Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Free Trade Agreements

Stephen J. Powell[1]

"Regional trade agreements require governments to have a conscience and to hold a mirror to themselves." Gabriela Llobet Yglesias, Vice Minister of Trade, Costa Rica[2]

A. Background: Direct Linkages between Trade and Human Rights

In the 2003 Conference on Legal and Policy Issues in the Americas and in courses and seminars taught at the University of Florida College of Law since 2001,[3] the College's International Trade Law Program has explored the more visible and controversial linkages between international trade law and non-trade issues that span a broad range of vital interests that may collectively be described as human rights law.

We have addressed the widespread criticism that international trade rules are insensitive to basic human rights and that globalization has done little with its enormous power[4] to preserve exhaustible natural resources and otherwise promote sustainable development, to alleviate the gap between rich and poor,[5] to encourage states to grant

---

[1]Lecturer in Law and Director, International Trade Law Program, University of Florida Levin College of Law; former Chief Counsel, U.S. Department of Commerce Import Administration. I would like to thank Robert W. Bowser and Joshua Clark for their first-rate research assistance. An initial version of this article was prepared for the Economic Integration Workshop convened at the 2004 Conference on Legal and Policy Issues in the Americas, June 24-26, San Jose, Costa Rica, under sponsorship of UFLaw's Center for Governmental Responsibility and the University of Costa Rica's College of Law.

[2]Minister Llobet was referring to the effect of transparency, notice, and publication provisions in regional economic arrangements during the Economic Integration Workshop, Conference on Legal and Policy Issues in the Americas, June 25, 2004, San Jose, Costa Rica. Notes on file with the author.

[3] International trade law, international trade and the environment, dispute settlement under international trade and investment agreements, international trade and human rights (with Levin Mabie & Levin Professor of Law Berta Esperanza Hernández-Truyol), and trade and human rights in the Americas (also with Professor Hernández).

[4]As Swedish prime minister Göran Persson put it in a speech arguing for further expansion of the EU beyond the present 25 states, "trade and diplomacy will overtake military muscle as the most important asset for gaining international influence." E.U. Observor (May 12, 2004), *available at* http://euobserver.com/?aid=15642&rk=1.

[5]In the useful FIELD GUIDE TO THE GLOBAL ECONOMY 62 (The New Press 1999), Sarah Anderson & John Cavanaugh, with Thea Lee & the Institute for Policy Studies, argue that because free trade widens the gap between rich and poor, social tensions are increased that "poison the ground for democratic

their citizens basic human rights contained in the United Nations Covenant on Human Rights and other treaties, to resolve the often conflicting policies underlying essential human rights and trade goals, and, in general, to integrate trade and critical human rights law on the global front.

Among other things, we concluded,[6] first, that the World Trade Organization and the North American Free Trade Agreement (NAFTA), primarily because of their single-minded pursuit of non-discrimination in trade and the surprising effectiveness of their dispute settlement systems in corralling violators, have had outsized effects on the parameters of national agendas for such human rights objectives as protection of the environment and pursuit of sustainable development, furtherance of core labor rights, and even promotion of other fundamental human rights principles, including elimination of disease and drug plagues.

Second, we found that these "direct" linkages are inevitable as part and parcel of the aftermath of international economic growth, because they necessarily follow from increased – often arguably unsustainable – use of natural resources, from higher – sometimes unacceptable – levels of pollution, from conflicts – frequently unavoidable – between trade rules and government attempts to promote sustainable development, and from a broad cultural disconnect – extending to Babel-like differences in the meaning of words – between multilateral human rights treaties and global treaties regulating trade.

We concluded, third, that trade negotiators must ever be mindful that global trade rules do not operate in a vacuum, but instead cohabit a world of preexisting human rights laws – articulated most often by demands of the labor and environment sectors, but underpinned by even more basic human rights of individuals such as the right to education and freedom from oppression – that simply should not, in any sensible system of laws, be contravened by narrow economic precepts.[7]

In other words, that these intersections of trade and human rights – "the two cutting edge and hugely active areas in global and local existence"[8] – are ignored only at the peril both of trade and human rights agendas.

---

development," thus explaining World Bank data showing that certain countries with the highest export growth rates are "far from free societies."

[6]*See* Berta Esperanza Hernández-Truyol, *The Rule of Law and Human Rights*, 16 FLA. J. INT'L L. 167, 191-192 (2004), and Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT'L L. 219, 220 (2004).

[7]*Id.* at 192.

[8]Hernández-Truyol, *supra* note 6, at 190.

B. Summary: Hidden Linkages between Trade and Human Rights

Our focus in this essay is on the contribution of regional free trade agreements (FTA's) – primarily the rich trove of such pacts found among the nations of the Western Hemisphere – to the rule of law. The rule of law, the definition of which in our usage includes the substantive ingredients of justice and fairness, is basic to enjoyment of human rights,[9] and FTA's in our experience have had pronounced effects on attainment of rules-based governance. Our task is to explore specific ways in which FTA's, through provisions that require governments to conduct their activities through a more transparent and expeditious process, a process that relies exclusively on an administrative record created with input from all affected members of civil society, and one whose rules, as well as their implementation by government agencies, are subject to substantive review by an independent and accessible judiciary, contribute to enjoyment by civil society in general, not solely to those involved in international trade, of rules-based governance. We will examine primarily indirect linkages between FTA's and the rule of law, that is, those secondary effects of trade pacts that, while perhaps not unintended by negotiators, likely were not among the overt bargaining chips exchanged to create the characteristic balance of rights and obligations found in trade agreements.

These lesser-noted effects include provisions that encourage transparency, accountability, and due process by governments. Dispute settlement systems in FTA's similarly promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process. For example, numerous provisions of a typical FTA require that rules applicable to importers and investors be easily available and open to them, and normally that any changes to such rules be adopted in a process that is open to the affected public and takes account of public input.

The fact that decisions made by national authorities affecting importers and investors will often be subject to dispute settlement under an FTA may work a substantial change in the government's decision making process. For example, the responding Government normally will want the dispute settlement panel to have access to the "administrative record" upon which the decision was based in order to show compliance with the treaty provisions the complaining Government has alleged were violated.

The fate of the agency decision will rely on the completeness of this record in setting

[9]Application of the rule of law is included, along with open and transparent civil institutions, in the list of the trappings of democracy, which was affirmed as a human right by the United Nations in 1999, C.H.R. res. 1999/57/ U.N. Doc. E/CN.4/1999/57 (1999). *See* David Weissbrodt, Joan Fitzpatrick, & Frank Newman, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 540 (Anderson Pub. 3d Ed. 2001).

out the evidence relied upon and its relation to the trade agreement's obligations. When effective dispute settlement is available in a trade agreement, national authorities may have strong incentives to follow a very different decisional process than previously may have been required by domestic law to implement the agreement's obligations. Creation of an administrative record anticipates, for example, that evidence upon which the decision is based will be explicitly identified and placed in the file of the measure, and mandates in addition that the analysis made by the agency be committed to paper and assigned to the file. It is easily seen that these steps transform the decision process into a rules-based mechanism, rather than one that flows from the opinions of agency officials alone, an approach that inevitably ensures greater openness in the decision process for all affected interests, both foreign and domestic.

The dispute settlement mechanisms of FTA's, in fact, may serve also as alternatives for foreign interests to less developed and robust judicial systems in smaller economies. FTA processes for resolving interpretive conflict are effective either in securing changes to national measures found to be in violation or, if the losing Party does not comply with the decision by bringing its measure into compliance, provide for compensation to the winning Party or, if the level of compensation cannot be agreed, permit retaliation by the winning Party in the amount of the damage suffered by its private companies in lost trade.

FTA dispute settlement also has measures designed to secure neutral panelists to review the national measure, and usually provide sources of law for the dispute panel to apply that are harmonized for FTA Parties, which may be a more business-friendly environment for a foreign interest than national rules on the subject. Trade dispute settlement systems often provide for expeditious relief, recognizing that, to a business engaged in the fast-paced global market, slow resolution of conflict essentially deprives the business of any relief at all.

These elements of a "binding" process for resolving commercial conflicts may provide more meaningful relief than national courts for foreign companies involved in trade with an FTA country that has imposed measures allegedly inconsistent with FTA terms. In fact, trade agreements may directly mandate changes to national court systems, as is the case with provisions requiring that review of governmental trade measures be made by tribunals that are independent of the agency deciding the measure, such as articles 13 and 23, respectively, of the WTO Anti-Dumping and Subsidies Agreements. For these same reasons, trade dispute settlement also may serve as prototype for the further evolution of national judicial systems in the FTA Parties. In effect, this aspect translates into trade dispute settlement making itself obsolete.

In sum, dispute settlement under the trade and investment provisions of FTA's aims to eliminate any role for nationalism or other bias in reviewing whether the border

measure or other national decision is consistent with the FTA's obligations, thus promoting a rules-based approach to the national regulatory processes of the FTA partners. From a somewhat broader perspective, the stability of national regulations promoted by FTA's becomes an end in itself, because predictability is one of the strongest motivators of businesses to trade with and invest in a particular country. In order to continue the economic growth stimulated by a predictable set of rules, nations may be encouraged to pursue a more rules-based system of governance.

We undertake our study aware of a certain scepticism as to our premise. Some argue that trade agreements have no legitimate role in examination of progress in rule of law principles, either because (1) human rights issues interfere with obtaining maximum economic benefit of the agreement; or (2) rule of law deficiencies, whether reflected in weak judiciaries or corrupt licensing systems, persist because powerful interests want them that way, and no glancing blow from an impartiality provision in an FTA will change that weakness in the system; or (3) social developments such as rules-based governance, like other aspects of nation-building, legitimately may be accomplished only from within the country, although, admittedly, outside forces (such as FTA's) can facilitate the process.[10]

C. Introduction: Human rights Motivation for Regional Trade Agreements

We continue in this essay our study of the human rights dimension of trade by isolating more indirect and non-obvious ties between the two legal regimes.

Promotion of the rule of law consistently finds itself among the worthy objectives rationalizing pursuit by the United States of regional FTA's. For example, in encouraging passage of the Trade Act of 2002, which renewed the authority of the President that had expired in 1994 to enter into trade agreements, Senator Orrin Hatch of Utah argued that "America's engagement in world affairs and trade can project our strengths and values. Vigorous efforts to forge free trade alliances between the United States and developing countries will help to foster respect for the rule of law, competition and free-market principles in the developing world."[11]

To be sure, benevolent impulses no doubt float hopefully about this objective. But at bottom the motivation is, understandably, to ensure that U.S. companies can

---

[10]Statements by participants in 2004 Conference on Legal and Policy Issues in the Americas, San José, Costa Rica, June 25, 2004. Notes on file with author.

