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Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations

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**TOWARD A VIBRANT PERUVIAN MIDDLE CLASS: EFFECTS
OF THE PERU-UNITED STATES FREE TRADE AGREEMENT
ON LABOR RIGHTS, BIODIVERSITY, AND
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I. BACKGROUND

A. Objectives of Present Study

The International Trade Law Program at the University of Florida has explored in some depth the general impact of trade rules on human rights. Our premise is straightforward. Trade and human rights are inextricably linked because trade rules weaken the ability of governments to promote sustainable development, to alleviate the widening gap between rich and poor, to ensure core labor rights among their workforce, to deter trafficking in women and farm workers, to address devastating levels of disease, to preserve indigenous and other cultural identities, and even to sustain democratic governance.¹ Warning that purposeful coordination of these two critical public policies is “ignored only at the peril both of trade and human rights agendas,” we argued that “trade negotiators must ever be mindful that global trade rules do not operate in a vacuum, but instead cohabit a world of preexisting human rights laws—articulated most often by demands of the labor and environment sectors, but underpinned by even more basic human rights of individuals such as the right to education and

1. See 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, 61 (2005) [hereinafter Powell, *Regional Economic Arrangements*]. See also Berta E. Hernández Truyol, *The Rule of Law and Human Rights*, 16 FLA. J. INT’L L. 167, 191-92 (2004).

freedom from oppression—that simply should not, in any sensible system of laws, be contravened by narrow economic precepts.”²

We examined first the global rules, marking the surprisingly numerous direct linkages between trade and human rights in World Trade Organization (WTO) agreements.³ While concluding that international trade rules have done little with their commanding strength to avoid conflict—much less promote conscious integration—with human rights law, we identified an arsenal of WTO provisions that stand ready for use as instruments of this necessary task. The general exceptions of the General Agreement on Tariffs and Trade’s (GATT’s) Public Health and Welfare Clause contain numerous examples of potential shelter from the foundational non-discrimination premises of global trade rules. From the protection of public morals to measures aimed directly at ensuring public health to guarantees of a healthy environment, GATT Article XX, as interpreted broadly by the WTO’s new world trade court, has set a hopeful path toward elevating human rights policies above economic ones. The world trade court’s ready embrace of other public international law to aid interpretation of WTO provisions adds further optimism by bringing into play other customary and treaty sources of human rights law.⁴

From the global trade rules and these more visible and controversial linkages between international trade law and international human rights law, we turned to regional economic arrangements and the Americas to uncover the more indirect or hidden linkages between trade and human rights. Our focus was on the contribution of regional free trade agreements (FTAs)—primarily the rich trove of such pacts found among the nations of the Western Hemisphere—to the rule of law. The rule of law, the definition of which in our usage includes the substantive ingredients of justice and fairness, is basic to enjoyment of human rights.⁵ We hypothesized that FTAs, by their necessary ground rules and quite without meaning to do so, have pronounced effects on attainment of rules-based governance.

We found strong anecdotal evidence that FTAs indeed contribute to enjoyment by civil society in general, and not solely by those involved in international trade, of rules-based governance. Regional trade agreements

2. Powell, *Regional Economic Arrangements*, *supra* note 1, at 61.

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

4. *Id.* at 230.

5. Application of the rule of law is included, along with open and transparent civil institutions, in the list of the trappings of democracy, which was affirmed as a human right by the United Nations in 1999, C.H.R. res. 1999/57/ U.N. Doc. E/CN.4/1999/57 (1999). See DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 540 (Anderson Pub. 3d ed. 2001).

require governments to conduct their activities in a more transparent and expeditious manner, relying exclusively on administrative records created with input from all affected members of civil society. These agreements mandate that government measures be subject to substantive review by an independent and accessible judiciary. They require transparency, accountability, and due process by governments. Dispute settlement systems in FTAs similarly promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process.⁶

That further work is needed became clear from our finding that “the rule of law” remains an inaccessible objective unless defined within the context of specific cultural premises and combined with the substantive norms that frame the concept for use in a particular society. Moreover, FTAs cannot directly inject rules-based governance into a country. Only national governments can ensure the success of the rule of law for their citizens. Outside sources such as international treaties can only lend a “helping hand” to governments in their transformation of these FTAs into legislation, regulations, policy guidance, and administrative measures that will contribute to previously established national objectives to promote rules-based governance.⁷

We have reached the stage of our project in which this theoretical background, substantial though it may be, must be tested within the context of a particular culture and a single trade agreement. We have chosen Peru and the recently signed Free Trade Agreement between Peru and The United States. Our task is to examine the direct and indirect effects of this agreement on human rights of Peruvian civil society. In doing so, we first will look at the Peruvian economic situation prior to negotiation of the FTA, specifically in regard to labor, biodiversity, and indigenous populations. Then we will consider the content of the treaty itself in order to focus on the effects that specific provisions of the treaty could have on the Peruvian economy’s more marginalized groups. Finally, we will conclude with recommendations that we hope will be helpful in taking full advantage of the FTAs benefits for Peruvian civil society—and the rule of law—and which may inform governments with respect to future trade negotiations.

Our objective in this Essay will be to suggest small steps governments may consider to take full advantage of the benefits generated by the FTA and to soften adverse impacts the agreement certainly will generate in certain sectors of the economy.

6. Powell, *Regional Economic Arrangements*, *supra* note 1, at 97.

7. *Id.* at 70.

B. *General Effects of International Trade on Labor Rights*

Governments of developing countries universally oppose linking trade concessions to labor standards.⁸ Leaders of these lesser-developed countries (LDCs) argue convincingly that requiring payment of higher wages, enforcing restrictions against child labor, and insisting on collective bargaining rights in their factories has the inevitable consequence of reducing the comparative advantage of poorer countries in the global market. If developed countries deny access to goods from LDCs based on noncompliance with labor standards, the LDCs argue, companies in such nations never will gain the economic strength needed to raise the wages of their workers and otherwise to match the labor standards of the markets to which they seek access. They accurately draw attention to the fact that one could find fault with the same developed nations now insisting on global observance of labor standards, because these nations failed to observe such standards before their own industrial revolutions made attention to worker rights possible.⁹

Governments of LDCs fear also that the motivation of developed countries in their attempts to link trade access with labor rights is less the protection of LDC worker rights than yet another disguised means of protection for domestic industries in developed countries. In asking whether their cynicism is well founded, we may remind ourselves that virtually every provision in the nearly two dozen agreements of the WTO is drafted with a view to guarding against such hidden protection of domestic industry in contravention of the GATT's Four Pillars. WTO Members have been creative indeed in sculpting border restrictions—purportedly aimed at food safety, protection of the environment, or ensuring against consumer fraud—to favor their own producers.¹⁰ Lesser-developed nations also find support for their skepticism in the insistence by powerful labor unions in the United States that labor standards be included in free trade agreements with LDCs.¹¹

8. Ernst-Ulrich Petersmann, *Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO, Introduction and Summary*, 7 J. INT'L ECON. L. 585, 589 (2004).

9. Industrialization is, of course, no guarantor of a government's sensitivity to human rights, as the situation in China attests.

10. Report of the WTO Appellate Body, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998) (ban on imported salmon to prevent pathogen infestation of native stocks, but no ban on herring imports that were more likely to infest native stocks but for which Australia had no domestic industry).

11. Sidney Weintraub, *The United States and the Future of Free Trade in the Americas*, 6

We could avoid the difficult question of whose opinions to accept if we could discover a set of universally acknowledged minimum labor standards that trade rules should help to enforce. The WTO is not the place to find such principles. Despite continued urging by the United States and other developed nations,¹² the WTO unambiguously has ceded all matters relating to labor standards to the International Labor Organization (ILO). In its definitive 1996 Singapore Declaration, trade ministers, while affirming their non-binding commitment to observance of “internationally recognized core labor standards,” pointed to the ILO as the “competent body to set and deal with these standards,” albeit with the continuing “collaboration” of the WTO Secretariat.

Trade and labor experts credit the WTO’s 1996 commitment to “internationally recognized core labor standards” as the telling impetus that led directly to ILO consensus two years later in resolving the long-contentious issue of exactly which are the “core” labor standards in the context of trade agreements.¹³ The ILO’s Declaration on Fundamental Principles and Rights at Work concludes in its Preamble that the ILO must adopt these principles in furtherance of its pledge to maintain tight linkages between economic growth and social progress. The Declaration establishes that the principles that nations must provide to ensure that workers have equal opportunity to share in the wealth they helped to generate are those contained in the adopted ILO Conventions.¹⁴ The Declaration groups these core labor standards into four categories: (1) freedom of association and the right to collective bargaining; (2) the elimination of forced or compulsory labor; (3) the abolition of the worst forms of child labor;¹⁵ and (4) elimination of discrimination in the

NAFTA L. & BUS. REV. AM. 303, 304 (2000). We might have greater willingness to accept such union advocacy as an example of international union solidarity, not domestic protectionism, but for near-universal union opposition to trade liberalization of any sort. Thomas J. Manley & Luis Lauredo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 EMORY INT’L L. REV. 85, 95-96 (2004). At the rank and file level, many workers do indeed support better working conditions for their counterparts in other nations. This motivation is reflected in the keying of wage proposals to living standards in the LDC, not in the developed market.

12. Manley & Lauredo, *supra* note 11, at 91.

13. Petersmann, *supra* note 8, at 590.

14. Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Equal Remuneration Convention, 1951 (No. 100); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182) (considered part of the array).

15. Worst Forms of Child Labor Convention, ILO No. C182 (June 17, 1999), <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

workplace.¹⁶ Each of these standards is expressly identified as a human right by the U.N. human rights conventions.

Adopted by overwhelming majority,¹⁷ the Declaration provides ILO Members have an “obligation arising from the very fact of membership in the Organization, to respect, to promote, and to realize” these principles even if they have not ratified the Conventions from which they are drawn. The Declaration lends credence to the concerns of LDC representatives⁸¹ with language overtly imported from the WTO Singapore Declaration: WTO Ministers “reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.”⁹¹

The ILO Declaration thus closes: “labour standards should not be used for protectionist purposes” and “the comparative advantage of any country should in no way be called into question by this Declaration.”²⁰ These two provisions have the evident intent of smoothing the path toward adoption in trade agreements of compulsory compliance with core labor standards. This intent notwithstanding, one can see the potential for inherent contradiction in a Declaration that identifies the “fundamental rights” of workers while simultaneously recognizing that, for certain countries, the very ability to participate in the global market relies on not fully granting these rights to their citizens.²¹ For example, the ILO’s Minimum Age

16. ILO Declaration on Fundamental Principles and Rights at Work, 86th Sess., Geneva (June 1998) pmb1. & art. 2, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT (last visited May, 6, 2008).

17. ILO Declaration on Fundamental Principles and Rights at Work: History, *at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DECLARATIONHISTORY?var_language=EN.

18. We remind readers the World Trade Organization (WTO) is a statist body that does not question the legitimacy of extant government officials to represent the best interests of their citizens.

19. Ministerial Declaration, WT/MIN(96)/DEC ¶ 4 (Singapore Dec. 13, 1996), http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm. We would hardly have expected developed countries to admit complicity in protectionist practices and the desire to deny LDCs their comparative advantage, particularly in the midst of multilateral negotiations styled the “Doha Development Agenda.”

20. *Id.* art. 5.

21. In general, the minimum age for employment of children should not be less than the age of completion of compulsory schooling, although never less than 15 years. In developing countries, a minimum age of 14 years may be applied where the economy and educational facilities are insufficiently developed. Sometimes, light work may be performed by children two years younger than the general minimum age. *See* ILO Declaration on Fundamental Principles and Rights at Work

Convention prohibits employment of children under 15 years of age. However, for nations whose economy and educational facilities are insufficiently developed, the minimum age drops to 14 years.²² Does the need for education to meet a child's present and future human rights depend on the economic development of the country in which the child happens to reside?

Juxtaposed with these opposing principles is an argument against attempting to force a single global "cookie-cutter" model on all states without account of their level of economic development. Under this approach, treatment of workers that may be considered a violation of human rights in one country should pass muster as a fair labor standard in another, at least until the latter country's development reaches some minimum level. The hidden danger in this view is the assumption that economic growth alone is the guarantor of worker rights. Profits are not wrenched from companies in favor of workers solely because they are higher in a given year. In developed countries, advances in worker rights take place because workers and their supporters insist on these rights, using the weapon of non-performance to enforce their entreaties. In LDCs, human rights for workers rely upon committed and informed governments.

Nonetheless, the Declaration also makes it clear that these rights are universal, and that they apply to all people in all states, regardless of the level of economic development. It particularly mentions groups with special needs, including the unemployed and migrant workers. It recognizes that economic growth alone is not enough to ensure equity and social progress, or to eradicate poverty.³²

C. General Effects of International Trade on Biodiversity and Indigenous Populations

The trade regime has produced negative economic and cultural outcomes for indigenous populations by rewarding work that is inconsistent with the nature-sensitive ways of subsistence lifestyles, by promoting unsustainable resource use, and through diversion of

[hereinafter ILO Declaration on Rights at Work], Effective Abolition of Child Labor (discussing child labor issues), http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=ISSUESCHILDLABOUR.

22. Convention 138 Minimum Age Convention, ILO Doc. C138, art. 2.4 (June 26, 1993), <http://www.itcilo.it/actrav/english/common/C138.html>. The Convention permits "light work" that does not interfere with schooling at age 13 (12 for LDCs). *Id.* arts. 7.1 & 7.4.

23. See ILO Declaration on Fundamental Principles and Rights at Work: History, *supra* note 17.

governments from long-range social priorities with the promise of quick riches.

Because trade rules give teeth to intellectual property protections, multinational companies have been able to appropriate to great profit traditional knowledge essential to indigenous culture. These same trade rules, however, deny communal inventions any share of the royalties earned by their use. This chapter explores the nature of trade's intersections with indigenous populations and evaluates policies governments can adopt both to promote trade and to protect indigenous knowledge and natural resources.

