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Stephen J. Powell

University of Florida Levin College of Law, powells@law.ufl.edu

Patricia Camino Pérez

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GLOBAL LAWS, LOCAL LIVES: IMPACT OF THE NEW REGIONALISM ON HUMAN RIGHTS COMPLIANCE

*Stephen Joseph Powell and Patricia Camino Pérez**

INTRODUCTION

Historically, economists have advocated for the exclusion of human rights provisions from trade agreements.¹ However, in recent years, a growing number of economists begrudgingly acknowledge the incontrovertible, although presently dysfunctional, link between trade and human rights, and the need to integrate these two policies. Continuation of the brisk pace of international economic growth with its necessarily increased use of natural resources – often at unsustainable levels – and its high levels of pollution – often at the cost of citizen health – combine with the rules of the global trading system to threaten human rights to health, to freedom from forced or child labor, to non-discrimination, to a fair wage, to a healthy environment, even to democratic governance and participation in the political process.²

In light of the slow progress in the recognition of human rights by the World Trade Organization (WTO) and the recent boom in regional trade

* Professor Powell teaches international trade law courses at the University of Florida's Levin College of Law and directs the College's International Trade Law Program. Before joining the College, Powell was for 17 years Chief Counsel for Import Administration in the U.S. Department of Commerce. Ms. Camino Pérez was awarded the J.D. degree from the Levin College of Law in 2009 and practices law in South Florida. We borrowed the title, "Global Laws, Local Lives," from BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, *JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS* ch. 3 (2009), which provides a useful framework for this article.

¹ Robert Howse and Makua Matua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, RIGHTS AND DEMOCRACY 11, Jan. 2000, available at http://www.dd-rd.ca/site/_PDF/publications/globalization/wto/protecting_human_rightsWTO.pdf ("Alarming, the notion developed that measures might only be justified under Article XX if no less trade restrictive alternative could be *imagined* to achieve the policy objectives in question. Since neo-classical economists can almost always find some policy instrument other than trade restriction that could hypothetically, and without regard to real world costs, achieve a given policy objective, this interpretation amounted to making Article XX largely superfluous.").

² Stephen J. Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Free Trade Agreements*, 17 FLA. J. INT'L L. 59, 63 (2005). See HERNÁNDEZ-TRUYOL & POWELL, *supra* note *, at 4-5.

agreements (RTAs), human rights advocates are now examining whether RTAs may be more effective and efficient avenues for human rights enforcement within the global trading system, given the impossibility that trade rules can any longer afford to ignore their widespread effects on human rights. Giving particular focus to the rich history of RTAs in the Western Hemisphere, this paper explores the recent RTAs as vehicles for compliance with a variety of U.N.-mandated human rights, in a manner that is consistent with the fundamental rules of the trading system.

Part I begins by describing the recent increase in RTAs under “new regionalism.” Part II explores the protection of human rights standards in recent RTAs in the Western Hemisphere by providing a close evaluation of RTA provisions concerning labor rights, environmental protection, intellectual property protection, and protection of the intellectual property of indigenous peoples, commonly referred to as “traditional knowledge.” Part III briefly analyzes the costs and benefits of including human rights in RTAs. Finally, we conclude that states have moral, legal, and economic obligations to take advantage of these possibilities to achieve greater integration of human rights in the trade rules formed by RTA and offer recommendations toward combining increased economic growth with improved well-being of their civil societies.

I. THE EMERGENCE OF REGIONAL TRADE AGREEMENTS

A. *History of Regional Trade Agreements and the World Trade Organization*

RTAs have been a feature of the world trading system since the late 1950s.³ In the 1980s, the uncertainty of a successful conclusion to the Uruguay Round of multilateral trade negotiations prompted an increased interest in regionalism.⁴ However, the surprisingly successful conclusion of the Uruguay Round and the establishment of the WTO did not diminish interest in RTAs.⁵ In fact, there has been a boom in RTA negotiations in the last decade and a half.⁶ Reports show that Members notified as many as ten

³ T.N. SRINIVASAN, *DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM: FROM THE GATT TO THE URUGUAY ROUND AND THE FUTURE* 59 (Westview Press 1998); see WTO, *Regional Trade Agreements*, <http://rtais.wto.org/UI/PublicAllRTAList.aspx> (last visited Feb. 11, 2011).

⁴ SRINIVASAN, *supra* note 3, at 59.

⁵ *Id.* at 60-61.

⁶ See WTO, *Regional Trade Agreements Gateway*, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Feb. 11, 2011).

RTAs to the WTO in the short period from July 2009 to October 2009.⁷ The currently stalled Doha Round negotiations,⁸ which emphasize “problems developing countries face in implementing the current WTO agreements,”⁹ and the expansion of globalization into increasingly domestic regulatory arenas have formed “the perfect storm” for another surge of RTAs.

The emergence of RTAs does not necessarily conflict with WTO rules or the global trading system. As we will show, RTAs provide an avenue for trade liberalization in areas that the WTO has yet to address. In addition, RTAs may also provide for the advancement of areas in trade that are difficult to address and enforce at a global level.

Although the concept of RTAs might seem contrary to the WTO’s agenda of promoting global free trade, an exception provision in the General Agreement on Tariffs and Trade (GATT) permits the maintenance of RTAs despite their discriminatory central attractions. Article I of the GATT, the Most-Favored-Nation Clause, restricts WTO Members from discriminating against the imports of other Members based on the country of origin.¹⁰ Article XXIV, however, provides Members with a way around this clause by providing a special exception where members may enter into preferential trade agreements if they meet strict criteria.¹¹ These standards include RTA notification requirements, information provisions, and transparency requirements.¹² The WTO recently enacted the Transparency Mechanism for Regional Trade Agreements¹³ to “ensur[e] that regional

⁷ *Goods Chair Says 10 New Regional Trade Agreements Notified to the WTO*, WTO NEWS, Oct. 30, 2009 (World Trade Organization), http://www.wto.org/english/news_e/news09_e/good_30oct09_e.htm (last visited Feb. 11, 2011).

⁸ See, e.g., Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT’L L. J. 1, 5 (2009).

⁹ World Trade Organization, *Doha Development Agenda: Negotiations, implementation and development*, http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited May 18, 2011).

¹⁰ General Agreement on Tariffs and Trade art. I, Jan. 1, 1948, 55 U.N.T.S. 194-95 [hereafter GATT].

¹¹ *Id.* at 268-72.

¹² General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. XXIV, 1867 U.N.T.S. 219-21, 33 I.L.M. 34-36 (1994), in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 31-33, 522-25 (Geneva: GATT Secretariat 1994).

¹³ WTO General Council, Transparency Mechanism for Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (last visited Feb. 11, 2011).

trade agreements become building blocks, not stumbling blocks, to world trade.”¹⁴ The Transparency Mechanism requires Members to give early notification to the WTO of new RTA negotiations.¹⁵ Formal notification is required once WTO Members ratify the RTA, which must include extremely detailed information about the agreement.¹⁶ The WTO Secretariat then makes a factual presentation, which is followed by a single formal meeting of the Members.¹⁷

Currently, about ninety percent of RTAs are free trade agreements (FTAs), with the rest being customs unions.¹⁸ The principal difference between the two integration instruments is that parties to a customs union have not only lowered tariff barriers among themselves, but have harmonized their tariffs with respect to imports into the territory of the customs union.¹⁹ Although the requirement of a report and recommendation regarding new RTAs may seem beneficial, the actual benefit of these new transparency mechanisms remains uncertain.²⁰ Even if the committees evaluating these agreements remain efficient, the prospective increase of RTAs may very well overwhelm the process. In addition, commentators believe that because every WTO Member is a party to at least one RTA, it is likely that WTO Members are under pressure to refrain from being critical of other RTAs.²¹

Although Members have not notified all RTAs to the WTO, it is safe to assume that most RTAs have indeed been submitted for approval.²² Members have notified 474 RTAs to the WTO or to its predecessor, the

¹⁴ WTO, 2006 News Items – *Lamy Welcomes WTO Agreement on Regional Trade Agreements*, http://www.wto.org/english/news_e/news06_e/rta_july06_e.htm (last visited Feb. 11, 2011).

¹⁵ Transparency Mechanism for Regional Trade Agreements, *supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ WTO, Regional Trade Agreements Gateway, *supra* note 6.

¹⁹ DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 92 (2008); *see also* CHRIS WOLD ET AL., TRADE AND THE ENVIRONMENT – LAW AND POLICY 71 (2005).

²⁰ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 41 (2009).

²¹ *See id.*

²² *See id.* at 57 (arguing that since there are 153 Members that are party to the WTO, it is unlikely that there are a significant number of RTAs that do not have at least one WTO Member; consequently, most all RTAs would be required to notify itself to the GATT).

GATT.²³ Most of these RTAs were notified to the WTO in accordance with the notification requirement of GATT Article XXIV (7)(a).²⁴ The recent appearance of numerous RTAs has laid the foundation for a serious debate regarding their costs and benefits. This debate involves matters ranging from economic and political issues to security and human rights issues.²⁵ The WTO believes that regional and multilateral integration could be complementary in view of the fact that some members of regional agreements have accepted higher levels of obligation than those existing in earlier multilateral negotiations.²⁶ As such, these agreements would lay a foundation for future multilateral progress in those areas not yet covered by multilateral agreements.²⁷

The United States has been a key player in the recent boom of RTAs in the twenty-first century. Since 2000, the United States has formed regional trade agreements with several countries in the Americas including Chile, Peru, Mexico, Canada, the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.²⁸ In addition, the United States has been an active participant in the proliferation of RTAs with geographically distant countries, which include, among others, Jordan, Singapore, Australia, Morocco, and Bahrain.²⁹

B. The Fall of Old Regionalism and the Rise of New Regionalism

What has been dubbed old regionalism was characterized by regional trade agreements formed in the bipolar, Cold War context of the

²³ WTO, Regional Trade Agreements Gateway, *supra* note 6.

²⁴ *Id.*; see also GATT, *supra* note 10, at 523 art. XXIV (7)(a) (“Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.”).

²⁵ See Export-Import Bank of India, *Regional Trade Agreements: Gateway to Global Trade* 13, Occasional Paper No. 120 (Oct. 2007), available at <http://www.eximbankindia.com/op/op120.pdf>.