[11]148 Cong Rec S2627 (daily ed. Apr. 12, 2002)(statement of Sen. Hatch). Subsections 2102(b)(5) and (6) of the Trade Act of 2002 itself identify transparency and anti-corruption as principal negotiating objectives for future U.S. trade agreements, 116 Stat. 933 (2002).

successfully – and safely – pursue export and investment strategies in their chosen markets.[12] In other words, when multinationals trade with or invest in lesser developed countries, they will find a business-friendly environment with which they are familiar and which will best ensure the success of their economic endeavors.

This self-interested premise need not be viewed as undermining the value of fostering the rule of law through FTA's, any more than an anthropomorphic basis for preserving a variety of animal or plant species[13] need detract from the importance of biodiversity. While the precise contours of measures chosen by a country to carry out either of these policies will be affected by the actual purpose, the end product should be the same.

---

[12] *See* 149 Cong. Rec. S9403 (daily ed. Jul. 15, 2003)(Statement of Pres. Bush on transmitting legislation implementing the U.S.-Chile FTA). As former Canadian Ambassador to the United States Derek Burney recently noted, "practical benefits can be derived from agreements that allow for greater predictability and enable the flow of goods, services, and people to be less vulnerable to capricious or politically tainted decisions. Essentially, I am talking about the rule of law, instead of the rule of might, or the rule of the mighty." 29 CAN.-U.S. L. J. 43, 46 (2003).

On a broader plane, foreign policy and even strategic considerations underlie promotion of the rule of law, and FTA's enter as well into this equation, as witnessed by (among many possible examples) the recent negotiation of an FTA with Morocco, U.S. Trade Representative Draft Text of United States-Morocco FTA, *at* http://ustr.gov/new/fta/Morocco/text/index.htm (March 2, 2004), and the March 15, 2004, Trade and Investment Framework Agreement with the United Arab Emirates, *at* http://ustr.gov/releases/2004/03/04-18.pdf. These nations do not hold great promise for U.S. trade opportunities, but, as U.S. Trade Representative Ambassador Robert F. Zoellick noted in announcing conclusion of the latter Agreement and the second round of FTA negotiations with Bahrain (which were successfully concluded on May 27, 2004, U.S. Trade Representative Press Release, *at* http://www.ustr.gov/releases/2004/05/04-44.pdf): "Expansion of trade with the United Arab Emirates is part of our efforts to promote democracy and economic vitality [and promotes our strong partnership in our fight against terrorism] in the Middle East and the Gulf Region." U.S. Trade Representative Press Release, *at* http://ustr.gov/releases/2004/03/04-18.pdf (Mar. 15, 2004).

Strategic considerations long have been bruited for international trade: prevention of a third world war underlay the Bretton Woods troika of global monetary, development, and trade disciplines following the Second World War, John H. Jackson, William J. Davey, & Alan O. Sykes, Jr., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 199 (4th ed. West 2002). As Senator Tom Daschle of South Dakota noted during consideration of the Trade Act of 2002: "Expanding trade also offers national security and foreign policy benefits because trade opens more than new markets. When it is done correctly, it opens the way for democratic reforms. It also increases understanding and interdependence among nations, and raises the cost of conflict." 148 Cong. Rec. S2222 (daily ed. Mar. 21, 2002)(statement of Sen. Daschle). This essay will not dwell on these strategic-military-security objectives, which have of course become central drivers of FTA's for the United States following the September 11, 2001, terrorist attacks on New York and Washington. *See* Kevin J. Fandl,*Terrorism, Development and Trade: Winning the War on Terror Without the War,* 19 Am. U. Int'l L. Rev. 587,589 (2004).

[13] *See* Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 DUKE ENVTL. L. & POL'Y F. 185, 186 (2003); Ajay K. Sharma, *The Global Loss of Biodiversity: A Perspective in the Context of the Controversy Over Intellectual Property Rights*, 4 U. Balt. Intell. Prop. L.J. 1, 5 (1995).

Successful advances to rules-based regimes, even if undertaken to aid U.S. trade interests, nonetheless also will bring great benefits to the citizens of our FTA partners, just as preservation of the rain forests in order to stock our future medicine cabinets[14] equally will preserve species for their own sake.

This essay examines specific ways in which FTA's promote rules-based governance in the Americas. We begin with an attempt to define our terms, then acknowledge the "second best" nature of promoting the rule of law through trade agreements by recognizing the primary role in this effort of national governments through enforcement of domestic legislation. We next explore particular aspects of the overarching transparency, accountability, and due process umbrellas, as well as the timeliness, impartiality, and record keeping stimuli of trade dispute settlement systems, in the context of the major trade agreements in the Hemisphere, including MERCOSUR, the NAFTA, the Andean Community, CARICOM, and the Central American Common Market, as well as the recent FTA between Chile and the United States and among a number of Central American nations and the United States. We conclude with our preliminary observations.

D. Meaning of "the Rule of Law"

We begin by recognizing that international decision makers – whether in the realm of human rights, foreign policy, or international development – often fail to articulate their understanding of "the rule of law" even as they promote its cause. This lack of examination has led to an amorphous concept capable of unqualified support from national security hawks and human rights activists alike.[15]

Most often, the confusion stems from a natural inclination to treat as identical the procedural and substantive aspects of the rule of law. We may see such formalities as open regulatory systems and independent judiciaries as tantamount to the government's respect for the views of civil society and substantive due process, but one does not of course necessarily follow the other.

"The philosophy of law has long been dominated by a disagreement between those who

---

[14] *See* Erin B. Newman, Note & Comment, *Earth's Vanishing Medicine Cabinet: Rain Forest Destruction and Its Impact on the Pharmaceutical Industry*, 20 AM. J. L. & MED. 479 (1994); Rodger Schlickeisen*, Protecting Biodiversity for Future Generations: An Argument for Constitutional Amendment,* 8 TUL. ENVTL. L. J. 181, 186 (1994).

[15] Rosa E. Brooks, *The New Imperialism: Violence, Norms and the Rule of Law* 401, 403 n.5, U. Va. Sch. L. Working Paper No. 03-20, *at* http://ssrn.com/abstract_id=478382 (Dec. 2003)(rev. of 101 MICH. L. REV. 401 (2003)).

say, with St. Augustine, 'that an unjust law is no law at all,' and those who respond, with John Austin, that '[t]he existence of law is one thing; its merit or demerit is another.' "[16] To be sure, observance of the rule of law does not of itself guarantee its fair administration. In practice, however, the correlation between implementation of the core principles of the rule of law, discussed below, and advancement of the human rights of citizens thereby regulated is strong and undeniable. While "[i]t is important to preserve the distinction between law as an operative system and justice as a moral ideal . . ., [l]aw is not necessarily just, but it does promise justice."[17] A rule of law makes government measures predictable, which in turn allows citizens to plan their activities with some degree of security.[18]

In our view the rule of law's procedural and substantive components are impossible to separate. In fact, as the University of Virginia's Rosa Brooks convincingly has observed, "creating the rule of law is most fundamentally an issue of norm creation."[19] Professor Brooks posits that the disappointing results of dozens of projects to promote rules-based societies are primarily the consequence of the sponsors' failure to address the complex relationships between "law" and "norms" in a given country.[20]

We believe that the rule of law is neither definable as a concept nor accessible as an objective except within the context of specific cultural premises and combined with the substantive norms that frame the concept for use in a particular society. Specifically, the U.S. model, or Western-based legal systems in general, may not be well suited to a legal system based on Islamic civil law, such as Syria's, or one that derives from tribal law, such as the Democratic Republic of the Congo's, or even a Dutch-French system such as that found in Suriname.[21] Each country's unique cultural heritage and values, whether in Ecuador or Canada or Nigeria, must be considered in the search for "the rule of law."

---

[16]Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U.L. REV. 759 (2001)

[17]Philip Selznick, *quoted in* Waldron, *id.*

[18]Melissa Thomas, *The Rule of Law in Western Thought*, World Bank Rule of Law and Development web site, *at* http://www1.worldbank.org/publicsector/legal/western.htm.

[19]Brooks, *supra* note 15, at 410.

[20]Brooks, *supra* note 15, at 410. To similar effect, Professor Hernández observes that "different legal traditions have divergent understandings of what the rule of law idea(l) is or should be," *supra* note 4, at 168.

[21]Government legal systems from THE WORLD FACTBOOK, *at* http://www.cia.gov/cia/publications/factbook/index.html (U.S. Central Intelligence Agency).

Not only must any model for promoting the rule of law take careful and explicit account of the cultural heritage of each country, but it must also dispel the bitterly destructive impression that the rule of law concept is yet another ploy by big countries to impose their will on the less mighty in order to promote the big country's interests. An important aspect of cultural heritage is Latin America's legal tradition of Roman or civil law, which implicates the loss of sovereignty from FTA's felt by some civil society groups.

Moreover, our analysis, premised as it is on the inevitability of interaction between trade rules and human rights law, presupposes that the rule of law concept is inseparable from the substantive norms of justice or fairness. A government that promulgates clear, consistent, predictable, and stable laws that deny human rights may be following the procedural niceties of rules-based governance, but it is not adhering to the rule of law.[22]

In sum, we use the rule of law in a substantive sense to incorporate formal justice that promotes liberty[23] and we recognize that our conclusions have little meaning if they cannot be translated into cultural norms comfortable to the country to which they would be applied. That said, our experience has been that a working definition of the rule of law, even one that emphasizes the law's procedural underpinnings, is essential to this general study of the contribution of FTA's to human rights law. We will in presenting our findings rely primarily on Joseph Raz's formalistic approach, which identifies two primary components of the rule of law: that citizens should be ruled by the law and obey it, and that the law must be able to be followed.[24]

Raz expands on these two points by listing eight principles among those that characterize a society applying the rule of law: (1) All laws should be open, clear, and prospective. We cannot be guided by a law that does not exist at the time of action, nor by one that is ambiguous. (2) Laws should be relatively stable. Constantly-changing rules create the fear of ignorance and make long-term planning impossible. (3) The making of laws governing particular subjects should be guided by open, stable, clear, and general rules. Health inspections, licensing decisions, and traffic enforcement are among the many legal regimes that provide some discretion to the decision maker, and thus run counter to the basic ideal of clear knowledge by citizens of the law. As a counterweight, such regimes must be carried out according to a strict

---

[22] *See* Hernández-Truyol, *supra* note 6, at 172.

[23] Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U.L.REV. 781, 787 (1989).

[24] Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 213 (Clarendon Press 1979). "In the final analysis, the doctrine rests on its basic idea that the law should be capable of providing effective guidance." *Id*. at 218.

procedure that adds certainty. (4) The independence of the judiciary must be guaranteed. If courts act on some other basis than the applicable law, the rule of law is thereby nullified. (5) The principles of natural justice must be observed. Even in Raz's "formalistic," procedural cookbook of ingredients in which the "merit" of the law supposedly is irrelevant, the concept of fairness is deemed essential to the rule of law. Law does, indeed, promise justice.[25] (6) The courts should have review power over the implementation of the other principles. The goal of such review is to ensure conformity with the law at issue of both agency action and later law. (7) The courts should be easily accessible. Even enlightened laws become dead letters in the face of excessive costs and lengthy delays in the courts. (8) The discretion of the crime-preventing agencies should not be allowed to pervert the law. Misallocation of police resources to target a certain class or improper exercise of prosecutorial discretion to overlook certain offenders effectively subvert the rule of law.[26] As will become apparent in our analysis, review of Hemispheric FTA's will continually bring to mind Raz's principles.

