characteristics of bilateralism,<sup>81</sup> only some reflect China's particular circumstances and preferences.

First, bilateralism allows governments to conclude the types of agreements in a manner that most closely aligns with their and their partner's interests.<sup>82</sup> In other words, it is better tailored to meet the specific needs of the present relationship, and influence future relations by making strategic decisions about which goods to liberalize, which services to protect, and so on. The bilateral approach allows more flexibility, creativity, political expediency, and ownership over the provisions. This is generally applicable for China. As revealed previously, in choosing FTA partners, China tends to choose partner countries that are resource rich, but not superpowers. Obviously, China will not have this luxury in WTO negotiations.

Moreover, areas not covered by the multilateral treaties or commitments may be included in FTAs. For instance, the FTA with New Zealand covers movement of people, allowing New Zealand to send business people to China and China to dispatch

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China will increase its available resources and market volume, allowing it to develop into an economic super-power, and that the formation of the ACFTA will allow China and ASEAN to work together to form international economic rules).

<sup>80</sup> See Arie Reich, *Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity*, 60 U. TORONTO L.J. 263, 287 (2010) (stating that "[b]ilateral and regional agreements have many advantages that are forgone within the multilateral system," like sensitivity to interest of states, reciprocity without free-riding, ease of negotiation, quicker response to technological change, and efficiency in signaling); Cf. Paul Krugman, *Is Bilateralism Bad?* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 2972, 1989) <http://time.dufe.edu.cn/spti/article/krugman/krugman022.pdf> (positing that while global welfare will likely decline in the presence of many bilateral agreements, individual countries involved in a customs union may benefit if the customs union reduces its external tariff to a level that will not result in trade diversion).

<sup>81</sup> See Reich, *supra* note 80 at 286 (highlighting recent inclusions in bilateral agreements including investment protection and side agreements regarding labor and environmental standards).

<sup>82</sup> See generally Taylor, *supra* note 27 (arguing that bilateralism allows greater flexibility with regard to the design and content of the regional agreement).

skilled workers to New Zealand in areas where shortages exist.<sup>83</sup> In addition, the China-New Zealand FTA contains enhanced investment protection provisions.<sup>84</sup> Furthermore, China will also have more control over the timing of the negotiation. A multilateral treaty could not possibly allow China such opportunities and protections. Most importantly, as a major carve-out of most-favored nation (MFN) principle, without concern for giving the same preferential treatment to all members, China might venture somewhat further in terms of opening its market to FTA partners. In summary, bilateralism can give the countries more room to customize the arrangements to the specific needs and circumstances of particular relationships.<sup>85</sup>

In addition, reciprocity is possible only in bilateral deals. Under the MFN principle, China must extend to all WTO members the best trading privileges granted to any one member and must treat goods of an importing WTO member's trading partners on equal terms with one another.<sup>86</sup> It will clearly be a losing deal for China if China extends to each WTO member a tariff reduction concession equal to those in China's FTAs if those WTO members

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<sup>83</sup> See N.Z. MINISTRY OF FOREIGN AFFAIRS AND TRADE, NEW ZEALAND-CHINA FREE TRADE AGREEMENT: NATIONAL INTEREST ANALYSIS 33-34 (2008), available at <http://www.chinafta.govt.nz/1-The-agreement/3-Publications/National-interest-analysis.pdf> (explaining that the Movement of Natural Persons chapter of the Agreement provides for "temporary entry," which allows service providers from one signatory nation to temporarily enter the other country to provide services, and "temporary employment entry," which allows citizens of one party to temporarily enter the labor market of the other country).

<sup>84</sup> In addition to the provisions on national treatment and most-favored-nation treatment, the FTA provides for additional protections for New Zealand's investments in China beyond those available under prior agreements, including protection from unjustified expropriation, provisions to allow the free transfer of investment funds, and the incorporation of minimum international law standards of fair and equitable treatment and full protection and security. See generally *id.*

<sup>85</sup> See Blum, *supra* note 25, at 339.

This lack of uniformity allows BLTs greater room for creativity, flexibility, and political expediency. A tailored arrangement also endows its authors and their subjects with a sense of ownership over its provisions, thereby increasing their propensity to comply. The uniformity of MLTs is thus traded for the individual fit of BLTs.

*Id.*

<sup>86</sup> See Peter K. Yu et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 21-22 (2003) (describing the steps that China has taken to ensure that its laws and practices are consistent with its WTO obligations and the MFN principle).

are not obligated to extend reciprocal concessions. In fact, this is precisely the “free-riding” problem that concerns scholars and critics of bilateral agreements.<sup>87</sup>

Logistically, bilateral agreements are easier to conclude. The failure to launch a new round of trade negotiation in Seattle, the collapse of the Cancun negotiations, and the uncertainties in the Doha round negotiation<sup>88</sup> have generated tremendous unease and distrust among states and led some to question the practicability of multilateralism generally. By contrast, bilateral agreements are certainly easier to conclude; only two parties need reach agreement, not 153 as in the WTO. However, certain scholars caution against confusing the efficiency of the negotiation process with the efficiency of its outcome, simply because an efficient negotiation process does not necessarily produce an efficient outcome. Reaching an efficient outcome might require lengthy and uneasy negotiations.<sup>89</sup> Multilateral negotiation cycles are getting longer.<sup>90</sup> International investment law well exemplifies the expediency of the bilateral approach. The failure of the international community to form a multilateral investment agreement suggests the difficulty of arriving at mutually agreeable multilateral treaties. In its absence, bilateral investment treaties have proliferated and become their own corpus of international law.<sup>91</sup>

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<sup>87</sup> See, e.g., Rodney D. Ludema & Anna Maria Mayda, *Do Countries Free Ride on MFN?*, 77 J. INT'L ECON. 137, 137 (2009) (examining whether the MFN creates a free-rider problem in multilateral trade negotiations by modeling multilateral negotiations as a mechanism design problem with voluntary participation); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 137-38 (1997) (noting that if a general MFN obligation required all code nations to grant the favorable code treatment to nations who did not become code members, these nations could take a “free-rider” approach).

<sup>88</sup> See Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 BERKELEY J. INT'L L. 395 (2007) (positing that the Doha round did not address many non-tariff, non-subsidy trade barriers and that these obstacles limit developing countries' exports).

<sup>89</sup> See Blum, *supra* note 25, at 352 (arguing that the ability of parties to manipulate the design of the regime without accepting its proscriptions leads to inefficient and ineffective outcomes, thereby diminishing the ability of MLTs to overcome collective action problems).

<sup>90</sup> See Reich, *supra* note 80, at 277-78 (stating that multilateral rulemaking is incapable of responding to the needs of the modern international economy, thereby lengthening multilateral negotiation cycles).

<sup>91</sup> See, e.g., Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303 (2009) (demonstrating how

Signing an FTA can, for certain countries, also have a signaling effect—that they are interested in attracting foreign investment by improving their legal infrastructure.<sup>92</sup> Some argue that there might be a “race to the bottom” when all the least developed countries are signing bilateral treaties in order to attract foreign capital. At this point, however, China does not sign FTAs to attract investment, for it has attracted foreign direct investment since the 1980s.<sup>93</sup>

Bilateralism can also promote political and strategic objectives. For example, the FTA with ASEAN to some extent improves the friendship between China and ASEAN.<sup>94</sup> Moreover, China can build its regional leader image by its artful FTA strategy. Japan certainly has felt the pressure—with the implementation of ASEAN-China FTA,<sup>95</sup> there is a growing fear in Japan that ASEAN countries will gradually become China’s backyard.<sup>96</sup>

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the network of bilateral investment treaties is gradually becoming a humanized multilateral agreement).

<sup>92</sup> See, e.g., Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1998) (stating that an LDC can gain a competitive advantage in attracting investments by signing bilateral treaties and thus demonstrating a willingness to sign such agreements despite the harm they may cause to LDCs as a whole).

<sup>93</sup> See, e.g., Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT’L ECON. L. 457, 490-91 (2009) (arguing that China is not overly concerned with the creation of a U.S.-China BIT because China is already attracting foreign investment through other national factors).

<sup>94</sup> See Qingjiang Kong, *China’s WTO Accession and the ASEAN–China Free Trade Area: The Perspective of a Chinese Lawyer*, 7 J. INT’L ECON. L. 839 (2004) (supporting the proposition that free trade agreements bring China and its Southeast Asian neighbors closer than ever before); see also Jiangyu Wang, *China’s Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System*, 8 SING. Y.B. INT’L L. 119 (2004) (examining China’s recent trend in negotiating and signing regional trade agreements); Jeremy Leong, *Singapore: Review of Major Policy Statements*, 11 SING. Y.B. INT’L L. 277, 296-97 (2007) (discussing relations between China and ASEAN); Li Gensheng & Yue Wei (李根生和岳伟), *Zhongguo – Dongmeng Ziyou Maoyiqu Shishi Xiaoguo Fenxi (中国—东盟自由贸易区实施效果分析)* [Analysis of the Effect of the Implementation of China-ASEAN Free Trade Zone], 387 HEZUO JINGJI YU KEJI (合作经济与科技) [CO-OPERATIVE ECONOMY AND SCIENCE] (China) 94, 96 (2010) (demonstrating that the establishment of ASEAN and the implementation of the Early Harvest Program and of the Agreement on Commodity Trade have significantly improved bilateral trade between China and ASEAN).

<sup>95</sup> Cf. Jiangyu Wang, *Association of Southeast Asian Nations-China Free Trade Agreements*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES* (Simon Lester & Bryan Mecurio eds., 2009) (stating that given the non-existence of an

Under certain circumstances, bilateral and regional arrangements can also shift export markets and circumvent non-tariff barriers. In fact, Vice Minister of Ministry of Commerce, Mr. Yi Xiaozhun has explicitly expressed in his speech at the China-New Zealand FTA Workshop that “[t]he Chinese government adheres to free trade, keeps market open and opposes trade protectionism.”<sup>97</sup> Since the international financial crisis, a number of countries, including the United States, have engaged in protectionism by attaching anti-dumping measures to foreign (especially Chinese) imports.<sup>98</sup> The China-ASEAN FTA, under which China and ASEAN member states imposed zero tariffs on over ninety percent of their products, will facilitate bilateral trade among the countries under the framework. Moreover, the industrial investment cooperation measures under the FTA will obviously facilitate China’s overseas investment in the ASEAN member states, which is a pragmatic way to shift the export markets and circumvent the confrontational trade barriers.