²⁶ SRINIVASAN, *supra* note 3, at 61, 140.

²⁷ *Id.*

²⁸ Brian Cimboric, *The Impact of Regional Trade Areas on International Intellectual Property Rights*, 48 IDEA 53, 58 (2007).

²⁹ See Trade Agreements: Office of the United States Representative, <http://www.ustr.gov/trade-agreements> (last visited Feb. 11, 2011).

1960s and 1970s.³⁰ The goal of regional trade agreements during this period was to substitute imports using strong protectionist standards.³¹ Old regionalism depicted foreign exports with skepticism. States were wary of any future scenario where they would become dependent on foreign products.³² The debt crisis of the 1980s caused a recession of RTAs where regionalism technically shut down.³³ The resurgence of regionalism a few years later marked the beginning phases of what is now known as “new regionalism.”

New regionalism has a number of focal characteristics that give it shape. Contrary to old regionalism, new regionalism was formed in a multi-polar environment where former superpowers became regional powers competing with emerging regional powers.³⁴ In this context, RTAs are further characterized as having a more comprehensive and multidimensional structure that not only includes economically oriented objectives, but also environmental, political, social, and democratic objectives.³⁵ New regionalism is also considered to be more compatible with the multilateral structure and interdependent economies that define present global relations.³⁶ As a result, trade liberalization was extended to all member partners and occurred through non-tariff and non-border reforms such as mutual recognition of product standards, as well as customs harmonization.³⁷ New regionalism is also distinguished by its framework provisions that allow for the involvement of non-state actors.³⁸ This outcome follows the tenets of the new regionalism, under which any country willing to accept the conditions of the agreement is welcome. As noted above, the result is the proliferation of trade agreements between developed and emerging market countries.

³⁰ Bjorn Hettne, *The United Nations and Conflict Management: The Role of the “New Regionalism”*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 643, 653 (1994).

³¹ See Robert Devlin & Antoni Estevadeordal, Inter-American Development Bank, *What’s New in the New Regionalism in the Americas?*, Working Paper No. 6, (2001).

³² *Id.* at 3, 14.

³³ *Id.* at 5, 20.

³⁴ Hettne, *supra* note 30, at 653.

³⁵ Chun Hung Lin, *Regionalism or Globalism? The Process of Telecommunication Cooperation Within the OAS and NAFTA*, 11 CURRENTS: INT’L TRADE L. J. 30, 32 (2002); Hettne, *supra* note 30, at 653.

³⁶ Hettne, *supra* note 30, at 653.

³⁷ Hung Lin, *supra* note 35, at 32.

³⁸ Hettne, *supra* note 30, at 653.

II. THE INTEGRATION OF HUMAN RIGHTS INTO REGIONAL TRADE AGREEMENTS

International trade laws were designed to allow parties to make full use of their comparative advantage to break down barriers and promote freer trade. The WTO achieves this purpose primarily through several non-discrimination provisions supporting the free movement of goods. As noted, the Most-Favored-Nation Clause in the WTO's GATT requires that a WTO Member must accord to the products of every other Member any advantage or privilege that the Member accords to the like products from any nation.³⁹ Similarly, the WTO's National Treatment Clause requires Members to treat foreign products "no less favorably" than they treat "like" domestic products.⁴⁰ Although these trade rules work to achieve freer trade, they have weakened the government's ability to promote sustainable development, reduce the growing gap between rich and poor, protect core labor standards, and preserve indigenous identities.⁴¹

Although the WTO agreement makes no direct reference to human rights, an arsenal of WTO provisions could be used to promote conscious integration of human rights in trade agreements.⁴² The World Trade Court⁴³ has in the past interpreted some WTO provisions as pertaining to human rights by embracing the use of public international law, including custom-

³⁹ GATT, *supra* note 10, at 486-87.

⁴⁰ Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT'L L. 219, 222 (2004).

⁴¹ See WOLD, *supra* note 19, at 168.

⁴² Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 29, 63 (Thomas Cottier, et al. eds., 2005). See Stephen J. Powell & Paola A. Chavarro, *Seventh Annual Conference on Legal & Policy Issues in the Americas: Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations*, 20 FLA. J. INT'L L. 93, 97 (2008).

⁴³ We use this substantially more descriptive term instead of "Appellate Body," the unfortunate title conferred by the WTO. As explained in HERNÁNDEZ-TRUYOL AND POWELL, *supra* note *, at n. 7 to ch. 2, the name "more accurately situates the [Appellate Body] within the international law dispute settlement system" because it is the final arbiter of international trade disputes among states. See Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2, 1869 U.N.T.S. 401, 417-19 (1995), 33 I.L.M. 1226, 1236-37 (1994), in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 404, 417-19 (1994).

ary and treaty sources of human rights law.⁴⁴ Specifically, the World Trade Court's interpretation of GATT Article XX has paved the way for the elevation of human rights issues over economic ones.⁴⁵ Article XX can be used to protect human rights because it allows for trade limitations that serve to protect public morals, protect human, animal, or plant life or health, and conserve natural resources.⁴⁶ These rules clearly are relevant to the protection of a variety of human rights.

Since the creation of the WTO, there has been a shift away from multilateral trade agreements toward regional and bilateral agreements. Today, RTAs build on World Trade Court interpretations by supplying rules explicitly linking market values to standards protecting human rights.⁴⁷ These standards add important protections to those considered relevant by the WTO.⁴⁸ Several economically powerful countries are now changing the politics and agenda of trade agreements by advancing human rights principles through the use of RTAs.⁴⁹ The United States, for example, will not consider entering into a trade partnership with most countries unless these countries demonstrate that their governments have made and continue to make domestic commitments toward the protection of human rights.⁵⁰

Only a handful of developed countries and a limited number of emerging market countries have taken on the task of linking trade and social protection in RTAs.⁵¹ Numerous RTAs promise to "[p]romote economic development in a manner consistent with environmental protection and conservation and with sustainable development."⁵² Other agreements reaffirm the commitment of the parties to human rights values without further explanation or insight into how these commitments are associated with the core elements of the agreement.⁵³ Some include provisions that set "pos-

⁴⁴ Powell & Chavarro, *supra* note 42, at 95.

⁴⁵ *Id.*

⁴⁶ GATT, *supra* note 10, at 519-20.

⁴⁷ See EMILIE M. HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS 6 (2009).

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 147.

⁵¹ See Lorand Bartels, *Social Issues: Labour, Environment and Human Rights*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 342, 345 (Simon Lester & Bryan Mercurio eds., 2009).

⁵² See, e.g., Preamble to the Free Trade Agreement between the Governments of Central America and Chile, *available at* <http://www.comex.go.cr/acuerdos/chile/Texto%20del%20acuerdo/Preambulo.pdf>.

⁵³ Bartels, *supra* note 51, at 346.

itive social standards” in the territories of the parties.⁵⁴ In general, the protections embedded in these RTAs focus on three main areas of human rights: labor rights, environmental protection, and protection of the intellectual property critical to indigenous populations.

A. RTAs and the Integration of Labor Rights

1. Labor Rights in International Trade

Since 1919, the main instruments promoting international labor standards have been the labor conventions adopted by the International Labor Organization (ILO).⁵⁵ In 1998, the ILO adopted the Declaration of Fundamental Principles and Rights at Work, which established certain core labor standards: the freedom of association and the right to engage in collective bargaining, the elimination of forced labor, the elimination of child labor, and the elimination of employment discrimination.⁵⁶ These core labor standards parallel the international labor standards referenced in several human rights agreements, including the Universal Declaration of Human Rights, the International Convention of Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.⁵⁷ While the ILO’s core standards certainly represent the most fundamental labor protections, it is important to note that agreement could not be reached on the inclusion of other extremely important worker rights, such as the right to fair wage and reasonable rest.

The linkage between trade and labor rights has become one of the most contentious issues in trade and labor policy debates.⁵⁸ Although there are several well-founded rationales for linking the two, leaders of emerging market countries passionately oppose enforcing labor restrictions through trade sanctions.⁵⁹ This opposition stems from the fear that concessions to labor standards will reduce the advantage of emerging markets in the global

⁵⁴ *Id.*

⁵⁵ Virginia A. Leary, “Form Follows Function”: Formulations of International Labor Standards – Treaties, Codes, Soft Law, Trade Agreements, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY 179 (Robert J. Flanagan & William B. Gould IV eds., 2003).

⁵⁶ Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 263 (2005).

⁵⁷ *Id.*

⁵⁸ *Id.* at 261.

⁵⁹ Powell & Chavarro, *supra* note 42, at 97.

trading system.⁶⁰ Studies suggest that developed countries have superior labor and health conditions.⁶¹ Thus, companies in the emerging markets believe they will never gain the economic ability to achieve such conditions until these developing countries industrialize using lower working standards, as did today's developed countries in the past.⁶² Consequently, trade-enforced labor standards would continue to give the developed countries a comparative advantage.

Emerging market countries also argue that implementing higher labor standards as a condition in trade agreements could be used as a disguised form of protectionism by developed countries,⁶³ thus aggravating an already unequal distribution of trade's bounty.⁶⁴ However, the ILO's Work Declaration specifically disclaims any use of labor standards for protectionist purposes, which provides a firm basis for a dispute settlement challenge.⁶⁵ Nevertheless, many countries continue to fear that high labor standards in trade agreements will open the door for developed countries to protect their domestic producers.

The opposing view is that emerging market countries that do not adopt core labor standards gain a competitive advantage over countries that do abide by these standards.⁶⁶ Exporting nations that produce goods by processes that fail to comply with fundamental worker protections would be engaging in unfair competition, ultimately depriving countries that do abide by these standards of their legitimate market share.⁶⁷

The ILO Constitution states that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."⁶⁸ The ILO mostly pursues its mandate through investigations, public reporting, and

⁶⁰ See Christian Barry & Sanjay G. Reddy, *International Trade and Labor Standards: A Proposal for Linkage*, 39 CORNELL INT'L L.J. 545, 574 (2006).

⁶¹ Robert J. Flanagan, *Labor Standards and International Competitive Advantage*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY 26 (Robert J. Flanagan & William B. Gould IV eds., 2003).