E. Primacy of Government Enforcement of the Rule of Law

FTA's cannot of course directly inject rules-based governance into a country. Only national governments can ensure the success of the rule of law in their countries. As the responsible authorities in a democratic nation, governments are charged with making and enforcing laws for their citizens. Moreover, governments also are obliged to design and implement their economic programs, including negotiating trade treaties, with the aim of achieving the best results for the country and all its citizens. Outside sources such as international treaties can have influence on the rule of law only as implemented by governments – including legislative, executive, and judicial authorities – in translating those treaties into conforming legislation, regulations, policy guidance, and administrative measures as part of the government's agreement that the FTA's rule of law principles contribute to those previously-set national objectives.

These actions have included dramatic reforms to the legal system. The problems of "lack of independence, lack of control in the judicial system, and lack of leadership," among others, led to the establishment of "systems" which effectively contribute to the rule of law.[27] Among these systems are judicial training schools and an emphasis on

---

[25] *Supra*, text at notes 16 & 17.

[26] Joseph Raz, *supra* note 24, at 214-218.

[27] Juan Enrique Vargas Viancos, "*The Vision for Reform and its Potential for Success*," 16 FLA. J. INT'L L. 239, 241 (2004).

financial self-sufficiency of the courts.[28]

The laws themselves are not the problem. As Viancos states, "[t]he problem here is enforcement. Laws are not being enforced." A main contributing factor to the ineffective enforcement of the laws has been technological. The system is functioning "as it was created to function five hundred years ago" and it requires updating. Among the other improvements of judicial institutions taking place, such as the restructuring of the training of court staffers and new organizational design, the "great emphasis on computer systems" arguably has become the most visible feature.[29]

Thus, when we suggest that regional FTA's may contribute to the rule of law, we recognize that FTA's may do so only with the active indulgence of the national governments that have subscribed to these international contracts. These national governments, of course, drafted and agreed to the terms that we will discuss as having secondary or tertiary effects on the rule of law within the FTA partner countries and thus are well-situated to bring them into effect.

Even so, the transparency, due process, and other human rights principles of regional trade agreements may, we believe, have impacts on the promotion of the rule of law that exceed both the drafting expectations and the noble-minded hopes of their architects. Certainly it has been our experience that FTA's markedly hasten progress toward the liberation of civil society far beyond the expectations of the contracting governments. Concerning the effect of the NAFTA on Mexico's agency procedures, we wrote in the day that "[t]he parties recognized that some risk attended the melding of Mexico's civil law system . . . with the common law system . . . of the other two NAFTA parties. The principal protection against an adverse clash of systems was to ensure sufficient change to Mexico's laws that the exporters of all three countries would be in a roughly equivalent position. Essentially, this combination of changes shifts Mexico several steps closer to a common law system for antidumping and countervailing duty."[30]

---

[28]*Id*.

[29]Juan Enrique Vargas Viancos, *supra* note 27, at 242.

[30]Stephen J. Powell & Mark A. Barnett, *The Role of United States Trade Laws in Resolving the Florida-Mexico Tomato Conflict*, 11 FLA. J. INT'L L. 319, 357 (1997). The reference was to the treaty's mechanism to draw back from a unique experiment in ceding judicial sovereignty to a dispute settlement system for trade remedies that would be staffed not by judges, but by private sector panelists. Concerning the broader impact of these changes to Mexican law on civil society, we offered in a footnote that "[t]hrough such provisions as disclosure meetings, notices of intended action by SECOFI [Ministry of Commerce], access to proprietary business information by counsel under a protective order, detailed reasons for SECOFI decisions, and elimination of the need to seek an administrative appeal before

We also observed at the time of NAFTA's ratification that "Mexico will implement far-reaching reforms to guarantee due process and effective judicial review . . .":

"In effect, Mexico has committed to bring its standards of transparency up the level of its NAFTA partners in three ways – Full participation in the administrative process by interested parties, including by explicit timetables by Mexico for its actions, [a] requirement that the administering authority . . . maintain a complete administrative record, [providing] counsel [with] access to everything in the record, . . . [and furnishing an] opportunity to present facts and argument in support of their positions. Full explanation by Mexico of its decisions . . . Full judicial review of all administrative determinations . . . without the present requirement first to exhaust administrative remedies . . . and with a standard of review [ensuring] full examination of the legal and factual basis for the determination . . . limited solely to evidence on the administrative record."[31] Evidence exists that not only in Mexico but also in Costa Rica and Argentina, trade agreements have visibly improved rules-based governance for civil society generally, especially through record-keeping, transparency, and timeliness provisions.[32] China Supreme Court Justice Cao Jianming has written that China's entry into the WTO will have a profound impact on both the rule of law and judicial reform in China and that the country is making progress toward these ends.[33]

When we suggest, therefore, that trade agreements may contribute to the rule of law, we do so in the knowledge that only national governments can make this suggestion a reality. Even though one could argue that the need – or opportunity – for trade agreements to promote fair, rules-based governance is a "second-best" solution, because national governments already should have ample incentives to govern under a rule of law without such artificial stimuli, that view may overlook political realities.

---

challenging a SECOFI determination before a binational panel, Mexico's law was assured a solid foundation in transparency and due process." *Id.* at note 233.

[31]Stephen J. Powell, *Increased Transparency and Due Process in Mexico's Antidumping and Countervailing Duty Practices Under NAFTA*, A4-4422 PRAC. L. INST. 405, 411 (1993).

[32]Statements made by trade officials of these governments at the San Jose 2004 Conference on Legal and Policy issues in the Americas on June 25, 2004. Notes on file with the author. Ours is, of course, but a theoretical analysis of the likely contribution of FTA's to the rule of law. We will continue to search for methodologies and data bases that assist in approximating the actual impact of FTA's on the rule of law in the Americas.

[33]Cao Jianming, *WTO and the Rule of Law in China,* 16 TEMP. INT'L & COMP. L.J. 379, 390 (2002). Justice Jianming was not, of course, addressing regional trade agreements.

Just as job retraining aid and vigorous enforcement of trade remedies (anti-dumping, anti-subsidy, and safeguard laws) are recognized political costs of continued steps to reduce protective trade barriers in the face of the "outsourcing" of jobs and the rough road to economic growth that are free trade's companions,[34] national governments as well may take advantage of the economic growth fostered by FTA's to justify changes to the status quo toward rules-based governance that may upset existing power bases. In some cases, second best may be the only course that is politically viable.

F. Trade and Transparency: Publication and Notification

The premise of our essay is that international trade and, specifically, FTA's not only promote economic growth, but also carry secondary benefits to civil society's enjoyment of the rule of law. Economic welfare increases dependently with rules-based governance through a process of openness, stability, and predictability, which in turn promotes greater economic growth by creating a business-friendly environment.[35]

In a fascinating study issued at the turn of the century, the Inter-American Development Bank examined the relationship between economic development and a series of factors reflecting the quality of public institutions in Latin America and the Caribbean. The report began by noting a paradox, that "[t]he region has the highest murder rates in the world and shows any number of symptoms that reflect a lack of respect for life and property [,y]et the region has moved to the forefront of the developing world in terms of civil liberties and respect for democratic rights."[36]

---

[34]Paul Krugman, *The Trade Tightrope*, Gainesville Sun 9A (Feb. 28, 2004). *See* Robert J. Samuelson, *China, Trade and Progress*, NEWSWEEK 47 (April 5, 2004), and Stephen J. Powell & Elizabeth C. Seastrum, *Straight Talk About a Complex Issue: The U.S. Standard of Judicial Review of Antidumping and Countervailing Duty Determinations*, 19 FORDHAM INT'L L. J. 1451, 1453 (1996)(discussing economic justifications for anti-dumping remedies). As South Dakota Senator Tom Daschle explained during consideration of the Trade Act of 2002, which expanded trade adjustment assistance to farmers and other workers whose jobs are lost as a result of trade agreements: "Expanded trade will provide billions and billions of dollars in economic growth for the United States. Certainly, we can dedicate a small fraction of this gain to those Americans who are harmed. It is the right thing to do. Frankly, it will be impossible to build a broad consensus for expanded trade unless we do it right." 148 Cong. Rec. S2222 (daily ed. Mar. 21, 2002)(statement of Sen. Daschle).

[35]DEVELOPMENT BEYOND ECONOMICS: ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA ch. 1 (Johns Hopkins Univ. Press for Inter-Am. Dev. Bank 2000), *available at* http://www.iadb.org/res/index.cfm?fuseaction=Publications.View&pub_id=B-2000 (hereinafter IADB Report 2000).

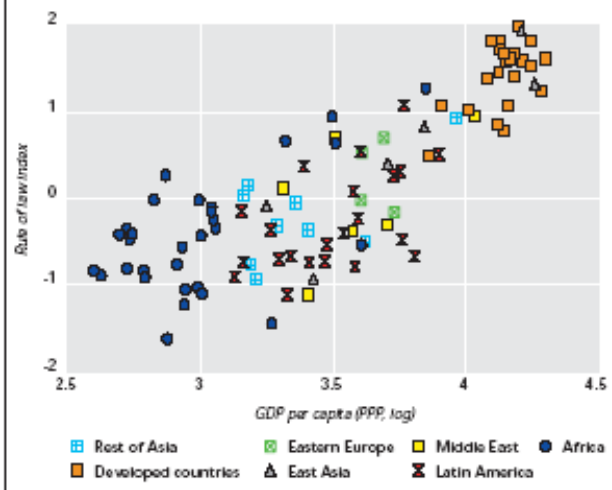
[36]*Id.* at 13.

A series of graphs illustrates the Bank's fundamental thesis: "[Public] [i]nstitutions represent the formal and informal rules and practices by which individuals relate with one another in order to attain economic and social objectives. It stands to reason, then, that institutional quality and development are largely synonymous."[37] Thus, the provisions in the studied FTA's are not merely normative structures to regulate

economic relationships between the international actors: they also reflect a normative trend of domestic practices.