Of course, bilateralism need not diametrically oppose multilateralism, and they are not necessarily mutually exclusive. Instead, they can be complementary forces. Multilateral rules or arrangements may constitute a foundation that provides a basic and overarching infrastructure for future development, while bilateral agreements could attend to detailed rules for effective

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international legal personality in ASEAN, as well as participation in the FTA by individual countries as sovereign States, the FTA is actually a regional agreement with eleven parties)

<sup>96</sup> See *The China-ASEAN Free Trade Agreement: Who’s Happy, Who’s Not*, KNOWLEDGE @ WHARTON (May 12, 2010), <http://www.knowledgeatwharton.com.cn/index.cfm?fa=viewArticle&articleID=2227&languageid=1> (describing Japan’s concerns regarding China’s increasing importance in world trade and Japan’s interest in bringing the ASEAN countries into its political sphere).

<sup>97</sup> Vice Minister Yi Xiaozhun, Speech at the China-New Zealand FTA Workshop (July 29, 2010), [http://fta.mofcom.gov.cn/enarticle/enrelease/201007/3094\\_1.html](http://fta.mofcom.gov.cn/enarticle/enrelease/201007/3094_1.html).

<sup>98</sup> See *Chinese Tires Targeted for Anti-Dumping Duties*, L.A. TIMES, Feb. 7, 2008, <http://articles.latimes.com/2008/feb/07/business/ft-tires7> (relating how the WTO found for the United States in a complaint brought by China); Juliane von Reppert-Bismarck, *China Challenges WTO Ruling on U.S. Tire Tariffs*, REUTERS, May 24, 2011, available at <http://www.reuters.com/article/2011/05/24/us-trade-wto-tires-idUSTRE74N23320110524> (describing China’s plan to appeal the WTO ruling against it for tire dumping).

implementation.<sup>99</sup> However, this complementary dynamic might not always occur. Rather, multilateral treaties and bilateral treaties may sometimes hinder each other. Parties always need a strong reason to sign an additional bilateral treaty where they have committed to a multilateral treaty previously and vice versa.<sup>100</sup> Moreover, signing parties must think carefully about the compatibility of the arrangements when doing so sequentially. However, China does not seem to adopt this strategy by taking advantage of the sequential interactive dynamics between the multilateral approach and the bilateral approach. Instead, China adopted the dual-approach, pursuing multilateral and bilateral agreements simultaneously, aiming to solve different issues.

Lastly, bilateral arrangements can serve an experimental function. FTAs can help Chinese companies experience trade liberalization on a small scale and learn to adapt to the wider-scale as multilateralism progresses.<sup>101</sup>

#### 4. CHOOSING FTA PARTNERS

How does China choose its FTA partners? This is a tough question to answer, and one that few experts could predict with any certainty. Approaching the question of how China's selection process works requires some tentativeness and modesty.

Since China has not publicly articulated its FTA strategy nor its selection criteria for FTA partners, other methods of investigation are needed. One way to approach the issue is through comparison, by looking at other countries' trade policies. When mapping out its trade strategy, China grappled with two possible models: that of Japan and of the United States.<sup>102</sup> Japan emphasized investment

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<sup>99</sup> See Blum, *supra* note 25, at 371 (arguing that bilateral agreements can be useful even when a multilateral rule governs an issue because they often involve commitments that are deeper and more nuanced than those of multilateral agreements).

<sup>100</sup> See *id.* at 373 (suggesting that countries sometimes sign bilateral agreements in order to escape their existing obligations under multilateral agreements).

<sup>101</sup> Yang Jiang, *China's Pursuit of Free Trade Agreements: Is China Exceptional?*, 17 REV. INT'L POL. ECON. 238, 250 (2010).

<sup>102</sup> See Zhang Yunling & Tang Shiping, *China's Regional Strategy*, in POWER SHIFT: CHINA & ASIA'S NEW DYNAMICS 48, 53 (David Shambaugh ed., 2005) (describing China's regional economic development strategy and choice between two alternative approaches for becoming more integrated with the rest of the region).

in the region and the establishment of transnational production lines but sealed off its domestic market from products made in the region.<sup>103</sup> By contrast, the United States has opened its domestic markets in the pursuit of economic interdependence with FTA partners in North and South America. China has followed the U.S. policy of more open integration, inviting neighboring states to establish a strong commercial presence in China, increasing bilateral investment between the two states, and expanding the relationship beyond mere economics (qua Japan). This in turn encourages the perception that China's economic growth presents an opportunity, not a threat, to the partner's prosperity.<sup>104</sup>

We cannot, of course, assume complete commensurability between China's FTA policy and the United States'. But since the United States is more transparent about its selection process, some indicia of China's own trade policy can be plumbed analogically. While China has not made a wholesale adoption of Western models, whether multilateral or neoliberal, it has pragmatically adapted elements of foreign models to suit its own conditions.<sup>105</sup>

It would not be surprising to see certain aspects of U.S. trade policy reflected in China. We do not minimize the enormous differences between the United States, a prime architect of the postwar multilateral trading system, and China, a historically reluctant participant in international organizations and only a recent advocate of bilateral engagement. But U.S. policy presents a typology that may, or may not apply, to China's FTAs.

While serving as United States Trade Representative in 2003, Robert Zoellick announced thirteen factors that he weighed in

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<sup>103</sup> *Id.* See also Webster, *supra* note 18, at 442–43 (explaining that in the period since the Pacific War, Japan has created transnational production networks by investing in the manufacturing and natural resource sectors of neighboring countries). See generally RAYMOND J. AHEARN, CONG. RESEARCH SERV., RL 33044, JAPAN'S FREE TRADE AGREEMENT PROGRAM (2005) (discussing Japan's attitude toward free trade agreements).

<sup>104</sup> See Webster, *supra* note 18, at 443–44 (arguing that China is viewed as a desirable trading partner by other nations because it takes a conciliatory approach to forming FTAs and promotes more than purely economic integration).

<sup>105</sup> See generally RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? 5–6 (2007) (stating that China has embraced market reforms and basic economic models but has not attempted to import wholesale the liberal democratic form found in Euro-America).

determining whether to launch FTA negotiations with a country.<sup>106</sup> These factors included geographic diversity (Asia, Middle East, Africa, the Americas), domestic business and agricultural interests, cooperation in security and foreign policy, and ensuring a mix of developed and developing countries.<sup>107</sup> Zoellick further noted that no single factor was dispositive nor was one factor weighed more heavily than another.<sup>108</sup> Thereafter, the U.S. Government Accountability Office Report (GAO Report) further subdivided the Zoellick factors into six categories: partner country readiness (adherence to rule of law, political will), economic benefit to the United States, benefits to broader strategy of trade liberalization (such as meeting WTO obligations), compatibility with U.S. trade interests, support from Congress and the private sector, and the resource constraints of the government.<sup>109</sup> As noted in the GAO Report, however, the most important factors in choosing trade partners included "U.S. trade strategy, foreign policy, and foreign economic goals."<sup>110</sup> The appendix to the Report lists individual factors that the United States weighed in signing each FTA.<sup>111</sup>

Jeffrey Schott elegantly broke the Zoellick factors down into four categories: domestic politics, economic policy considerations, partner country commitments to trade liberalization, and foreign

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<sup>106</sup> See IAN F. FERGUSSON, CONG. RESEARCH SERV., RL 33463, TRADE NEGOTIATIONS DURING THE 110TH CONGRESS 3 n.6 (2008) (stating that Zoellick considered several factors to evaluate countries desiring to form trade agreements with the United States and listing several of those criteria). The list of thirteen factors is also available in a comprehensive report published by the Government Accountability Office. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-233, INTERNATIONAL TRADE: INTENSIFYING FREE TRADE NEGOTIATING AGENDA CALLS FOR BETTER ALLOCATION OF STAFF AND RESOURCES 7-9 (2004) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d04233.pdf>.

<sup>107</sup> GAO REPORT, *supra* note 106, at 7-9.

<sup>108</sup> *Id.* at 7.

<sup>109</sup> *Id.* at 9-10.

<sup>110</sup> *Id.* at 10.

<sup>111</sup> See *id.* at 37-56 (describing the nature of various FTAs signed by the United States, considerations that went into partner selection, and various concerns raised by these agreements). For example, the Moroccan FTA stemmed from six factors, which include (1) to promote openness, tolerance, and economic growth across the Muslim world, (2) to recognize Morocco's "staunch" alliance in the war on terror, (3) to ensure Moroccan support for U.S. positions in WTO negotiations, and (4) to encourage sustainable development, environmental protection, transparency, and increased accountability of Moroccan government institutions. *Id.* at 47-48.

policy considerations.<sup>112</sup> Because Schott abstracted the categories in such a way that they do not exclusively reflect U.S. characteristics, we adopt them for our analysis.

To be sure, it would be a mistake to view China's FTA policy solely through the prism of the United States. In general, China's foreign policy pays far less attention to the domestic political situation and internal conditions of partner countries than the United States. Indeed, since its founding, China has steadfastly stuck to the principle of non-interference in the internal affairs of other countries, preferring instead to "live and let live." If the United States has sought to introduce a world order of international institutions promoting multilateral trade and limiting state sovereignty, China can be characterized as promoting a worldview stressing "the equal, unfringeable sovereignty of all states large and small, Western and non-Western, rich and poor, democratic and authoritarian, each to run its own system as it sees fit, whether its methods suit Western standards or not."<sup>113</sup> In both principle and practice, China is relatively less concerned with such matters as a country's human rights record, political system, transparency, environmental protection, or commitment to multilateral trading system.<sup>114</sup>

Notably, Vice Minister Yi Xiaozhun mentioned that China's selection criteria include first, that the potential partner maintain a good political and diplomatic relationship with China; second, that the potential partner has complementary economic structures with China and share similar import/export patterns, and as a result, the realization of free trade will not impose significant adverse impact on China's industries relating to national economy as well as the people's livelihood; third, that the potential partner has significant domestic market and could also serve as a trade hub;

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<sup>112</sup> See Schott, *supra* note 34, at 365–71 (organizing into four broad categories the criteria that the United States considers when deciding whether to begin FTA negotiations with a country).

<sup>113</sup> Andrew J. Nathan, *Principles of China's Foreign Policy*, ASIA FOR EDUCATORS, [http://afe.easia.columbia.edu/special/china\\_1950\\_forpol\\_principles.htm](http://afe.easia.columbia.edu/special/china_1950_forpol_principles.htm) (last visited Oct. 16, 2011).