The "traditional knowledge" that struggles in the trade intersection is the historical use by indigenous peoples of herbs and other plant resources for curative, agricultural, or other purposes that may have been practiced for hundreds of years, but without the written documentation expected of patentable ideas by Western intellectual property law, including the TRIPS Agreement. Protection of traditional knowledge from biopiracy and development of rules that provide economic rewards for the knowledge is an important aspect of trade's effect on indigenous populations.

The U.N. Working Group on Indigenous Populations adopted the most direct attempt to delimit the human rights of indigenous populations. The Draft Declaration on Discrimination Against Indigenous Peoples²⁴ (Draft Declaration) remains soft law because the broader membership of United Nations has not adopted it. Article 4 of the Draft Declaration identifies the right of indigenous peoples "to maintain their distinct political, social, and cultural characteristics while retaining the right to participate fully, if they choose to, in the political, legal life of the State." Article 7 affirms that indigenous peoples have the collective and individual right not to be subjected to "ethnocide and cultural genocide," the strength of the language an indication of the importance to local communities of preserving their ethnic and cultural identity if they are to continue at all as distinct indigenous peoples.

Article 30 of the Draft Declaration reaches far indeed. In this Article, the right of indigenous peoples to determine the "development of their lands and other resources" (including mineral and water) is confirmed. In addition, indigenous populations, we are told, have the right to require that states obtain their "free and informed consent" before the State approves a project that would affect those lands or resources. Approval by states of resource extraction projects to advance the economic development of the

24. U.N. Commission on Human Rights, Draft Convention on Discrimination Against Indigenous Peoples, E/CN.4/Sub.2/1993/29/ Annex I (Aug. 23, 1993), <http://www.cwis.org/draft9329.html>.

majority, in the form of investment contracts with multinational corporations, without the knowledge or against the wishes of tribal populations, has caused irreversible hardships to native communities whose future generations rely on the sustainable use of the natural resources located on indigenous land.

II. PERUVIAN ECONOMY PRIOR TO THE FTA

A. *Employment: Formal and Informal*

If Andean countries are to gain populist support for opening internal markets to global competition, the decisive concern in negotiating their respective free trade agreements with the United States is the virtual certainty that unemployment levels will increase in those sectors that cannot compete with U.S. imports. The negotiating challenge is to balance these job losses against gains in those sectors in which the country has a comparative advantage over U.S. producers. Therefore, to determine the possible effects of a free trade agreement, we must—like Andean negotiators—consider the particular situation in the country under study.

In Peru, as in many other developing economies, governments face the challenges of creating better employment opportunities, reducing the large percentages of the population engaged in the “informal economy,” and improving working conditions. Noted Peruvian labor analyst Fernando Villaran found that unemployment affects 5.7% of the “formal” Peruvian economic population, while over half the population is under-employed and only about one-third has adequate employment. The Peruvian active economic population consists of almost 12 million people, of whom almost 700,000 are unemployed. Thirty-five percent of those who have found jobs work for the private sector, 10% for the public sector, and 53% in some form of self-employment.²⁵ In assessing the effects of the Peruvian FTA, it is essential to take into consideration these already high levels of unemployment in the formal economy and high levels of participation in the so-called “informal economy.”

Peru’s informal workers join the 80 million informal workers in the Americas, with 57 million unemployed or underemployed.²⁶ Most of those

25. Juan Flores, *La Situación Laboral en el Perú* [The Labor Situation in Peru], available at <http://www.monografias.com/trabajos6/sila/sila.shtml> (last visited May 6, 2008).

26. Marie-Claire C. Segger, *Sustainable Development in the Negotiation of the FTAA*, 27 *FORDHAM INT’L L. J.* 1118, 1119 (2004).

who are self-employed work in the informal economy. This sector consists mostly of small family units that operate with very low productivity levels and are unable to face the costs that the formal economy implies, such as taxes, fees, and other financial expenses. The strategy of this informal sector is only to survive because they lack the means to enter the formal sector of the economy.²⁷ Peru's Ministry of Labor and Employment Promotion estimates that as much as 60% of those seeking employment in the cities work in the informal sector and concentrate their activities in the trade of goods and services. Informal workers are characterized by their low educational and training levels.²⁸

Regarding unemployment rates, it has been argued that structural unemployment levels in the Andean countries have grown as a consequence of several factors. The first factor is the relatively rapid market opening process of Andean countries, which facilitated the entry of foreign investment and modern technology, established high productivity standards, and increased the demand for more qualified labor. A second factor is the imbalance between the labor market demand for qualified labor and the non-qualified labor supply. A third factor could arguably be the increase of imports which reduces the domestic demand for local products, one of the inevitable downsides of trade that leads to the decline of domestic industry, thus creating lay offs because of lessened demand for labor.²⁹

In Peru, as in all of Latin America, the high unemployment level among young people between 15 and 24 years old is a worrisome fact. This figure is considerably higher than those found in adult unemployment rates. Youth unemployment rates are strongly related both to low education levels and household income.

The lack of employment opportunities or the existence of employment with precarious salaries and poor work conditions usually turn into social problems such as social exclusion, undermining of social cohesion, rampant crime, and violence in general, which in turn, are detrimental to economic growth.

27. Victor E. Tokman, "De la Informalidad a la Modernidad" [From an Informal to a Modern Economy], Oficina Internacional del Trabajo, available at <http://www.ilo.org/dyn/infoecon/docs/486/F1558379380/Tokman%201.pdf>.

28. Ministry of Labor and Employment Promotion of Peru, Program of Statistics and Labor Studies, *Boletín de Economía Laboral* [Bulletin of Labor Economy] 22-24 Year 6, Oct. 2002 [hereinafter *Boletín de Economía Laboral*], available at http://www.mintra.gob.pe/peel/publicaciones/bel/BEL_22-24.pdf (last visited May 6, 2008).

29. Flores, *supra* note 25.

Important facts that have had an effect on labor must be considered. The first of them was the demographic explosion that occurred between 1960 and 1980 which caused people who were born during this time to enter the labor market in the 80's and 90's creating a labor supply surplus, and thus, putting strong pressure on employment and remunerations. A second factor is the continuous and mass migration from rural areas to urban areas and the increase of female participation in labor which has caused not only unemployment but also an increase in informal and sub-employment.

Other important factors have been the inability of the productive sector to absorb the labor surplus, causing a lot of workers to occupy positions below their qualifications in order to keep their employment and the lack of adaptation of the educational system to the demands of the productive sectors.³⁰

These latter facts are evidenced by the rates of workers with university (46.7%) or technical education (55%) and those that do not carry out activities related to their profession or qualification or are under using their skills in their employment.

According to the Peruvian Ministry of Labor and Employment Promotion, the rate of labor activity in the urban regions of Peru is 67.7%, meaning that 7 out of 10 people capable of work participate in the labor market. The average unemployment rate in the urban regions of Peru is about 8%, and the average under-employment rate for the same regions in 2001 was over 47%. Rate differences between cities are due to the type of economic activity developed in each region. Similarly, the remuneration level also depends on the type of activities carried out in the different regions. It is important to keep in mind that most workers in the principal cities (73%) have basic educational levels.³¹

In order to cope with labor related problems and improve its protection of workers' rights, Peru has undergone a fundamental labor reform in recent years. In 2003, a major labor law reform was passed in order to deal with restrictions that were remnants of the Fujimori presidency. The reform reduced the number of workers needed to establish a union, eliminated prohibitions that kept workers from joining unions during their probationary period, limited the power of the labor authority to cancel a union's registration, and removed prohibitions on the political activities of unions. This amendment also repealed compulsory arbitration requirements that limited the right to strike in essential services and was

30. *Boletín de Economía Laboral*, *supra* note 28, at 22-24.

31. *Id.*

followed by a regulation ensuring that union dues of public employees are collected according to the intent of union members.

In 2004, regulations to strengthen labor inspections and broaden labor inspectors' powers were published, allowing easier access to firms, improving inspectors' ability to impose sanctions, and increasing the level of fines. Likewise, Peru modernized the electronic system for tracking wage and hour data to ensure that workers are paid all wages due. Additionally, in 2005, new labor law legislation was introduced addressing anti-union discrimination and the right for unions to determine the criteria for striking. At an international level, Peru has also ratified 71 ILO conventions—including all eight of the core conventions.²³

On the other hand, the 2005 human rights report of the U.S. Department of State found instances of forced and other illegal child labor violations of Peruvian law and a general inability of the small staff of Peru's Ministry of Labor to conduct adequate inspections. Because of the large informal employment sector, less than half of Peru's population earns the minimum wage. The report also noted problems with Peruvian labor laws themselves, primarily in permitting companies located in one of Peru's four export processing zones to exceed the 20% cap on temporary employment contracts, which prevents greater unionization.³³

B. *Competitiveness of Peruvian Industries*

A study by Peru's Economy Institute identified three primary aspects of the country's competitiveness challenge. The factors are poverty, education, and the predominance of micro-enterprises. With an average per capita income of about US\$2,000 annually, poverty is of course a competitiveness factor in Peru. The poor have reduced access to educational opportunities and to the nutritional and health care needed to make them fully productive members of society.³⁴

32. OFFICE OF THE U.S. TRADE REPRESENTATIVE, REAL RESULTS ON LABOR RIGHTS FACTS ABOUT PERU'S LABOR LAW PROTECTION AND ENFORCEMENT, U.S.—PERU TRADE PROMOTION AGREEMENT POLICY BRIEF (Dec. 2005), http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file163_8548.pdf.

33. *Levin Warns of Democratic Opposition to Peru FTA as Labor Groups Rally*, INSIDE U.S. TRADE, Mar. 17, 2006, available at http://www.insidetrade.com/secure/dsply_nl_txt.asp?f=wto2002.ask&dh=44966635&q= (last visited May 6, 2008).

34. Carlos Oliva et al., *Obstáculos para el aumento de la competitividad en el Perú* [Obstacles for the Increase of the Competitiveness in Peru], at 12, Peruvian Economy Institute Study No. 2002-081 (Dec. 2002), available at <http://www.ipe.org.pe/publicaciones/docs/2002-081%20CAF.pdf> (last visited May 8, 2008).

A second factor, highlighted both by businesses and by UNESCO, is the quality of education. According to UNESCO, education in public schools is not of the highest quality and drop-outs rates are high. Businesses complain of their inability to find workers with the educational skills to perform difficult tasks. The lack of educational quality would explain the low productivity levels of the average educated workers. As a result, labor productivity is low and more than half of the workers with secondary education and almost a third of workers with higher education levels earn less than a dollar an hour.⁵³

A third factor is the average size of the Peruvian business. According to the Ministry of Labor, 57% are micro-enterprises, companies with less than 10 workers, and many of these are not part of the formal employment sector, even though they are responsible for 18% of the country's GNP. A study by the National Institute of Statistics and Informatics estimated that 35% of micro-enterprises have no labor benefits and less than 1% complies with all required labor benefits.³⁶ Big businesses account for 29% of GNP with only 5% of the productive units, thus showing the relationship between business size and productivity.³⁷

We will mention again and again a further productivity factor identified by the study. The small technological and scientific base in Peru result from failing to exploit modern communication and information technologies, as well as the need to commit government funds to private investment in research and development.⁸³

C. Traditional Export Products

Regarding the agricultural sector, coffee has traditionally been the main agricultural product of exportation. According to the Peruvian Ministry of Agriculture, coffee represents almost half of the agricultural exports and about 5% of total exports, with its principal destination markets being the United States, the European Union, and Japan.

Similarly, cotton has traditionally been the most utilized raw material in the textile industry. Even though Peru produces five varieties of cotton, cotton production faces a severe crisis that has caused the increase of cotton imports from various sources such as China, Bolivia, the United States, Argentina, and Australia.⁹³

35. *Id.* at 19-20.

36. *Id.* at 13.

37. *Id.*

38. *Id.*

39. Ministry of Agriculture of Peru, *Principales Productos de Exportación Tradicional* [Main Products of Traditional Export], <http://www.minag.gob.pe/agricola3.shtml> (last visited Jan. 31,

For the most part, Peruvian exports are still predominantly minerals and metals, which are capital-intensive sectors and do not depend so heavily on labor nor do they include a significant added value. Manufactured exports, on the other hand, represented only around 21% of total exports in 2000—percentage well below the Latin American average of 58%. In general, according to the Peruvian Economy Institute, the export of goods does not represent more than 13% of the GNP and is highly dependent on traditional products.⁴⁰

Even though Peru has been highly favored by the price increase of minerals, which constitutes an important part of the Peruvian export-supply, the most spectacular growth has been evidenced in non-traditional exports which registered a growth of more than 35%. This has had a positive impact on employment because non-traditional products require significantly more labor force. Furthermore, this growth has been positive for the Peruvian economy given the fact that prices of non-traditional products are not subject to the drastic changes in international supply and demand, as is the case of traditional commodities pricing.⁴¹

Even though the United States is one of Peru's biggest commercial partners, in general the Peruvian economy is somewhat diversified since a considerable percentage of its trade is carried out with Europe (approximately 30%), Asia (approximately 20%), and other countries in the hemisphere.⁴²

The percentage of goods that are traditionally exported to the United States (approximately 30%) has increased thanks to the ATPDEA. Through the ATPDEA, which was enacted in 2002, the United States granted unilateral preferential tariff treatment to Bolivia, Colombia, Ecuador, and Peru in order to facilitate the eradication of drug-crops. However, this benefit was effective only through December of 2006.

According to the Peruvian Ministry of Foreign Commerce and Tourism, the tariff-free entrance in to the American market of a significant number of Peruvian products has proven to be essential for the growth of exports and employment. In this sense, the average annual growth of Peruvian exports to the United States has been approximately 13% over the last 10 years.

2008).

40. Oliva et al., *supra* note 34.

41. Ministry of Foreign Commerce and Tourism of Peru, Peru-United States FTA Communications Unit, *Peru-United States FTA: Nociones Clave* [Key Notions], at 6, Feb. 2005 [hereinafter Key Notions], available at http://www.tlcperu-eeuu.gob.pe/downloads/documento/TLCPeru-Estados_Unidos_Nociones_Clave.pdf.