⁶² See Powell & Chavarro, *supra* note 42, at 97.

⁶³ Flanagan, *supra* note 61, at 15.

⁶⁴ Andrea R. Schmidt, *A New Trade Policy for America: Do Labor and Environmental Provisions in Trade Agreements Serve Social Interests or Special Interests?*, 19 IND. INT'L & COMP. L. REV. 167, 174 (2009).

⁶⁵ Powell & Chavarro, *supra* note 42, at 99.

⁶⁶ Flanagan, *supra* note 61, at 15.

⁶⁷ Trebilcock & Howse, *supra* note 56, at 266.

⁶⁸ INTERNATIONAL LABOUR ORGANIZATION CONST., pmbl., available at <http://www.ilo.org/ilolex/english/constq.htm>.

technical assistance rather than formal sanctions.⁶⁹ Arguably, attempting to enforce a universal set of labor standards for all states without accounting for their level of economic development will affect their ability to participate fully in the global market.⁷⁰ No universal formula prescribes an efficient way to incorporate labor rights into trade agreements.⁷¹ Because conditions will be different for every party to a trade agreement, the worker rights provisions must account for these specific circumstances. Thus drafted, RTAs will provide greater opportunity to ensure the establishment of more relevant labor standards and achieve increased enforcement of human rights through trade.

2. The Effect of Labor Rights Provisions in Current RTAs

There are two important distinguishing features to look for regarding the integration of labor rights in RTAs. The first is whether the framework of the RTA includes integration of labor harmonization, that is, a common set of worker rights that bind all state-parties to the agreement. The second is whether the RTA includes some enforcement mechanism to implement the labor standards, including, in particular, a provision for trade sanctions for the violations.

RTAs that include labor rights provisions generally address both substantive and procedural rights. Substantive labor rights include maximum working hours, minimum wages, and health and safety protections.⁷² Procedural labor rights include the right of association and the right to collective bargaining.⁷³

The three RTAs discussed herein mark the progress of labor rights in Latin American trade. The first Latin American RTA discussed is MERCOSUL (known in English as the “Southern Common Market”). We then discuss labor rights under the North American Free Trade Agreement (NAFTA), its side agreement, the North American Agreement on Labor Cooperation (NAALC), and the recently adopted United States-Peru Trade Promotion Agreement. Although this article focuses on Latin American RTAs, we begin by discussing the United States-Oman Free Trade Agreement because it provides a noteworthy example of negotiations for a trade

⁶⁹ Trebilcock & Howse, *supra* note 56, at 262.

⁷⁰ Powell & Chavarro, *supra* note 42, at 99-100.

⁷¹ See Kristi Schaeffer, Note, *Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States*, 45 COLUM. J. TRANSNAT'L L. 829, 857 (2007).

⁷² Michael A. Cabin, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, 109 COLUM. L. REV. 1047, 1051 (2009).

⁷³ *Id.*

agreement that began a process prompting the emphasis of worker rights that may not have otherwise occurred.

a. The United States-Oman Free Trade Agreement

Before the United States reached a trade agreement with Oman in 2006, the State Department analyzed the human rights violations committed by the Omani government.⁷⁴ According to the Department's subsequent report, Oman had "severely restricted" workers' human rights for many years⁷⁵ and noted that Omani labor laws prevented workers from having procedural labor rights including creating or belonging to labor unions, the right to strike, or the right to bargain collectively.⁷⁶ Further, the few labor laws Oman did implement only applied to Omani nationals; foreigners in the country were left without formal protections, resulting in their suffering from conditions tantamount to forced labor.⁷⁷

Negotiations with the United States for the creation of a trade agreement that included human rights standards pressured Oman to improve its domestic labor standards.⁷⁸ By 2006, Oman had reformed its labor laws and extended them to foreign workers in an attempt to comply with international labor standards.⁷⁹

The treaty between the United States and Oman was signed on January 19, 2006.⁸⁰ By the summer of 2006, Oman had already issued a royal decree revising Omani laws to meet certain ILO core labor standards,⁸¹ providing workers with the right to exercise procedural labor rights.⁸² This is a prime example of a developed country pushing for stricter labor standards from an emerging market economy, which has resulted in significant changes for the human rights of the Omani people.

⁷⁴ HAFNER-BURTON, *supra* note 47, at 148.

⁷⁵ *Id.*

⁷⁶ *Id.*; Mary Jane Bolle, *USA-Oman Free Trade Agreement*, CRS REPORT FOR CONGRESS 13-14 (Oct. 10, 2006), available at <http://fpcc.state.gov/documents/organization/75249.pdf>.

⁷⁷ HAFNER-BURTON, *supra* note 47, at 148.

⁷⁸ *Id.*

⁷⁹ Donna Borak, *House Debate Oman Labor Rights in U.S. FTA*, UNITED PRESS INT'L, Apr. 6, 2006, available at http://citizenstrade.org/pdf/upi_housedebatsoman_labor_04062006.pdf; see also HAFNER-BURTON, *supra* note 47, at 148.

⁸⁰ HAFNER-BURTON, *supra* note 47, at 147.

⁸¹ *Id.* at 149.

⁸² *Id.*

The United States-Oman Trade Agreement finally entered into force on January 1, 2009.⁸³ Since this date, the United States and Oman continue to cooperate to increase labor rights as well as environmental rights.⁸⁴ The significant change in Omani law is exemplary proof of how RTAs can be an important avenue for the enforcement of human rights. In addition, the United States-Oman relationship is an example of how RTAs can yield quicker improvements to human rights enforcement than global treaties. In this instance, a human rights change that might have taken decades under a multilateral setting was addressed more efficiently in a regional setting.

b. MERCOSUL

The signing of the Treaty of Asuncion in 1991 established the Southern Common Market, commonly referred to as MERCOSUL.⁸⁵ MERCOSUL's members include Argentina, Brazil, Paraguay, and Uruguay, making it the largest trade block in South America.⁸⁶ The MERCOSUL framework was initially modeled after the governing structure of the European Union.⁸⁷ The Common Market Group acts as the major

⁸³ Office of the U.S. Trade Representative, Oman Free Trade Agreement, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta>.

⁸⁴ At a February 7, 2010 meeting with the Sultan of Oman, Assistant U.S. Trade Representative Christopher Wilson reiterated the U.S. commitment to labor rights and environmental protections, and stated that “[t]he meetings in Oman are an important example of the United States’ commitment to ensuring that our trade agreements . . . promote enhanced protections for labor rights and the environment.” Press Release, Office of the U.S. Trade Representative, U.S. and Oman Hold Joint Committee Meeting of the U.S. – Oman Free Trade Agreement (Feb. 12, 2010), *available at* <http://www.ustr.gov/united-states-and-oman-hold-joint-committee-meeting-us-oman-free-trade-agreement>.

⁸⁵ MERCOSUL is the treaty’s acronym in Portuguese; in Spanish, it is known as MERCOSUR.

⁸⁶ When Hugo Chávez withdrew Venezuela in 2006 from the Andean Pact of Northwestern countries in South America, Venezuela’s full membership in MERCOSUL seemed assured. Brazil and Paraguay soon had second thoughts about Chávez’s plans to add political objectives to MERCOSUL’s trade mission, and Venezuela’s membership is no longer active. See Joanna Klonsky & Stephanie Hanson, *MERCOSUR: South America’s Fractious Trade Bloc*, COUNCIL ON FOREIGN RELATIONS BACKGROUNDER (last modified Aug. 20, 2009), www.cfr.org/publication/12762/mercosur.html (last visited Feb. 11, 2011).

⁸⁷ Ljiljana Biukovic, *Dispute Resolution Mechanisms and Regional Trade Agreements: South American and Caribbean Modalities*, 14 U.C. DAVIS J. INT’L L. & POL’Y 255, 270 (2008).

executive body of MERCOSUL and is given decision-making functions that include monitoring, compliance, and enforcement of the Asuncion Treaty.⁸⁸ The Group is composed of four representatives from each member state and may reach a decision only by consensus.⁸⁹ Using this formula, MERCOSUL appears to achieve integration through a political process, but delegates little power to the institutions themselves. Some critics view this structure as demonstrating the lack of commitment MERCOSUL members have for deep economic integration⁹⁰; we note, however, that the same structure is employed in the NAFTA and the WTO, neither of which seeks comprehensive economic integration. Nevertheless, the decisions made by the Common Market Group are binding on the members.⁹¹

While MERCOSUL contains general human rights language, it lacks specific human rights obligations that establish members' common commercial policy.⁹² However, MERCOSUL members have made efforts to improve human rights standards, which can be considered an acknowledgment of the undeniable link between trade and human rights. For example, MERCOSUL has commitments to core labor standards set forth by the International Labor Organization. If a member believes another member has violated one of these ILO commitments, the Commission on Social and Labor Matters will review the allegations.⁹³ However, similar to the MERCOSUL Trade Commission, the Commission on Social and Labor Matters cannot impose sanctions; this power remains with the national governments.⁹⁴

MERCOSUL members frequently meet in working groups and discuss policy objectives, including human rights concerns.⁹⁵ Directly under the Common Market Group are working subgroups that conduct studies on

⁸⁸ Schaeffer, *supra* note 71, at 834.

⁸⁹ *Id.*

⁹⁰ See Biukovic, *supra* note 87, at 271.

⁹¹ Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR (Protocol of Ouro Preto) art. 15, Dec. 14, 1994, available at http://untreaty.un.org/unts/144078_158780/12/10/4997.pdf.

⁹² SUSAN ARIEL AARONSON & JAMIE M. ZIMMERMAN, TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING 106 (2008).

⁹³ Pedro da Motta Veiga & Miguel F. Lengyel, Inter-American Development Bank, *International Trends on Labor Standards: Where Does Mercosur Fit In?* 17, Jun. 2003, available at <http://idl-bnc.idrc.ca/dspace/bitstream/10625/27827/1/124138.pdf>.

⁹⁴ AARONSON & ZIMMERMAN, *supra* note 92.