The graphs that follow strikingly demonstrate "the close relationship between overall governability and several indicators of economic and social development. The countries with the highest levels of per capita income and the best outcomes in health and education have public institutions of outstanding quality."[38]

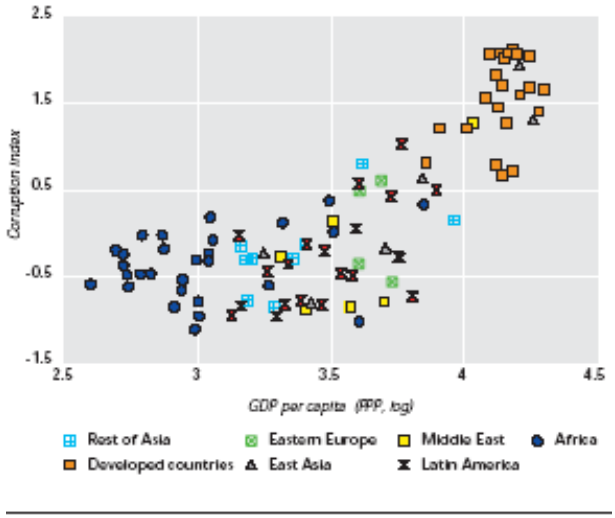
Figure 1.45a GDP and the Rule of Law



[37]IADB Report 2000, *supra* note 35, at 23: "The most important institutions for development are those that ensure that people and their enterprises can benefit from their productive efforts, which in turn makes them more willing to invest in education, technology and physical capital. That process entails protection of property rights, respect for the law and for contractual commitments, and the absence of corruption."

[38]IADB Report 2000, *supra* note 37, at 24: "The indicator used to measure governability is a combination of four indices that reflect essential aspects of the quality of government and have been constructed using information from many international rating sources that have emerged in recent years (footnote omitted). The indices are the rule of law, control of corruption, quality of the regulatory framework, and the effectiveness of public administration. Figures 1.45a-d show the strong connection each of these indicators has to per capita income."

Figure 1.45b GDP and Corruption



On the basis of these data, the Bank concludes that "[i]n terms of the rule of law and control of corruption, Latin America ranks lower than any other region except Africa."[39]

As noted, our essay concentrates on trade agreements negotiated among nations in the Western Hemisphere. The reader should be aware that every such FTA builds upon the global trade rules of the 1947 General Agreement on Tariffs and Trade (GATT), and the WTO that perfected GATT's organizational structure half a century later and created an advanced dispute settlement system substantially based on the rule of law.[40] The GATT and WTO agreements are the *sub rosa* understructure of our examination of regional agreements.[41]

As to transparency, we see near universal agreement among Hemispheric FTA's that transparency through publication and notification is essential to stability and predictability, which are in turn elements of a market fundamental to trade. By examining the trade agreements, it is possible to see that transparency translates into Raz's first principle, that laws must be open, clear and prospective.[42] Openness is of course aided by publication of the laws and notification to interested parties of laws that could potentially affect them.

1. Publication

[39]IADB Report 2000, *supra* note 37, at 25.

[40]General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194; Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1226 (1994).

[41]For an interesting argument from the perspective of a Federalist scholar that global trade rules contribute to domestic democracy by making trade restrictions more transparent and thus obvious to average citizens, *see* John O. McGinnis, *World Trade Constitution*, 114 HARV. L. REV. 511, 547-48 (2000).

[42]Raz, *supra* note 24, at 214.

Publication plainly promotes the first of Raz's principles.[43] Publication is the means by which governments communicate the law to the public, which also promotes prospective application of rules by preventing governments from applying hidden laws that did not exist at the time of an action. Moreover, public notice of laws subjects them to the scrutiny of interested parties. Examination and open application flesh out ambiguity in the laws, thus promoting clarity.

In the NAFTA, as well as in the U.S.-Central America Free Trade Agreement (CAFTA)[44] signed in early 2004 between the United States and the nations of the Central American Common Market[45] – Costa Rica, Honduras, Guatemala, El Salvador, and Nicaragua – and into which the Dominican Republic was soon after integrated,[46] these basic principles of transparency are pervasive. The CAFTA in particular aggressively promotes the conditions we believe create secondary human rights effects.[47] CAFTA chapter 18 and similar provisions in the NAFTA are the hub of a network of transparency provisions fanned out into more specific chapters in each treaty.[48]

Specifically as to publication, these FTA's require in chapters 18 that the Parties make available to the public all laws and other binding rules and, "to the extent possible,"

---

[43]Raz, *supra* note 24, at 214.

[44]U.S. Trade Representative Draft Text of U.S.-Central America Free Trade Agreement, *at* http://www.ustr.gov/new/fta/Cafta/text/index.htm.

[45]General Treaty on Central American Economic Integration arts. XXII & XXIII, signed at Managua Dec. 13, 1960 (hereinafter CACM).

[46]U.S. Trade Representative Draft Text of U.S.-Dominican Republic Free Trade Agreement, *at* http://www.ustr.gov/new/fta/Dr/texts.htm (Apr. 9, 2004).

[47]The U.S. Advisory Committee for Trade Policy and Negotiations has suggested that "[t]he agreement meets or exceeds the negotiating achievements of the recently implemented Chile and Singapore agreements, and in many ways has set the highest standard yet achieved in free trade agreements," including in its anti-corruption provisions. Report of the Advisory Committee for Trade Policy and Negotiations on the U.S.-Central America Free Trade Agreement, *at* http://www.ustr.gov/new/fta/Cafta/advisor/actpn.pdf *(Mar. 12, 2004). Rule of law principles can be observed throughout the CAFTA; we have selected several illustrative provisions.*

[48]North American Free Trade Agreement (hereinafter NAFTA), Jan. 1, 1994, Can.-Mex.-U.S., 107 Stat. 2057, 32 I.L.M.. 289 (1993). Provisions that implement the principle of transparency appear throughout the NAFTA. *See, e.g.,* NAFTA arts. 510, 909, 1036, 1411, annex 1010.1, and annex 11.37.4, 32 I.L.M.. 289, 358, 386, 653, 657, 613, and 639 (1993), available at www.sice.oas.org/trade/nafta/naftatc.asp.

that they give interested parties opportunity for input prior to enactment.[49] Advance publication and an opportunity for interested parties to have their voices heard are hallmarks of a transparent law-making process. To be sure, the transparency facilitated by chapters 18 benefit foreign sellers and investors, but it decidedly also opens the process of adopting those legal acts to domestic interested parties in civil society and in this way assists governments in advancing the rule of law.

Although CAFTA chapter 18 explicitly addresses publication and notification procedures, rule of law principles first are captured in the treaty's objectives. The preamble fixes as goals for the agreement to ensure a predictable commercial framework for business planning and investment, to make customs procedures transparent and thus predictable, to create opportunities for economic and social development, to promote transparency, and to eliminate corruption.[50] Additional publication requirements supplement the broader preambular and chapter 18 objectives of transparency through chapters for customs administration and trade facilitation, which contain publication features for this field similar to those in chapter 18.[51] Article 9.3 ensures transparency in the government procurement process through publication.[52] Laws, regulations, invitations to tender for procurements, relevant judicial decisions, and administrative procurement rulings must be published.[53] Article 5.1 of the CAFTA demands publication on the Internet of customs laws, regulations, and general administrative procedures,[54] and also requires governments to designate a contact point to entertain inquiries.[55]

CAFTA article 7.7 calls for greater transparency in the development of technical regulations, such as those governing product safety or standard product specifications.[56] To achieve this objective, FTA Members are required, with respect to

---

[49]NAFTA, *supra* note 48, at art. 1802(1), 107 Stat. 2057, 32 I.L.M.. at 681; CAFTA, *supra* note 44, at art. 18.2.

[50]CAFTA, *supra* note 44, at Preamble (enunciating the importance of transparency to ensure predictability and to eliminate bribery and corruption.

[51]CAFTA, *supra* note 44, at art. 5.1.

[52]CAFTA, *supra* note 44, at art.. 9.3.

[53]*Id.*

[54]CAFTA, *supra* note 44, at art. 5.1.(1).

[55]CAFTA, *supra* note 44, at art. 5.1.(2) – (3).

[56]CAFTA, *supra* note 44, at art. 7.7.

the notices already called for by the WTO's Agreement on Technical Barriers to Trade,[57] to describe the objective of the proposal and the rationale for the approach the Member is proposing, and to transmit the proposal to the other Members through the inquiry points established under article 10 of the WTO Agreement.[58] To give actual meaning to those obligations, the parties must also allow other parties to participate in the development of technical regulations, in part by allowing at least 60 days for comments.[59] To reaffirm the importance of transparency in the NAFTA, supplementary requirements that ensure transparency also have been expressed in the specialized areas. Article 1306 relates to publication of measures for the telecommunications industry.[60] Article 1411 mandates publication of specific measures regarding financial services.[61]

Publication also is required by Article 718 for sanitary and phytosanitary measures.[62] Article 909 requires publication of the adoption or modification of technical regulations.[63] In the field of government procurement, entities must publish an invitation to participate in all government procurements.[64] Publication of arbitral awards under the investor-state dispute settlement provisions of NAFTA chapter 11 is permissible under article 1137.4 and in 2001, the trade ministers of the Parties, sitting as the NAFTA Free Trade Commission, agreed to make available to the public in a timely manner all non-confidential documents submitted to or issued by arbitration tribunals.[65] Similar publication provisions are scattered throughout the annexes, which

---

[57]Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), 33 I.L.M. 1144 (1994), ann. 1, *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (THE LEGAL TEXTS) 139, 143, & 149 (WTO 1994).

[58]CAFTA, *supra* note 44, at art. 7.7(3)(b).

[59]*Id.*

[60]NAFTA, *supra* note 48, at art. 1306, 107 Stat. 2057, 32 I.L.M. 653.

[61]NAFTA, *supra* note 48, at art. 1411, 107 Stat. 2057, 32 I.L.M. 657.

[62]NAFTA, *supra* note 48, at art. 718 , 107 Stat. 2057, 32 I.L.M. 368.

[63]NAFTA, *supra* note 48, at art. 909 , 107 Stat. 2057, 32 I.L.M. 386.

[64]NAFTA, *supra* note 48, at art. 1010.1, 107 Stat. 2057, 32 I.L.M. 613.

[65]Free Trade Commission Clarification Related to NAFTA Chapter 11, para. A.2.(b), *available at* http://www.naftalaw.org/ (July 31, 2001).

contain the North American Agreement on Environmental Cooperation (see Article 4) and the North American Agreement on Labor Cooperation (see Article 6).[66]

In the MERCOSUR – the powerful Southern Cone Common Market of Brazil, Argentina, Paraguay, and Uruguay – transparency promotes stability and predictability through publication of agency actions in the official journal. The Protocol of Ouro Preto establishes an administrative secretariat which performs a number of transparency functions.[67] This body is the centralized location for official documentation. The Secretariat collects information from the Members regarding the measures taken to implement decisions adopted by the other MERCOSUR organs,[68] thus serving an instrumental role in ensuring the transparency and accountability of MERCOSUR institutions. Centrally maintaining all the official documents simplifies the process of requesting and obtaining documents and promotes public scrutiny of the activities of government agencies.