<sup>114</sup> China's relationships with such countries as North Korea, Burma, Sudan, and Zimbabwe are often singled out to show that China supports "rogue regimes." A less tendentious view of these relationships would suggest that China places economic, geographical, and historical linkages above political ones.

fourth, that the potential partner shares a common desire with China to enter into FTAs.<sup>115</sup>

Of course, factors such as domestic politics, economic considerations, and foreign policy also influence China's selection of partner countries. Take the issue of domestic politics. Indeed, politics in China manifest themselves rather differently than politics in the United States, where a democratically elected Congressman reflects the interest of the member himself, his constituents, and powerful lobbying groups. In China, domestic politics are far less transparent. After a series of internal discussions, policies are often announced by central leaders, and then left to the responsible organ or agency for implementation. Nonetheless, it is still possible to discern the influence of domestic politics on Chinese FTA patterns.

#### 4.1. Domestic Politics

One striking example of domestic politics influencing trade policy may be the China-ASEAN FTA. For many years, China has tried to build up its western and southwestern regions, whose economic development lags significantly behind richer coastal areas. In the late 1990s, leaders from various provinces in southwest China, such as Sichuan, Yunnan and Guangxi, pressured the central government to enter an FTA with ASEAN.<sup>116</sup> Provincial leaders hoped that tariff-free access to Southeast Asia would make Chinese manufactured and agricultural goods more competitive in those markets. Moreover, increased trade flows between southwest China and Southeast Asia (Laos, Vietnam, Thailand) would convince Beijing to increase transportation services and infrastructure (roads, railroads, airline routes) between these two areas. By directly shipping goods over the southwestern border, Chinese manufacturers and farmers could avoid the transportation costs of first sending goods to China's east coast and then shipping them to Southeast Asia. Given the very low profit margins associated with the agricultural products grown

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<sup>115</sup> See *Interview with Vice Minister Yi Xiaozhun*, *supra* note 78 (outlining China's selection criteria for pursuing its free trade partners).

<sup>116</sup> See *The China-ASEAN Free Trade Agreement: Who's Happy, Who's Not*, *supra* note 96 (quoting Zheng Hui, Finance Professor at Fudan University, as stating that the Chinese government's decision to propose the China-ASEAN Free Trade Agreement was influenced by local government leaders in China's southwest).

in these areas, a reduction in transport fees would significantly boost profitability and competitiveness. In the case of the ASEAN agreement, then, domestic political pressure played an important role in Zhu Rongji's proposal of 2000. A similar motivation—developing the western provinces—likely propelled the China-Pakistan FTA.<sup>117</sup>

#### 4.2. Economic Considerations

Economic considerations weigh heavily in China's FTA calculus. Chief among them is the continuation of its unprecedented economic growth. This in turn requires expanding, or at least maintaining, high growth in such sectors as construction, heavy manufacturing (steel), light manufacturing (copper), infrastructure (railways, roads), and the production of consumer goods.<sup>118</sup> These forms of economic activity require enormous amounts of natural resources, which China has assiduously scoured the world for, notably in Africa,<sup>119</sup> Australia,<sup>120</sup> and South America.<sup>121</sup> At present, China is the largest consumer of copper,

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<sup>117</sup> See Syed Fazl-e-Haider, *Pakistan's Trade Bear-hug with China*, ASIA TIMES, Apr. 21, 2010, [http://www.atimes.com/atimes/South\\_Asia/LD21Df01.html](http://www.atimes.com/atimes/South_Asia/LD21Df01.html) (stating that China and Pakistan are interested in developing the water potential of Pakistan's northern areas, which connects to Xinjiang, China's western province).

<sup>118</sup> See, e.g., MINISTRY OF FOREIGN TRADE AND TOURISM IN PERU AND THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, PERU-CHINA FREE TRADE AGREEMENT: JOINT FEASIBILITY STUDY 6-7 (2007) [hereinafter PERU-CHINA: JOINT FEASIBILITY STUDY] (noting that China's highest growth industries include manufacturing, construction, and transportation); see also David Menzie et al., *U.S. Geological Survey, China's Growing Appetite for Minerals* (explaining that as China continues to grow, the country will need to consume large quantities of minerals as it enters each of several development stages: infrastructure development, light manufacturing, heavy manufacturing, consumer goods development, and the development of services).

<sup>119</sup> See French, *supra* note 3 (describing the considerable investments that China has made in Africa in its quest to obtain natural resources); DEBORAH BRAUTIGAM, *THE DRAGON'S GIFT: THE REAL STORY OF CHINA IN AFRICA* (2009) (analyzing Chinese aid and investment in Africa).

<sup>120</sup> See Minerals Council of Australia, *Fact Sheet – The Australia China Minerals Trade*, Apr. 2005, available at [http://www.minerals.org.au/\\_data/assets/pdf\\_file/0009/8829/MCA\\_au-china\\_fact\\_sheet\\_april-1.pdf](http://www.minerals.org.au/_data/assets/pdf_file/0009/8829/MCA_au-china_fact_sheet_april-1.pdf) (presenting mineral market statistics in favor of a China-Australia FTA).

<sup>121</sup> See *China's Growing Influence: Objectives and Strategies: Hearing Before the U.S.-China Economic and Security Review Commission*, 109th Cong. 158–60 (2005) (statement of Claudio Loser, Senior Fellow, Inter-American Dialogue) (stating that

tin, zinc, steel, iron ore, and coal, and the second largest consumer of aluminum, petroleum and lead, and the fourth largest consumer of gold.<sup>122</sup>

China's pressing need for raw materials illuminates several of its recent choices for FTA partners.<sup>123</sup> Chile, Costa Rica, and Peru account for a few drops in China's ocean of world trade, a topic more fully explored below. But vast copper reserves made Chile an ideal partner for a free trade agreement with China, while Peru's silver, iron ore, and copper were also attractive. By entering into FTAs with these countries, China was able to correct trade deficits that it had with both countries due to its heavy reliance on their mineral imports.

At the same time, China must open up new markets for its exports. In today's global economy, and particularly after the global recession, reliance on exporting to the EU, United States, and Japan will no longer serve all of China. China is particularly interested in promoting agricultural and manufacturing trade with Southeast Asia, which will help develop its largely agrarian and underdeveloped western regions, such as Xinjiang, Tibet, and Yunnan.

Like the United States and Japan, China prefers to enter FTAs with countries with which it transacts very little trade.<sup>124</sup> Though China's main trading partners include the United States, EU, and Japan, there is very little chance of an FTA with any of these countries. An FTA with either Japan or the United States would require both parties to overlook a long history of mutual suspicion, while certain sectors—such as agriculture and intellectual property—could not be arranged satisfactorily as between China and the United States, or China and Japan. Rather, as one Chinese

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China's demand for energy and natural resources has contributed to the economic growth Latin America has experienced in recent years).

<sup>122</sup> See Minerals Council of Australia, *supra* note 120.

<sup>123</sup> See, e.g., Yang Liyan & Lei Xiaohang (杨丽艳和雷晓航), *FTA Zhanlüe xia Woguo Haiwai Nengyuan Touzi de Falü Wenti Yanjiu* (FTA 战略下我国海外能源投资的法律问题研究) [*On the Several Legal Issues of China's Energy Investment Abroad under FTA*], 4 ZHENG FA LUN CONG (政法论丛) [J. POL. SCI. & L.] (China) 67, 67-68 (2009) (illustrating the history, trends, and developments of China's energy investment abroad from the 1990s to the present and addressing the legal issues China may encounter when making energy investment abroad).

<sup>124</sup> The United States, for instance, has signed FTAs with Oman, Bahrain, Morocco, and Singapore, none of which conduct significant bilateral trade with the United States.

observer stated, "China does not have the confidence to open its market to those economies that are huge and far more advanced than its own."<sup>125</sup> China has opted for countries with small economies and low volumes of bilateral trade, which will prevent the Chinese domestic market from experiencing a flood of cheap imports into its domestic market. Furthermore, entering into FTAs with those relatively less powerful trading partners is certainly more manageable for China. Moreover, it could also help China diversify its import sources and export market. By focusing on countries with abundant natural resources, China can ensure that it obtains the materials it needs to promote economic growth without endangering domestic industries through excessive competition.

Finally, China seeks to complete FTAs with countries that have healthy economies and strong credit ratings. Agencies like Standard and Poor's and Fitch have rated Chile and Peru as South America's first and second most creditworthy countries, respectively, and Argentina, Bolivia, and Ecuador as its least.<sup>126</sup> Therefore, it is not surprising that China first signed an FTA with Chile, and then Peru, while an FTA with Argentina, Bolivia, or Ecuador does not appear to be in the cards.

#### 4.3. *Foreign Policy*

Foreign policy may not be as important to Chinese trade policy as it is in United States trade policy, but it still plays a key role. In selecting FTA partners, the United States considers the country's adherence to rule of law, as well as its commitment to trade liberalization, and to WTO commitments more specifically.<sup>127</sup> This is not so for China. As noted above, China's traditional concern for state sovereignty renders it essentially uninterested in a partner country's internal affairs, such as adherence to rule of law, respect for international norms, or interest in democratic politics. Nor

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<sup>125</sup> Sheng Lijun, *China-ASEAN Free Trade Area: Origins, Developments and Strategic Motivations* 8 (Inst. of Se. Asian Studies, Working Paper: International Politics & Security Issues Series No. 1, 2003).

<sup>126</sup> See PERU-CHINA: JOINT FEASIBILITY STUDY, *supra* note 118, at 12 (listing the Moody's, S&P and Fitch ratings for Chile, Peru, Argentina, Bolivia, Ecuador, and several other Latin American nations as of 2007).

<sup>127</sup> See GAO REPORT, *supra* note 106, at 8-10 (outlining factors that the United States weighs in selecting FTA partners and identifying a countries' commitment to the "trade disciplines" of the WTO as a factor).

does China seem especially concerned with whether a country embraces free trade, multilateralism, or another economic paradigm. China does not appear to weigh a partner country's commitment to multilateral trade liberalization in making its FTA choices. Chile, for instance, has signed many bilateral and multilateral FTAs,<sup>128</sup> which cover seventy-five percent of its trade.<sup>129</sup> Pakistan, by contrast, has signed only three bilateral FTAs, and one regional one.<sup>130</sup>

Two additional foreign policy considerations of the U.S. Trade Representative include striking a balance between developed and developing countries and maintaining geographic diversity.<sup>131</sup> The former is important because developed countries currently have the market to purchase U.S. goods and services, while developing countries are likely to do so in the future. Such arrangements can help lock in longer-term market plans. Geographic diversity is important because of the United States' desire to be active in many parts of the globe and to hedge against regional economic downturns, such as the Asian financial crisis of 1997–98.