⁹⁵ *Id.*

specific concerns affecting MERCOSUL.⁹⁶ Created in 1992, Subgroup No. 10 on Labor Relations, Employment, and Social Security has pushed for improvements by members in the areas of labor relations, employment and labor migration, professional development, health, safety, and social security by the oversight of eight committees.⁹⁷ Subgroup No. 10 is also responsible for defining substantive labor rights norms for MERCOSUL. In making its recommendations, the Subgroup called for members to ratify thirty-four ILO Conventions determined to be essential in achieving fair labor standards.⁹⁸ Further, Subgroup No. 10 created the Labor Market Observatory, which researches and analyzes issues relating to the labor markets of each member country.⁹⁹

In addition to the working subgroups, MERCOSUL members addressed labor concerns through the 1998 adoption of the Socio-Labor Declaration.¹⁰⁰ This Declaration asserts a variety of labor rights, including non-discrimination, equality, freedom of association, the right to strike, elimination of forced labor, and the rights of the unemployed.¹⁰¹ Unfortunately, however, the document lacks a mechanism for enforcement.¹⁰² While MERCOSUL lacks explicit protections for worker rights within the instrument itself, members take labor protection seriously and have continuously engaged in a standard-setting process to guide the national governments in improvement of their human rights record with respect to workers. In 2009, MERCOSUL created the Institute of Public Politics for Human Rights.¹⁰³ Headquartered in Buenos Aires, the Institute's purpose is to create, design, and monitor human rights throughout the region in accordance with international standards.¹⁰⁴ The Institute will conduct human right studies and serve as a forum for further discussions among members regarding human rights

⁹⁶ Schaeffer, *supra* note 71, at 834.

⁹⁷ *Id.* at 836.

⁹⁸ *Id.*

⁹⁹ *Id.* at 835-36.

¹⁰⁰ Socio-Labour Declaration, MERCOSUR, Dec. 10, 1998, *available at* <http://www.mercosur.int/innovaportal/types/file/downloadfilecontent.jsp?contentid=103&site=1&channel=secretaria>.

¹⁰¹ *Id.*

¹⁰² Schaeffer, *supra* note 71, at 838.

¹⁰³ *See* About MERCOSUR, Human Rights in MERCOSUR *available at* <http://www.mercosur.int/show?contentid=655&channel=secretaria> (last visited Apr. 23, 2011).

¹⁰⁴ *Id.*

issues.¹⁰⁵ Although the Institute seems to be a positive step toward the further integration of human rights issues into the MERCOSUL culture, it is unclear at this early stage what effect, if any, it will have as a future enforcement mechanism for human rights violations.

c. North American Agreement on Labor Cooperation

NAFTA was one of the first RTAs with significant links to labor rights.¹⁰⁶ The original NAFTA agreement did not directly address labor rights. However, increased U.S. concern about the general effect of RTAs on labor conditions prompted officials to reconsider the integration of labor rights into NAFTA. One of the biggest concerns at the time was the Mexican labor laws. Although Mexican labor practices appeared to be consistent with most ILO Conventions, there was concern that they were not fully enforced.¹⁰⁷ These concerns eventually led to the promulgation of the labor side agreement to NAFTA, the North American Agreement on Labor Cooperation (NAALC).¹⁰⁸ However, NAALC lacks an effective enforcement mechanism and explicitly allows each party “to establish its own domestic labor standards.”¹⁰⁹ As we noted earlier, the failure of an RTA to harmonize labor standards to an objectively acceptable level, twinned with weak enforcement of this even lower threshold, portend an inauspicious beginning of efforts to protect workers from human rights violations in the workplace.

The NAALC, along with its environmental counterpart, the North American Agreement on Environmental Cooperation (NAAEC), are notable because they both provide for an adjudicative process that is open to governmental and non-governmental groups.¹¹⁰ The NAALC has a citizen petition process that allows a private person to file a complaint.¹¹¹ Complaints alleging that a NAFTA party is not enforcing its labor laws are sent

¹⁰⁵ *Id.* See also News Ministerio de Justicia, Seguridad y Derechos Humanos de Argentina, Comunicados de Prensa, (Mercosur’s Creation of the IPPDDHH), Jul. 27, 2009, available at <http://www.derhuman.jus.gov.ar/institucional/prensa/2009/jul.html>.

¹⁰⁶ Cabin, *supra* note 72, at 1055.

¹⁰⁷ Trebilcock & Howse, *supra* note 56, at 295.

¹⁰⁸ North American Agreement on Labor Cooperation, available at <http://www.naalc.org/index.cfm?page=147>.

¹⁰⁹ North American Agreement on Labor Cooperation, art. 2., available at <http://www.naalc.org/naalc/naalc-fulltext.htm>.

¹¹⁰ Ruth Buchanan & Rusby Chaparro, *International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labor Cooperation*, 13 UCLA J. INT’L L. & FOREIGN AFF. 129, 131 (2008).

¹¹¹ See *id.* at 131 n.3.

to one of the three National Administrative Offices (NAOs) representing each member country.¹¹² The NAO reviews the complaint, commissions a legal study, and issues a report with findings and recommendations.¹¹³

The NAALC goes beyond many RTAs by providing for the possibility of using sanctions in the systematic reinforcement of domestic labor laws.¹¹⁴ The process is a ladder structure where only some of the complaints can proceed to the second and third steps.¹¹⁵ The first step involves the consultation of parties, whereby the parties in dispute must make a full attempt to arrive at a mutual resolution of the matter at issue.¹¹⁶ If a dispute is not resolved by ministerial consultations, then a party can request the establishment of an Evaluation Committee of Experts (ECE) to review such matters.¹¹⁷ Notably, disputes regarding procedural labor laws, which include the freedom of association, the right to bargain collectively, and the right to strike have no option for dispute mechanism and cannot be heard by the ECE.¹¹⁸ In addition, the ECE may not be convened if the matter at issue is not trade-related or is not covered by the mutual recognition of labor laws.¹¹⁹

In the third and final step, an arbitral panel is established.¹²⁰ However, this step can only be invoked in relation to three areas of labor laws: child labor rights, minimum wages, or occupational safety and health.¹²¹ This detail is crucial because the only significant avenue of true enforcement is to reach the third step, in which the arbitral panel has the power to

¹¹² NAALC, *supra* note 109, at arts. 15, 21.

¹¹³ Buchanan and Chaparro, *supra* note 110, at 138.

¹¹⁴ NAALC, *supra* note 109, at art. 22-24, 29. The NAALC three-step process toward adjudication consists of the following three steps: (1) anything within the scope of the agreement can request ministerial consultations with another party, (2) establishment and evaluation by the Evaluation Committee of Experts, and (3) establishment and evaluation by an arbitral panel; *see also*, Buchanan & Chaparro, *supra* note 110, at 138.

¹¹⁵ Buchanan & Chaparro, *supra* note 110, at 138.

¹¹⁶ NAALC, *supra* note 109, at art. 27.

¹¹⁷ NAALC – ECE's and Arbitral Panels, <http://www.naalc.org/naalc/ece.htm> (last visited Feb. 11, 2011).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ NAALC, *supra* note 109, at art. 29; *see also* Buchanan & Chaparro, *supra* note 110, at 138.

¹²¹ NAALC, *supra* note 109, at art. 27.1; *see also* Buchanan & Chaparro, *supra* note 110, at 138.

levy a “monetary enforcement assessment.”¹²² The possibility that any labor dispute will survive this arduous process and that a monetary assessment will be imposed for a violation seems remote.

The NAALC has been criticized because it does not establish a common regimen of labor standards and does not have an effective enforcement method.¹²³ However, some critics believe that the publicity surrounding the NAO recommendations create pressure for governments to improve their human rights record with respect to their workers.¹²⁴ Many later RTAs, such as the United States-Chile Free Trade Agreement and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) followed the NAALC structure in implementing labor rights, causing increased concern over the rapid spread of “soft law” agreements with respect to workers. However, as described in the next section, the United States would take an important step toward genuine enforcement of labor rights in its negotiations with Peru.

d. United States-Peru Trade Promotion Agreement (U.S.-Peru TPA)

In 2006, the United States and Peru signed a bilateral free trade agreement¹²⁵ that, in the pattern set by other recent U.S.-negotiated agreements, contained labor and environmental provisions.¹²⁶ However, a significant difference in this particular agreement is that labor protections are enforceable obligations that provide for the same settlement procedures and remedies set forth in commercial obligations.¹²⁷

The U.S.-Peru TPA requires that parties abide by the principles of the ILO Work Declaration. Article 17.2 of the TPA specifically states that

¹²² Schaeffer, *supra* note 71, at 841; Trebilcock & Howse, *supra* note 56, at 297.

¹²³ Buchanan & Chaparro, *supra* note 110, at 137; Stephen F. Diamond, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 199, 216 (Lance A. Compa & Stephen F. Diamond eds., 1996).

¹²⁴ See Buchanan & Chaparro, *supra* note 110, at 139.

¹²⁵ Office of the U.S. Trade Representative, *Peru Trade Promotion Agreement*, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>.

¹²⁶ Office of the U.S. Trade Representative, *Trade Facts, Free Trade with Peru: Brief Summary of the United States-Peru Trade Promotion Agreement*, Jun. 2007, http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file585_13067.pdf (last visited Feb. 11, 2011).

¹²⁷ Office of the U.S. Trade Representative, *Peru TPA Facts, Real Results on Labor Rights: Facts About FTA Labor Protections and Peru's Labor Laws*, Jul. 2007, <http://www.ustr.gov/sites/default/files/Real-Results-on-Labor-Rights.pdf> (last visited Feb. 11, 2011).

each party must “adopt and maintain . . . the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.”¹²⁸ Some of the principles explicitly stated include the freedom of association, the right to collective bargaining, the elimination of forced labor, the abolition of child labor, and the elimination of employment discrimination.¹²⁹ Thus, both members have committed to ensuring that their domestic laws are in accordance with the ILO’s fundamental work rights principles.

The U.S.-Peru TPA also created a Labor Affairs Council that is responsible for the implementation and development of the labor obligations in the agreement.¹³⁰ In addition, the TPA provides for cooperative labor consultations of the Council. If the disputed matter has not been resolved within sixty days of the consultation request, the complaining party has the option to bring the matter to the dispute settlement mechanism.¹³¹ Unlike other RTAs, this agreement allows for the same remedies available for trade violations to apply to labor violations.¹³² In contrast with the NAALC, violations of both procedural and substantive labor rights could result in dispute resolution mechanisms or sanctions.