42. Oliva et al., *supra* note 34.

The ATPDEA has increased economic activity and formal employment on a more regional scale. According to the Peruvian Ministry of Labor, the cities largely benefited from the employment increase generated by exporter companies are Piura, Ica, La Libertad, Lambayeque, Áncash, Chincha, and Arequipa. Between January and September 2004, the employment increase of companies with 10 or more workers located in the mentioned cities was higher than the employment increase in Lima.⁴³

The increasing U.S. demand for Peruvian apparel, favored by the ATPDEA, has generated approximately 80,000 jobs and has raised worker's remunerations in the sector. The textile and apparel sector is one of the greater sources of employment. It is estimated that the sector's productive chain generates around 350,000 direct jobs and that more than 10% of the Peruvian population depends on an employment directly or indirectly generated by an activity related to the textile and apparel industry chain.

In general, the apparel industry, which has benefited from the ATPDEA, is characterized as labor-intensive and requiring relatively low investment. The ATPDEA, which permitted the apparel exportation to the United States free of tariffs since August 2002, has increased the activity level, the demand for qualified labor, and the salaries of occupations connected to apparel exports. According to the National Institute of Statistics and Informatics, in the third trimester of 2004 the employment rate in the apparel industry grew 21.5% from the same period of the previous year. In this regard, the United States has become the principal destination for Peruvian textile and apparel exports.

The textile-apparel sector represents almost 15% of the Peruvian industrial production, 9% of total exports, and employs approximately 350,000 direct workers. More precisely, 106,000 direct and indirect jobs depend on textile and apparel export industry. It is estimated that the U.S. demand alone generates between 70,000 and 80,000 direct and indirect jobs, most of them closely related to the ATPDEA.⁴⁴

In 2004, a study entitled "ATPDEA Sectoral and Regional Impacts" indicated that more than 194,000 Peruvians have jobs that directly depend on the exports that enter the United States free of tariffs thanks to the ATPDEA, and around 550,000 Peruvians have jobs indirectly related to U.S. exports.⁴⁵

43. Key Notions, *supra* note 41.

44. *Id.*

45. Ministry of Foreign Commerce and Tourism of Peru- Peru-United States FTA Communications Unit, *El TLC y el Agro*, at 8, May 2005 [hereinafter FTA & Agriculture],

In short, according to the Peruvian Ministry of Foreign Commerce and Tourism, the Peruvian exports to the United States benefited by the ATPDEA preferential tariff treatment have created more than 745,000 direct and indirect jobs. Likewise, this Ministry estimates that the Peru-U.S. FTA could generate a net gain of around 81,000 additional jobs, mainly in the agricultural sector, which implies more and better employment on more of a regional scale.

III. THE FLEEING POPULATION: EMIGRATION IN PERU

A. *The Decision to Emigrate*

The Krugman model of center-periphery⁴⁶ about labor mobility and regional development postulates that the most productive regions (centers) offer better salaries and thus stimulate migration from less productive regions (periphery). Given the low costs of transportation, migration is made easy. The flow of workers is related to the region's development, with development understood to mean the leap from an agricultural to an industrialized economy.⁴⁷ The lack of employment opportunities and economic equality are some of the most influential factors for migration in Peru. There are two different migration movements, one internal from rural to urban areas within Peru and one at a more international level.

The decision to migrate is explained by the hope of higher income offered by the chosen destination and has caused some 90 million people worldwide—3% of the global labor force—to leave their homes for employment in other countries.⁴⁸ This explains the reason why some countries and urban centers are so attractive for immigrants. In Peru, the internal migration has been emphasized by migration from the rural areas to the city centers. A substantial number of peasants and farmers travel to the surrounding cities in the region and particularly to Lima.⁹⁴

Peasants and farmers that migrate to coastal cities are low skilled workers, and thus they become street vendors or informal workers that live in the marginal sectors of the cities. Lima alone makes up one third of the

available at <http://www.tlcperu-eeuu.gob.pe/downloads/documento/folleto%20mincetur.pdf> (last visited May 9, 2008).

46. *Boletín de Economía Laboral*, *supra* note 28, at 22-24.

47. *Id.*

48. PHILIP MARTIN ET AL., *MANAGING LABOR MIGRATION IN THE TWENTY-FIRST CENTURY* 7 (Yale Univ. Press 2006).

49. Hernando de Soto, *THE OTHER PATH [El Otro Sendero]* (ILD 1992).

Peruvian population and this proportion is ever increasing. This uncontrolled migration has caused most of individuals and families that come to Lima to occupy uninhabited lands, especially near the mountains, building precarious dwellings and incrementing the rate of extreme poverty.⁵⁰

In general, due to their precarious situation, immigrants accept employment that local populations would not accept or otherwise create their own work alternatives because they cannot afford the wait in finding a job. Immigrants face lower unemployment rates and higher under-employment levels than local populations. Consequently, the likelihood of getting the lowest paid jobs is higher for immigrants.⁵¹ However, as one study puts it, “[w]hat is worse than being exploited abroad? Not being exploited abroad.”⁵²

B. *Emigration Levels*

At an international level, according to the data provided by the Peruvian National Department of Immigration and Naturalization and the National Institute of Statistics of Peru, it is estimated that approximately 2.5 million Peruvians live abroad. Between 1996 and 2003 around 5.8 million Peruvians left the country. The largest group of emigrants (51%) went to other South American countries, 37% went to North America, and 7% to Europe. From the 51% that went to other South American countries, most of them chose a bordering country, especially Chile, Bolivia, and Ecuador. Argentina and the United States followed in importance.

Only 4.8 million returned to Peru. The majority of this migratory balance of almost one million individuals or 58% settled in a bordering country such as Chile, Bolivia, and Ecuador while 29% did so in the United States. Ninety percent of the migratory balance for the period between 1996 and 2003 is found somewhere in the Americas.

An alarming fact is that according to the existing data, the technical and professional population constitutes a considerable proportion of Peruvian emigrants. Between 2000 and 2003, nearly a million professionals and technicians left the country, or almost 29% of the total number of Peruvians that left the country. This information indicates an important phenomenon of international emigration in Peruvian society, where

50. Julio Calderón Cockburn, *La mirada demográfica*, DESCO Seminar concerning Cities, June 15, 2004, at <http://www.desco.org.pe/eventos/ciudades/DEMOGRAFIApercent20Juliopercent20Calderon.doc>.

51. *Boletín de Economía Laboral*, *supra* note 28, at 22-24.

52. MARTIN ET AL., *supra* note 48, at 8.

professionals and technicians constitute one of the most significant emigrant groups in search of more favorable conditions to improve their situation. One of the principal destinations of this group is the United States, made up of 24% professionals and 7% technicians, followed by Chile (16% and 5%), Bolivia (11% and 3%), Argentina (6% and 2%), Ecuador (6% and 2%), Spain (4% and 1%), and Italy (1.2% and 0.3%).³⁵

IV. INTERNATIONAL TRADE POSSIBILITIES FOR PERUVIAN AGRICULTURE

According to the Peruvian Ministry of Agriculture, Peru participates in international trade playing a role of a small supplier with its exports representing about 0.5% of the worldwide agricultural trade.⁵⁴ According to the WTO, Peru is considered to be a Net Food Importer Developing Country due to the fact that its trade balance is usually deficient in regard to food.⁵⁵ From 1980 to 2001, Peru has registered a systematically negative agro-commercial balance amounting to an average deficit.⁵⁶

Historically, the traditional Peruvian exports have been coffee, cotton, and sugar. However, in the 1990s, non-traditional exports substantially increased their participation in export value, reaching 65% of the total agricultural exports in 2001.⁵⁷ In 2000, the agricultural exports reached US\$680 million, equal to 9.7% of the total value of exports and 132% greater than export value in 1990.⁵⁸

In 2005, the ten most exported agro-products alone generated 350,000 jobs,⁵⁹ a number that keeps growing due to the significant quantity of products with tremendous potential to be exported. In 2004, Peru was the fastest growing agro-exporter country with 67 new agricultural products such as asparagus, olives, mango, grapes, yellow onions, beans, cacao

53. César Germaná et al., *Una aproximación a la emigración internacional del Perú. Perú, sociedad de transición (III)* [An Approach to the International Emigration of Peru. Peru, Society of Transition (III)], in CÉSAR GERMANÁ ET AL., LA MIGRACIÓN INTERNACIONAL. EL CASO PERUANO [INTERNATIONAL MIGRATION. THE PERUVIAN CASE] (2005), available at http://www.lainsignia.org/2005/diciembre/ibe_074.htm.

54. Ministry of Agriculture of Peru, *El Comercio Internacional y las Posibilidades del Agro Peruano* [The International Trade and the Possibilities of the Peruvian Land], available at <http://www.minag.gob.pe/agricola2.shtml> (last visited May 8, 2008).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. FTA & Agriculture, *supra* note 45, at 7.

grain, chirimoya, lemon, lentil beans, broad beans, and roses among others.⁶⁰

Non-traditional agro-exports, according to the Agricultural Businessmen Association, represented approximately 40,000 hectares in 2001 (with a set goal of 200,000 hectares in 5 years), located mainly on the coast.⁶¹ These non-traditional agro-export products are produced by mid-size farmers with access to credit resources and superior levels of technology.

Despite this growth, one of the main problems of the Peruvian agricultural sector has been the impossibility to generate a modern agro-export sector able to compete in world markets. Some of the main problems are the landscape fragmentation combined with the lack of organization of agricultural producers, which have reduced the possibilities of farmers to effectively compete in the world market.

The land in the agricultural areas is highly fragmented. Eighty-four percent of agricultural units are smaller than 10 hectares and they represent around 50% of total lands.⁶² This is an obstacle for the development of economies of scale because it has resulted in higher-priced agricultural supplies, production, and commercialization of products and has reduced the farmers' capacity to obtain credit or re-orient their crops to agro-export crops.⁶³

"During the last decade the agricultural GNP has increased around 5.7% annually despite the international financial crisis and the internal political crisis."⁶⁴ In general, the agricultural sector has been the third most productive sector (8.9%) behind manufacturing (14.9%) and commerce (14.3%).⁶⁵

Most of the additional growth comes from agricultural expansion which has been founded mainly on the augmentation of cultivated landscapes as opposed to significant productivity or labor increases. Consequently, it has been argued that this growth has been produced within a low profitability context due to falling prices and high production costs.

60. *Id.* at 7.

61. Ministerio de Agricultura [Ministry of Agriculture of Peru], *Plan Estratégico Sectorial Multianual-Sector Agricultura 2002-2006*, at 4 [Multiannual Sectorial Strategic Plan-Sector Agriculture 2002-2006] Dec. 2001, available at <http://www.minag.gob.pe/politica.shtml> (last visited May 8, 2008).

62. *Id.* at 3.

63. *Id.*

64. *Id.* at 2.

65. *Id.*

In 2000, the Peruvian population was estimated around 25.7 million people from which 7.1 million (30%) were rural populations.⁶⁶ In turn, 31% of the economically active population in the rural areas works in some type of agricultural activity.⁶⁷

Despite the important changes at a social and economic level, poverty is still an essential trait of the rural sector. According to the National Institute of Statistics and Informatics (INEI), in 2001, 70% of the rural population was considered poor while 35.6% were living in conditions of extreme poverty.⁶⁸ This is closely related to the low productivity level of the labor force in agriculture.

An analysis by the Peruvian National Institute of Statistics and Informatics of Peruvian living standards showed that poverty affects mostly small farmer-families and sustenance growers, while commercial farmers and non-agricultural rural populations are less vulnerable to extreme poverty.⁶⁹ Another factor that limits productive development is the low level of technological innovation and public investment in research which restricts the farmers' capacity to increase productivity improving the transformation process after the harvest and the consequent commercialization.

Regarding the commercialization of agricultural products, the Peruvian system lacks the proper infrastructure to offer nationwide agricultural production in the largest of Peruvian cities, which results in losses for producers. Currently, the agricultural sector depends on legal provisions such as the Forest Law, the Sanitation Law, the Law of Seeds, the Law of Agricultural Promotion Investment, and the Water Law that jointly endeavor to encourage private activity, to improve the participation of producers, to generate employment, and to stimulate local, regional and national economic growth while guaranteeing the sustainable management of natural resources.⁷⁰

V. BIODIVERSITY AND INDIGENOUS POPULATIONS IN PERU

A. Peru's Strategic Ecosystems

Pioneer ecologist Edward O. Wilson explains that the richness of

66. Ministerio de Agricultura, *supra* note 61, at 2.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 3.

biodiversity in Peru's rain forests follows a general principle of biology known as the latitudinal diversity gradient.⁷¹ The largest numbers of species occur in the equatorial regions of South America, Africa, and Asia. Wilson posits the case of vascular plants, that is, flowering plants, ferns, and a mix of lesser groups. Together these groups constitute 99% of land vegetation. Of the 250,000 known species, 170,000 (or 68%) occur in the tropics and subtropics, especially in the rain forests.⁷² For example, Peru and its neighboring Andean countries of Colombia and Ecuador account for 40,000 of these species with just 2% of the world's land mass.⁷³ By way of contrast, only 700 species may be found in all of Canada and the United States, ranging from the mangrove swamps of Florida to the coniferous forests of Labrador.⁴⁷

Peru possesses strategic ecosystems that constitute a very important factor in international negotiations. Peru is one of the five countries with the largest tropical rainforests in the world, and it is considered a mega-diverse country due to its vast diversity regarding ecosystems, species of flora and fauna, genetic resources, and cultures. According to the Peruvian Ministry of Agriculture, Peruvian forests are home to 11% of the world's wild fauna species and 8% of the world's flora.⁷⁵

Likewise, as a genetic source, Peru possesses around 25,000 flora species (10% of the world's total amount), 128 species of domesticated plants, and 4,400 native plant species with known usages in the nutritional, cosmetic, ornamental, aromatic, and medicinal fields, among others.⁷⁶ Bioprospecting⁷⁷ from Peru's countless plant types of new chemical products of strategic importance for the pharmaceutical and cosmetic industries is one of the great potentials in Peru.