China, too, seems concerned with striking a balance between developed and developing countries in its FTA platform. Although China has concluded a greater number of FTAs with developing countries, recently concluded FTAs with New Zealand and Singapore as well as ongoing negotiations with Australia indicate that China also places a premium on developed countries.

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<sup>128</sup> See *Tratados de Libre Comercio Firmados por Chile* [Free Trade Agreements Ratified by Chile], BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE-BCN [THE NAT'L CONG. LIBRARY OF CHILE], [http://www.bcn.cl/carpeta\\_temas/temas\\_portada.2005-11-29.5590492629/area\\_2.2005-12-01.2439583052](http://www.bcn.cl/carpeta_temas/temas_portada.2005-11-29.5590492629/area_2.2005-12-01.2439583052) (last visited Oct. 7, 2011) (identifying Canada, Mexico, Central America, the European Community, the United States, Korea, the European Free Trade Area, and China as FTA partners of Chile). In addition, Chile is negotiating treaties with many other states, including Thailand, Indonesia, and the Gulf States.

<sup>129</sup> See Antkiewicz & Whalley, *supra* note 17, pt. 5 (stating that seventy-five percent of Chile's foreign trade is governed by FTAs).

<sup>130</sup> See Tanveer Ahmed, *Nepal Intends to Sign FTA with Pakistan in JEC Meeting*, DAILY TIMES, July 24, 2010, [http://www.dailytimes.com.pk/default.asp?page=2010%5C07%5C24%5Cstory\\_24-7-2010\\_pg5\\_3](http://www.dailytimes.com.pk/default.asp?page=2010%5C07%5C24%5Cstory_24-7-2010_pg5_3) (reporting Nepal's intention to become the second country in South Asia to enter a free trade agreement with Pakistan).

<sup>131</sup> See GAO Report, *supra* note 106, at 8–9 (listing the “[n]eed to ensure a mix of developed and developing countries” and the “[n]eed to do FTAs in each of the world's major regions” as amongst the Trade Representative's thirteen factors in targeting potential FTA partners).

China wants to create a sound economic environment in which to trade all of its exports—electronic and other consumer goods to developed countries and agricultural products and textiles to developing countries. Nonetheless, certain policymakers in China have viewed FTAs as a new bridge to facilitate cooperation between China and other developing countries.<sup>132</sup>

Geographic diversity, at this stage, seems to be a secondary concern for China, whose FTA preferences are circumscribed to the Asia-Pacific region. As noted above,<sup>133</sup> China has invested considerable diplomatic resources in establishing itself as a regional power and, to a lesser extent, a global one. As economic matters are now firmly part of that diplomatic initiative, FTAs will tread the same path forged by China's recent regional engagements in politics and security. The FTAs with ASEAN, Singapore, and Pakistan, all indicate the importance of location in to China's FTA strategy. Slightly further afield, China has also signed agreements with countries on both sides of the Pacific Ocean, such as Chile, Costa Rica, Mexico, Peru, and New Zealand. Its ongoing discussions with Australia suggest the geographic limits of its strategy: the Pacific. This suggests that China is not aiming toward the strict geographic contiguity often associated with "natural" trading blocs,<sup>134</sup> but rather the idea that China wants to be a—if not *the*—center of gravity in the Asia-Pacific region.

On the other hand, China's discussions with European countries such as Norway and Iceland, the Gulf Cooperation Council, and the Southern Africa Customs Union hint at a larger global strategy. But the seriousness of such negotiations remains

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<sup>132</sup> See Zhu Hong (朱洪), *Ziyou Maoyi Xieding—Zhongguo yu Fazhanzhong Guojia Nannan Hezuo de Xinqiaoliang* (自由贸易协定—中国与发展中国家南南合作的新桥梁) [Free Trade Agreements—New Bridge for South-South Cooperation between China and other Developing Countries], 9 *Guoji Maoyi* (国际贸易) [INT'L TRADE] (China) 8, 8 (2009) (arguing that, according to statistical data, free trade agreements assist in the economic and trade relations between China and other developing countries).

<sup>133</sup> See *supra* Section 3.1 (outlining China's increased regional diplomatic efforts since the 1990s designed to position itself as a regional leader).

<sup>134</sup> See Krugman, *supra* note 59, at 12 (observing that neighboring countries are "natural" trading partners who would trade with each other even in the absence of FTAs).

unclear. Certain negotiations have been stalled for years,<sup>135</sup> while others do not appear to be concluding any time soon. For the foreseeable future, China will most likely cling more closely to its neighbors in Asia and across the Pacific.

#### 5. CHINA'S FTAs AND SIMILAR AGREEMENTS

China has signed FTAs with ASEAN, Pakistan, Chile, Mexico, Peru, Costa Rica, Singapore, and New Zealand.<sup>136</sup> Mainland China preceded the FTA boom by signing Cooperative Economic Partnership Agreements (CEPAs) with Hong Kong and Macau.<sup>137</sup> The Economic Cooperation Framework Agreement between Chinese mainland and Taiwan recognizes the tremendous cross-strait economic activity of recent years.<sup>138</sup> As this amounts to more than a dozen agreements, analyzing each one (as well as their numerous annexes and follow-up agreements) would be impractical. Accordingly, this Section focuses on three treaties: China FTAs with ASEAN, Peru, and New Zealand. This grouping captures the geographic and developmental diversity of China's FTA partners, as well as the variety of forms the agreements have themselves taken. China's FTAs do not follow one path, but adapt to partner preferences. After a decade, the greatest defining feature of Chinese FTAs is their malleability. Though clear principles underlie the FTAs, each agreement is itself the product of a unique collaboration between China and the partner country guided by the circumstances of the day.

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<sup>135</sup> The last round of China-SACU negotiations, for instance, took place in 2004. See *China-SACU FTA*, CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/topic/ensacu.shtml> (last visited Oct. 16, 2011) (asserting that China and SACU's negotiations are ongoing, even though the most recent meeting took place on June 28, 2004).

<sup>136</sup> For a list of China's FTAs and similar agreements, see *infra* app., 1.

<sup>137</sup> PAC. ECONOMIC COOPERATION COUNCIL & APEC BUS. ADVISORY COUNCIL, AN APEC TRADE AGENDA? THE POLITICAL ECONOMY OF A FREE TRADE AREA OF THE ASIA PACIFIC 59, available at [http://www.apec.org.au/docs/061120\\_FTAAP.pdf](http://www.apec.org.au/docs/061120_FTAAP.pdf) (discussing China's approach to trade agreements, including its CEPAs with Hong Kong and Macau).

<sup>138</sup> See Kun-Ming Chen et al., *Impact of Cross-Strait Trade Liberalization: A Computable General Equilibrium Analysis*, 17 CHINA & WORLD ECON. 106, 106-07, 119-20 (2009) (noting that an Economic Cooperation Framework Agreement is under "intensive examination" and concluding that trade liberalization between mainland China and Taiwan should have positive effects on the region's economies).

Before describing the characteristics of Chinese FTAs, another comparative note provides a model by which to make sense of them. Like China, the United States has signed a flurry of FTAs in the new millennium, many with the same countries as China.<sup>139</sup> The United States has derived a model,<sup>140</sup> as well as enhancements to that model,<sup>141</sup> to which it more or less adheres in negotiating FTAs. The model includes sixteen subject areas, two restricted categories (agriculture and labor mobility), and other rules for safeguards such as antidumping or countervailing duties.<sup>142</sup> The enhanced model increases protection of intellectual property and investment while covering new areas such as corruption, transparency, and capacity-building.<sup>143</sup> For present discussion, the specifics of the U.S. model are secondary to the simple fact that the U.S. hews to a model (or two) when negotiating FTAs. In reality, because of their limited bargaining power, small economies like Bahrain, Morocco, and Oman largely tend to acquiesce to U.S. standards when finalizing FTAs.

By contrast, China imposes less stringent standards on its FTA partners. The substance of Chinese FTAs shifts with the preferences and legal requirements of the partner. If one partner wants to take the process in steps, China obliges. If another partner wants a more comprehensive arrangement, China agrees. Some FTAs cover the three pillars of FTAs—trade in goods, trade in services, and investment protections—but some do not. In addition, FTAs may include special provisions for labor and

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<sup>139</sup> Under the second Bush administration (2001–09), the United States entered into FTAs with Singapore (entering force in 2004), Chile (entering force in 2004), Australia (entering force in 2005), Morocco (2004), Central America (2005), Bahrain (2006), Oman (2006) and Peru (2007). See 2008 TRADE POLICY AGENDA & 2007 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, at 107–17 (2008). The Bush administration also signed FTAs with Korea, Colombia, and Panama in 2007, but Congress has yet to approve them. *Id.* at 112–16.

<sup>140</sup> See C. O'Neal Taylor, *The U.S. Approach to Regionalism: Recent Past and Future*, 15 ILSA J. INT'L & COMP. L. 411, 420–26 (2009) (identifying the United States' initial model FTA as the "NAFTA model").

<sup>141</sup> See *id.* at 428–33 (describing the United States' enhanced model as the "WTO-plus model").

<sup>142</sup> See *id.* at 421–22, 426 (detailing the organization and subject matter of the United States' initial FTA model).

<sup>143</sup> See *id.* at 430–34 (describing the additions made to the United States' initial FTA model towards development of its enhanced FTA model).

environment<sup>144</sup> or enhanced protections against expropriation.<sup>145</sup> Developing countries such as Pakistan and ASEAN have also negotiated “Early Harvest Programs,” whereby China opens up its agricultural markets by lowering tariffs on partner country exports before the partner country reciprocates.<sup>146</sup> This conciliatory gesture assures trade partners that China acts with their interests in mind, and helps quell the “China threat” that afflicts much of Asia (and the world).

### 5.1. ASEAN

The China-ASEAN Free Trade Agreement took a decade to negotiate and enter into force, a reflection of ASEAN's gradual approach to international relations and binding agreements more generally. Through repeated interactions between 2001, when Premier Zhu Rongji proposed the FTA at the Fourth China-ASEAN Leadership Forum in Singapore, and 2010, when it came into force, China adhered to the ASEAN way: meeting regularly to discuss important issues, agreeing to smaller issues before tackling more

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<sup>144</sup> See Free Trade Agreement Between The Government of New Zealand and The Government of the People's Republic of China, China-N.Z., art. 96, Apr. 7, 2008 [hereinafter NZCFTA], available at <http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf> (establishing that the parties would develop joint initiatives to manage environmental risks and establish work programs).