However, the labor chapter adds a trade relationship test to its broadened enforcement reach reminiscent of the softer language in the NAALC.¹³³ In order to qualify for dispute settlement, the challenged party must fail to adopt or maintain the questioned regulation or practice “in a manner affecting trade or investment between the Parties.”¹³⁴ At some level, all violations of worker rights affect trade, but we do not know how broadly dispute settlement panels will interpret this limitation. Nevertheless, the TPA’s enforceable labor and environmental provisions signify an important step toward efficient integration of human rights and trade. If its provisions prove successful, they may become the standard for future RTAs intending to implement human rights.

¹²⁸ United States-Peru Trade Promotion Agreement, art. 17.2, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

¹²⁹ *Id.*

¹³⁰ Powell & Chavarro, *supra* note 42, at 119.

¹³¹ United States-Peru Trade Promotion Agreement, *supra* note 128, at art. 21.5.

¹³² Cabin, *supra* note 72, at 1072.

¹³³ *See text at supra* note 114.

¹³⁴ United States-Peru Trade Promotion Agreement, *supra* note 128, at art. 17.2 n.1.

B. Environmental Protection through Trade Agreements

Environmental protection and human rights go hand in hand. Clean air and water, and adequate food and shelter depend on a healthy environment. There is an undeniable link between trade and environmental protection. Trade not only promotes the consumption and use of sustainable resources, but it also inevitably exacerbates pollution. Notably, experts in human rights and trade do not address environmental protection in the same discipline as human rights.¹³⁵ The failure to consider environmental protection as a human right bars environmental issues from reaching many international human rights forums, which ultimately affects these issues from being considered in trade forums.

1. The Effects of Trade on the Environment

Economists believe that economic integration has direct and indirect effects on the environment and sustainable development.¹³⁶ Many environmentalists view economic liberalization as driving the demand for greater consumption of natural resources.¹³⁷ Theoretically, the liberalization of trade will likely increase economic efficiency and productivity between the trading members, causing an increase in economic activity.¹³⁸ In turn, an increase in the production of goods and services likely leads to higher consumption of natural resources, and increased pollution.¹³⁹ These environmental effects may reach the importing country as well as the exporting country.¹⁴⁰

A good example of the direct impact trade liberalization can have on the environment is the Brazil tire dispute. Brazil has an active tire re-treading industry. Its companies import used tires, retread them, and sell the resulting product. However, many of the tires imported cannot be retreaded. Brazil, however, lacks tire disposal policies; therefore, tires are simply abandoned at any vacant parcel of land available. Ultimately, they collect

¹³⁵ HERNÁNDEZ-TRUYOL & POWELL, *supra* note *, at 86.

¹³⁶ Kevin P. Gallagher & Jacob Werksman, *International Trade and Sustainable Development: An Integrative Approach*, in INTERNATIONAL TRADE & SUSTAINABLE DEVELOPMENT 3, 5 (Kevin P. Gallagher & Jacob Werksman eds., 2002).

¹³⁷ *Id.* at 4.

¹³⁸ See, e.g., Sanford E. Gaines, *Environmental Protection in Regional Trade Agreements: Realizing the Potential*, 28 ST. LOUIS U. PUB. L. REV. 253, 256 (2008).

¹³⁹ See, e.g., *id.*; see also Charles E. Di Leva, *International Trade and the Environment*, 18 PACE INT'L L. REV. 227, 227 (2005).

¹⁴⁰ See Gaines, *supra* note 138, at 256.

water during the country's rainy seasons¹⁴¹; this stagnant water provides the perfect breeding ground for mosquitoes that cause dengue, malaria, and yellow fever.¹⁴² In 2002, Brazil suffered a severe outbreak of dengue, a potentially deadly tropical disease caused by mosquitoes feeding on infected persons and then spreading it when they bite others.¹⁴³

In an attempt to address the health epidemic caused by these abandoned tires, the Brazilian Ministry of Development, Industry and Foreign Trade subsequently banned imports of retreaded and used tires.¹⁴⁴ Two dispute settlement proceedings, however, frustrated Brazil's attempt at a total ban of old tires. Uruguay, like Brazil a member of MERCOSUL, challenged the ban before the MERCOSUL's dispute settlement tribunal, which found that under the terms of that agreement, Brazil must exclude all MERCOSUL members from the ban.¹⁴⁵ Importers of used tires, deprived of input, successfully challenged the ban of "used" tires in the Brazilian court system.¹⁴⁶

Against this background, the European Union challenged the ban under the WTO's dispute settlement system where, among other arguments, it noted that the partial ban had the result of completely protecting Brazil's retreading industry from outside competition while providing ready access to that industry of old tires needed for the retreading process.¹⁴⁷ The World Trade Court ultimately declared that although a general ban could be justified under Article XX(b)'s exception for measures necessary to protect pub-

¹⁴¹ AARONSON & ZIMMERMAN, *supra* note 92, at 94.

¹⁴² *The Brazil-Retreaded Tires Case, Background Paper*, Center for International Environmental Law, Mar. 2006, http://www.ciel.org/Publications/Brazil_Tires_3Apr06.pdf (last visited Feb. 11, 2011) [hereafter Brazil-Tire].

¹⁴³ See World Trade Organization, Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 4.28, WT/DS332/R, Jun. 12, 2007, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm.

¹⁴⁴ AARONSON & ZIMMERMAN, *supra* note 92, at 95. Retreaded tires are also, of course, "used." However, they are classified separately under the Harmonized Commodity Description and Coding System, a detailed and logical numerical system for distinguishing some 5,000 commodities administered by the World Customs Organization and used by about 200 countries to set up their national customs tariff and for the collection of economic statistical data. World Customs Organization, *What is the Harmonized System*, <http://www.wcoomd.org/hsharmonizedsystem.htm> (last visited Feb. 11, 2011).

¹⁴⁵ AARONSON & ZIMMERMAN, *supra* note 92, at 95.

¹⁴⁶ Panel Report, *supra* note 143, at ¶ 7.291.

¹⁴⁷ WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm (last visited May 19, 2011).

lic health, Brazil's selective ban was "unjustifiably discriminatory" because the exclusion of MERCOSUL members and used tires from abroad clearly did not contribute to the protection of public health and, in fact, had the opposite effect.¹⁴⁸ As this example demonstrates, the linkage between trade and the need for environmental protection is easily proven. The commitment that parties make by joining trade agreements inevitably affects the ecosystem in which that trade takes place. This symbiotic relationship argues strongly for including environmental protection provisions in these trade agreements.

In addition to concern for the effects in countries that lack local environmental regulations, some commentators believe that the lack of linkage in trade rules to the environment reduces the effectiveness of local environmental regulations already in existence. One worry is that because trade rules do not allow members to discriminate against imported goods, they are forcing countries to accept products manufactured in a manner that is below their environmental regulatory standards.¹⁴⁹

Another negative effect of a lack of environmental standards in trade agreements is what has been dubbed the "competitiveness effect."¹⁵⁰ The theory behind this effect is that producers required to meet higher environmental standards will be at a competitive disadvantage when competing with foreign producers complying with lower environmental standards.¹⁵¹ The political consequence is that the political pressure to protect domestic business will strengthen opposition to higher environmental standards, thus creating a chilling effect on governmental agencies considering higher environmental regulatory standards.¹⁵² On the other hand, opponents of the integration of environmental policy with trade rules argue that requiring imports to meet domestic standards restricts emerging market countries

¹⁴⁸ World Trade Organization Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 228, WT/DS332/AB/R, Dec. 3, 2007, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm. Article XXIV: 12 requires that the provisions of GATT be observed by both the central government and the local authorities of a Member, and that the central government is responsible for ensuring observance of GATT provisions by its local authorities. In this case, despite Brazil's attempt to ban imported used tires without exception, it bore responsibility for the decision of its courts, including the judicial authority it had delegated to the MERCOSUL dispute settlement tribunal.

¹⁴⁹ Gaines, *supra* note 138, at 254.

¹⁵⁰ *Id.* at 255.

¹⁵¹ *Id.*

¹⁵² *Id.*

from accessing larger markets,¹⁵³ and that stricter environmental policies will become a pretext for protectionism that will deprive them of the wealth they need for further development.¹⁵⁴ Thus, trade liberalization will be negatively impacted by environmental burdens.¹⁵⁵

2. Regional Trade Agreements and Environmental Policies

One of the main advantages that regional trade agreements have is the geographic proximity of their Members. This proximity means that member countries of a regional trade agreement will most likely be ecologically similar.¹⁵⁶ Agreements between countries with shared ecologies would particularly benefit from environmental protection because the environmental behavior in one country could directly affect the other country.¹⁵⁷ This dynamic is especially true in South America, where the Amazon Rainforest encompasses regions belonging to nine countries. In addition, specific environmental issues that should be addressed can more readily be identified at a regional level. As such, the development of environmental solutions and attainment of a mutual consensus for the development of specific mechanisms addressing those issues is easier to achieve at a regional level than at a multilateral level.¹⁵⁸ Therefore, theoretically, RTAs such as MERCOSUL, NAFTA, CAFTA-DR, and the Andean Pact have the geographical advantage to provide the inarguable premises for environmental preservation through trade.

3. North American Agreement on Environmental Cooperation

In addition to NAALC, NAFTA members succeeded in adopting the NAAEC side agreement. The NAAEC established the Commission for Environmental Cooperation (CEC) to mitigate regional environmental concerns and conflicts, and encourage the enforcement of environmental

¹⁵³ JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS 39 (1997).

¹⁵⁴ Di Leva, *supra* note 139, at 228; Daniel C. Esty, *Bridging the Trade-Environment Divide*, in THE EARTHS SCAN READER ON INTERNATIONAL TRADE & SUSTAINABLE DEVELOPMENT 186, 190 (Kevin P. Gallagher & Jacob Werksman, eds., 2002).

¹⁵⁵ Esty, *supra* note 154, at 190.

¹⁵⁶ Gaines, *supra* note 138, at 262-65.