Even though two-thirds of the Peruvian territory (around 78 million hectares) is covered by tropical forest and most of it has potential for permanent forest production, the forest sector represents only around 0.5% of the GNP.⁷⁸

71. EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. WILSON, *supra* note 71.

77. The systematic search for new sources of compounds, genes, enzymes, whole organisms, and other products that have potential economic value and can be found in our biodiversity. Ana Sittenfeld, *Biodiversity, Bioprospecting, and Intellectual Property: The Case of Costa Rica and Merck Pharmaceuticals*, Lecture at Univ. of Fla. College of Law, Feb. 27, 2006 (on file with authors).

78. Key Notions, *supra* note 41.

The Peruvian Amazon has 46 million hectares of forest suitable for exploitation, with an estimated productive capacity of 2.3 million of cubic meters.⁷⁹ Even though wood exports total only US\$70 million annually, uncontrolled forest exploitation has caused reduction of wild fauna because wood is obtained without following sustainable forest management practices.⁸⁰

Peru also possesses a diversity of cultures. Fourteen linguistic families and at least 44 different ethnic groups are located in the Amazon regions. These indigenous populations possess important knowledge regarding the use and properties of plant and animal species concerning their nutritional and medicinal value and their genetic resources.⁸¹

B. Peru's Indigenous Peoples

According to the 1993 census, Peruvian indigenous populations represented nearly a fifth of the total Peruvian population and were estimated at 3.7 million, 85% of which were of Quechua origin. In 1994, there were 1192 native communities and 5680 peasant communities.⁸²

In 2000, Peru's indigenous population was estimated at 3.5 million people and, according to the Peruvian living standards survey, most live in the rural areas of the Sierra (61.2%), cities within the same region (15.5%), and Lima (11%).⁸³ In general, 70% of the indigenous population lives in rural areas and the remaining 30% in urban areas.⁸⁴ The 'urban indigenous peoples' amount to a little over one million people, or about 7% of the Peruvian urban population.⁸⁵

According to a study by Nestor Valdivia of indigenous immigrants to Lima and Cuzco, the principal motives behind the indigenous peoples' emigration to urban zones are economic in nature. The indigenous peoples immigrate to these zones in search of employment opportunities.⁸⁶ Another

79. Sittenfeld, *supra* note 77, at 1.

80. Ministerio de Agricultura, *supra* note 61.

81. ANTONIO BRACK EGG, PERU'S BIODIVERSITY AND ITS STRATEGIC IMPORTANCE, CULTURAL BULLETIN OF THE MINISTRY OF FOREIGN AFFAIRS (2004), available at http://www.chasquieru.com/Y2N5_Edition/PeruBiodiversity.htm (last visited May 8, 2008).

82. NÉSTOR VALDIVIA, ETNICIDAD, POBREZA Y EXCLUSIÓN SOCIAL: LA SITUACIÓN DE LOS INMIGRANTES INDÍGENAS EN LAS CIUDADES DE CUZCO Y LIMA [Etnicidad, Poverty and Social Exclusion: the Situation of the Indigenous Immigrants in the Cities of Cuzco and Lima], at 9, available at http://www.amdh.com.mx/ocpi_/documentos/docs/4/4/01/04/03.pdf (last visited May 8, 2008).

83. *Id.* at 10.

84. *Id.* at 11.

85. *Id.*

86. *Id.* at 13.

reason might be the status of the Quechuans as victims of the fight between the army and the Maoist Shining Path. For the most part, urban indigenous populations work as merchants, vendors, construction workers, and in agricultural activities.⁸⁷

Given that rural areas of Peru, which traditionally have been inhabited by indigenous populations, continue to be the zones that register the highest poverty levels, the indigenous peoples are forced to emigrate to the cities.⁸⁸ The situation for these immigrant indigenous populations is no better in the cities. A worrisome indicator of the living and labor conditions of the indigenous populations in cities is the extremely high percentage of children between 5 and 13 years old that work (32%) compared to the percentage of non-indigenous children that work (6%).⁸⁹

Other factors that indicate the disadvantageous conditions of the urban indigenous peoples are the lack of social security coverage, precarious health conditions, and the lack of education.⁹⁰ For the most part, the Peruvian indigenous peoples are socially, politically, and economically excluded from society. Despite the progress reached in recent years, there are still obstacles to overcome. Some of those obstacles are the lack of legal recognition of indigenous organizations and the violation of indigenous peoples' property rights.⁹¹

C. Medicinal Plants

The herbal treatment of diseases has existed in Peru since the pre-Columbian age. Peruvian biodiversity has enormous potential not only in the pharmaceutical sector and modern medicine but also in the perfume, fragrance, soap, cosmetic, spice and seasoning, and pesticide industries, among others.⁹²

A very interesting case of plants with medicinal properties is the native berry called camu camu (*Myrciaria dubia*). Camu camu is a small tree native to wetlands of the Amazon Basin and is especially abundant in Peruvian Amazonia.⁹³ Although very high in vitamin C, until recently

87. NÉSTOR VALDIVIA, *supra* note 82, at 13.

88. *Id.* at 15.

89. *Id.* at 20.

90. *Id.* at 87.

91. *Id.* at 86.

92. Ministry of Agriculture of Peru, *Exportación Agrícola No Tradicional: Principales Líneas Emergentes* [Nontraditional Agricultural Export: Main Emergent Lines], available at <http://www.minag.gob.pe/agricola42.shtml> (last visited Jan. 23, 2008).

93. Jim Penn, *Camu Camu: A Conservation and Development Issue in Peru*, available at <http://www.rainforestconservation.org/articles/camu-camu.html> (last visited Jan. 31, 2008).

camu camu was used almost exclusively in Peru as fish bait and a convenient source of firewood when dead.⁹⁴ Then camu camu fruit pulp became very popular and began to be exported, mainly to Japan.⁹⁵

Peru sought to protect against biopiracy not only camu camu but other resources of Peruvian origin considered as priority resources by the National Anti-Biopiracy Commission, through the search for potential cases of biopiracy covering hercampuri, camu camu, yacon, caigua, sacha inchi and chancapiedra.⁹⁶ Peru also submitted a paper describing in detail the case of camu camu for disclosure of origin purposes.⁹⁷

Peru, led by India and joined by Brazil, has now taken its fight to the next level by proposing an amendment to the WTO TRIPS Agreement that would require the patent applicant to disclose the source of the genetic materials such as plant life and traditional knowledge before being able to receive a patent on biotechnological inventions.⁹⁸ These countries charge that bioprospectors from the First World have caused large economic losses to Third World countries from biopiracy and that the suggested disclosure requirement would reduce the chance that a patent would be issued that is not based on new knowledge.⁹⁹ The United States, Japan, and, surprisingly, Argentina support a system of contracts between bioprospectors and developing nations that give the companies permission to research genetic materials and which commit the companies to share the benefits of any patents later issued as a result of the research.¹⁰⁰

VI. DETAILS OF THE PERU-UNITED STATES FREE TRADE AGREEMENT

A. *Promotion and Protection of Worker Rights*

Labor obligations are part of the core text of the Peru-U.S. FTA. The

94. *Id.*

95. *Id.*

96. World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eight Session Geneva, June 6 to 10, 2005, available at http://www.indecopi.gob.pe/ArchivosPortal/deinteres/5/2006/1-363/wipo_grtkf_ic_8_12.pdf (last visited May 8, 2008).

97. *Id.*

98. *India, Brazil, Peru Push for Text-Based Talks on Patent Disclosure*, 24 INSIDE U.S. TRADE 11, Mar. 17, 2006, at 12 [hereinafter *India*].

99. *Id.*

100. Frances Williams, *WTO Battle Looms Over Patents*, FIN. TIMES (London), June 6, 2006; *India*, *supra* note 98, at 12.

FTA reiterates the commitments assumed by the parties by virtue of the 1998 ILO Declaration of Fundamental Principles and Rights at Work and sets forth internationally recognized labor rights such as the right of association, right to organize and bargain collectively, a prohibition of the use of any form of forced or compulsory labor, labor protections for children and minors—including a minimum age for the employment of children and elimination of the worst forms of child labor—and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.¹⁰¹ Both parties have committed to strive to ensure that their domestic laws provide for labor standards consistent with internationally recognized labor principles and rights.¹⁰² Ironically, Peru is said to have offered to incorporate these standards directly into the FTA, but the United States demurred on the grounds that it did not wish to go so far beyond the model of FTAs with other countries.¹⁰³ Some participants in trade promotion believe that the U.S. failure to pursue stronger labor accords seriously impedes growth of middle classes in partner developing countries.¹⁰⁴

Similarly, the agreement reaffirms the complete respect for the parties' political constitutions and legislations and the compromise so as not to fail in effectively enforcing their labor laws in a manner that would affect trade between the parties.¹⁰⁵ The agreement also emphasizes that it is improper to weaken or reduce domestic labor protections to encourage trade or investment.¹⁰⁶

The agreement requires the parties to effectively enforce their own domestic labor laws.¹⁰⁷ This obligation is enforceable through the Agreement's dispute settlement procedures and the FTA establishes procedural guarantees to ensure both workers and employers the right to defend themselves and to have fair, equitable, and transparent access to labor tribunals.¹⁰⁸

101. ILO Declaration on Rights at Work, *supra* note 21.

102. OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. PERU TRADE PROMOTION AGREEMENT POLICY BRIEF, FREE TRADE WITH PERU: SUMMARY OF THE U.S.-PERU TRADE PROMOTION AGREEMENT [hereinafter USTR Summary] (Dec. 2005), available at http://insidetrade.com/secure/pdf8/wto2005_7248f.pdf; ILO Declaration on Rights at Work, *supra* note 21.

103. *U.S., Peru Sign FTA, Portman Hopes for Passage Before Summer Recess*, 24 INSIDE U.S. TRADE 15, Apr. 14, 2006, at 1, 17.

104. *Id.* (quoting Rep. Sander Levin, Democratic Member of the House Ways and Means Committee that must approve FTAs under U.S. law).

105. *Id.*

106. USTR Summary, *supra* note 102.

107. *Id.*

108. *Id.*

The FTA creates a Labor Affairs Council which will be in charge of the implementation and development of the labor chapter and its labor cooperation annex.¹⁰⁹ Likewise, the agreement establishes cooperative labor consultations which may be requested by any party regarding any matter arising under the labor chapter.¹¹⁰ The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter, but if they fail to resolve the matter, the consulting party may request that the Council be convened to consider the matter.¹¹¹ If the matter concerns whether or not a party failed to effectively enforce its labor laws in a manner affecting trade between the parties, and the consulting parties have failed to resolve the matter within 60 days of a the consultation request, the complaining party may resort to the dispute settlement mechanism provided for in Chapter 21 of the agreement.¹¹²

Similarly, the FTA establishes a labor cooperative mechanism to promote a general respect for the principles embodied in the ILO Declaration on Fundamental Principles and Rights at Work, and compliance with ILO Convention 182 on the Worst Forms of Child Labor.¹¹³

The objective of the labor cooperative mechanism is the seeking of bilateral or regional cooperative activities regarding labor fundamental rights, law and practice related to the principles and rights of the ILO Declaration on Fundamental Principles and Rights at Work, compliance with ILO Convention 182 on the Worst Forms of Child Labor, methods to improve labor administration and enforcement of labor laws, social dialogue and alternative dispute resolution. Also, labor relations, occupational safety and health, working conditions, mechanisms and best practices to protect and promote the rights of migrant workers, social assistance and training, technology and information exchange, labor statistics, employment opportunities, gender, best labor practices, and issues related to small, medium, and micro-enterprises, and artisans.

According to the before mentioned, under the FTA, Peru is committed to comply with its own labor legislation and its international compromises regarding labor, which strengthen worker's rights. It is important to emphasize that as a dissuasion formula, the non-fulfillment of labor

109. Business Roundtable, The U.S.-Peru Trade Promotion Agreement and Labor, *available at* http://trade.businessroundtable.org/trade_2006/peru/BRT_Labor.pdf (last visited May 8, 2008).

110. *Id.*

111. *Id.*

112. Key Notions, *supra* note 41.

113. USTR Summary, *supra* note 102.

obligations provided for by the FTA may lead to the imposition of a considerable fine which would be utilized to improve labor matters.¹¹⁴

B. *Environmental Protection*

The Environment Chapter of the agreement recognizes the sovereign rights and responsibilities of the parties with respect to their natural resources.¹¹⁵ In this sense, each party has the right to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies. Nonetheless, the parties compromise to continue improving their respective levels of environmental protection.

Environmental obligations, which are part of the core text of the trade agreement, seek to contribute to the parties' efforts to ensure that trade and environmental policies are mutually supportive, to promote the optimal use of resources in accordance with the objective of sustainable development, and to strive to strengthen the links between the parties' trade and environmental policies and practices.

The agreement commits both parties to enforce their own domestic environmental laws in an effective way. This obligation is enforceable through the agreement's dispute settlement procedure.¹¹⁶ Similarly, the parties also commit to establish high levels of environmental protection and to not weaken or reduce environmental laws to attract trade or investment.¹¹⁷ However, the environmental chapter does not empower a Party's authorities to undertake environmental law enforcement activities in the territory of another party.¹¹⁸

Likewise, the parties compromise to ensure that judicial, quasi-judicial, or administrative proceedings are available under their laws to provide sanctions or remedies for violations of their respective environmental laws.¹¹⁹ It is important to emphasize that the agreement promotes a

114. Key Notions, *supra* note 41.

115. OFFICE OF THE U.S. TRADE REPRESENTATIVE, PROPOSED UNITED STATES—PERU TPA TEXTS, CHAPTER 18 (Jan. 2006) [hereinafter CHAPTER 18], http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file852_8712.pdf (last visited Jan. 31, 2008).