Each MERCOSUR Member is required to maintain an official journal and must publish all decisions taken by MERCOSUR entities that have entered into force, including resolutions of the Common Market Group (the executive body which monitors compliance with the treaties), directives of the Trade Commission, decisions of the Council, and dispute settlement rulings.[69]

Directives promulgated by the MERCOSUR Trade Commission – which helps the Common Market Group monitor application of trade policy instruments – also find voice in the official journal.[70] The MERCOSUR Trade Commission considers and rules upon requests submitted by the Member States concerning application of and compliance with the external tariff and other trade policies.[71]

---

[66]North American Agreement on Environmental Cooperation, *done on* Sept. 8-14, 32 I.L.M. 1480, 1483 (1993). North American Agreement on Labor Cooperation, *done on* Sept. 8-14, 32 I.L.M. 1500, 1503 (1993).

[67]Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR, Dec. 17, 1994, art. 19, *available at* http://www.sice.oas.org/trade/mrcsr/ourop/index.asp (hereinafter Protocol of Ouro Preto). Under these provisions, the Secretariat is vested with autonomy equal to the other MERCOSUR organs, the Council of the Common Market, the Common Market Group, the Trade Commission, the Joint Parliamentary Commission, and the Economic-Social Consultative Forum.

[68]Protocol of Ouro Preto, *id.* at art. 38, 34 I.L.M. 1255.

[69]Protocol of Ouro Preto, *supra* note 67, art. 40, 34 I.L.M. 1255.

[70]Protocol of Ouro Preto, *supra* note 67, art..16, 34 I.L.M. 1251.

[71]Protocol of Ouro Preto, *supra* note 67, art..16, 34 I.L.M. 1251.

In the Andean Community, a strong regional integration agreement among Bolivia, Colombia, Ecuador, Peru, and Venezuela, the General Secretariat is the executive body and ensures transparency of operations of the Andean Community institutions.[72] Its duties include record keeping – as depository for the other Community organs – and publication of the Official Gazette of the Cartagena Agreement.[73]

2. Notification

Notification relates to Raz's first and third rule of law principles.[74] It suggests that the making of laws should be guided by open, stable, clear, and general rules. The affirmative acts of identifying and seeking parties that may materially be impacted by proposed laws exhibits a dedication to openness – a step beyond simple publication of the law. Moreover, such notification measures are often accompanied by an opportunity to respond. Notification thus brings the parties that will primarily be affected by the laws closer to the lawmaking process. Not only are the laws themselves opened to the public; so also is the process of creating the laws, the essence of Raz's third rule of law principle.

Notification is another essential characteristic of transparency and, as in the case of publication, chapter 18 is also the center of gravity from which all notification provisions in the NAFTA emanate.[75] Article 1803 transmits the message that notification is fundamental to the administration of the trade laws under NAFTA.[76] The effects of notification are many and its link to due process and fairness complex, as will be seen in later sections.[77] The differences in impact on civil society between publication and notification can be dramatic. Notification requires the government to take affirmative action to determine who might materially be affected by a proposed measure, find them, and supply notice. Publication assists citizens who have an incentive to seek out

---

[72]Protocol of Trujillo Modifying the Agreement on Andean Subregional Integration Agreement, Mar. 10, 1996, Bol., Colom., Ecuador, Peru, & Venez., art. 29 (Protocol of Trujillo).

[73]*Id.* at art. 30(k)-(m).

[74]Raz, supra note 21, at 215-216.

[75]NAFTA, *supra* note 48, at art.. 1803, 107 Stat. 2057, 32 I.L.M. 681.

[76]NAFTA, *supra* note 48, at art.. 1803, 107 Stat. 2057, 32 I.L.M. 681.

[77]*Infra*, text at notes 118-122.

information; notification eliminates the need for individuals to search out proposed measures that may affect them.

Ancillary notification provisions are dispersed throughout the NAFTA. In articles 718 and 909, notification is linked closely to publication in promoting transparency. These articles respectively require that a government actor proposing to adopt or modify a sanitary or phytosanitary measure or a technical regulation must supply written notice to interested parties, thus supplementing the publication mandate of these articles.[78]

These provisions emphasize the different roles that publication and notification play in promoting transparency. With regard to food and product safety measures, it is considered inadequate to transparency simply to require general publication. Interested parties – even those who could potentially be most affected by such a measure – may not even be aware of the existence of the information without specific notification.

G. Trade and Accountability

Accountability is another principle of the rule of law echoed in Hemispheric trade agreements. Consistent with Raz's eighth principle,[79] accountability ensures that the discretion of the domestic governmental institutions and the authorities established under the agreements are not allowed to pervert the law and frustrate its purpose. This corralling of discretion is fulfilled through procedures that ensure creation and maintenance of documents and the review and appeal of rules and decisions made by authorities. As detailed in this section, Raz's eighth principle is reflected by NAFTA Chapter 18's creation of a means of recourse from administrative decisions, by the subjection of decisions of customs administrations to scrutiny under NAFTA Chapter 5, the MERCOSUR, and the Central American Common Market, and by NAFTA Chapter 19's extensive review procedures for agency actions under anti-dumping and countervailing duty laws.

The creation and maintenance of documents improves both transparency and accountability. There would be no documents to publish and therefore no transparency if a legitimate system for keeping documents were not in place. Moreover, creation and maintenance of a system of documentation is fundamental to accountability. There would be little basis for the accountability of customs officials and other administrative actors absent some objective documentary basis for challenging their decisions.

---

[78]NAFTA, *supra* note 48, at arts.. 718, 909, 107 Stat. 2057, 32 I.L.M. 386.

[79]Raz, *supra* note 24, at 218.

1. Review and Appeal

Provisions that promote accountability of the decision-making bodies can be observed throughout the NAFTA and, again, chapter 18 is the hub.[80] Article 1805 requires the establishment and maintenance of a mechanism for review of administrative actions taken under the Agreement.[81] Review and appeal procedures such as these ensure that the domestic administrative decision-making bodies are held at least to a minimum level of accountability, as well as helping to deter corruption and contribute to due process by establishing the principle that rules are to be equitably applied.

An equitable and efficient customs administration lies at the core of an accountable trading system. NAFTA chapter 5 sets guidelines for the administration of customs.[82] Article 510 obligates each Party to afford the right of review and appeal of the various decisions of customs administration, such as marking determinations of origin, country of origin determinations, and advance rulings.[83] There is also an instruction of equity and national treatment. Article 510 expects these review and appeal rights to be the same as those afforded importers within the Party's territory.[84] Parties must provide access to at least one level of administrative review independent of the office that made the challenged determination and even this review does not end the accountability provided.[85] Article 510 also mandates that the final level of administrative review be subject at least to quasi-judicial appeal.[86]

Chapter 19 of the NAFTA establishes the rules that must be followed to invoke review of determinations made by a Party under its anti-dumping and countervailing duty laws.[87] This chapter facilitates accountability on several levels. First, the review

[80]NAFTA, *supra* note 48, at art. 1805, 107 Stat. 2057, 32 I.L.M. 681; s*ee also, e.g.*, NAFTA, *supra* note 48, at art. 510, 107 Stat. 2057, 31 I.L.M. 358.

[81]NAFTA, *supra* note 48, at art. 1805, 107 Stat. 2057, 32 I.L.M. 681.

[82]*See* NAFTA, *supra* note 48, at arts. 501-514, 107 Stat. 2057, 32 I.L.M. 358.

[83]*See* NAFTA, *supra* note 48, at art. 510, 107 Stat. 2057, 32 I.L.M.. at 358.

[84]NAFTA, *supra* note 48, at art. 510(1), 107 Stat. 2057, 32 I.L.M. 358.

[85]NAFTA, *supra* note 48, at art. 510(2), 107 Stat. 2057, 32 I.L.M. 358.

[86]NAFTA, *supra* note 48, at art. 510(2), 107 Stat. 2057, 32 I.L.M. 358.

[87]NAFTA, *supra* note 48, at art. 1904, 107 Stat. 2057, 32 I.L.M. 682.

mechanism itself represents an accountability-ensuring principle at the highest level, because it holds governments directly accountable to dispute settlement panels. Chapter 19 also mandates creation of an administrative record,[88] which directly reflects the importance of documentation and promotes accountability. And by requiring that decisions of dispute panels be based on the administrative record, Chapter 19 exemplifies the necessity for objectivity and accountability. Although there is no right to appeal the ruling of a binational panel, another layer of accountability is provided.[89] If actions of a Party prevent a panel decision from being implemented, a special committee may be formed to safeguard the integrity of the panel process by allowing the aggrieved Party to suspend operation of the binational panel system as to the offending Party.[90]

NAFTA chapter 19 promotes accountability through an additional review mechanism, one that allows Parties to test through dispute settlement whether an amendment to the anti-dumping or countervailing duty laws is consistent with WTO rules governing this trade field.[91]
MERCOSUR customs procedures provide that a Party may challenge the origin decisions made by another Party.[92] These procedures presuppose the maintenance of a document system in order to justify the origin decision and its exceptions.[93] Origin decisions similarly may be reviewed in the Andean Community through the General Secretariat.[94]

---

[88]NAFTA, *supra* note 48, at art. 1904(2), 107 Stat. 2057, 32 I.L.M. 682.

[89]NAFTA, *supra* note 48, at art. 1904(11), 107 Stat. 2057, 32 I.L.M. 682.

[90]NAFTA, *supra* note 48, at art. 1905, 107 Stat. 2057, 32 I.L.M. 682.

[91]NAFTA, supra note 48, at art. 1902, 107 Stat. 2057, 32 I.L.M. 682.

[92]Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay, Mar. 26, 1991, ann. II, art. 6, 30 I.L.M. 1054 (1991), *available at* http://www.sice.oas.org/trade/mrcsr/mrcsr8.asp (hereinafter MERCOSUR Treaty of Asuncion).

[93]MERCOSUR Treaty of Asuncion, *id.* at ann. II, art. 5 (allowing an exception to the satisfaction of requirements of origin when particular documentation can be presented, a "certificate informing the importing State Party and the Common Market Group, together with any background information and evidence justifying the issue of that document").

[94]Agreement on Andean Subregional Integration, entered into force Oct. 16, 1969, art. 101, 28 I.L.M. 1165 (1989)(hereinafter Cartagena Agreement).

In the MERCOSUR, functional and institutional accountability is catalogued on a broader scale. Article 47 contemplates that Parties will review the institutional structure and the functions of each of its organs.[95] The Andean Community contemplates this type of institutional accountability as well. The Andean Presidential Council annually reviews the actions taken by the bodies and institutions of the Andean Integration System, in addition to their projects, programs, and suggestions.[96]

The MERCOSUR also contains a complaint procedure that is available to state Parties as well as to natural or legal persons.[97] When a complaint is filed, the MERCOSUR Trade Commission exercises its authority to render decisions on the administration and application of the common external tariff and the common trade policy instruments.[98] The complaint may also be reviewed by the Technical Committee if the Trade Commission is not able promptly to decide the issues.[99] Therefore, in addition to the accountability ensured by the complaint procedure itself, review by the Technical Committee protects the integrity of the Trade Commission decision that is ultimately rendered.