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* at 265.

laws.¹⁵⁹ The NAAEC does not set any particular environmental standards but merely provides that each party ensures their domestic laws include high standards of environmental protection.¹⁶⁰

Regardless of the problems embodied by these weak environmental provisions, the NAAEC does include several mechanisms for environmental transparency and dispute resolution. For example, similar to NAALC, the NAAEC also provides for a submission process where citizens are able to submit a complaint to the CEC when a party is failing to enforce environmental laws.¹⁶¹ If the Secretariat considers the submission and warrants the need for a factual record, the Secretariat may only prepare a record with a two-thirds approval by the Council.¹⁶² To date, there have been seventy-five complaints submitted to the CEC.¹⁶³ Of these, only sixteen factual records have been produced.¹⁶⁴ These statistics leave some critics doubting the effectiveness of this procedure. Moreover, although any citizen may submit a complaint, submissions have been made by non-governmental organizations, suggesting that the procedure might be too cumbersome or that individuals lack the time or financial resources to complete a complaint.¹⁶⁵ Some critics also argue that the CEC can easily undermine the citizen submission process.¹⁶⁶ These critics specifically point to the result of the Ontario Logging Submission, where, despite the Secretariat's recommendation for a factual record, the CEC initially refused to review the submission.¹⁶⁷ In that instance, the complaint included factual models estimating the environmental damage that would be caused by Canada's logging operations.

¹⁵⁹ North American Agreement on Environmental Cooperation [hereinafter NAAEC] art. 10, U.S.-Can.-Mex., Sept. 14, 1993, available at <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567>.

¹⁶⁰ *Id.* at art. 3.

¹⁶¹ *Id.* at arts. 14-15.

¹⁶² *Id.* at art. 15.

¹⁶³ CEC Registry of Citizen Submissions, available at <http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250>.

¹⁶⁴ *Id.*

¹⁶⁵ See Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT'L ENVTL. L. REV. 129, 138 (2007).

¹⁶⁶ See Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 229-30 (2008).

¹⁶⁷ Commission for Environmental Cooperation [CEC], Council Res. 03-05, CEC Doc. C/C.01/03-02/RES/05/final, Apr. 22, 2003, available at http://www.cec.org/Storage/72/6574_02-1-RES-E.pdf.

The CEC, however, demanded that the complainants submit data showing the actual environmental damage that the logging had already caused.¹⁶⁸ Thus, in the absence of a treaty mandate requiring the CEC to take a “pre-cautionary approach,” the citizen submission process will remain remedial at best, and it is unlikely to be used as an anticipatory means of environmental protection.

Furthermore, even if a factual record of a complaint is published, a party is under no obligation to provide the CEC with information as to any corrective measures it has taken.¹⁶⁹ Without any enforcement or follow-up mechanisms, it is easy for the parties to simply ignore the findings of the CEC. Nevertheless, the CEC has succeeded in accomplishing some notable environmental outcomes. One of the most evident is the establishment of clear strategies for managing toxic chemicals through its North American Regional Action Plans (NARAPs).¹⁷⁰ The CEC has already successfully eliminated the use of DDT and chlordane.¹⁷¹

Several completed studies¹⁷² evaluate the effects of the NAFTA agreement. Notably, despite fears that the integration of environmental protection into trade regulation would pave the ground for a “race to the bottom” scenario, some studies of NAFTA effects have concluded that although trade liberalization could have been a factor leading some American companies to move to Mexico, little evidence shows that “large-scale shifts in industrial investment and relocation to pollution havens have occurred.”¹⁷³ Despite strong criticism of the NAAEC procedures, many of the

¹⁶⁸ Complainants alleged that Canada was failing to enforce the migratory bird regulations because it allowed logging companies to destroy eggs and nests of migratory birds. See CEC, *Ontario Logging Submission*, (SEM-02-001), A14/SEM/02-001/01/SUB, Feb. 6, 2002, available at http://www.cec.org/Page.asp?PageID=2001&ContentID=2375&SiteNodeID=250&BL_ExpandID.

¹⁶⁹ Notably, the Joint Public Advisory Committee recommended in 2001 that the Council adopt a follow-up scheme requiring a report by the relevant Party to the Council after release of the factual record. However, the Council objected to the recommendation, concluding that follow-up schemes were the responsibility of domestic law. Dorn, *supra* note 165, at 140-41.

¹⁷⁰ Wold, *supra* note 166, at 226.

¹⁷¹ *Id.*; see also Comm’n on Env’tl. Coop. Fact Sheet on Chlordane (Apr. 2003), available at http://www.cec.org/Storage/50/4282_chlordane_en.pdf; CEC Fact Sheet on DDT (Apr. 2003), available at http://www.cec.org/Storage/50/4285_DDT_en.pdf.

¹⁷² Several of these studies are cited in J. F. Hornbeck, *NAFTA at Ten: Lessons from Recent Studies*, CRS Report for Congress, Feb. 13, 2004, available at <http://fpc.state.gov/documents/organization/34486.pdf>.

¹⁷³ Wold, *supra* note 166, at 223.

U.S.-negotiated RTAs following NAFTA have adopted the NAAEC's enforcement framework and have ignored the valuable lessons the CEC studies afford.¹⁷⁴ To enhance the success of future integration of trade and human rights into RTAs, parties should carefully review the results of preceding RTAs.

C. The Effects of Intellectual Property Regulation on Local Populations

Advances in technology have brought about new forms of trade in the global market – most prominently, the transfer across borders of intellectual property (IP) consisting primarily of patents and copyrights to original inventions and other works. As much as half of the value of U.S. exports resides in its IP content,¹⁷⁵ such as the patent on a new malaria medicine, the trademarked emblem on the hood of a Cadillac Escalade, the copyright on a Stephen King novel, or the mask works on a semiconductor chip. A strong indicator of the value of these goods of creative minds is the appalling pace at which it is stolen, or, put more politely, “infringed.” Estimates of the annual cost to world wealth of IP piracy range as high as \$983 billion.¹⁷⁶

In 1995, the WTO stepped into the enforcement arena left wanting by dozens of years of unenforceable treaty making in the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations.¹⁷⁷ With its 150-plus Members and its near-automatic dispute settlement system, the WTO's adoption of the tenets of the WIPO treaties into its own Agreement on Trade-Related Aspects of Intellectual Property Rights

¹⁷⁴ See *id.* at 205. Wold further argues that although the United States has claimed that it has achieved further environmental integration in subsequent agreements to NAFTA by including the environmental provisions in the RTA itself, “this benefit is more imagined than real” because there is no legal difference to placing environmental provisions in the agreement itself as opposed to placing them in a side agreement. *Id.* at 236.

¹⁷⁵ Chris Cylke, *The Facts on Counterfeiting and Piracy*, Chamber Post, Mar. 7, 2008, <http://www.chamberpost.com/category/author-chris-cylke/> (last visited May 18, 2011).

¹⁷⁶ HERNÁNDEZ-TRUYOL & POWELL, *supra* note *, at 214; see also International Intellectual Property Alliance, 2010 “Special 301” USTR Decisions, available at <http://www.iipa.com/pdf/IIPA2010USTRDecisionsSpecial301TableofEstimatedTradeLossesandPiracyLevels061110.pdf>.

¹⁷⁷ A 1989 effort to draft a dispute settlement system that would make WIPO treaties enforceable failed. See Edward Kwakwa, Essay, *Some Comments on Rulemaking at the World Intellectual Property Organization*, 12 DUKE J. COMP. & INT'L L. 179, 184 (2002).

(TRIPS) made the prior treaties both broader in reach and significantly more powerful.¹⁷⁸

Intellectual property rights generally give creators the exclusive right to use their work for a specified period of time (e.g., twenty years for patents) and have been recognized in many international instruments, including Article 27, paragraph 2, of the Universal Declaration of Human Rights, which provides that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”¹⁷⁹

The WTO divides IP rights into two main categories: (1) copyright material and (2) industrial property.¹⁸⁰ The latter generally includes patent rights, trademarks, and trade secrets. Patent laws are most relevant in our discussion because it is the IP right that has recently had direct impact on several other human rights enumerated in the United Nations’ Universal Declaration on the Rights of Indigenous Peoples.¹⁸¹ As discussed below, the regulation of patents specifically affects two distinct human rights: (1) indigenous population rights and (2) the public right to health.

1. Patent Protections and its Effect on the Right to Health

During TRIPS negotiations, many emerging market countries argued for reduced patent protection of pharmaceuticals.¹⁸² Though policy-based at first, these objections quickly turned toward a human rights justifi-

¹⁷⁸ See HERNÁNDEZ-TRUYOL & POWELL, *supra* note *, at 213-14. Non-signatories to the WIPO treaties were bound to their terms because the WTO allowed only one kind of adherence, that is, to receive the irresistible trade benefits of some of the WTO agreements, Members must agree to abide by the terms of all 24 of its agreements. This single-undertaking approach added great weight to the WTO agreements, both individually and jointly. See PETROS C. MAVROIDIS, GEORGE A. BERMAN, & MARK WU, *THE LAW OF THE WORLD TRADE ORGANIZATION (WTO): DOCUMENTS, CASES & ANALYSIS* 9 (2010).

¹⁷⁹ Universal Declaration of Human Rights, G.A. Res. 217A, at 27, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), *available at* <http://www.un.org/en/documents/udhr/>.

¹⁸⁰ WTO, *What are Intellectual Property Rights?*, www.wto.org/english/tratop_e/trips_e/intell_e.htm (last visited Feb. 11, 2011).

¹⁸¹ United Nations Declaration on the Rights of Indigenous Peoples, art. 31, G.A. Res. 61/295, U.N. Doc A/RES 61/295 (Sept. 13, 2007), *available at* <http://www.un.org/esa/socdev/unpfii/en/drip.html>.

¹⁸² HOLGER HESTERMEYER, *HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES* 76 (2007).

cation.¹⁸³ Critics of the proposed WTO/WIPO patent-protection system claimed that the push for stronger IP rights infringed upon the right of access to medicines essential to the health of a country's population. Stronger patent rights allowed pharmaceutical companies to charge higher prices for medicines, thereby taking these "essential medicine" beyond the reach of most, if not all, of the sick in emerging market countries.