116. USTR Summary, *supra* note 102.

117. *Id.*

118. Ministry of Foreign Commerce and Tourism of Peru, Peru-United States FTA Communications Unit, *Peru-United States FTA: Resúmenes explicativos por Capítulos—Contenido del Capítulo de Medio Ambiente*, available at <http://www.tlcperu-eeuu.gob.pe/downloads/documento/Mediopercent20Ambiente.pdf> (last visited May 8, 2008).

119. CHAPTER 18, *supra* note 115.

comprehensive approach to environmental protection. It establishes procedural guarantees, which ensure fair, equitable, and transparent proceedings for the administration and enforcement of environmental laws, complemented by provisions that promote voluntary, market-based mechanisms to protect the environment.

Some of the mechanisms provided for by the treaty to reach this comprehensive environmental protection are ones such as the creation of a public submissions process to ensure that views of civil society are appropriately considered. Benchmarking environmental cooperation activities, and the mutual supportiveness of multilateral environmental agreements and international trade agreements to which Peru and the United States are parties.¹²⁰

Chapter 18 of the agreement establishes an Environmental Affairs Council which must consider and discuss progress in the implementation of this chapter and the Environmental Cooperation Agreement, and strive to resolve any controversies arising under this Chapter which could not be settled through environmental consultations.¹²¹

A party may request environmental consultations along with another party regarding any matter arising under this chapter.¹²² The consulting parties must endeavor to arrive at a mutually satisfactory resolution of the matter, but if they fail to resolve the matter through consultations, a consulting party may request that the Council be convened to consider the matter.¹²³ If the matter concerns whether or not a party failed to effectively enforce its environmental laws in a manner affecting trade between the parties, and the consulting parties have failed to resolve the matter within 60 days of the consultation request, the complaining party may resort to the dispute settlement mechanism provided for in Chapter 21 of the agreement.¹²⁴

Chapter 18 also includes an environmental cooperation agreement, which provides a framework for undertaking environmental capacity building in Peru, and establishes an Environmental Cooperation Commission in order to develop a work plan for cooperative activities.¹²⁵ This environmental cooperation agreement identifies a number of priorities such as the strengthening of the capacity to develop, implement, and enforce environmental laws, promotion of incentives to encourage

120. USTR Summary, *supra* note 102.

121. CHAPTER 18, *supra* note 115.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

environmental protection, protection of endangered species, promotion of clean production technologies, and building capacity to promote public participation in the environmental decisionmaking process.

A very distinctive aspect of this chapter is the inclusion of provisions recognizing the importance of protecting biodiversity. Both parties recognize the importance of conservation and sustainable use of biological diversity in order to achieve sustainable development, as well as the importance of respecting and preserving the traditional knowledge and practices of native communities in order to contribute to cultural, economic, and social development.¹²⁶

C. Dispute Settlement Chapter as a Tool to Enforce Labor and Environmental Commitments Under the Agreement

Despite the cooperative spirit of the labor and environment chapters, in which direct and mutually satisfactory solutions are preferred, those chapters do allow resort to the Chapter 21 Dispute Settlement provisions under enumerated circumstances. Article 17.6(6) of the Agreement provides that if the matter under consultation concerns whether or not a party failed to effectively enforce its labor laws in a manner affecting trade between the parties, and the consulting parties have failed to resolve the matter within 60 days of the consultation request, the complaining party may request consultations under Article 21.4 (Consultations) or a meeting of the Commission under Article 21.5 (Intervention of the Commission) and, as provided in Chapter 21 (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter.¹²⁷

Similarly, Article 18.9(6) of the agreement provides that if the matter under consultation concerns whether or not a party failed to effectively enforce its environmental laws in a manner affecting trade between the parties, and the consulting parties have failed to resolve the matter within 60 days of the consultation request, the complaining party may request consultations under Article 21.4 (Consultations) or a meeting of the Commission under Article 21.5 (Intervention of the Commission) and, as provided in Chapter 21 (Dispute Settlement), have recourse to the other provisions of that chapter.¹²⁸

126. CHAPTER 18, *supra* note 115.

127. OFFICE OF THE U.S. TRADE REPRESENTATIVE, PROPOSED UNITED STATES—PERU TPA TEXTS, CHAPTER 17 (Jan. 2006) [hereinafter CHAPTER 17], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Asset_upload_file73_9496.pdf (last visited May 8, 2008).

128. CHAPTER 18, *supra* note 115.

According to both labor and environment chapters, no party may have recourse to the dispute settlement mechanism provided in Chapter 21 for any matter arising under any provision of those Chapters other than the obligations contained in Articles 17.2.1(a) and 18.2.1(a).¹²⁹ Said articles establish the obligations not to fail to effectively enforce their respective labor and environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties. Therefore, these two obligations are the only obligations within the environmental and labor chapters that may be subjected to the dispute settlement mechanism provided by Chapter 21.¹³⁰

It is important to take into account that the Chapter 21 dispute settlement provides for dispute panel procedures which set high standards of openness and transparency through open public hearings, public release of legal submissions by parties, special labor or environment expertise for disputes in these areas, and opportunities for interested third parties to submit views. Even though Chapter 21 emphasizes promoting compliance through consultation and trade-enhancing remedies, it establishes an innovative enforcement mechanism which includes monetary penalties to enforce commercial, labor, and environmental obligations of the trade agreement.¹³¹

D. Agricultural Matters

The FTA permanently consolidates tariff-free preferential access for all products included in the ATPDEA, such as asparagus, grapes, mangoes, paprika, artichokes, dry grain legumes, tangerines, and ethanol.¹³² Going beyond prior preferences for Peru, the agreement guarantees immediate access to the U.S. market for new products such as olives, cotton fiber, and fruits.¹³³

129. *Id.*; CHAPTER 17, *supra* note 127.

130. OFFICE OF THE U.S. TRADE REPRESENTATIVE, PROPOSED UNITED STATES—PERU TPA TEXTS, CHAPTER 21 (Jan. 2006), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file890_8715.pdf (last visited Oct. 11, 2007).

131. CONTENIDO DEL CAPÍTULO DE SOLUCIÓN DE CONTROVERSIAS (CHAPTER OF DISPUTE RESOLUTIONS—CHAPTER 21,) *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file144_9539.pdf (last visited May 8, 2008).

132. Contenido del Capítulo de Agricultura [hereinafter Agricultura], *available at* <http://www.tlcperu-eeuu.gob.pe/downloads/documento/Agricultura%2016%20FEB.pdf> (last visited May 8, 2008).

133. *Id.*

Over 1,200 new customs classifications are added to the duty-free list for Peru.¹³⁴ With the present 388 duty-free products, immediate access to the U.S. market is provided for 90% of the total agricultural products made in Peru, which in turn represent 99% of the value of the Peruvian exports to the United States.¹³⁵ Notwithstanding the tariff elimination provided by the FTA, there is a significant protective mechanism for the parties. The agreement establishes that a party may apply an agricultural safeguard measure in the form of an additional import duty on an originating agricultural good listed in that party's schedule, provided that some conditions, such as the transparent implementation of the measure, are met.¹³⁶ Peru, according to the agreement, may apply agricultural safeguard measures by volume to 36 sensitive products such as milk powder, butter and dairy spreads, cheese, standard quality beef, chicken leg quarters, and rice.¹³⁷

In turn, Peru granted the United States duty free access to 451 customs classifications, which represent 56% of the total classifications for agricultural goods and 87% of the total amount imported from the United States.¹³⁸ Of these, 125 are sensitive products such as rice, dairy products, meat, and yellow corn.¹³⁹ Therefore, as protective mechanisms, Peru has obtained annual linear decreases in tariffs of 10 years or more and has established the application of agricultural safeguard measures for these products.¹⁴⁰

Similarly, the FTA contains important provisions dealing with its implementation and the application of fundamental principles to ensure its effectiveness. An important aspect of the agreement is its guarantee of the application by both parties of the national treatment principle to the products of the other party.¹⁴¹ Ensuring that each party treats products from the other in the same manner by which it deals with its domestic products ensures that the benefits of the FTA will be spread quickly and broadly over each party's production.

134. *Id.*

135. *Id.*

136. OFFICE OF THE U.S. TRADE REPRESENTATIVE, PROPOSED UNITED STATES—PERU TPA TEXTS, CHAPTER 2 (Jan. 2006) [hereinafter CHAPTER 2], http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Draft_Texts/asset_upload_file374_8853.pdf (last visited Jan. 31, 2008).

137. *Id.*

138. *Id.*

139. *Id.*

140. Agricultura, *supra* note 132.

141. *Id.*

Likewise, both parties commit to ensure that procedures to implement and administer the tariff-rate quotas for agricultural goods set out in the agreement are transparent, made available to the public, timely, nondiscriminatory, responsive to market conditions, and minimally burdensome to trade.¹⁴² As we discuss in Part VII, these are the types of provisions that indirectly promote the rule of law, which benefits civil society in general, not only farmers and growers in both countries.

Another important provision is the parties' compromise to eliminate export subsidies for agricultural goods and to prevent their reintroduction in any form.¹⁴³ In this sense, the agreement provides for the parties' abstention to introduce or maintain any export subsidy on any agricultural good destined for the territory of the other party.

Finally, the agreement provides for the creation of a committee on agricultural trade comprised by representatives of both parties.¹⁴⁴ This committee will be in charge of the promotion of cooperation on the implementation and administration of the agriculture section and the consultation between the parties on matters related to this section.¹⁴⁵

E. Textile and Apparel Matters

Another very important aspect of the agreement with a significant impact on labor are provisions concerning textiles and apparel. Textiles and apparel will be duty-free and quota-free immediately if the products meet the agreement's rule of origin.¹⁴⁶ This result will have effects on U.S. and Peruvian fiber, yarn, fabric, and apparel manufacturing.¹⁴⁷

The FTA textile and apparel section expands the ATPDEA benefits by including both old and new products such as synthetic or artificial fibers, clothing, suitcases, briefcases, towels, tablecloths, umbrellas, fiberglass manufactures, and comforters.¹⁴⁸ The agreement also establishes a transitional special safeguard, which provides for temporary tariff relief in the event that, as a result of the reduction or elimination of a duty provided for in the agreement, imports of goods benefiting from preferential tariff treatment increase to unexpectedly high levels and cause serious injury or

142. CHAPTER 2, *supra* note 136.

143. *Id.*

144. *Id.*

145. *Id.*

146. USTR Summary, *supra* note 102.

147. *Id.*

148. *Contenido del Capítulo de Textil—Confecciones*, <http://www.tlcperu-eeuu.gob.pe/downloads/documento/Textil.pdf> (last visited Jan. 31, 2008).

threat to the respective domestic industry.¹⁴⁹ In this case, the importing party may apply a textile safeguard measure to that good to the extent necessary to prevent or remedy the injury and to facilitate adjustment. These safeguard measures consist of a suspension of the reduction of the rate of duty provided for the agreement on the goods causing the injury or an increase in the rate of duty on these products.

The agreement also establishes rules of origin, which guarantee that only goods considered of U.S. and Peruvian origin will benefit from the preferential treatment of the agreement, and customs cooperation commitments between the United States and Peru, which will allow for verification of claims of origin or preferential treatment.¹⁵⁰

VII. EFFECTS OF THE PERU-U.S. FTA

A. *Direct Employment and National Growth Effects*

From a theoretical economic viewpoint, we would expect trade to increase efficiency, wages, and employment while reducing poverty. As each FTA partner takes advantage of its comparative advantages, it benefits from specialization in export and production of goods in which the country is more efficient, as well as from the lower prices of importing the remaining goods from other countries that can produce them at lower costs.¹⁵¹ That is at least the theory which underpins the tremendous growth in international trade, a compelling leap of some 400% in the past 10 years.¹⁵² We also know that this theory does not mean that all countries engaged in the global market, nor certainly all segments of civil society in any country, will benefit equally from trade's great and grinding growth engine.

To compete in the global market, domestic industries must increase their productivity. They may do so by importing new technologies and implementing newer, more productive work methods. This increase in work productivity reduces the number of workers needed for each unit

149. *Id.*

150. USTR Summary, *supra* note 102.

151. DANIEL MARTINEZ, EL MUNDO DEL TRABAJO EN LA INTEGRACIÓN ECONÓMICA Y LA LIBERALIZACIÓN COMERCIAL. UNA MIRADA DESDE LOS PAÍSES AMERICANOS [The World of the Work in Economic Integration and the Commercial Liberalization. A Glance from the American Countries] (Lima: ILO/Regional Office for Latin America and the Caribbean—ILO International Training Centre (Turin) 2004).

152. *Id.*

produced and thus increases the industry's competitiveness. The productivity increase generates an increase in exports, which must increase employment if it is to offset the reduction in the number of workers needed for each unit of production.¹⁵³

Peru's trade agreement with the United States will be controversial, if only because the continuous opening of markets to free trade, as Peru's government has done, inevitably disturbs the existing economic power structure. Trade's potential to work a rapid reduction in employment in sectors in which the country does not hold any particular comparative advantage guarantees opposition from affected industries.

However, the decrease in employment in these sectors should be temporary because affected workers should eventually find jobs in different sectors or learn new skills to qualify for employment. This was the case of Mexico after NAFTA.¹⁵⁴ To gauge the effects of the FTA on employment levels, we must consider the primary employment sectors in Peru, that is, minerals, fishing, agriculture, textiles, and refined oil. Peru's Ministry of Labor and Employment Promotion estimates that imports could displace local production in the labor-intensive agriculture and textile sectors.¹⁵⁵ However, the increase in exports in these sectors could lead to an increase of new jobs if producers take advantage of the opportunities created by the FTA.¹⁵⁶ The export-related jobs should be higher-paying work, leading to a doubling of new jobs through an increase in indirect employment. Small job losses can be expected in manufacturing and chemical sectors.¹⁵⁷

___ According to a study done by *Universidad del Pacifico*, the increase in Peruvian exports to the U.S. market should increase overall economic

153. *Id.*

154. Carlos Patrón, *Building Competitive Markets in Peru: The Case for Indecopi* (on file with authors).

155. Moron, Bernedo, Chavez, Cusato, Winkelried, TRATADO DE LIBRE COMERCIO CON LOS ESTADOS UNIDOS: UNA OPORTUNIDAD PARA CRECER SOSTENIDAMENTE [Free Trade Agreement with the United States: An opportunity for Sustainable Development], at 242 (Instituto Peruano de Economia 2005).