<sup>145</sup> See Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru, China-Peru, art. 133, Apr. 28, 2009, available at [http://fta.mofcom.gov.cn/bilu/annex/bilu\\_xdwb\\_en.pdf](http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf) (agreeing that neither party expropriate against the other's investments except under certain conditions); see also NZCFTA, *supra* note 144, art. 145 (stipulating that neither country shall expropriate against investments of the other unless it is compensated and carried out for a public purpose, in accordance with applicable domestic law, in a non-discriminatory manner, and is not contrary to a Party's undertaking).

<sup>146</sup> See generally Agreement on the Early Harvest Programme for the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, China-Pak., April 5, 2005, available at [http://fta.mofcom.gov.cn/pakistanarticle/chpakistan/pakhwmy/200809/467\\_1.html](http://fta.mofcom.gov.cn/pakistanarticle/chpakistan/pakhwmy/200809/467_1.html) (agreeing to implement an Early Harvest Program between China and Pakistan beginning in 2006); see also ERLINDA M. MEDALLA & JENNY D. BALBOA, THE IMPACT OF ASEAN-CHINA FTA EARLY HARVEST PROGRAM: THE CASE OF THE PHILIPPINES WITH FOCUS ON SHORT-RUN EFFECTS ON THE AGRICULTURE SECTOR 9–11 (Phillipine Inst. for Dev. Studies, Research Paper Series No. 2007-01, 2007), <http://dirp4.pids.gov.ph/ris/rps/pidsrp0701.pdf> (providing an overview of the ASEAN-China FTA and the Early Harvest Program component to the agreement).

sensitive ones, and making progress incrementally instead of in one fell swoop.<sup>147</sup> China even made concessionary gestures, such as the Early Harvest Program, to elicit goodwill and trust from ASEAN.<sup>148</sup>

China was the first country to sign an FTA with ASEAN,<sup>149</sup> followed by Korea,<sup>150</sup> Japan,<sup>151</sup> Australia,<sup>152</sup> and India.<sup>153</sup> The China FTA is best understood as a series of agreements, rather than the “big bang” type of pact favored by developed countries like the United States, Japan, and Australia. China and ASEAN first signed a Framework Agreement in 2002, in essence an agreement to

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<sup>147</sup> Herman S. Kraft, *Japan and the United States in ASEAN-China Relations*, in ASEAN-CHINA RELATIONS: REALITIES AND PROSPECTS 90, 92 (Saw Swee-Hock & Chin Kin Wah eds., 2005) (discussing Chinese Premier Zhu Rongji's 2001 China-ASEAN FTA proposal); Ong Keng Yong, *Securing a Win-Win Partnership for ASEAN and China*, in ASEAN-CHINA RELATIONS: REALITIES AND PROSPECTS, *supra*, at 19, 22 (noting that ASEAN and China “have targeted to realize the Free Trade Area in 2010 for the ASEAN-6”).

<sup>148</sup> SHULAN YE, CHINA'S REGIONAL POLICY IN EAST ASIA AND ITS CHARACTERISTICS 6 (Univ. of Nottingham China Policy Inst., Discussion Paper No. 66, 2010), <http://www.nottingham.ac.uk/cpi/documents/discussion-papers/discussion-paper-66-china-regional-policy-shulan-ye.pdf> (observing that the Early Harvest Program provided ASEAN states favorably treatments to demonstrate China's “benignancy”).

<sup>149</sup> See Sen & Srivastava, *supra* note 49, at 196 (indicating that the ASEAN-China FTA acted as a catalyst for the proliferation of FTAs in the region, and triggered a new focus on bilateralism among ASEAN countries).

<sup>150</sup> Korea and ASEAN also signed agreements on trade in goods and services which entered into force in 2007, as well as an agreement on investment signed in 2009. See Yoon Ja-young, *Korea-ASEAN FTA to Boost Trade Ties*, KOREA TIMES, June 2, 2009 (discussing Korea's signing of the Korea-ASEAN FTA and other earlier related agreements with ASEAN).

<sup>151</sup> Japan and ASEAN signed a comprehensive (goods, services, and investments) FTA with ASEAN in 2008. See *ASEAN-Japanese FTA to Take Effect Dec. 1*, JAPAN TIMES, Oct. 22, 2008, <http://search.japantimes.co.jp/cgi-bin/nb20081022a6.html> (reporting that the ASEAN-Japan FTA would soon take effect and cover goods services and investments).

<sup>152</sup> See Joint Media Statement on the Signing of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (Feb. 27, 2009), [http://aanzfta.asean.org/uploads/jms/AANZFTA\\_Signing\\_27\\_Feb\\_09\\_FINAL.pdf](http://aanzfta.asean.org/uploads/jms/AANZFTA_Signing_27_Feb_09_FINAL.pdf) (announcing the signing of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Agreement, which covers goods, services, and investment, among other measures).

<sup>153</sup> See Joint Media Statement, The Seventh AEM-India Consultations (Aug. 13, 2009), <http://www.asean.org/JMS-7th-ASEAN-India-Consultations.pdf> (announcing the signing of the “ASEAN-India Trade in Goods Agreement and other AFTA-related [a]greements”).

agree.<sup>154</sup> The Framework articulates the broad economic aims of the China-ASEAN relationship (strengthening cooperation in trade and investment, liberalizing services, and exploring new areas for economic cooperation) and acknowledges the special status of the least developed members of ASEAN (Vietnam, Laos, Cambodia, and Myanmar), but imposes no legally binding commitments.<sup>155</sup> These commitments have instead been assumed incrementally, over the course of many years. They include the Early Harvest Program (2004), Agreement on Trade in Goods (2005), Agreement on Trade in Services (2007), Agreement on Investment (2009), and other agreements on dispute settlement and information technology.<sup>156</sup> The trade area itself took effect on January 1, 2010, six years after the Early Harvest Program went into effect.<sup>157</sup> It is still too early to conclude what economic effect the FTA will have on bilateral economic relations. But the rapid increase in bilateral trade, from \$40 billion in 2000,<sup>158</sup> to \$193 billion in 2008,<sup>159</sup> suggests that both sides are gaining from increasingly favorable market access.<sup>160</sup>

<sup>154</sup> See generally Framework Agreement on Comprehensive Economic Co-Operation between the People's Republic of China and the Association of South East Asian Nations, China-ASEAN (Nov. 4, 2002), available at <http://gjs.mofcom.gov.cn/aarticle/Nocategory/200212/20021200056711.html?361458593=2989170482> (establishing a framework for free trade negotiations between China and ASEAN).

<sup>155</sup> See generally *id.* (providing generally the economic goals and contours for China and ASEAN to consider during the course of free trade negotiations).

<sup>156</sup> *China-ASEAN FTA*, CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/topic/chinaasean.shtml> (last visited Oct. 18, 2011) (outlining the significant trade agreements signed intermittently between China and ASEAN in the years following the 2002 Framework Agreement).

<sup>157</sup> See Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-Operation Between the People's Republic of China and the Association of Southeast Asian Nations, China-ASEAN, annex 1, ¶ 6 (Nov. 29, 2004), available at <http://fta.mofcom.gov.cn/dongmeng/annex/xieyi2004en.pdf> (agreeing that "[e]ach Party shall eliminate all its tariffs for tariff lines . . . not later than 1 January 2010").

<sup>158</sup> See Suthiphand Chirathivat, 13 J. ASIAN ECON. 671, 673 (2002) (noting that China trade totaled "U.S. \$39.5 billion in the year 2000").

<sup>159</sup> See Press Release, ASEAN Secretariat, China Ready to Accommodate on ASEAN-China FTA (Jan. 22, 2010), <http://www.asean.org/24209.htm> ("The total trade between ASEAN and China reached US\$ 192.7 billion [sic] in 2008.").

<sup>160</sup> See *Zhongguo-Dongmeng Jingmao Buzhang Huiyi zai Yuenan Xiangang Zhaokai, Huiyi Jiji Pingjia Zhongguo-Dongmeng Zimaoqu Shishi Jinzhan Qingkuang*, (中国—东盟经贸部长会议在越南岘港召开会议积极评价中国—东盟自贸区实施进展

### 5.2. Peru

China and Peru initiated negotiations for an FTA in September 2007 during an APEC meeting in Sydney, Australia, highlighting APEC's centrality to China's FTA diplomacy.<sup>161</sup> Eight rounds of negotiations later in April 2009, leaders from both countries signed an FTA in the Great Hall of the People.<sup>162</sup> Fourteen months of negotiations is a relatively short period of time,<sup>163</sup> especially when compared with China's dealings with ASEAN and New Zealand, suggesting that China can respond quickly and nimbly to partner expectations.<sup>164</sup> Here, Peru's experience of negotiating agreements

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情况) [China-ASEAN Economic and Trade Ministerial Conference was Held in Da Nang, Vietnam and the Implementation Progress of the China-ASEAN FTA was Positively Evaluated], ZHONGGUO ZIYOU MAOYIQU FUWUWANG (中国自由贸易服务网) [CHINA FTA NETWORK] (Aug. 26, 2010, 12:20:50 PM), [http://fta.mofcom.gov.cn/article/chinadongmeng/dongmengnews/201008/3216\\_1.html](http://fta.mofcom.gov.cn/article/chinadongmeng/dongmengnews/201008/3216_1.html) (reporting on the 9th AEM-MOFCOM Consultation held in Vietnam and detailing the economic benefits both sides have enjoyed as a result of the FTA).

<sup>161</sup> See *China-Peru Free Trade Pact Takes Effect*, XINHUA GENERAL NEWS SERVICE, Mar. 1, 2010 (noting that the China-Peru FTA was signed in 2008 following fourteen months of negotiations); *China, Peru Launch FTA Talks*, PEOPLE'S DAILY, Sept. 7, 2007, <http://english.peopledaily.com.cn/90001/90776/90883/6257682.html> (reporting that China and Peru commenced FTA negotiations in Australia "on the sidelines" of an APEC meeting occurring in Sydney).

<sup>162</sup> See *id.* (stating that the FTA was signed April 2009 in Beijing).

<sup>163</sup> See *China, Peru Sign Free Trade Deal Amid Global Financial Crisis*, GLOBAL TIMES, Apr. 28, 2009, <http://www.globaltimes.cn/china/choice/2009-04/428436.html> (remarking that negotiation of the China-Peru FTA lasted fourteen months).