Developed countries have used RTAs as a way of increasing protection to their pharmaceutical industries¹⁸⁴ through "TRIPS-plus" protection for IP.¹⁸⁵ These added conditions ensure tighter IP protection than those required by TRIPS.¹⁸⁶ Although the TRIPS Agreement powerfully protects pharmaceutical companies through its patent provisions, it also creates an exception for countries in dire need of medicines by permitting them to issue patent-busting compulsory licenses,¹⁸⁷ which allow a country undergoing a health crisis, such as HIV/AIDS or malaria, to license the production of generic equivalents without consent of the holder of the medicine's patent.¹⁸⁸ The WTO, in the Declaration on the TRIPS Agreement and the Public Health, clarified Article 31 of TRIPS by stating, "[e]ach member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."¹⁸⁹ This statement gives

¹⁸³ See *id.*

¹⁸⁴ See Cimbolic, *supra* note 28, at 58.

¹⁸⁵ RTAs to which WTO members are party must, of course, adhere to the WTO obligations of such members, including the TRIPS Agreement. "TRIPS-plus" refers to the obligations unique to the RTA.

¹⁸⁶ Mindahi Cresencio Bastida-Muñoz & Geraldine A. Patrick, *Traditional Knowledge and Intellectual Property Rights: Beyond TRIPS Agreements and Intellectual Property Chapters of FTAs*, 14 MICH. ST. J. INT'L L. 259, 287 (2006).

¹⁸⁷ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS] art. 31, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 313-14 (1995), 33 I.L.M. 1197, 1209-10 (1994), in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 381-82 (1994); Cimbolic, *supra* note 28, at 58.

¹⁸⁸ The member must nonetheless negotiate in good faith to arrive at agreement with the company on "reasonable commercial terms" for the license. See TRIPS, *supra* note 187.

¹⁸⁹ This document was one of the principal agreements during key stages in the ninth "round" (since GATT's creation in 1947) of multilateral trade negotiations launched by the November 2001 Doha Ministerial Conference. World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, ¶ 5(b), WT/MIN(1)/DEC/2, 41 I.L.M. 755 available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

WTO Members free reign to create barriers to compulsory license access in RTAs without fear of violating WTO provisions.

Developed countries have taken advantage of RTAs to prevent these compulsory licenses from being granted. For example, the United States has placed a five-year shield on the production of generic pharmaceuticals in its most recent RTAs.¹⁹⁰ The result was achieved by prohibiting generic producers from using pre-existing safety data tests, essentially obligating the producers to conduct the same time-consuming and costly tests themselves.¹⁹¹ Moreover, the United States punishes emerging market countries that fail to agree to these TRIPS-plus measures by using the so-called “Special 301” list to label them as threats to IP rights.¹⁹² This listing will scare away investors with IP needing protection.

It seems that in the case of IP, RTAs may have the effect of actually increasing human rights abuse and strengthening the North-South divide.¹⁹³ Nevertheless, as explained below, a possible change in the multilateral arena might cause a significant change for IP rights in the negotiation of future RTAs.

3. Acknowledgment of Traditional Knowledge and its Exclusion from IP Rights

Consistent with the standards of the Western patent system, the TRIPS Agreement makes patent protection available only to inventions that are new, inventive, and capable of industrial application.¹⁹⁴ This section explains that, while recognizing property rights, TRIPS standards essentially ignore the identities and collective rights of indigenous peoples.¹⁹⁵

In recent years, there has been a movement toward the recognition and appreciation of the correlation between the culture and biodiversity of a

¹⁹⁰ Cimbolic, *supra* note 28, at 59.

¹⁹¹ *Id.*

¹⁹² Tony Dutra, *Health Activists Say Special 301 List Targets Developing Countries Beyond TRIPs Minimum*, 27 INT’L TRADE REP. (BNA) 1142 (2010).

¹⁹³ “The most important social problem facing humanity at the beginning of the 21st century is the yawning divide in standards of living between the rich nations of the global North and the poor nations of the global South.” Reuven S. Avi-Yonah, *Bridging the North/South Divide: International Redistribution and Tax Competition*, 26 MICH. J. INT’L L. 371, 371 (2004).

¹⁹⁴ TRIPS, *supra* note 187, at art. 27(1); Prabhash Ranjan, *International Trade and Human Rights: Conflicting Obligations*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 311, 313 (Thomas Cottier et al. eds., 2005); Cimbolic, *supra* note 28, at 53.

¹⁹⁵ See TRIPS, *supra* note 187, at art. 27.3(b); see also Bastida-Muñoz & Patrick, *supra* note 186, at 259.

particular region.¹⁹⁶ The knowledge and practices that local and indigenous populations have passed on through generations have been linked closely to the conservation and sustainable use of biodiversity in their communities.¹⁹⁷ This knowledge exhibited by these communities living in close relationship with biodiversity has been termed “traditional knowledge.”¹⁹⁸ Traditional knowledge specifically refers to the historical use of natural resources by indigenous populations for medicinal, curative, and agricultural purposes; as such, indigenous people remain the keepers of traditional knowledge.¹⁹⁹ Given countries such as Peru, where the total population consists of forty percent indigenous peoples,²⁰⁰ it is evident why traditional knowledge is an important concern in South American trade.

Traditional knowledge has been used as a tool for new product development in the pharmaceutical, agricultural, cosmetic, and food and beverage industries.²⁰¹ However, indigenous people have been stripped of their use of this knowledge by other intellectual property rights, specifically patent rights. Although traditional knowledge has been increasingly recognized, it is generally deemed as non-patentable; as a result, it provides fertile ground for multinational companies to expropriate traditional knowledge freely.²⁰²

Although RTAs have proved to be a fertile ground for enforcing “TRIPS-plus” provisions, no such provisions have been used in recent RTAs to further protect traditional knowledge. Traditional knowledge has become a frequent subject in recent RTA negotiations, but has not been included in the final provisions. In fact, the United States recently rejected several proposals for increased protection of traditional knowledge in its

¹⁹⁶ Susette Biber-Klemm & Danuta Szymura Berglas, *Problems and Goals*, in *RIGHTS TO PLANT GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: BASIC ISSUES AND PERSPECTIVES* 3, 15 (Susette Biber-Klemm & Thomas Cottier eds., 2005).

¹⁹⁷ David R. Downes, *How Intellectual Property Could be a Tool to Protect Traditional Knowledge*, in *THE EARTHSCAN READER ON INTERNATIONAL TRADE & SUSTAINABLE DEVELOPMENT* 186, 190 (Kevin P. Gallagher & Jacob Werksman, eds., 2002).

¹⁹⁸ Biber-Klemm, *supra* note 196, at 15.

¹⁹⁹ Convention on Biological Diversity, *Traditional Knowledge Information Portal: Background Material*, <http://www.cbd.int/tk/material.shtml> (last visited May 18, 2011).

²⁰⁰ <http://www.ilo.org/indigenous/Activitiesbyregion/LatinAmerica/Peru/lang—en/index.htm>.

²⁰¹ Downes, *supra* note 197, at 372.

²⁰² See Powell & Chavarro, *supra* note 42, at 101.

negotiations with Colombia and Peru.²⁰³ However, one of the most intense debates in the Doha Declaration discussions concerns IP rights. Paragraph 19 of the 2001 Doha Declaration states that the TRIPS Council should study the relationship between TRIPS, the United Nations Convention on Biological Diversity, and the protection of traditional knowledge and folklore.²⁰⁴ One suggestion at the Doha Round for future protection from bio-piracy is to require inventors to disclose the source of genetic resources and traditional knowledge as a prerequisite for patent protection. WTO Director General Pascal Lamy has recently advised that, although the latest discussions have focused on new ways to avoid bio-piracy and misappropriation of patents, Members disagree on whether the solution lies in the inclusion of specific protections for traditional knowledge in the TRIPS agreement.²⁰⁵ The end of the Doha discussions will determine whether there will be any progress for the integration of these human rights in the multilateral trade arena.

²⁰³ David Viva-Eugui, *Landmark Biodiversity, TK Provisions Accompany EFTA-Colombia FTA*, 3 BIO. RES. REV. 1, 1-2 (2009), available at <http://ictsd.org/downloads/bioresreview/biores3-2.pdf>.

²⁰⁴ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746, ¶ 19 (2002), available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm [hereinafter Doha Declaration].

²⁰⁵ WTO, *Intellectual Property Differences 'Better Illuminated' – Lamy Reports*, Mar. 12, 2010, http://www.wto.org/english/news_e/news10_e/trip_12mar10_e.htm (last visited May 19, 2011). The Director General of the WTO, Pascal Lamy, in a speech to WTO members on March 12, 2010, explained that the differences in consensus that the countries had “concern[ed] whether a disclosure mechanism, if introduced more widely, would be useful and effective, whether the presumed benefits for the system and for the holders of the genetic resources and traditional knowledge would be experienced in practice, whether those benefits would outweigh administrative costs, and whether the disclosure requirement would enhance or undermine the predictability, clarity and public policy role of the patent system. In sum, there is general agreement on the public policy objectives, including ensuring equitable benefit sharing, but differences clearly remain on how to arrive at those goals in practice.” *Id.*

4. The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)²⁰⁶

Central America has the second highest death rate from communicable disease in Latin America.²⁰⁷ Guatemala suffers from high incidences of malnutrition and starvation, as well as critical shortages in health care professionals, medicine, and affordable health care.²⁰⁸ Consequently, the majority of deaths in Guatemala can be attributed to easily treatable diseases like respiratory infections, diarrhea, and malaria.²⁰⁹ Furthermore, the country has an accelerating AIDS epidemic. The World Health Organization estimates that there are 60,000 people living with HIV/AIDS in Guatemala.²¹⁰ Access to antiretroviral medicines is crucial in order to combat this epidemic. Thus, local IP legislation and trade commitments have an important effect on the welfare of the Guatemalan people.

The issues related to IP were hotly debated during the CAFTA-DR negotiations. The U.S. point of view was clear, and the United States showed no restraint in pushing its ideals forward. The United States wanted CAFTA-DR to be subject to patent rules similar to those in place in the United States,²¹¹ which meant that members would have to abide by TRIPS-plus obligations. Under CAFTA-DR, pharmaceutical safety data were exclusive for a period of five years, thus, making it extremely difficult for generics to compete with brand-name pharmaceuticals.²¹² It was clear to Guatemala and other Central American countries during the negotiations that such provisions posed a clear threat to the right to access essential medicines. In 2004, the Guatemalan government issued a decree that per-

²⁰⁶ The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR].