156. *Id.* at 242.

157. U.N. DEVELOPMENT PROGRAMME/MINISTRY OF LABOR AND EMPLOYMENT PROMOTION OF PERU, EFECTOS DEL TLC CON EE.UU. SOBRE EL EMPLEO [*Effects of the TLC with the U.S. Employment*] (Bruno Seminario de Marzi & Oswaldo Molina Campodonico Consultants) (Sept. 2004) [hereinafter *Effects of the TLC with the U.S. Employment*], <http://www.perufrentealtlc.com/files/Seminario%20Efectos%20del%20TLC%20sobre%20el%20Empleo.pdf>.

productivity.¹⁵⁸ The FTA should also cause a rise in public spending, subsidized through an increase in the sales tax.¹⁵⁹

B. *Social and Labor Effects*

Just as the global market rewards high-technology labor (witness the lower unemployment rates in Japan and the United States), so too will the Peru-U.S. FTA offer greater benefits to skilled workers. Because Latin America in general and Peru in particular have large informal economies with substantial under-employment, competition from imports will be felt more sharply until Peru substantially advances its policies not only to fulfill the higher demand for skilled labor, including scientists and engineers, but also to offer a social safety net for workers displaced by the inevitable “evolution” of the labor market. As economists have noted, a strong governmental commitment to free education in technological skills is necessary to meet the demand for skilled labor created by international trade. Eastern Asia has conquered the global market in large part because of this commitment, which leads not only to lower unemployment but also to social benefits in general.¹⁶⁰

Increased growth from international trade has not led to the hoped-for reduction of the gap between rich and poor in Latin America. Part of the reason has no doubt been the traditional belief that Latin American competitiveness depends on cheap labor and that governmental attempts to increase the quality of life of workers would lead to lessened competitiveness through increased labor costs. Labor demands increased as expected with increased trade, but these were low-paying jobs that reduced poverty levels, but could not narrow the income gap. The technologically-skilled made increasingly-higher salaries while the unskilled continued to earn low wages.¹⁶¹

Trade agreements generally deliver their strongest economic impact during the first 5 years after implementation.¹⁶² For example, Vietnam experienced a surge in U.S. foreign direct investment averaging 27% annually during the first 5 years after entering into the Vietnam-U.S. Free

158. Moron et al., *supra* note 155, at 243.

159. *Id.* at 244.

160. BEETHOVEN H. VALENCIA, *IMPACTOS SOCIOLABORALES DEL LIBRE COMERCIO* [SOCIO LABORALES IMPACTS OF THE FREE COMMERCE], http://www.perufrentealtlc.com/files/HERRERA_Impactos_sociolaborales_del_ibre_comercio.pdf (last visited Jan. 31, 2008). *See also* EDUARDO MORÓN, PACIFIC UNIV. RESEARCH CENTER, *EVALUATION OF THE PERU-U.S. FTA ON THE PERUVIAN ECONOMY* (Mar. 2005), http://www.cocentes.up.edu_pe/EMoron/DD0503.pdf.

161. VALENCIA, *supra* note 160.

162. *Id.*

Trade Agreement, unexpectedly outpacing even the traditionally largest investors from other Asian countries such as Japan, South Korea, and Singapore.¹⁶³ Investment from the United States into Mexico after the NAFTA grew exponentially during the first half decade after the agreement's 1994 entry into force.

Experts who have studied Peru's economic and political system caution that these initial years after Peru's trade agreement with the United States will be crucial to the future of free market capitalism in the country.¹⁶⁴ Structural reform in Peru has lagged behind that of its neighbors, Colombia and Chile, and the nature of that reform has fanned nationalist fervor,¹⁶⁵ not unlike that being experienced by Bolivia, Venezuela, Brazil, and other South American nations for whom free market capitalism has not delivered the economic self-sufficiency—at least for citizens subsisting at the financial margins—that its proponents promised. Because Peru is rich in gold, copper, and other mineral deposits, investment has been capital intensive, creating wealth but few jobs. The rich are getting richer, but poverty levels have not improved—half of Peru's families remain below the poverty line.¹⁶⁶

Unless the government is able to use the economic growth that will follow the Peru-U.S. trade agreement to reduce unemployment in both the formal and informal sector, and improve the plight of the poor, we fear Peru may face a strong increase in the nationalist, populist elements that recently have come to power in other Latin American countries such as Argentina, Brazil, Venezuela, and Bolivia. This result would not of necessity predict adoption of an anti-capitalist policy—although both the Andean Community of Nations and MERCOSUR may forever be changed by recent events¹⁶⁷—but it is certain to work a diversion from the long-term infrastructural and institutional reform necessary to ensure Peru's future economic success.

163. *Bilateral Trade Agreement Helps Vietnam Attract Surge in Investment Since '01*, 23 BNA INT'L TRADE REP. 315 (Mar. 2, 2006).

164. Cruz, Betanzos, Lizarraga, Dias, REPERCUSSIONES DEL TLC EN LAS FINANZAS DE LAS EMPRESAS MEXICANAS [TLC's Impact in the Economy of Mexican Corporations] 125 (Sicco 1998).

165. One expert estimates that Peru needs US\$24 billion to catch up with the level of infrastructure in Colombia and Chile. Carlos Patrón, *Globalization and Neo-Nationalism through the Lens of the Peru-U.S. FTA*, Lecture at Univ. of Fla. Levin College of Law, Feb. 24, 2006 (on file with authors).

166. *Id.*

167. Juan Forero, *Now the Hard Part: Bolivia Faces Pitfalls of Gas Takeover*, N.Y. TIMES, May 8, 2006, at A10.

The FTA will make possible diversification of the labor-intensive sectors in Peru's economy, such as agriculture and textiles. Under the Andean Trade Preference and Development Act and its predecessor,¹⁶⁸ production since 2002 of asparagus, mangos, limes, onions, and other newly developed export crops has created 350,000 new jobs.¹⁶⁹ New textile and apparel exports have resulted in 190,000 new jobs.¹⁷⁰ Together, agriculture and textiles have doubled Peru's exports, a telling predictor of the future when one considers the small size and limited agricultural commodities involved in this trade.¹⁷¹ Tourism is booming, and opportunities for expansion of that sector through eco-tourism in Iquitos and the rainforest region have enormous potential. Costa Rica is a model in that respect, hosting 1.4 million eco-tourists each year in a country of only 14 million.¹⁷² Even as Brazil was failing to deliver on its plan to entitle 1.5 million families with property rights, Peru has in fact done just that, carrying forward on Hernando De Soto's findings of the deadweight losses of informal land tenure and the benefits of enfranchising the people with their own piece of economic potential by privatizing public lands.¹⁷³ We do not contend that this level of private land ownership is sufficient to ensure full and zealous participation of the private sector in the economic growth predicted by the trade agreement. It is, however, an important start.

The Peru-U.S. Free Trade Agreement continues for Peru on a permanent basis the preferential tariff rates the country enjoyed under the Andean trade preference laws¹⁷⁴ and, therefore, makes possible additional infrastructural investments, such as irrigation projects, that will be needed to put to use the 50% of arable lands not currently under production.

Because of its closeness to the equator, Peru enjoys a four to six week lead in harvesting seasons on Chile, its principal competitor for agricultural exports to the United States. Peru is the price leader during this critical period. U.S. investors have begun since the turn of the century to realize the importance of this fact by purchasing arable lands in Peru. Investment should surge with the protections offered to foreign funding by

168. Andean Trade Preference Act, Pub. L. No. 102-182, tit. II (1991), revised and expanded by the Andean Trade Promotion and Drug Eradication Act, Pub. L. No. 207-2210, tit. XXXI (2002).

169. *Id.*

170. *Id.*

171. *Id.*

172. Sittenfeld, *supra* note 77.

173. Patrón, *supra* note 154.

174. OFFICE OF THE U.S. TRADE REPRESENTATIVE, PROPOSED UNITED STATES—PERU TPA TEXTS, http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Draft_Texts/Section_Index.html (last visited Jan. 31, 2008).

the Peru-U.S. agreement's investment chapter, which recreates the NAFTA's guarantees of equitable treatment and safety from regulatory expropriation.¹⁷⁵

From Mexico to Chile, a principal reason for opposing free trade with developed countries is the loss of agricultural jobs—together with a rural way of life—necessitated by opening the smaller country's market to agribusiness powerhouses in the United States such as ADM and Cargill. Peru is positioned to avoid much of this downside of opening its borders to the global market. Only seven agricultural crops potentially compete with U.S. crops for the domestic Peruvian market and U.S. growers presently import only two of these crops into Peru. The agreement provides a transition period for these seven tariff-sensitive crops. In fact, in the case of most agricultural consumption in Peru, U.S. producers will be in competition with producers in Argentina, from which Peru presently purchases most of its grains. Highly-efficient grain producers in the United States can only bring benefits to Peruvian consumers in the form of lower prices for grains if these producers displace importers from other countries.

In our view, the conditions for expansion of both Peruvian and U.S. investment in the agricultural and textile sectors are ideal. We take the point made by Oswaldo Molina¹⁷⁶ that the United States already had reduced tariff barriers for Peruvian exporters 15 years ago through Andean trade preference legislation.¹⁷⁷ We believe that exports nonetheless will increase. One reason will be the increased protection for foreign direct investors provided for the first time through the new trade agreement. These provisions make available to investors from the United States protections previously available in Peru only for its Andean Pact neighbors. The predictable business environment ensured by this chapter will greatly spur U.S. investment in the most promising sectors of Peruvian trade. Another reason is that the 10% of Peru's exports to the United States that were dutiable include those products that have the greatest import sensitivity to U.S. producers and the greatest export value to Peru, such as asparagus, sugar, and some textile products.¹⁷⁸

With the huge untapped areas of arable land and the early harvest seasons, agriculture is one of those sectors. Textiles and apparel is another. The FTA increases the types of products eligible for duty-free treatment

175. *FTA: A Tool to Generate Exportation Evolution*, http://www.tlcperu-eeuu.gob.pe/index.php?id_noticia=322#top.

176. Effects of the TLC with the U.S. Employment, *supra* note 157.

177. Andean Trade Promotion & Drug Eradication Act, *supra* note 168.

178. Lenore Sek, *U.S. Congressional Research Service: Andean-U.S. Free Trade Agreement Negotiations*, at 5, 7, & 9 (June 29, 2005).

and changes the rules of origin to permit increased imports of Peruvian textile and apparel merchandise to the United States.¹⁷⁹

Some of the sectors most likely to benefit from the FTA are the mid-size and micro-enterprises. These companies not only have the opportunity to enter the world's largest market, but also—as a result of lowered tariffs for U.S. imports, can buy machinery and supplies at lower prices, which will contribute to higher efficiency and productivity. The FTA also may stimulate joint ventures between small Peruvian companies and larger U.S. investors.¹⁸⁰

The Peruvian Ministry of Foreign Commerce and Tourism has expressed the government's intention to employ all possible mechanisms to protect market-sensitive products and make the changes necessary for farmers to improve conditions of production of current plantings or to switch acreage to more profitable crops.¹⁸¹ Tariffs for market-sensitive products will be removed gradually over a period of 12 to 19 years, and quotas in the meantime will protect Peru's most sensitive products, mainly agricultural commodities in which U.S. producers are dominant. However, these quotas begin at under 10% of annual Peruvian production and increase annually until both tariffs and quotas are completely removed.¹⁸²

The General Department of Economic Studies of the Peruvian Ministry of Foreign Commerce and Tourism estimates that as a consequence of the FTA the number of jobs in the export sector would increase by 123,000, which would bring to 1.2 million the number of jobs directly and indirectly related to the export sector.¹⁸³

It has been argued that the large U.S. subsidies to its agriculture sector will adversely affect Peruvian producers by creating an uneven playing field for competition. However, it must be noted that of the 1100 agricultural products, the United States subsidizes only fourteen.¹⁸⁴ Of those fourteen products, seven are not produced in Peru and thus do not create concerns for the Peruvian agricultural industry. Of the remaining seven products that compete with Peruvian products, only two are imported principally from the United States. The five remaining products are imported primarily from neighboring countries that do not subsidize at all, and thus present a level playing field for Peruvian producers.¹⁸⁵ This

179. USTR Summary, *supra* note 102. See *supra* Part IV.D (giving further detail).

180. Key Notions, *supra* note 41.

181. *Id.*

182. *Id.*

183. *Id.*

184. FTA & Agriculture, *supra* note 45.

185. *Id.*

is not to say that U.S. producers of these products will not displace present importers, but that Peruvian producers have already learned to be globally competitive in these crops because of previous foreign competition.

The U.S. subsidy situation thus hangs in the background as a looming threat to Peruvian farmers, making even more important successful conclusion of the WTO's Doha Development Round. However, Peru has no intention of simply ignoring the U.S. subsidies, but instead will "fight fire with fire." That is, the government will directly compensate producers of market-sensitive products such as cotton, corn, and wheat, which should reduce the negative effects of imports on these farmers.¹⁸⁶

In much the same way that agricultural production in the two countries is primarily complementary, manufactured products also do not overlap. The United States exports high technology assets such as machine tools that are not produced in Peru, and thus the lowered tariffs on those goods will not negatively affect the Peruvian manufacturing industry. The reduction in tariffs will, in fact, have beneficial effects because it will permit Peruvian manufacturers to buy needed supplies at more competitive prices, which will reduce input costs.¹⁸⁷ This result should be felt most clearly by farmers, because the price of fertilizers as well as agricultural equipment will be lower, which should in turn help to improve agricultural productivity and diversification.¹⁸⁸

Of the market-sensitive products—sugar, meat, rice, wheat, cotton, corn, and milk—only three (cotton, corn, and wheat) could be substantially affected by increased imports from the United States. To reduce any immediate effects, the FTA sets quotas limiting entry of competing U.S. products. If U.S. imports nonetheless increase so quickly that they cause injury to Peruvian producers, Peru is permitted to implement special safeguards to restrict the sudden increase of imports. Special restrictions also may be put in place at the border international prices of the competing prices drops.¹⁸⁹

Moreover, Peru is in any event a net importer of cotton, purchasing some US\$60 million annually. Even without the transitional period for Peruvian tariff reductions, U.S. cotton imports would not necessarily cause injury to domestic cotton growers because the Peruvian textile industry will have an increased demand for cotton under the FTA. As to corn and

186. BRUNO SEMINARIO DE MARZI, ARANCELES Y TLC, CORREO—YEAR XXI, EDITION 9271 [hereinafter ARANCELES Y TLC], http://www.correoperu.com.pe/paginas_columna.php?columna_autor=Bruno%20Seminaro&seccion_nota=8¬a_id=14032 (last visited Jan. 31, 2008).