<sup>164</sup> The New Zealand FTA took over three years to negotiate. See Shu-Ching Jean Chen, *Landmark Trade Deal Struck by China, New Zealand*, FORBES, April 7, 2008, [http://www.forbes.com/2008/04/07/china-nz-fta-markets-econ-cx\\_jc\\_0407markets2.html](http://www.forbes.com/2008/04/07/china-nz-fta-markets-econ-cx_jc_0407markets2.html) (noting that negotiation of the New Zealand FTA spanned three years). The Australia FTA, negotiation of which began in 2003, has yet to materialize. See Yanning Yu, *Trade Remedies: The Impact on the Proposed Australia-China Free Trade Agreement*, 18 MICH. ST. J. INT'L L. 267, 267-68 (2010) (commenting that as of January 2009, no final FTA had been agreed upon). The ASEAN agreement was laid out between 2002 and 2009. See generally CHINA FTA NETWORK, *supra* note 15 (providing press releases from 2004 to 2009 chronicling the China-ASEAN agreement). The Early Harvest program under the agreement began in 2004. See Sarah Y. Tong & Catherine Chong Siew Keng, *China-ASEAN Free Trade Area in 2010: A Regional Perspective* 17, app. 1 (Sing. Univ. E. Asian Inst., Background Brief No. 519), available at <http://www.eai.nus.edu.sg/BB519.pdf> (noting that "the Early Harvest Program was implemented on [January 1, 2004]"). The goods agreement with ASEAN's most developed countries began in January 2010, while the goods agreement with the least developed members is scheduled to begin in 2015. See *China-ASEAN Free Trade Areas Starts Operation*, *supra* note 67

with the United States (2006), Chile (2006), Canada (2008), and Singapore (2008) suggested it may prefer a comprehensive approach.<sup>165</sup> More important, the agreement was signed amidst worldwide economic recession. When many countries resorted to protectionism,<sup>166</sup> Peru and China signaled that their economies were strong enough to withstand the additional pressure of cheaper exports.

The FTA covers the full basket of goods, services, and investment, and would eventually include ninety percent of all goods.<sup>167</sup> Significantly, the "FTA takes into account the sensitivities of both countries."<sup>168</sup> One salient feature of the Peru-China FTA is enhanced protection when investment is expropriated for national security reasons, a mandate of the 1993 Peruvian Constitution.<sup>169</sup> In addition, the FTA also calls for a more legalistic review of investment disputes.<sup>170</sup> Article 63 of the

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(reporting at the start of 2010 that the China-FTA agreement had taken effect and that in 2015, the agreement would take effect as to various developing members).

<sup>165</sup> *Peru Country Brief*, AUSTL. DEP'T OF FOREIGN AFFAIRS & TRADE, [http://www.dfat.gov.au/geo/peru/peru\\_brief.html](http://www.dfat.gov.au/geo/peru/peru_brief.html) (last visited Oct. 24, 2011) (providing an overview of Peru's recent trade strategies, including its activity in signing FTAs).

<sup>166</sup> For instance, the United States' imposition of tariffs on Chinese tires, as well as the "Buy American" provisions of the American Recovery and Reinvestment Act of 2009, led many to fear a return to Depression-era protectionism. See GARY CLYDE HUFBAUER ET AL., PETERSON INST. FOR INT'L ECON., US PROTECTIONIST IMPULSES IN THE WAKE OF THE GREAT RECESSION: REPORT TO THE INTERNATIONAL CHAMBER OF COMMERCE RESEARCH FOUNDATION 14-27 (2010), available at <http://www.iie.com/publications/papers/hufbauer201003.pdf> (detailing the United States' shift towards more protectionist trade policies during the current economic recession).

<sup>167</sup> See *China-Peru Free Trade Pact Takes Effect*, *supra* note 161 (listing some of the ninety percent of goods that would eventually be tariff-free as a result of the agreement, ranging from Chinese electronics to Peruvian fruits and minerals).

<sup>168</sup> *The China-Peru Free Trade Agreement: A Brief Overview*, SQUIRE SANDERS (June 2010), [http://www.ssd.com/the\\_china-peru\\_free\\_trade\\_agreement\\_a\\_brief\\_overview](http://www.ssd.com/the_china-peru_free_trade_agreement_a_brief_overview).

<sup>169</sup> See Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru, China-Peru, art. 133 (April 28, 2009), available at [fta.mofcom.gov.cn/bilu/annex/bilu\\_xdwb\\_en.pdf](http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf) (detailing the conditions which must be met to expropriate investments).

<sup>170</sup> See *id.*, ch. 15 (detailing rules and procedures for legal "dispute settlement" under the agreement).

Peruvian Constitution grants foreign investors the same privileges and protections as Peruvian nationals.<sup>171</sup>

### 5.3. *New Zealand*

After fifteen rounds of negotiations over three years, China signed its first FTA with a developed country, New Zealand, in 2009.<sup>172</sup> As we might expect, this comprehensive agreement (goods, services, and investment) is predicted to cover ninety-six percent of bilateral trade, putting it more comfortably within the WTO approved requirements of FTAs.<sup>173</sup> One controversial aspect of the FTA was a provision that permits skilled Chinese workers to work in New Zealand.<sup>174</sup> With a high unemployment rate for certain skilled workers, China aims to employ its excess labor in New Zealand's schools, restaurants, offices, and various other trades.<sup>175</sup> Three types of labor provisions exist in the agreement. First, executives and managers in certain service areas (e.g. computers, construction, and education) can apply for three-year renewable visas to work in New Zealand.<sup>176</sup> Second, a set number of positions are available for jobs with "Chinese characteristics,"

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<sup>171</sup> CONSTITUTION OF THE REPUBLIC OF PERU, art. 63, available at [http://web.parliament.go.th/parcy/sapa\\_db/cons\\_doc/constitutions/data/Peru/peru.pdf](http://web.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Peru/peru.pdf).

<sup>172</sup> See *China, New Zealand Sign Free Trade Deal*, CHINA FTA NETWORK (April 4, 2009), [http://fta.mofcom.gov.cn/enarticle/ennewzealand/ennewzealandnews/200911/1626\\_1.html](http://fta.mofcom.gov.cn/enarticle/ennewzealand/ennewzealandnews/200911/1626_1.html) (noting that China and New Zealand signed an FTA "after 15 rounds of negotiations over three years").

<sup>173</sup> See *id.* (providing details on the China-New Zealand FTA, including its coverage).

<sup>174</sup> BELL GULLY, *NEW ZEALAND-CHINA FREE TRADE AGREEMENT: SUMMARY OF KEY OUTCOMES 22* (2008), available at [http://www.bellgully.com/resources/pdfs/NZ\\_China\\_FTA.pdf](http://www.bellgully.com/resources/pdfs/NZ_China_FTA.pdf) (noting that under the FTA, certain Chinese workers will be permitted to enter New Zealand to work in specified occupations for which "an identified skills shortage" exists).

<sup>175</sup> See *Educated and Fearing the Future in China*, N.Y. TIMES, March 7, 2010, <http://roomfordebate.blogs.nytimes.com/2010/03/07/educated-and-fearing-the-future-in-china> (providing commentary on the shortage of skilled jobs available to educated Chinese workers); see also N.Z. MINISTRY OF FOREIGN AFFAIRS AND TRADE, *supra* note 83, at 33-34 (summarizing the China-New Zealand FTA's temporary employment entry provision, which allows skilled Chinese workers to work in those New Zealand industries which possess labor shortages).

<sup>176</sup> N.Z. MINISTRY OF FOREIGN AFFAIRS AND TRADE, *supra* note 83, at 33 (overviewing the provision of the China-New Zealand FTA which temporarily allows Chinese executives and managers to work in New Zealand)

such as Chinese chefs, Mandarin teachers, wushu instructors, and practitioners of traditional Chinese medicine.<sup>177</sup> A third group of positions opens after a determination that New Zealand has a skills shortage in a particular field. If local labor cannot fill the post, up to one hundred Chinese citizens may work in a very diverse group of occupations for up to three years.<sup>178</sup>

An additional feature of the China New Zealand FTA is the inclusion of labor and environmental provisions. Since 2001, the New Zealand Ministry of Foreign Affairs and Trade has required the incorporation of environmental<sup>179</sup> and labor standards<sup>180</sup> into FTAs. Though not part of the FTA itself—probably a concession to China—these provisions impose legally binding obligations on China to cooperate with New Zealand on matters such as sustainable development, abolition of child and compulsory labor, and elimination of employment discrimination.<sup>181</sup> To achieve these lofty goals, the Labor MOU provides for dialogues and cooperative activities on labor laws, working conditions, and labor inspection. Likewise, the Environment Cooperation Agreement (ECA) obliges China to cooperate with New Zealand on environmental management, nature conservation, and in various technological fields. The ECA permits members of the public, and NGOs, to

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<sup>177</sup> See NZCFTA, *supra* note 144, annex 11 (providing temporary employment in New Zealand to Chinese nationals for specified qualifying jobs).

<sup>178</sup> See *id.* (allowing temporary skilled employment in New Zealand for Chinese nationals in “sectors in which New Zealand has an identified skills shortage”). Twenty-five occupations—boatbuilder, computer application engineer, diesel mechanic, plumber, radiation therapist, and university lecturer, among others—are covered. See NZ: *New immigration policies for Chinese as a result of FTA*, WORKPERMIT.COM (Sept. 25, 2008), <http://www.workpermit.com/news/2008-09-25/new-zealand/free-trade-agreement-new-immigration-policies-chinese-workers.htm> (listing the types of skilled Chinese workers permitted to work in New Zealand under the FTA).

<sup>179</sup> See *New Zealand and the World Trade Organisation: Framework for Integrating Environment Issues into Free Trade Agreements*, N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE, <http://mfat.govt.nz/Trade-and-Economic-Relations/NZ-and-the-WTO/Trade-Issues/0-environment-framework.php> (last updated Oct. 12, 2010) (highlighting New Zealand’s concern for the environmental impact of its FTAs, and its dedication to ensuring that its FTAs contribute to sustainability).

<sup>180</sup> See *Trade Issues: Framework for Integrating Labor Standards and Trade Agreements*, N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/NZ-and-the-WTO/Trade-Issues/0-labour-framework.php> (last visited Oct. 17, 2011) (highlighting New Zealand’s focus on trade and labor issues in the context of its global trade policies).