Article 5 of the Central American Common Market agreement (CACM) contains measures that establish a minimum level of accountability and review relating to a customs officer's determination of the country of origin.[100] That provision also allows a Party to request intervention of the Executive Council, which administers the treaty, to verify the origin of an item if the origin of that item is uncertain and the uncertainty cannot be resolved through bilateral negotiations.

2. Documentation and Record Keeping

Both the CAFTA and the NAFTA promote accountability through record keeping. Each agreement provides that Parties must require importers and exporters to create and

[95]Protocol of Ouro Preto, *supra* note 67, at art. 47, 34 I.L.M. 1257.

[96]Cartagena Agreement, *supra* note 94, at art. 13. "The members of the Andean Council of Foreign Ministers and of the Commission, and the representatives of the System bodies and institutions, may attend the meetings of the Andean Presidential Council as observers."

[97]Protocol of Ouro Preto, *supra* note 67, at ann. arts. 1 & 2, 34 I.L.M. 1258.

[98]Protocol of Ouro Preto, *supra* note 67, at art. 16, 34 I.L.M. 1251.

[99]Protocol of Ouro Preto, *supra* note 67, at ann. art. 2, 34 I.L.M. 1258.

[100]CACM, *supra* note 45, at art. V.

maintain for at least five years documentation establishing the origin of traded goods.[101] The customs procedures revolve primarily around the certificate of origin, which is a fundamental instrument that becomes the basis for the construction of the administrative record of a particular trade transaction. Chapter 18 makes an administrative record essential by requiring that it constitute the basis for a decision on appeal.[102]

Under Chapter 19 of the NAFTA, the Secretariat is responsible for preparing and maintaining the record of an anti-dumping or countervailing duty dispute settlement proceeding.[103] The Secretariat serves as a centralized location to receive and file requests, briefs, and other papers presented to a binational panel.[104] "Administrative record" is given a special meaning, is made the basis for a panel's decision, and must be transmitted by the agency directly to the panel.[105]

NAFTA's chapter 10 establishes another system of record keeping that supports government procurement operations. Article 1013 outlines the documents that a government must include when it provides tender documentation to suppliers,[106] thereby furnishing to the public a benchmark by which the tender process may be observed to ensure its integrity. The CAFTA contains a similar provision regarding tender documentation.[107]

The MERCOSUR requires that export documentation and the certificate of origin must be maintained to support the reduction in duties under the agreement.[108] Copies of certificates and corresponding documents must also be kept for two years after their issuance.[109]

---

[101]NAFTA, *supra* note 48 at art. 505; 107 Stat, 2057, 32 I.L.M. 358; CAFTA, *supra* note 44, at art. 4.19.

[102]NAFTA, *supra* note 48, at art. 1805(2)(b); CAFTA, *supra* note 36 at art.. 18.5.2(b).

[103]NAFTA, *supra* note 48, at arts. 1908(2), 1908(3), 107 Stat. 2057, 32 I.L.M. 682.

[104]NAFTA, *supra* note 48, at art. 1908(3), 107 Stat. 2057, 32 I.L.M. 682.

[105]NAFTA, *supra* note 48, at arts. 1911, 1904(2), & 1904(14), 107 Stat. 2057, 32 I.L.M. 682.

[106]NAFTA, *supra* note 48, at art. 1013(1), 107 Stat. 2057, 32 I.L.M. 613.

[107]CAFTA, *supra* note 44, at art. 9.6.

[108]MERCOSUR Treaty of Asuncion, *supra* note 89, at ann. II, arts. 11-12, 30 I.L.M. 1054.

[109]*Id.at* ann. II, art. 17.

As will be noted in greater detail below, both MERCOSUR's alternative dispute resolution system and its formal system for resolving disputes anticipate, without labeling it as such, construction of a record upon which a decision on the dispute will be based.[110] In order for the MERCOSUR Council to perform one of its critical functions – supervising implementation of the formative treaties,[111] – Parties must supply the Council with documentation of actions taken to comply with their MERCOSUR obligations. Moreover, the Council's supervisory authority presupposes the existence of some channel and means of communication with the States. In fact, the formal institutional structure of the MERCOSUR implicitly demands the existence of a system of documentation and record keeping. In addition to Council supervision of implementation of the various treaties of the common market, organs of the MERCOSUR are asked to formulate new policies, make important decisions, and promulgate procedures that will bind the Parties.[112] The governing entities simply could not perform their duties without a substantial system both of communication and record keeping.

In the Caribbean Community (CARICOM), an example of the development and maintenance of a record is found in the rules controlling a Member's application of quantitative restrictions to imports that are causing serious injury to domestic producers. The Member must submit a wide range of information regarding the producers allegedly being harmed, the product, the domestic market, the nature of the imports, and the import protection being proposed.[113] These rigorous proof requirements strongly promote maintenance of a record keeping system.

Indications of the need for an administrative record appear in other Hemispheric pacts. In the CACM, five copies of the customs form must be created and the form referred to the Executive Council when there is a dispute about the origin of the goods.[114] An

---

[110]*See* Annex to the Protocol of Ouro Preto, *supra* note 67, at ann., esp. art. 2 (the Trade Commission shall, without taking further action, pass on the "dossier" to a Technical Committee) and Protocol of Brasilia for the Solution of Controversies, Dec. 17, 1991, 36 I.L.M.. 691, *available at* www.sice.oas.org/trade/mrcsrs/decisions/ANO191e.asp.

[111]Protocol of Ouro Preto, *supra* note 67, at art. 8(I), 34 I.L.M. 1249.

[112]Protocol of Ouro Preto, *supra* note 61, at ch. 1, 34 I.L.M. 1248.

[113]Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, Feb. 19, 1997, art. 92(5), *at* http://www.sice.oas.org/trade/ccme/protocol1.asp (hereinafter CARICOM).

[114]CACM, *supra* note 45, at ann. B, arts. III & V.

explicit function of the General Secretariat of the Andean Community is to serve as depository for the records of meetings and other documents.[115]

H. Trade and Due Process

We noted earlier that a connotation of fairness accompanies this essay's treatment of rules-based governance. The incidents of due process engineered by trade agreements evidence the core legal concept that implements Raz's fifth principle of the rule of law, that of observing the precepts of natural justice.[116] As Raz perceives, open and fair hearings, the absence of bias, and other emoluments of natural justice not only stand as principles of the rule of law in their own right, but also "are essential for the correct application of the law" and thus the law's ability to guide action.[117]

Law interpreted on the basis of whim or simply in the absence of knowing input from affected members of civil society is unlikely to be "correct" either from the standpoint of legal construction or of judicial credibility. The concept of due process ensures this "correctness" in law's implementation and review and FTA's profoundly contribute to the concept. Due process entails a range of considerations. We begin with the basic notions of equity, notice, and time limits, and proceed to the more advanced aspects of regularized procedures and codes of ethics.

1. Fairness – Equity, Notice, Public Participation, and Time Limits

NAFTA articles 1804 and 1805 are aimed at the heart of the classic due process protections. Article 1804 establishes the minimum level of due process that administrative proceedings must afford, including the fundamental characteristics of reasonable notice: "a description of the nature of the proceeding, a statement of legal authority under which the proceeding is initiated, and a general description of any issue in controversy."[118]

In addition, NAFTA citizens must be "afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action."[119] Similar assurances are provided by article 1805 in the context of review and appeal

---

[115]Cartagena Agreement, *supra* note 94, at art. 30(l).

[116]Raz, *supra* note 24, at 217.

[117]*Id.*

[118]NAFTA, *supra* note 48, at art.1804(a), 107 Stat. 2057, 32 I.L.M. 681 .

[119]NAFTA, *supra* note 48, at art.1804(b), 107 Stat. 2057, 32 I.L.M. 681.

procedures, including "a reasonable opportunity to support or defend their respective positions" and "a decision based on the evidence and submissions of record."[120] A parallel requirement appears in article 1904(2). The provision mandates that a panel review of an anti-dumping or countervailing duty determination be based on the deciding agency's administrative record, as exhaustively defined.[121]

NAFTA chapter 19 contains other due process characteristics. A panel's review is guided by detailed standards of review (depending on what country's determination is under review).[122] These standards, together with the need to base the decision on the administrative record, assure at least a minimum level of objectivity and thus fairness. Other due process requirements are that the request for panel review must be in writing and transmitted to the other Party involved in a timely manner, which of course facilitates fairness by putting the opposing Party on notice of the challenge. The panel will follow detailed procedures set down by the Parties and each person affected has the right to appear and be represented by counsel before the panel.[123]

Chapter 17 of the NAFTA, which protects intellectual property, injects due process standards directly into the domestic legal systems of the Parties. The chapter requires that the enforcement procedures Parties must incorporate into domestic law be fair and equitable.[124] Administrative decisions, for their part, must be in writing, must be made available without undue delay, and must be "based only on evidence in respect of which such parties were offered the opportunity to be heard."[125] Article 1715 is one of those powerful provisions that directly may change the nature of domestic judicial review for all citizens, not solely foreign exporters and investors. Parties undertake the obligation to provide domestic judicial proceedings to enforce intellectual property rights. The provision then sets down a laundry list of due process measures that must be afforded in these proceedings.[126] Defendants have a right to written notice that is timely. Parties in such a proceeding are allowed independent legal representation and

---

[120]NAFTA, *supra* note 48, at art.1805(2), 107 Stat. 2057, 32 I.L.M. 681.

[121]NAFTA, *supra* note 48, at arts.1904(2) & 1911, 107 Stat. 2057, 32 I.L.M. 682.

[122]NAFTA, *supra* note 48, at art. 1904(3), 107 Stat. 2057, 32 I.L.M. 682.

[123]NAFTA, supra note 48, at art.1904(4), (6), & (7), 107 Stat. 2057, 32 I.L.M. 682.

[124]NAFTA, *supra* note 48, at art. 1714(1), 107 Stat. 2057, 32 I.L.M. 670.

[125]NAFTA, *supra* note 48, at art. 1714, 107 Stat. 2057, 32 I.L.M. 670.