187. *Id.*

188. FTA & Agriculture, *supra* note 45.

189. *Id.*

wheat, most of the domestic demand for yellow corn (80%) is met through domestic production. The remaining 20% is supplied mostly by Argentinean imports (75%). Similarly for wheat, domestic production meets only 10% of Peruvian wheat demand and the remaining 90% is supplied by imported wheat, again mainly from Argentina.¹⁹⁰ In other words, U.S. corn and wheat imports, even when tariffs are reduced sufficiently to justify sale in Peru, likely will be displacing Argentinean wheat, not domestic Peruvian production.

Under the agreement, the zero tariffs at the U.S. border created by the Andean Trade Preference and Drug Eradication Act will continue. However, on Peru's part, tariff reduction will occur slowly over a 10-year period in order to minimize the costs of opening Peru's borders to competitive U.S. imports. This additional time will give Peruvian industries a transitional period to become more competitive.¹⁹¹

C. Indirect Effects

By increasing employment and income levels, FTAs can of course create amplified indirect growth, primarily through added consumption and increased investment by the domestic private sector. Further, employment should thereby be created, although the displacement of local products by imports can offset this effect in part. Importantly, these indirect multiplier effects, unlike the direct effects on particular industries, have the capacity to bring benefits to the economy as a whole. Speaking generally of fiscal effects, the expected outcome of the reduction in tariff income, which in Peru represents some 10% of government revenue, is that these taxes will be offset by increased tax revenue flowing from higher economic growth by civil society as a whole.¹⁹²

D. Long Term Effects

Without trade, there would be no export revenues to fund social and infrastructure projects than can target poverty alleviation on a local level. These increased export revenues also are critical for paying off international debts. One program in Mexico seeks to tie rural poverty assistance measures to child education, requiring children to enroll full time in school before their parents are eligible for government assistance. Programs such as this have the potential to benefit Latin America's poor,

190. *Id.*

191. *Id.*

192. ARANCELES Y TLC, *supra* note 186.

but without the revenues generated by trade, such programs could not exist.¹⁹³

An additional probable long term effect of the FTA relates to technology transfer between the United States and Peru. The Agreement seeks in the intellectual property rights chapter to promote technological capacity, which Peru dearly needs to raise the level of skilled employment in which its workers may engage, through “collaborative research projects” and other means.¹⁹⁴ The authors are convinced that Peru should embrace technological opportunities such as these with both arms. Increased employment from expansion of the agricultural and textile sectors will continue to be lower paying jobs. Jobs that command higher levels of compensation can only follow attainment of higher skill levels, such as those promised by the technical sector. Mexico has been able to develop its technological sector in such areas as automobile and consumer electronics assembly.¹⁹⁵ Costa Rica’s educational successes recently were rewarded with a major new investment by Intel. Positions in these sectors pay substantially higher wages than those in the agriculture and textile sectors while demanding only minimally greater technical training. Peru’s National Council for Science and Technological Innovation has been designated as the lead agency for this work,¹⁹⁶ and the Government of Peru should ensure its adequate funding and priority to take full advantage of the opportunity presented for collaborative projects with the advanced scientific institutions of government and the academy in the United States.

With respect to the labor rights of Peru’s workers, Peru has made substantial progress in reforming its labor laws. Some have said that deficiencies remain in particular—and Peru is by no means alone in Latin America in this respect—with respect to laws guaranteeing freedom of association and the right to form unions. The Agreement provides in the labor chapter the opportunity for Peru to push toward full compliance with International Labor Organization standards in this and all other respects. In particular, we see substantial opportunities exchange of information on best practices and ways to improve them.¹⁹⁷ This provision presents the challenge to Peru’s Ministry of Labor and Employment Promotion to learn from the mistakes and successes of the United States, including its

193. *Id.*

194. Peru-U.S. Trade Promotion Agreement, art. 16.12.1 (Dec. 7, 2005), www.sice.oas.org/TPD/AND_USA/PER_USA/Draft_text_e/index_e.asp.

195. Robert E. Scott, *The High Price of Free Trade*, ECON. POL. INST., Nov. 17, 2003, http://www.epinet.org/content.cfm/briefingpapers_bp147.

196. Peru-U.S. Trade Promotion Agreement, *supra* note 194, art. 16.12.3(a).

197. *Id.* art. 17.4.6(b)(iii).

powerful labor unions, and to become a model of labor rights protection in the hemisphere. The opportunity is there for the taking, and the reward is not simply implementation of the human rights of Peru's workers. Compliance with ILO treaties will lead to a more productive work force that is delivering its best effort to excel in the global market.

As mentioned in Part I, one of the objectives of this Essay is to unravel the possible contributions of the Peru-U.S. FTA to the rule of law. We emphasize that trade alone cannot create equitable distribution of its economic benefits. Government use of the increased taxation revenue and other growth potential is crucial to that end.

The Peru-U.S. FTA contains provisions that require the government to conduct its activities through a more transparent and expeditious process, a process that relies exclusively on an administrative record created with input from all affected members of civil society, and one whose rules, as well as their implementation by the governmental agencies, are subject to substantive review by an independent and accessible judiciary, contribute to enjoyment by civil society in general, not solely to those involved in international trade, of rules-based governance.¹⁹⁸

These unheralded effects include provisions that encourage transparency, accountability, and due process by governments, in effect lending a "helping hand" to Peru's forward-thinking government to advance the participation of civil society in its decisional processes in order both to establish the nation's democracy and to make civil society, in general, a winner in international trade's marketplace. Likewise, the dispute settlement systems provided for in the Peru-U.S. FTA similarly promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process. For example, Chapter 19 of the Peru-U.S. FTA requires that rules applicable to importers and investors be easily available and open to any interested persons and parties, and that any changes to such rules be adopted in a process that is open to the affected public and accounts for public input.¹⁹⁹

The fact that decisions made by national authorities affecting importers and investors will often be subject to dispute settlement under the FTA

198. Chapter 8 Trade Remedies (art. 8.3, Investigation Procedures and Transparency Requirements, art. 8.4, Notification and Consultation); Chapter 10 Investment (art. 10.14: Special Formalities and Information Requirements, art. 10.15: Consultation and Negotiation, art. 10.16: Submission of a Claim to Arbitration, art. 10.21, Transparency of Arbitral Proceedings, Annex 10-F, Special Dispute Settlement Provisions); Chapter Sixteen Intellectual Property Rights (art. 16.1, General Provisions, ¶ 14, Transparency); Chapter 17 Labor (art. 17.3, Procedural Guarantees and Public Awareness, Annex 17.5.4. Public Participation); Chapter 19 Transparency.

199. Statements by participants in 2004 Conference on Legal and Policy Issues in the Americas, San José, Costa Rica (June 24, 2004) (on file with authors).

may work a substantial change in the government's decisionmaking process. For example, the responding government normally will want the dispute settlement panel to have access to the "administrative record" upon which the decision was based in order to show compliance with the treaty provisions the complaining government has alleged were violated.

The fate of the agency decision will rely on the completeness of this record in setting out the evidence relied upon and its relation to the trade agreement's obligations. When effective dispute settlement is available in a trade agreement, national authorities may have strong incentives to follow a very different decisional process than previously may have been required by domestic law to implement the agreement's obligations.

Creation of an administrative record anticipates, for example, that evidence upon which the decision is based will be explicitly identified and placed in the file of the measure and, additionally, mandates that the analysis of the agency be committed to paper and assigned to the file. Clearly, these steps transform the decision process into a rules-based mechanism, rather than one that flows from the opinions of agency officials alone. This approach inevitably ensures greater openness in the decision process for all affected interests, both foreign and domestic.

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

The FTA's dispute settlement system also has measures designed to secure neutral panelists to review the national measure and provides sources of law for the dispute panel to apply that are harmonized for the FTA parties. These provisions should result in a business environment that is "friendlier" to a foreign interest than national rules on the subject. Trade dispute settlement systems often provide for expeditious relief, recognizing that, to a business engaged in the fast-paced global market, slow resolution of conflict essentially deprives the business of any relief at all.

These elements of a "binding" process for resolving commercial conflicts may provide more meaningful relief than national courts for foreign companies involved in trade with an FTA country that has imposed measures allegedly inconsistent with FTA terms. In fact, trade agreements

may directly mandate changes to national court systems, as is the case with provisions requiring that review of governmental trade measures be made by tribunals that are independent of the agency deciding the measure, such as Article 19.5 of the Peru-U.S. FTA.²⁰⁰ For these same reasons, trade dispute settlement also may serve as prototype for the further evolution of the judicial systems in the FTA parties. In effect, this aspect translates into trade dispute settlement making itself obsolete.

In sum, dispute settlement under the trade and investment provisions of the FTA aims to eliminate any role for nationalism or other bias in reviewing whether the border measure or other governmental activity is consistent with the FTA's obligations, thus promoting a rules-based approach to the national regulatory processes of the FTA partners. From a somewhat broader perspective, the stability of national regulations promoted by FTA becomes an end in itself, because predictability is one of the strongest motivators of businesses to trade with and invest in a particular country. In order to continue the economic growth stimulated by a predictable set of rules, nations may be encouraged by these provisions to pursue a system of governance with fuller foundations in democratically-enacted and consistently-applied rules.

Nonetheless, we are aware of certain skepticism as to our premise. Some argue that trade agreements have no legitimate role in examination of progress in rule of law principles, either because (1) human rights issues interfere with obtaining maximum economic benefit of the agreement; or (2) rule of law deficiencies, whether reflected in weak judiciaries or corrupt licensing systems, persist because powerful interests want them that way and no glancing blow from an impartiality provision in an FTA will change that weakness in the system; or (3) social developments such as rules-based governance, like other aspects of nation-building, legitimately may be accomplished only from within the country, although, admittedly, outside forces (such as FTAs) can facilitate the process.²⁰¹

VIII. CONCLUSIONS AND RECOMMENDATIONS

Pablo de la Flor, Peruvian Vice-Minister of Foreign Trade and chief of the FTA negotiating team, summarized the post-FTA situation as follows:

Now that the FTA negotiations with the U.S. have culminated, Peru counts on a new tool to generate a true exportation revolution

200. *Id.*

201. *Id.*

and a real transformation of the national productive system. The FTA has also provided us the basis for clear and certain laws for investors which would encourage foreign investment.

This agreement places in the national agenda important changes and reforms which are essential in order to consolidate Peru as a productive, stable, and fair country leader in Latin America. Therefore, this agreement constitutes a legacy for future governments which would provide resources to combat poverty, generate employment, and increase the consumption levels of the Peruvian citizens.²⁰²

We began our Essay with the suggestion that trade negotiators and governments implementing FTAs could take “small steps” toward improvement of worker rights, protection of the environment, and preservation of indigenous cultures. These measures, we believe, could be adopted without impeding the economic benefits promised by the trade liberalization efforts represented by the FTA. Peru has already begun these efforts with special legislation to protect indigenous lands from development.²⁰³ One of these small steps is retraining of rural populations that, because of their small size and unsophisticated agricultural techniques, may be unable to compete with imports from the large agrobusiness corporations in the United States.

The government has several options toward this end. The first option is to offer these farmers adequate training and transitional economic assistance needed to modernize their farming techniques and become more competitive in the global market. A second option is to provide the farmers the necessary training and resources to replace their crops with those that will allow them to have a competitive advantage in the international market. The third option is providing training for those farmers that could not be retrained in the agricultural sector in order to integrate them into a different economic sector that will benefit from increased trade, such as mining and professional services.

Peru has begun to implement a trade adjustment assistance program. Implementation of the trade agreement with the United States should be accompanied by a major expansion of that program if Peru is to ameliorate

202. Peruvian Ministry of Foreign Commerce and Tourism, TLC: Herramienta para generar revolución exportadora [TLC: Tool to Generate Revolution Exporting], Lima, Dec. 11, 2005, http://www.tleperu-eeuu.gob.pe/index.php?id_noticia=322#top.

203. Ministerio de Agricultura, *supra* note 61.

the industry-shifting effects of opening to full competition from the United States. Cushioning the negative effects of free trade is both a necessary function of government and a necessary predicate for continued support of free trade. The labor chapter of the Agreement commits the United States to cooperation in worker retraining and assistance.²⁰⁴ The U.S. Department of Labor has gained substantial experience in administering the trade adjustment assistance program in the United States. This experience could permit Peru to avoid the mistakes made by the United States in the early years of the program and to implement trade adjustment assistance in a manner that will cushion the necessary but devastating retrenchments in industry employment that accompany open borders.

[These alternatives should be accompanied by government incentives to encourage the private sector to invest in projects such as the modernization of agriculture, substitution of crops, and development of different economic sectors that have been ignored and which possess great potential for wealth and success. The question these alternatives pose is where to find the financial resources needed to carry out the required educational and training programs and other economic help essential to further counteract the negative effects of competing with one of the most efficient economies in the world.