<sup>181</sup> *Id.*

submit views on the efficacy of the ECA, potentially applying pressure on China from sectors of the society that it has heretofore managed to neutralize.

#### 6. COMMENTS AND RECOMMENDATIONS ON CHINA'S FTA STRATEGY

China has incentive "to commit to multilateral disciplines" with the WTO, through which it can gain "non-discriminatory access to large markets" and intercept discrimination by fellow large powers.<sup>182</sup> On the other hand, China has also been pursuing its free trade agreement strategy, as FTAs can serve its need for flexibilities in trade and economic negotiations, which is unavailable in multilateral negotiations. Moreover, FTA negotiations present an opportune platform for China to ask for what it truly wants, whereas it would have difficulty openly making such requests during the course of multilateral negotiations.<sup>183</sup> Furthermore, with the unpromising prospects of U.S. demand in the near future, FTAs could provide China with significant regional markets. In any event, while pursuing FTAs, China should also be proactive in pushing for multilateral arrangements.<sup>184</sup> In sum, China has to strike a balance in its trade strategy which includes both multilateral and bilateral approaches.<sup>185</sup>

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<sup>182</sup> See John Whalley, *China in the World Trading System*, 52 CESIFO ECON. STUD. 215, 226 (2006) (discussing how China's trade policies and strategies have changed since its membership in the WTO).

<sup>183</sup> See Henry Gao, *China's Strategy for Free Trade Agreements: Political Battle in the Name of Trade 17* (Dec. 8, 2009) (unpublished manuscript), available at [http://www.networkideas.org/ideasact/dec09/pdf/Henry\\_Gao.pdf](http://www.networkideas.org/ideasact/dec09/pdf/Henry_Gao.pdf) (analyzing China's FTA and its impact on other Asian regions).

<sup>184</sup> See, e.g., Jeffrey J. Schott, *China and Doha*, BEIJING REV., [http://www.bjreview.com.cn/world/txt/2006-12/14/content\\_50751.htm](http://www.bjreview.com.cn/world/txt/2006-12/14/content_50751.htm) (last updated Dec. 14, 2006) (noting that "China should work closely with other major trading nations to ensure that the WTO talks re-engage and progress").

<sup>185</sup> See *Interview with Vice Minister Yi Xiaozhun*, *supra* note 78 (noting that Vice Minister Yi Xiaozhun has stated that "China is walking by two legs").

### 6.1. Macro-Level Considerations and FTA Negotiation Strategies

#### 6.1.1. Individualize Negotiation Strategy

As discussed previously, China's FTA strategy is motivated by several concerns, including the opening of markets for Chinese exports, improving relations with its neighbors as part of China's smile diplomacy, and obtaining natural resources. China looks at each FTA as a unique opportunity to secure a mutually advantageous agreement, paying particular attention to what China and the partner country can gain from the relationship. This includes taking on obligations that may work to the short-term detriment of Chinese citizens, including farmers, but may increase goodwill with China's neighbors, who are suspicious of the player on the block. In contrast to the U.S. practice of using a model FTA, China does not have a model FTA, and its FTAs vary from each other both in form and coverage. This custom, in reality, "reflects both a pragmatism in recognizing differences across partners, but also the clear linkages being established between seemingly conventional trade interests and China's interests in wider economic, diplomatic and strategic relationships."<sup>186</sup> Given the fact that the objectives in each negotiation vary, it is advisable for China to customize its negotiation strategy for each potential FTA partner individually.<sup>187</sup>

With respect to long-term strategies, there is a long list of FTAs under negotiation or consideration, although it seems that all of them will take a long time to conclude for one reason or another. FTAs under negotiation include the following: China-GCC (Gulf Cooperation Council) FTA,<sup>188</sup> China-Australia FTA,<sup>189</sup> China-Iceland FTA, China-Norway FTA,<sup>190</sup> and China-SACU (Southern

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<sup>186</sup> Antkiewicz & Whalley, *supra* note 17, pt. 6.

<sup>187</sup> See, e.g., Barfield, *supra* note 18, at 110 (discussing China's "pragmatic" FTA approach to negotiation that is "individually tailored to the needs and priorities" of each country).

<sup>188</sup> Energy security bears significant importance in the negotiations.

<sup>189</sup> See, e.g., Yanning Yu, *Trade Remedies: The Impact on the Proposed Australia-China Free Trade Agreement*, 18 MICH. ST. J. INT'L L. 267, 296 (2010) (emphasizing that "the enactment of trade remedy measures in FTAs may relieve political pressures that are imposed on negotiating parties to some degree during negotiations and thus facilitate agreements").

<sup>190</sup> See Press Release, China FTA Network, Eighth Round Negotiation of China-Norway FTA Held in Norway (Sept. 16, 2010), available at

African Customs Union) FTA. Potential FTAs under consideration include: China-India Regional Trade Arrangement Joint Feasibility Study, China-Korea FTA Joint Feasibility Study, China-Japan-Korea Joint Study, and China-Switzerland FTA Joint Study. It seems that as long as those potential partners need China more than China needs them,<sup>191</sup> China will have stronger bargaining power in the negotiation process and can therefore afford to wait.

*6.1.2. Continue Bilateral Negotiations while Simultaneously Pushing for an East Asian FTA*

Based on our analysis, we predict that the future of China's FTAs will continue to be bilateral. Though scholars and officials occasionally speculate about an East Asian FTA or Asia-wide FTA, such a plan would require difficult multilateral negotiations among states that have not generated sufficient goodwill and trust. Given the failure of multilateral trade negotiations at the WTO level, it is unlikely that China, Japan, Korea, and ASEAN could easily overcome historical and political enmities to join together. Moreover, the U.S. trade initiative on the Trans-Pacific Partnership Agreement has made the game even more complicated. Instead, China will likely seek out small trade partners who possess strategic interests for China, at least in the near future – whether on the security front (like Pakistan), diplomatic front (like ASEAN), or labor mobility front (like New Zealand).

However, with its rapid development in economy, it is a good opportunity for China to push for an East Asia-wide FTA through which to seize the leadership role in Asia. Indeed, there are already various proposals for a region-wide FTA, including an East Asia Free Trade Area among the ASEAN+3 countries and a Comprehensive Economic Partnership for East Asia among the ASEAN+6 countries. It is debatable whether it is desirable to create a region-wide FTA by consolidating the plethora of bilateral

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[http://fta.mofcom.gov.cn/enarticle/enrelease/201009/3504\\_1.html](http://fta.mofcom.gov.cn/enarticle/enrelease/201009/3504_1.html) (describing negotiations between China and Norway “on such topics as trade in goods and services, rules of origin, plants, plant hygienic standards, technical barriers to trade, trade remedy and facilitation”)

<sup>191</sup> See Press Release, China FTA Network, News Analysis ACFTA We Need China More Than They Need Us (Apr. 20, 2010), available at [http://fta.mofcom.gov.cn/enarticle/enrelease/201006/2939\\_1.html](http://fta.mofcom.gov.cn/enarticle/enrelease/201006/2939_1.html) (noting that China increasingly absorbs exports while traditional trade markets shrink creating a reliance on China as a source of imports).

and plurilateral FTAs. Scholars have divergent viewpoints. Some argue that a region-wide FTA would generate much greater benefits than the existing FTAs by increasing market size—and therefore specialization and economies of scale—facilitating investment and technology transfer, and simplifying tariff schedules, rules, and standards. Moreover, the prior Asian financial crisis has warned people in Asia that collective efforts are needed when facing common challenges in the areas of trade and investment.<sup>192</sup> Furthermore, an East Asian-wide FTA adopting a uniform rule of origin will be administratively efficient to reduce the “spaghetti bowl” effect in Asia.<sup>193</sup> However, pessimists argue that the countries of East Asia are too diverse to be able to agree on an FTA. In any event, pushing for an Asia-wide FTA seems like a plausible strategy for China to achieve its broader goal as the regional leader in Asia.

### 6.1.3. Leverage the Hubbing Effect

Certain scholars have found that the hubbing effect plays an important role in China’s FTA strategy.<sup>194</sup> Many of China’s FTA partners are important FTA hubs. So far, China has concluded FTAs, or entered into negotiations, with almost every major region in the world, including Europe (Iceland and Norway), America (Chile, Peru, and Costa Rica), the Middle East (GCC), Africa (SACU), East Asia (Korea), Southeast Asia (ASEAN and Singapore), South Asia (Pakistan and India), and Oceania (New Zealand and Australia). By entering FTAs with those partners who are FTA hubs, China could potentially tap into the broader markets created by FTA arrangements already in place.<sup>195</sup>

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<sup>192</sup> See Kawai & Wignaraja, *supra* note 30, at 7 (discussing how “a region-wide FTA may make it easier to achieve” WTO trade deals because regional agreements would already encompass issues about agricultural and industrial goods).

<sup>193</sup> See *id.* at 5–7 (arguing that the “spaghetti bowl” of “overlapping and complex FTAs in East Asia” created an “explosion of deals” and tariffs that have increased transaction costs significantly for small and medium-sized enterprises, those who can least afford them).

<sup>194</sup> See Gao, *supra* note 183, at 9–10 (stating that the hubbing effect seems to be more important than domestic market size in determining China’s FTA strategy).

<sup>195</sup> See *id.* at 10 (explaining that entering in RTAs with countries who are members of the EFTA, EEA, and SAARC is a cost-effective method of “exploring new markets” and could potentially lead to entrance into larger markets).

#### 6.1.4. *Speed is Precious*

With the China-ASEAN Free Trade Agreement coming into force, "there is a growing fear in Japan that ASEAN countries will gradually become China's backyard."<sup>196</sup> Moreover, depending on how fully the FTA is implemented, the China-ASEAN FTA might place the United States at an economic disadvantage. The Obama Administration needs to push Congress to renew the Trade Promotion Authority in order for FTAs successfully negotiated by U.S. trade representatives to be approved by Congress. As a result, China should try to make FTA arrangements as quickly as possible to get an edge in the region.