[126]NAFTA, *supra* note 48, at art. 1715, 107 Stat. 2057, 32 I.L.M. 670.

are entitled to substantiate their claims and present evidence. Their confidential information must be protected.[127]

In addition to the due process rights directly accorded parties appearing in the judicial proceedings, the courts themselves must be given a broad range of legal and equitable powers of a personal and *in rem* nature.[128] These comprehensive judicial powers forcefully implement Raz's fourth and sixth principles of the rule of law by imparting to courts both clear independence from the administrative bodies whose decisions they review, and by ensuring that the judicial system has the means to enforce implementation of the other rule of law principles.[129]

2. Regularized Procedings

NAFTA chapter 19 provides a potpourri of procedural regularity, toward institutionalizing the due process concept.[130] The theme of regular procedings can as well be noted in MERCOSUR instruments. Specific rules of internal procedure must be approved for operation of the Common Market Group, the MERCOSUR Trade Commission, and the Socio-Economic Advisory Forum.[131]

CARICOM promotes routinization by setting down substantial and explicit procedures for determination of dumping by national authorities.[132] These procedures are further evidence of implementation of a rules based system that promotes certainty and stability about what the law is and how it will be applied.

In CAFTA, chapter 8's trade remedies provisions that regulate the imposition of safeguard measures for temporary protection against surging imports go to great lengths to guarantee due process protections. A series of articles constrain and regulate the use of safeguard measures toward consistent, impartial, and reasonable administration of each Party's laws, regulations, decisions, and rulings governing

[127]NAFTA, *supra* note 48, at art. 1715(1), 107 Stat. 2057, 32 I.L.M. 670.

[128]NAFTA, *supra* note 48, at art. 1715(2), 107 Stat. 2057, 32 I.L.M. 670.

[129]Raz, *supra* note 24, at 216-217.

[130]NAFTA, *supra* note 48, at art. 1904(14), 107 Stat. 2057, 32 I.L.M. 682. The rules of procedure for binational panel review must include, *inter alia*, the content and service of panel requests, the manner of transmitting the administrative record to the panel, protection of privileged information, participation by private persons, computation and extensions of time, the form and content of briefs, and oral argument.

[131]Protocol of Ouro Preto, *supra* note 67, at arts. 14(X), 19(XI), & 30, 34 I.L.M. 1250-53.
[132]CARICOM, supra note 113, at arts. 125-133.

safeguards.[133] There is also a mandate of fairness. The investigating authority that applies safeguard measures must operate under equitable, timely, transparent, and effective procedures and be subject to review by independent administrative or judicial tribunals.[134]

3. Codes of Ethics

Most of the ethical steps taken to date relate to establishment of procedures and increasing transparency and accountability. Procedures that enhance transparency and accountability – for example, in customs administration and government procurement – diminish the circumstances that create the opportunity for irregular reimbursement by reducing the discretionary authority given to government officials.[135]

Bhala has observed that the problem of unethical activity is systemic in developing countries.[136] As noted earlier,[137] irregular behavior of this nature by government officials can directly translate into lessened economic growth by citizens of the affected country. An effective first phase of combating this problem is implementing procedures that promote transparency.[138]

The Treaty of Asuncion reflects MERCOSUR's overwhelming sentiment to thwart corruption by requiring Parties promptly to establish a harmonized regime of administrative penalties for cases of false certification, without prejudice to the corresponding criminal proceedings.[139]

NAFTA contemplates the establishment of a code of conduct for panelists and members of committees established pursuant to the chapter addressing trade remedies.[140] Section B of CAFTA chapter 18 ("Anti-corruption") begins with a statement of principle

[133]CAFTA, *supra* note 44, at art. 8.3(1).

[134]CAFTA, *supra* note 44, at art. 8.3(2).

[135]Raj Bhala, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 818 (2nd Ed. Lexis Pub. 2001).

[136]*Id*.

[137]*Surpa*, text at notes 37-39.

[138]Bhala, *supra* note 135, at 818.

[139]MERCOSUR Treaty of Asuncion, *supra* note 92, at ann. II, art. 12, 30 I.L.M. 1047.

[140]NAFTA, *supra* note 48, at art. 1909, 107 Stat. 2057, 32 I.L.M. 682.

that Parties resolve to eliminate bribery and corruption in international trade and investment, then sets out explicit benchmarks Parties must attain to achieve that statement of principle.[141]

CAFTA article 9.13 ("Ensuring Integrity in Procurement Practices") insists that each Party maintain a system that would declare persons ineligible to participate in the tender process if they are determined to have engaged in fraudulent or other illegal activities in relation to procurement.[142]

I. Contribution of FTA Dispute Resolution Systems to the Rule of Law

We recognize the existence of a degree of convergence between the aspects of FTA dispute settlement systems that contribute to rules-based governance and the contribution of FTA provisions explored earlier in this essay. Record keeping is perhaps the clearest example of this overlap.

We believe even so that the effects of dispute settlement are better understood in a separate discussion. The indirect effects on civil society of trade dispute settlement are generally more powerful and they operate in a manner distinct from the effects of other provisions. We will attempt cross references when that device appears helpful.

Much has been written about the problems both of independence and timeliness in the judicial systems of developing nations in the Hemisphere. Advancements in efficiency and administration of justice, long viewed as preconditions for private sector trade and development, have been difficult to accomplish under existing legal frameworks. According to some, what was needed was an environment "conducive to trade, financing, and investment," however, "[i]n the views of the [World] Bank, the Latin American judiciary had become an impediment to these ambitious goals due to its inefficiency, characterized by lengthy case delays, limited access to justice, a lack of transparency and predictability, and poor public confidence in the system."[143]

With an eye toward these areas of potential improvement, trade agreements being implemented in the region now have strict time tables and stricter methods for ensuring judicial impartiality. While a discussion of judicial reform is beyond the scope of our essay, the dispute resolution chapters in Hemispheric agreements indeed emphasize

[141]CAFTA, *supra* note 44, at art. 18.7-18.8.

[142]CAFTA, *supra* note 44 at art 9.13.

[143]Joseph R. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America,* 2000 Wis. L. Rev. 691, 697 (2000).

judicial independence and accountability. Independence of the judiciary has been defined as encompassing three indicators: "Detachment from interest groups such as political parties, unwillingness to bend to the views of peers within the judicial system (e.g., other judges, members of the Bar) and independence from other governmental institutions."[144]

Another secondary effect of FTA's that has had a positive impact on the rule of law ideal of accountability, reflected in Raz's sixth principle – asserting that courts must have review powers over implementation of the other principles – is in the area of administrative record keeping. Records are essential for the proper functioning of both businesses and governments. Records have been viewed as absolutely necessary for the rule of law, as they lead to accountability of the decision-makers and transparency of the decision process.

From a somewhat broader perspective, the stability of national regulations promoted by FTA's becomes an end in itself, because predictability is one of the strongest motivators of businesses to trade with and invest in a particular country. In order to continue the economic growth stimulated by a predictable set of rules, nations may be encouraged to pursue a more rules-based system of governance.

J. Trade and Timeliness in Dispute Resolution Systems

1. Time Limits

[144]Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 Va. J. Int'l L. 167, 172 (1995).

The NAFTA has an elaborate system for dispute settlement that involves separate structures for controversies involving anti-dumping and countervailing duties, investment-related disputes, and challenges to labor and environmental measures. Where none of these more specific provisions applies, chapter 20 of the NAFTA controls the controversy through its general dispute resolution mechanism.

Timeliness is central to dispute settlement under NAFTA, with tight deadlines established beginning with the length of required initial consultations and extending to
formation of a dispute panel and the ultimate implementation of the panel's report. NAFTA's basic 90-day time period is repeated in MERCOSUR as the limit for the *ad hoc* tribunal appointed to review a measure to issue its final decision, subject to further review of the Permanent Revision Tribunal.[145]

In the Andean Community, the Court of Justice is responsible for the annulment of decisions by Community organs – the Council of Foreign Ministers, the Commission, and the General Secretariat – found to have rules of the Andean Community. In the interest of timeliness, a statute of limitations limits requests for annulment to two years from the date of the original decision. If a decision is annulled, the affected Andean Community body must ensure that the judgment effectively is fulfilled within the time frame mandated by the Court of Justice.[146]

Because this review procedure may be pursued not only by member states, but also by natural or artificial persons within the Andean Community whose rights have been affected, as an alternative to filing suit in domestic courts, these timeliness dictates

[145]Protocol of Brasilia for the Solution of Controversies, Dec. 17, 1991, art. 20.

[146]Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, ch. III, *at* http://www.sice.oas.org/Trade/Junac/Tribunal/cartageA.

have broadly positive implications for civil society as a whole with respect to a wide range of activities that may be undertaken by Andean Community governing bodies. These provisions strongly support Raz's seventh principle by making review of government action more accessible by reducing delays.[147]

CARICOM's dispute settlement procedures insist on an earnest attempt at an expeditious resolution of conflict through "good offices, mediation, consultations, conciliation, arbitration and adjudication," and set detailed time lines for each of these stages in the conflict resolution process, including ultimate review by the Caribbean Court of Justice.[148]

The CACM agreement makes little reference to dispute settlement. Although the pact calls for arbitration to settle "any differences which may arise regarding the interpretation or application of any of [the treaty's] provisions" that cannot be resolved by amicable settlement, the formalities and insistence on rule of law principles such as those found in CARICOM are missing.[149]

Dispute settlement procedures under CAFTA, which are identical to those found in the U.S.-Chile FTA[150], make available to Parties that find themselves at conflict over terms of or actions taken under the FTA the full spectrum of resolution alternatives, and set strict deadlines for each stage, including explicit treatment of compliance review by the original panel.[151]

2. Alternative Dispute Resolution (ADR)

CAFTA adds a groundbreaking additional requirement whose effectuation inevitably will lead to an increase in access to justice and timeliness of decisions for the citizens of CAFTA countries, whether or not they are involved in international trade. The treaty calls for maximum efforts by Parties to facilitate ADR systems – as options not only to domestic courts, but also to the FTA's own dispute mechanisms – for resolution of

[147]Raz, *supra* note 24, at 217.

[148]CARICOM, *supra* note 113, at protocol IX: Dispute Settlement, arts. 3-10(c) & 12, *available at* http://www.sice.oas.org/trade/ccme/protoc9a.asp (CARICOM Dispute Settlement Protocol).

[149]CACM, *supra* note 45, at art. XXVI.

[150]United States-Chile Free Trade Agreement, June 6, 2003, *at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

[151]CAFTA, *supra* note 44, at ch. 20 (Dispute Settlement), *at* http://www.ustr.gov/new/fta/Cafta/text/20-dispute_settlement.pdf.

commercial disputes, and specifies the particular framework that such systems should emulate.[152]

The 1990s have witnessed a strong movement in the Americas to resolve disputes through ADR.[153] Actions include Nicaragua's 1994 decision to include a permanent mediation office with the Law School at the National University of Nicaragua in Leon, which supervises 40 cases per month, and Argentina's 1991 National Mediation Plan.

Like provisions of FTA's that require review in the Parties' domestic courts of a treaty provision's implementation,[154] requirements to fashion additional domestic procedures for the review both of agency action and private behavior will relieve crowded judicial dockets, thereby directly influencing Raz's seventh principle – access to courts – with respect to civil society in general. A potential further effect is that once these systems are fully operational and meet the anticipated international standards, an increase in their scope beyond commercial disputes becomes substantially more achievable.