Despite its many flaws, the unquestionable answer is to strengthen trade. As summarized in a report from the well-regarded Institute for International Economics in Washington, D.C.,

[T]he biggest source of concern [is] the evident hostility in the region to the idea of using the market economy as the basic mode of economic organization. Good macro policy is not of much consequence without vibrant supply-side growth. . . . Distribution has often been wrongly derided, but nonetheless it remains true that one needs to have a lot of output before one can worry about how to distribute it. All the evidence suggests that one needs a thriving private sector nurtured by a competitive market economy for rapid and sustained increase in output. Yet this view is not dominant in Latin America. That is a threat to the future.²⁰⁵

204. Peru—U.S. Trade Promotion Agreement, ch. 17, art. 17.5.2. (Dec. 7, 2005), http://ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file848_8711.pdf.

205. John Williamson, *After the Washington Consensus: Latin American Growth and Sustainable Development*, Inst. for Int'l Econ. (Mar. 30, 2006), at 8, <http://www.iie.com/publications/papers/williamson0306.pdf>.

To the extent that Peru becomes a more open, diversified economy and creates a clearer and more predictable regulatory environment, exports and local and foreign investment will increase, and the flow of money in the economy will follow suit. In short, despite the fact that globalization and trade may not have created the large middle class to which economically disadvantaged members of society aspire, the only way to reach this objective is through additional trade.²⁰⁶ The marginalized members of society will not reap trade's gains overnight, especially in a country such as Peru in which higher-paying jobs do not rely solely on gaining global market share by developing products or services in which Peru has a comparative advantage. Increasing the educational and skill levels of workers is also necessary to create better paying jobs. Wise government decisions will be needed over the next generation to push the additional state wealth that will follow from the FTA with the United States and other trade liberalization downward to the workers while not impeding the country's active capitalists from also benefiting from their risk-taking in the global market.

Another step that should be considered is the implementation of educational programs to provide technological training and develop the high-technology sector. Increased trade in Peru today can create mostly low-paying jobs in the labor-intensive textile and agriculture sectors. These jobs will have value because they are, after all, better than no jobs at all and continued high unemployment in the formal and informal economies. These new jobs will reduce unemployment and, as a matter of course, poverty levels. However, only a long-term investment in increasing educational opportunities for Peru's civil society can deliver the higher-paying jobs that will enable these workers to join Peru's nascent middle class. Achieving a higher educational level of the populace will take a continuing commitment of many years.

To reach this objective, Peru must diversify its economy to reduce reliance on the agricultural sector, which is subject to fierce global competition. Development of the technological sector may allow Peru to acquire a certain level of independence from foreign technology and would create a more stable market for their products, attract investors, and increase formal employment levels.

The Peru-U.S. FTA has a very important provision concerning cooperation mechanisms regarding labor and capacity-building matters.

206. Clive Crook, *Globalization and Its Critics*, *ECONOMIST*, (Sept. 27, 2001), at 3; Carlos Patrón, *Globalization and Neo-Nationalism Through the Lens of the Peru—United States Free Trade Agreement*, Lecture at Univ. of Fla. College of Law (Feb. 24, 2006) (on file with authors).

Annex 17.5 provides for pursuit of bilateral or regional cooperation activities on labor issues, such as programs for social assistance, skill development, training and worker adjustments, programs to promote new employment opportunities, and workforce modernization.²⁰⁷ These programs should include employment services and the promotion of fundamental workers rights, improvement of work conditions, competitiveness, and productivity levels, as well as public awareness of relevant laws, among others.

In order to implement cooperative activities, Annex 17.5 provides for technical assistance programs, including providing human, technical, and material resources, exchange of official delegations, professionals, and specialists.²⁰⁸ These cooperation activities could help the Government of Peru to ensure the effectiveness of educational and training programs and to strengthen the technical and technological sectors with the greatest potential for positive impacts on the Peruvian economy.

An important step that should also be considered is negotiation of trade agreements and other economic alliances with countries such as China, the European Union, as well as further arrangements with neighboring countries. This trade diversification would allow Peru to find alternative markets for its products and reduce its reliance on the U.S. market. The Andean Community has created a watershed moment for Peru with its invitation to that country's Southern neighbor, Chile, to rejoin the pact which Chile left during the Fujimori reign in the mid-1970s. Chile's free trade policies and its proximity have made that country Peru's largest export market. Peru can parlay the changing face of the Andean Community into an unprecedented opportunity to join Chile as a major export platform to service the seemingly-insatiable mineral and agricultural demands of China and other Pacific Rim nations.²⁰⁹

The option to make of trade a mechanism to improve the living conditions of its citizens or to make of trade a vehicle that further increases the gap between rich and poor is in the government's hands. Trade and democracy share a symbiotic role. Capitalism, as realized through the open markets and minimal interference at the border mandated by global and regional trade rules, is a necessary but insufficient condition to democracy. Trade brings the economic growth that raises living standards, thus permitting civil society to participate in democratic governance.²¹⁰

207. *Id.*

208. *Id.*

209. Carlos M. Paz-Soldan, *Guest Comment*, in *LATIN AMERICAN ADVISOR* 4 (Aug. 10, 2006), available at www.thedialogue.org (on file with authors).

210. Robert J. Samuelson, *Capitalism vs. Democracy*, *NEWSWEEK*, Oct. 3, 2005, at 47.

Democratic governance makes possible the social measures that cushion trade's growing pains, its transfer of jobs to sectors with the lowest opportunity costs.²¹¹

Trade alone can neither establish democratic governance nor ensure observance of human rights. Only governments can accomplish these objectives. However, trade agreements, especially regional agreements among close trading partners, can lend a helping hand toward these ends. If trade negotiators fail to use trade's great power to promote human rights—an objective promised by all members of the United Nations²¹²—the result will be substantially slowing of progress toward the objectives of both trade and human rights.

Free trade and the economic growth it brings can help establish democracy if governments ensure that the economic gains created by trade are diverted in part to the infrastructural and institutional improvements necessary for civil society's full participation in trade's benefits. This lesson resonates with special relevance in Latin America, where authoritarian regimes are part of a very recent past. We may find comfort in the fact that the democratic era of the past two decades has witnessed only one classic military coup since 1990—in Haiti. However, we must also face the fact that 15 hemispheric presidents since that time have been unable to complete their terms.²¹³ Establishing democracy in Latin America as the steadfast form of government such as India or the United States, as opposed to creating democratic governance in the first instance, will require governments to make substantial improvements to infrastructure and education, and to equalize enjoyment of trade's benefits.

As the Government of Peru has recognized, a stable legal framework is also a necessary prerequisite to attracting foreign and domestic investment.²¹⁴ The FTA with the United States will have the effect of reducing the risk associated with foreign investment in Peru and will for that reason stimulate additional venture capital with the employment gains this new money will bring.²¹⁵ With the reduction in risk associated with investment, long term interest rates also should fall, furnishing further incentives for both domestic and foreign investment.²¹⁶

211. Paul Krugman, *The Trade Tightrope*, N.Y. TIMES, Feb. 28, 2004, at 2A. See also Robert J. Samuelson, *China, Trade and Progress*, NEWSWEEK, Apr. 5, 2004, at 47.

212. U.N. Charter art. 103.

213. Arturo Valenzuela, *The U.S. and Latin America in the Post-Cold War Era: More of the Same?*, Keynote Address at "A Celebration of 75 Years of Latin American Studies at the University of Florida" (Feb. 16, 2006) (on file with authors).

214. Ministerio de Agricultura, *supra* note 61.

215. Effects of the TLC with the U.S. Employment, *supra* note 157.

216. Key Notions, *supra* note 41.

Successful, stable governments are hardly the rule in the Western Hemisphere. In some ways, the work of Chile's Ricardo Lagos Escobar could be seen as a model. When Mr. Lagos left office in March 2006 after six years, he was more popular than when he entered, an unusual accomplishment indeed. During Mr. Lagos's tenure, for example, two neighboring countries, Argentina and Bolivia, experienced six different presidents, two of whom were toppled by popular uprisings. By combining cautious economic policies with advances in social equality and human rights, Lagos built a level of respect that cuts across class and generational lines. President Lagos calmed the powerful business elite by continuing the principal economic policies of his predecessors, pursuing budget surpluses and other programs to stimulate exports. "But with copper prices at a record high and the economy growing faster than in any other in South America, he could also afford to let the military acquire new weapons while investing in health, education, and housing programs for the poor."²¹⁷ We do not claim that Peru's situation is identical to that in Chile, but a delicate combination of stimulation of infrastructural growth while business at the same time is permitted to reap the profits earned by its efforts should be the objective of government implementation efforts. With Peru's mining industry booming and recent increase in domestic investments in copper,²¹⁸ now may be the time to expand the benefits of these zinc, copper, gold, and molybdenum riches to a greater proportion of civil society through job creation programs and similar means.

We do not believe it is alarmist to recognize the fact that if in the next five years Peru is not able to use the impetus of its FTA with the United States to distribute more equitably the nation's increased economic growth, the nationalistic and populist elements that have risen in several Latin American nations will not long lay dormant in Peru, particularly in light of Peru's populist political past. If these elements result in abandonment of free market capitalism, rather than turning market fundamentalism into a vehicle to promote human rights, we fear the outcome will be further delay in realization of Peru's potential for both economic and human rights growth.

Government must encourage joint projects among universities, other research centers, and producers to retrain workers in order to take full advantage of technological innovations. This effort will be especially

217. Larry Rohter, *Chile's Socialist President Exits Enjoying Wide Respect*, N.Y. TIMES, Mar. 11, 2006, at A3, available at <http://www.nytimes.com/2006/03/11/international/americas/11chile.html?pagewanted=all>.

218. U.S. Department of State, Background Note: Peru, Mar. 2008, available at <http://www.state.gov/r/pa/ei/bgm/35762.htm> (last visited May 8, 2008).

important to agriculture, which is vulnerable to import competition, but this approach will benefit all small businesses in general.²¹⁹ These efforts to strengthen the linkages between the knowledge centers and the potential knowledge users in the business community are necessary steps to take advantage of the new technologies so essential to solving the social and environmental challenges that Peru faces.²²⁰

Chapter 18 of the FTA on the environment contains the seeds of a governmental implementation program that could significantly improve the situation of Peru's indigenous populations. While the language fell short of the aspirations of Peru that patent applicants must reveal the source and origin of genetic resources and traditional knowledge used in their inventions, as well as share the benefits with the source of the traditional knowledge if the resource is commercially exploited, there is reason to hope that Peru will use the ambiguity of the provision in its favor when drafting the implementing legislation.

Through Article 18.8, "[t]he Parties recognize the importance of respecting and preserving traditional knowledge and practices of indigenous and other communities that contribute to the conservation and sustainable use of biological diversity," the Peruvian Government should ensure that the large U.S. pharmaceutical and chemical companies work closely with Peruvian governmental agencies in bioprospecting of Peru's genetic resources for the future medical health of the general public.²²¹ Further, support for an aggressive approach by Peru in putting Chapter 18 into place is furnished by the Understanding Regarding Biodiversity and Traditional Knowledge that accompanies the FTA and amplifies the environment chapter's intent: "The Parties recognize the importance of the following: (1) obtaining informed consent from the appropriate authority prior to accessing genetic resources under the control of such authority; (2) equitably sharing the benefits arising from the use of traditional knowledge and genetic resources; and (3) promoting quality patent examination to ensure the conditions of patentability are satisfied."²²² While this Understanding falls short of binding language, the Peruvian Government's proven commitment to protecting the future of both its indigenous populations and its rich biodiversity should lead to the maximum leverage possible to make further advances toward its original negotiating objectives. Peru has already succeeded in obtaining the strongest environmental chapter ever negotiated by the United States. Peru's

219. Key Notions, *supra* note 41.

220. Oliva et al., *supra* note 34.

221. EGG, *supra* note 81.

222. *Id.*

Government should continue its victory with strong implementing language.

In fact, a cooperative scientific entity that would jointly apply for patents and simultaneously ensure that the indigenous populations of Peru that have for centuries preserved and nurtured these genetic resources, as well as uncovered their medical uses, will share in the profits generated by development of these resources, while at the same time guaranteeing adequate habitat for the genetic resources.²²³ Peru has been vigilant in its advancement of the rights of its indigenous people. In 2002, Peru joined 13 other countries as the Group of Like-Minded Megadiverse Countries to advocate at the Johannesburg World Summit on Sustainable Development for recognition of the rights of indigenous populations to their traditional knowledge and fair and equitable sharing by these peoples in the benefits that flow from modern uses of genetic resources.²²⁴

The Convention on Biological Diversity also furnishes powerful ammunition for Peru's work to improve the situation of its indigenous peoples. The Convention recognizes the intimate relationship between preservation of biodiversity and protection of the traditional knowledge of indigenous populations.²²⁵ We hope that Peru completes the circle by providing the needed legal framework for access to the genetic resources, equitable sharing of the economic value contributed by the indigenous population and by the developer of the resource, and technology transfer that applies in both directions.²²⁶

On a broader environmental scale, Peru also should consider further negotiations with the United States to fund specific environmental projects such as those included in the Chile-U.S. FTA.²²⁷ Efforts to improve pollutant data bases, to improve water quality and to make agricultural practices more eco-friendly, among others, would be as valuable in Peru as they are in Chile. This kind of cooperation can make the Environment Chapter a solidly positive source for environmental protection.²²⁸

Mexico's experience has proven that increased competitiveness is not guaranteed by signing an FTA. Greater competitiveness will flow, however, from an FTA combined with governmental improvement of

223. *Id.* at 95.

224. U.N. Report of the World Summit on Sustainable Development ¶ 15, ch. IX (Sept. 4, 2002).

225. Convention on Biological Diversity, 31 I.L.M. 818, 837 (1992).

226. Sittenfeld, *supra* note 77.

227. U.S.-Chile Free Trade Agreement, ch. 19, Annex 19.3, Office of U.S. Trade Rep., available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file482_4013.pdf.

228. *Id.*

physical infrastructure (ports, airports, highways), transportation services,²²⁹ and increased educational opportunities in the sciences and technology for all segments of Peruvian society.

229. Key Notions, *supra* note 41.