#### 6.1.5. *Artfully Handle FTAs and BITs*

Unlike prior practice, where FTAs and BITs were used as two separate and parallel legal instruments to address trade and investment issues, respectively, it is currently not unusual to find an investment chapter in FTAs. As a result, there is a possibility that countries will have to face a more comprehensive mode of negotiations where both trade and investment issues are on the negotiation table at once. For instance, the United States has successfully used its leverage to gain "access in key service sectors in partner countries in return for accelerated bilateral tariff elimination."<sup>197</sup> Similarly, China needs to analyze carefully what it can offer and what it can gain in both trade and investment. In the situation where potential partners need China more than China needs them in terms of trade,<sup>198</sup> China should try to negotiate trade and investment matters all at once and should be able to use the leverage to request more from its counterpart. In addition, "[f]rom an administrative perspective, a comprehensive inclusion of investment matters into an FTA . . . [might] reduce the costs of administrating bilateral economic relations."<sup>199</sup> Moreover, it is a

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<sup>196</sup> *The China-ASEAN Free Trade Agreement: Who's Happy, Who's Not*, *supra* note 96.

<sup>197</sup> Antkiewicz & Whalley, *supra* note 17, pt. 1 (citation omitted).

<sup>198</sup> See, e.g., Press Release, China FTA Network, *supra* note 191 (stating that capital goods and intermediate goods imported from China are necessary for Indonesian industries to "operate and grow").

<sup>199</sup> Chang-fa Lo, *A Comparison of BIT and the Investment Chapter of Free Trade Agreement from Policy Perspective*, 3 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 147, 167 (2008).

good way for China to make sure that it can invest and subsequently control strategic resources.

Should China decide to incorporate an investment chapter into an FTA, it needs to pay attention to two important issues. First, China should be especially cautious in affording pre-investment national treatment to foreign investors, simply because pre-investment national treatment “can bring about more far-reaching influence upon [the] host state than post-establishment [national treatment].”<sup>200</sup> Second, given that it is unclear whether an investor may rely on an MFN clause to invoke the dispute settlement provisions of a third-party treaty that are relatively more favorable to the investor,<sup>201</sup> it is advisable for China to exclude the application of MFN on dispute settlement provisions at the moment.

#### 6.1.6. Continue to Seek Market Economy Status from FTA Partners

China's status as an economy in transition has put China at a significant disadvantage in the anti-dumping investigations.<sup>202</sup> As a result, China has been seeking recognition of market economy status from individual countries through various ways. Among them, using this recognition as a precondition to start FTA negotiations is a sound strategy. In fact, as more and more economies recognize China's market economy status, there would be pressure on those stubborn ones who still deem China a non-market economy.

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<sup>200</sup> Congyan, *supra* note 93, at 472 (2009).

<sup>201</sup> See, e.g., Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the “Trojan Horse,”* 18 EUR. J. INT'L L. 757, 764 (2007) (evaluating arguments on the applicability of the most-favored-nation clause to the dispute settlement provisions of bilateral investment treaties and arguing that the former nearly always covers the latter); Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties,* 32 YALE J. INT'L L. 125, 126 (2007) (citing that international law presents different MFN clauses in different treaties, rather than having any single convergence and interpretation that investors can rely upon).

<sup>202</sup> See Andrew L. Stoler, Exec. Dir., Inst. for Int'l Bus., Econ. & Law, *Treatment of China as a Non-Market Economy: Implications for Antidumping and Countervailing Measures and Impact on Chinese Company Operations in the WTO Framework* 1 (Dec. 1-2, 2003), <http://www.iit.adelaide.edu.au/docs/Shanghai%20Speech.pdf> (indicating that China has retained its status as a non-market economy and is treated as such by other WTO members).

### 6.1.7. *Establish an Effective Dispute Settlement and Enforcement Mechanism*

An efficient dispute resolution mechanism is paramount to successful arrangement of a free trade agreement. As mentioned previously, nowadays, lots of FTAs cover both trade and investment matters. Given the different nature of trade and investment, they warrant differentiated dispute mechanisms. As Alan O. Sykes has insightfully pointed out, a private right of action for money damages is particularly valuable in the international investment arena, where the objective is to lower the cost of capital for new investments. This objective is absent in trade matters where “trading nations will often prefer to act as political filters” and deny private enforcement actions that can lessen political welfare.<sup>203</sup> Here, the dispute settlement mechanism under the NAFTA framework is a good example to follow.

Moreover, a dispute arising under an FTA is also likely to be covered by the WTO Agreement and the dispute settlement mechanism as stipulated in BITs. To avoid such possible parallel proceedings, it is advisable to include a “single forum” requirement per Article 2005 of Chapter 20 in NAFTA,<sup>204</sup> which essentially requires the parties to choose one forum to solve the disputes.

### 6.2. *Coordinate Domestic Institutions and Companies*

For firms using FTAs, institutional support from government agencies<sup>205</sup> and non-governmental agencies such as business associations is important. Some estimate that the low utilization ratio of China's FTAs in certain areas may be due to a lack of

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<sup>203</sup> See Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 631 (2005) (developing “a theory of the rules regarding standing and remedy in international trade and investment agreements”).

<sup>204</sup> See North American Free Trade Agreement, U.S.-Can.-Mex., art. 2005, Dec. 17, 1992, 20 I.L.M. 3 (1993), available at <http://www.worldtradelaw.net/nafta/chap-20.pdf> (indicating that any agreement negotiated may be settled at the forum of either party “at the discretion of the complaining party”).

<sup>205</sup> The main government agencies involved in assisting firms with issues regarding FTA usage and certificate of origin applications in the PRC are the Ministry of Commerce (including local departments of commerce), China Customs, the Ministry of Foreign Affairs, and other agencies such as the State General Administration for Quality Supervision, Inspection, and Quarantine.

awareness about existing FTAs and the benefits, and a lack of information on the relevant rules.<sup>206</sup> A study indicates that the Ministry of Commerce and China Customs have important roles to play in helping firms to use FTAs for exports and therefore should strengthen their capacities to support the business community's use of FTAs for exports and the expansion of services and FDI flows.<sup>207</sup> Non-governmental agencies, such as law firms and private consultants, are another source of assistance for firms.

Importantly, to address the firms' concerns, more efforts should be made to improve the assistance available for making the best use of the signed FTAs. Special programs and institutions should be developed to provide FTA-related information, training, and consulting services for China's corporations. "An electronic information exchange and sharing mechanism should be built by" governmental and non-governmental agencies cooperatively "in order to maximize the utilization of services provided by both the public and private sectors."<sup>208</sup>

Lack of communication and difficulty of interagency coordination, particularly between the Ministry of Commerce and Ministry of Foreign Affairs, have significantly reduced administrative efficiency in handling FTA related matters. As a result, establishing an FTA taskforce made of representatives of key government agencies would be an efficient way to facilitate domestic coordination.<sup>209</sup>

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<sup>206</sup> See PRICEWATERHOUSECOOPERS, CHINA'S FREE TRADE AGREEMENTS: LOWERING LANDED COSTS AND GAINING COMPETITIVE ADVANTAGE 3, available at [http://www.pwccustoms.com/webmedia/doc/633910492656405807\\_fta\\_lower\\_1\\_and\\_cost.pdf](http://www.pwccustoms.com/webmedia/doc/633910492656405807_fta_lower_1_and_cost.pdf) (noting that companies need to proactively plan and put into place new processes to take advantage of the, as of now underutilized, Chinese FTA system).

<sup>207</sup> See Yunling Zhang, *The Impact of Free Trade Agreements on Business Activity: A Survey of Firms in the People's Republic of China* 23-4 (Asian Dev. Bank Inst., Working Paper No. 251, 2010), available at <http://www.adbi.org/files/2010.10.12.wp251.impact.fta.business.activity.prc.pdf> (suggesting that more effort should be made by the Chinese Ministry of Commerce, the China Council for the Promotion of International Trade, and the China Chamber of International Commerce, to address the concerns of firms in utilizing FTAs).

<sup>208</sup> See *id.* at 27 (making policy recommendations based on the study's findings).

<sup>209</sup> See Zhang Fan (张帆), Lun Goujian Zhongguo de FTA Zhanlüe (论构建中国的FTA战略) [On Establishing China's FTA Strategy], 5 KAIFANG DAOBAO (开放导报) [CHINA OPENING HERALD], 74 (2004) (demonstrating the significance of

As argued before, an effective and efficient dispute settlement mechanism is essential for the success of FTAs. However, under most FTAs, a private party who is unsatisfied with the measures adopted by a government can only report the matter to his own government, who will conduct a multifaceted balancing (taking into account economic and political concerns) and then decide whether to raise the matter with the other government. As a result, smooth exchange of information and cogent cooperation between governmental agencies and private parties are crucial to ensure efficient conflict resolution under the framework of FTAs. In order to facilitate cooperation between public and private sectors to solve the problem of information asymmetry arising out of different objectives between both sectors, this Article tries to promote a workable formula and information filter mechanism for the trade agency to prioritize petitions.

#### 7. CONCLUSION

China's trade policy and FTA strategy has significant implications for all, whether inside or outside of China. Multilateralism (such as WTO) and regionalism (such as FTAs) are the two major paths for international trade. China needs to continue to "walk on two legs:" China needs to participate more proactively in the rulemaking of multilateral negotiations on international trade while making full use of FTAs (as part of its larger political and diplomatic framework) to influence the international environment.

## APPENDIX 1

<b>Signing Parties</b>	<b>Implementation Date</b>	<b>Name of the Agreement</b>
The People's Republic of Bangladesh, the People's Republic of China, the Republic of India, the Lao People's Democratic Republic, the Republic of Korea, and the Democratic Socialist Republic of Sri Lanka	2006.9.1	Asia-Pacific Trade Agreement
The People's Republic of China and the Republic of Costa Rica	2010.4.8	The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Costa Rica
The People's Republic of China and the Republic of Peru	2010.3.1	The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru
The People's Republic of China and the Republic of Singapore	2009.1.1	The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore

The People's Republic of China and New Zealand	2008.10.1	The Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand
The People's Republic of China and the Republic of Chile	2006.10.1	The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Chile
The People's Republic of China and the Islamic of Pakistan	2009.10.10	The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan
The People's Republic of China and Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic	2010.1.1	Framework Agreement on Comprehensive Economic Co-Operation between the People's Republic of China and the Association of South East Asian Nations (2002), Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-Operation between the People's Republic of China and the Association of South

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## CHINA'S FIRST DECADE OF FREE TRADE

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of Viet Nam, Member States of the Association of Southeast Asian Nations (collectively, ASEAN)		East Asian Nations (2004), Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-Operation between the People's Republic of China and the Association of South East Asian Nations (2007)
Mainland China and Hong Kong, Macao SAR Government	2003	Closer Economic Partnership Arrangement (2003), various supplementary agreements
Mainland China and Taiwan	2010.6.29	Economic Cooperation Framework Agreement