Examples such as CAFTA's ADR provision show most clearly the rule of law ideals promoted in FTA's. While many do not mandate directly such reforms of domestic judicial systems, the requirements for record keeping, public notice, written rationale for decisions, and overall timeliness for each stage of dispute resolution promote the honesty, integrity, and efficiency that are so important to the level playing field that exists under the rule of law.

---

[152]CAFTA, *supra* note 44, at art. 20.22. Parties are deemed in compliance if they have acceded to and are in compliance with either the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* or the 1975 *Inter-American Convention on International Commercial Arbitration. Id.* at art. 20.22(3).

[153]Thomas J. Moyer & Emily S. Haynes, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 625-637 (2003). Argentina's program experienced a particularly strong start. Within a year, Argentina had certified 60 mediators and by 1995 a statutory mandatory mediation procedure, which does require representation by counsel, was in place. Even with the required representation, this has been seen as an improvement over the traditional court system as the "[parties] are still better off financially if they settle and avoid endless delays and expenses of litigation." In 1997 the Mediation Center expanded to include a Community Mediation Program in Buenos Aires. The proposed goal included "harmoniz[ing] neighborly coexistence, improv[ing the] quality of life, and creat[ing] a change in attitudes" and, through their conflict resolution programs in primary and secondary schools, "strengthen[ing] democratic and participatory values." *Id*. at 661, quoting Marcela Valente, *Rights-Argentina: Mediation Resolves Neighborhood Conflicts*, Inter Press Serv. (Sept. 15, 1999), *available at* 1999 WL 27374020.

[154]E.g., art. 1714(1) of NAFTA, *supra* note 48.

K. Trade and Impartiality

Under the NAFTA, substantial efforts are made to protect the impartiality of dispute panelists. This objective manifests itself in a number of ways, starting with creation of the panel. Under the general dispute settlement procedures of chapter 20, a panel of five arbitrators is constituted from a standing roster of individuals previously chosen by the three NAFTA Parties. The chair of the panel is either mutually agreed or chosen by the winner of a coin toss within 15 days of the request for the formation of the panel. In the next 15 days, each Party is to name two panelists from the opposing party.[155]

There are a number of similarities between the provisions of NAFTA and MERCOSUR. Under the most recent MERCOSUR protocol dealing with dispute resolution, which regulates disputes between Member states as well as those of private parties against Member states, one arbitrator for the three-person *ad hoc* tribunal is selected by each Member from a roster drawn by the opposing Party, with the third being mutually agreed. As ways to address impartiality, the third arbitrator may not be a citizen of either disputing country and this arbitrator acts as president of the tribunal.[156]

The objective to ensure impartiality by balancing the dispute resolution body from among Member nations also is pursued by the Andean Community for its Court of Justice, which interprets Community laws for uniformity and otherwise settles disputes. The Court has five judges, each from a different Member state. The treaty enjoins that judges must "enjoy full independence in the exercise of their duties" and, as a further means of ensuring impartiality, prohibits judges from performing "other professional activities, either paid or free of charge, except for teaching [and] any act that is incompatible with the nature of their position.[157]

Similar protections of the impartiality of panelists are found under CARICOM , whether the settlement of disputes is pursued through conciliation or arbitration.[158] Along these

---

[155]NAFTA, *supra* note 48, at art. 2011(1).

[156]Protocol of Brasilia for the Solution of Controversies, *supra* note 145, at art. 9.2.

[157]TREATY CREATING THE COURT OF JUSTICE OF THE ANDEAN COMMUNITY (AS AMENDED BY THE COCHABAMBA PROTOCOL), entered into force Aug. 25, 1999, Bol., Colom., Ecuador, Peru, Venez., arts. 6-8, *available at* http://www.sice.oas.org/Trade/Junac/Tribunal/TratModi.asp and Thomas A. O'Keefe, LATIN AMERICAN TRADE AGREEMENTS app. 23-1 (Transnational Pubs. 2004).

[158]CARICOM Dispute Settlement Protocol, *supra* note 148, at arts. 8-10. In conciliation, the disputing Members each appoint one conciliator, then must either agree on the third or ask the Secretary-General to make the appointment from a pre-existing list. During arbitration, as far as practicable no arbitrators are to be members of the disputing nations and not be affiliated with or take instructions from any Member State. *Id.*

same lines, the chair of a CAFTA dispute panel may not be a national of the disputing Parties absent their agreement, and 12 of the 60 pre-selected panelist roster candidates may actually be nationals of non-Parties, a strong vote for impartiality.[159]

L. Trade and Record Keeping

Because a dispute settlement panel normally must be given access to all or most of the administrative record upon which the decision was based in order to determine the relationship between the challenged measure and the FTA's obligations, proper record keeping becomes crucial. The creation of an administrative record anticipates, for example, that evidence upon which the decision is based be explicitly identified and placed in the file of the measure.

This necessity of recording evidence holds equally true for the methods of analysis made by the agency, which serves greatly to reduce the potential for arbitrariness because the record increases the ability for future review of such things as "job performance, actions or omissions of specific judges in specific cases." The advent of improved record keeping serves as a barrier to these potential sources of "excessive discretion" in the judiciary.[160]

FTA dispute settlement systems make decisions of national authorities affecting importers and investors subject to close scrutiny, including through reviews by entities that are independent of the agency that made the decision. Knowledge of this strict review may have a positive effect on a government's decision making process, as any potential misuse of authority will be exposed on an international level.

This effect would seem particularly important where obligations arising out of the FTA require that national authorities follow markedly different decisional processes than previously required by domestic law. Together, the dispute settlement attributes of timeliness, impartiality, and record keeping may aid the government's measures to transform the decision process into a rules-based operation, rather than one that may flow from changing opinions of agency officials alone.

Although normally only trading interests are expressly benefitted by an FTA, the creation of an administrative record almost always results in greater openness in the decision process for all affected interests, both foreign and domestic. The dispute settlement mechanisms of FTA's may serve also as alternatives for foreign interests to

---

[159]CAFTA, *supra* note 44, at art. 20.7 & 20.9.

[160]Maria González de Asis, *Anticorruption Reform in Rule of Law Programs* 10, at http://www.worldbank.org/wbi/governance/jr_africa/pdf/asis_ac_rol.pdf.

less developed judicial systems in smaller economies, and even potentially as a framework for reform for less robust court systems. A positive example such as the elimination of nationalism or other bias in reviewing whether a border measure is consistent with the FTA's obligations promotes a rule-based approach to the regulatory process in general.

M. Conclusions, and More Questions

Provisions in regional economic arrangements that encourage transparency, accountability, and due process by governments, as well as dispute settlement systems in FTA's that promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process seem powerful allies to right-minded governments interested in supplemental avenues to advance for their citizens the rule of law, by which we mean formal justice that promotes liberty.

The notice, publication, timeliness, and record keeping provisions of FTA's, in particular, seem to have outsized effects in promoting rules-based governance. As Minister Llobet remarked at the start of our essay, and she accurately reflects my own observations over two decades, these requirements have the effect of turning a mirror onto the process of government itself, revealing its strengths and weaknesses at once both to public officials and to their constituencies, often with positive effects on the lawmaking process that could not have been predicted even by the officials who negotiated the provisions. They institutionalize measures the government already is taking to advance the rule of law, thus serving as the government's conscience and relief force.

One may ask whether the Inter-American Development Bank graphs,[161] which posit that Latin America ranks low in rule of law and other governance factors, put the lie to our essay's basic premise in light of the proliferation of FTA's in the Americas. Perhaps, but our own view is that the data reflect that, although the Americas has witnessed economic integration efforts since at least the 1950's, until the 1990's these attempts at free trade have yielded to protectionist economic policies.[162] The jury is still out on whether FTA's in the Hemisphere have had noticeable impact on rules-based governance. Studies by Paul Zak of Claremont Graduate University, in association with his collaborator at the World Bank, Stephen Knack, in the new science of neuroeconomics, which searches for biological bases for economic phenomena, also give the present author cause for optimism. Their pioneering study concludes that trust

[161] *Supra*, text at notes 37-39.

[162] See O'Keefe, *supra* note 158, at 1-1.

levels (as in “Do you trust strangers?”) vary greatly between societies and is strongly correlated with economic growth. As the authors explain,

> "Trust is one of the most powerful factors affecting a country's economic health. Where trust is low, individuals and organisations are more wary about engaging in financial transactions, which tends to depress the national economy."[163]

Trust is higher in more economically homogeneous societies where legal mechanisms for constraining opportunism are better developed. High-trust societies, in turn, exhibit higher rates of investment and growth.[164] FTA’s promote the indicators of higher trust by creating a more predictable civil society environment, including the business environment, overseen by conscientious governments practicing rules-based governance. These conditions bode well for increasing trust levels in the Americas and economic growth with them.

Since the so-called “Battle in Seattle” in 1999, globalization’s opponents have confirmed that a broadly representative segment of civil society unshakably believes that trade agreements, far from being allies of human rights advocates, in fact weaken labor, health, education, and other human rights, as well as lessen the power of governments to protect against adverse environmental and health effects and to provide affordable infrastructure services such as telecommunications and electricity.[165] These civil society members would be highly unlikely to accept the proposition that FTA’s promote rules-based governance. On the other hand, the fact that these groups demand explicit provisions in FTA’s protecting human rights priorities leaves little room for acceptance of subtle, incidental effects on human rights concepts.

Even if trade negotiators accept our essay’s thesis, many questions make its immediate application problematic, we admit. For example, what steps should negotiators take to account for the specific cultural premises and substantive norms that frame the rule of law concept for use in a particular society? Is it realistic to expect that one could discover a confluence of such premises and norms within a region, for example, Central America or the Caribbean, so that regional negotiations may be undertaken among trading blocs, or must each country be addressed separately?

---

[163] 178 NEW SCIENTIST 32, 36 (May 10, 2003), available at http://fac.cgu.edu/~zakp/media/Newsci.pdf.

[164] Paul J. Zak & Stephen Knack, *Trust and Growth,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=136961. *See also The New Science of Decision Making: It’s Not as Rational as You Think,* NEWSWEEK 46, 47 (July 5, 2004).

[165] *See* Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, in TRADE LAW AND GLOBAL GOVERNANCE 495, 512 (Cameron May 2002).

At bottom, we may ask, are trade agreements, despite their importance to society as mechanisms to spur economic growth, simply unsuited as instruments to improve human rights for civil society in general, because the meat and bones of trade treaties lie in reducing barriers to open trade through nondiscrimination principles, when we know that most human rights priorities use discrimination as their most powerful avenue of enforcement?[166]

We hope our study will encourage further work in this important area.

[166]Steve Charnovitz, *Competitiveness, Harmonization, and the Global Economy*, in TRADE LAW AND GLOBAL GOVERNANCE 191, 208 (Cameron May 2002).