²⁰⁷ Rahul Rajkumar, *The Central American Free Trade Agreement: An End Run Around the Doha Declaration on TRIPS and Public Health*, 15 ALB. L. J. SCI. & TECH. 433, 436 (2005).

²⁰⁸ Emily M. Cowley, *The Right to Health: Guatemala's Conflicting Obligations under the Central American Free Trade Agreement and the International Covenant on Economic, Social, and Cultural Rights*, 11 MICH. ST. J. MED. & LAW 227, 239 (2007).

²⁰⁹ *Id.*

²¹⁰ World Health Organization [WHO], *Guatemala, Epidemiological Country Profile on HIV and AIDS*, fig. 2, http://apps.who.int/globalatlas/predefinedReports/EFS2008/short/EFSCountryProfiles2008_GT.pdf (last visited Feb. 11, 2011).

²¹¹ *See* Rajkumar, *supra* note 207, at 455.

²¹² CAFTA-DR, *supra* note 206, at art. 15.10.1(a); GANTZ, *supra* note 20, at 194.

mitted the marketing of generics with their brand-name equivalents to combat the health crisis.²¹³ However, because of U.S. pressure later that year, Guatemala eventually repealed the decree.²¹⁴

It is unclear what the exact consequences of CAFTA-DR will have on Guatemala, but it is evident that IP rights, still a crude area of international law, may have direct consequences on the right to health. As such, it is important that future considerations regarding intellectual property rights take into account the implications on human rights, including traditional knowledge and the right to health.

III. COST-BENEFIT ANALYSIS FOR THE INTEGRATION OF HUMAN RIGHTS STANDARDS IN RTAs

The debate on whether trade agreements are appropriate for implementing laws protecting human rights continues apace. However, the inevitable and undeniable linkage between trade and human rights has led to dozens of contractual provisions in trade agreements that attempt to integrate human rights concerns into the substantial corpus of both global and regional trade rules. As multilateral trade negotiations progress at a crawling pace toward human rights considerations, the question now becomes whether RTAs present a more efficient, appropriate, and effective forum for the integration of human rights. This section discusses several positive and negative considerations in response to that question.

A. *Arguments in Favor of the Exclusion of Human Rights*

Some fear that, like “wolves in sheep’s clothing,” advocates of protectionist economic policies masquerade as advocates of labor and environmental rights because those issues are politically popular. Yet their real purpose in including the human rights provisions in RTAs is to advance the protectionist platform.²¹⁵ For example, domestic industries might seek to shield themselves from competition from lower-priced imports by advocating the inclusion of high labor standards in trade agreements with the exporting countries.²¹⁶ However, the enforcement of higher human rights standards of course will raise production costs in these exporting countries, thereby increasing the comparative advantage of their international competitors.²¹⁷ Thus, although higher environmental and labor standards might

²¹³ Decree 34-04 (2004) (Guat.) (repealed Mar. 10, 2005).

²¹⁴ *Id.*

²¹⁵ See Schmidt, *supra* note 64, at 168.

²¹⁶ *Id.*

²¹⁷ *Id.*

seem to serve a greater purpose, the integration of these specific provisions might serve principally to protect domestic industries from foreign competition.

Additionally, some experts argue that the integration of human rights provisions in RTAs inevitably increases the North-South divide. Since the signing of the GATT, the authority of developed countries to dictate terms in multilateral negotiations has decreased. Currently, approximately two-thirds of WTO members are emerging markets.²¹⁸ The effects caused by the change in membership class are reflected in current WTO negotiation goals. Evidenced by statements made in the 2001 Doha "Development" Round, a key goal is enforcing the WTO commitment to improve the level of participation in global trade of emerging market countries: "We shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development."²¹⁹

Thus, developed countries look toward RTAs to gain back their control. The economic advantage of large markets, huge transnational firms, and access to substantial investment capital provide developed nations with outsized leverage in negotiations with emerging market states. As a consequence, many of the human rights provisions negotiated arguably serve the political and economic agendas of the developed countries rather than the actual concerns of the regional partners about their failure to implement human rights obligations to the betterment of their civil societies.

The inclusion of even relatively ineffective standards may pacify human rights groups that would have otherwise opposed the agreement. For example, many of the earlier RTAs simply had provisions promising to "promote" human rights,²²⁰ which arguably have the effect of being illusory because there is no method of dispute resolution or enforcement. Thus, the theory is that adding these provisions provides only an appearance of concern for human rights without having to take a step further.

Finally, the sheer number of RTAs in existence today might also inadvertently bolster protectionist interests.²²¹ As the number of RTAs increase, it becomes impossible to identify which agreements connect which parties and on what terms. As a consequence, human rights and environ-

²¹⁸ *Id.* at 178.

²¹⁹ Doha Declaration, *supra* note 204.

²²⁰ *See, e.g.*, Preamble to the Free Trade Agreement, between the Governments of Central America and Chile, Feb. 15, 2002, *available at* <http://www.comex.go.cr/acuerdos/chile/Texto%20del%20acuerdo/Preambulo.pdf>.

²²¹ Schmidt, *supra* note 64, at 174.

mental protection advocates lose power and influence over the outcome of these agreements. Furthermore, the “spaghetti bowl”²²² of conflicting and confusing RTA rules of origin and other market access requirements might overburden the WTO’s review process of these agreements. Thus, the WTO will have more difficulty keeping track of violations and maintaining consistency in its recommendations. In the event that future multilateral provisions prescribe minimum human rights requirements, many RTAs lacking these requirements will simply fall through the cracks.

B. Arguments In Favor of the Integration of Human Rights into RTAs

There are several reasons why the integration of human rights standards into RTAs will be beneficial for the members of that trade agreement. First, members of RTAs that are “regional,” in the true sense of the term, will likely share more similarities with each other than would RTAs that are regional in name only. The geographical proximity is beneficial in many respects, including, most importantly, similar ecological concerns. Because a nation’s environmental behavior may have detrimental effects in neighboring countries, inclusion of environmental provisions will be more acceptable at the regional level than on a 150-plus member global level. Moreover, geographical proximity may not only imply environmental similarities, but almost certainly ensures comparable cultural and economic factors, including agricultural production, language, and indigenous populations. These factors may result in an easier ability to reach consensus regarding inclusion of human rights provisions in the agreement. Basically, “[a]greements among smaller groups of ‘like-minded’ states . . . are easier to negotiate” than agreements at the global level.²²³

Second, some commentators believe that the greater influence of developed countries in RTAs is a positive force for the inclusion of human rights provisions.²²⁴ Many believe that, unlike in the case of multilateral agreements, political forces in RTAs are more influential and will likely lead to the inclusion of human rights provisions that otherwise would not even be considered.²²⁵ Consequently, it would also be more likely that eco-

²²² Jagdish Bhagwati, David Greenaway & Arvind Panagariya, *Trading Preferentially: Theory and Policy*, 108 ECON. J. 1128, 1138 (Jul. 1998).

²²³ GANTZ, *supra* note 20, at 18.

²²⁴ Emilie M. Hafner-Burton, *The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe*, 7 PERSPECTIVES ON POLITICS 33, 33-34 (2009).

²²⁵ See Pengcheng Gao, *Rethinking the Relationship Between the WTO and Int’l Human Rights*, 8 RICH. J. GLOBAL L. & BUS. 397, 422 (2009).

conomic sanctions will be used to deter human rights violations.²²⁶ Although some believe that protectionist reasons may underpin the inclusion of human rights provisions, the harm that opponents claim these provisions will cause to the emerging market countries has yet to be seen.²²⁷ Additionally, enforcement mechanisms at a regional level can be monitored better than those at the multilateral level.

Many human rights advocates claim that the inclusion of human rights provisions in RTAs complements free trade. Historically, developed countries have dumped their exports in emerging market countries. Despite arguments that the enforcement of human rights in RTAs increases the North-South divide, some commentators believe that human rights considerations will provide a level playing field between developed and emerging market countries.²²⁸

Notably, among all the arguments for and against the inclusion of human rights provisions in trade agreements, the most important factor to consider is that there *is* a link between trade and human rights. Thus, whether or not future RTAs include human rights provisions, it is evident that the trade agreement will undoubtedly affect human rights in that member country.

IV. CONCLUSION

RTAs have a number of advantages that are not shared by the WTO. For instance, RTAs generally create more “transparency, accountability, and due process.”²²⁹ These qualities can be attributed to the new regionalism’s multidimensional structure. The geographical closeness of most RTA parties and the small number of countries involved in RTAs provide ideal conditions for tailored provisions that specifically apply to the needs of members.

Nevertheless, debates continue as to what extent, if any, human rights should be incorporated into trade agreements. The most common claim opposing such integration is the allegation that human rights provisions will promote protectionist use. However, these claims seem weak in

²²⁶ See *id.*

²²⁷ See, e.g., John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1235 (1992).

²²⁸ See Susan Ariel Aronson, *Is the Wedding of Trade and Human Rights a Marriage of Convenience or a Lasting Union?*, A Review of EMILIE HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS*, 10 HUM. RTS. & HUM. WELFARE 1-2 (2010), available at <http://www.du.edu/korbel/hrhw/volumes/2010/aaronson-2010.pdf>.

²²⁹ See Powell & Chavarro, *supra* note 42, at 96.

light of the negative effects that non-integration would have on the individual rights of civil society in member countries.

Recently, RTA members have begun to include human rights provisions in their agreements. The notable differences in human rights provisions from earlier agreements, such as MERCOSUL, to more recent agreements, like the U.S.-Peru TPA, show a significant trend toward providing enforcement mechanisms for human rights violations. Despite the recent increase in the inclusion of human rights provisions in trade rules, the language of these agreements clearly shows how members inconsistently draw a bright line between trade and human rights. MERCOSUL, for example, specifically prohibits labor requirements to apply to instances where trade is affected. The U.S.-Peru TPA, on the other hand, requires a trade relationship before a worker rights violation becomes actionable. We have illustrated a few of the many avenues through which RTAs can achieve further integration of human rights. Nations have an obligation to take advantage of these possibilities to combine greater economic integration with the improved well-being of their people.

