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

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# **Global Laws, Local Lives: Impact of the New Regionalism on Human Rights Compliance**

**Stephen Joseph Powell and Patricia Camino Perez<sup>1a</sup>**

## **Abstract**

Continuation of the brisk pace of international economic growth with its necessarily increased use of natural resources—often at unsustainable levels—and its higher levels of pollution—often at the cost of citizen health—combine with the rules of the global trading system to threaten human rights to health, to freedom from forced or child labor, to non-discrimination, to a fair wage, to a healthy environment, even to democratic governance and participation in the political process. As a result, in recent years a growing number of economists begrudgingly acknowledge the incontrovertible—although presently dysfunctional—linkage between trade and human rights and the need to integrate these two great global policies. In light of the slow progress in the recognition of human rights by the World Trade Organization (“WTO”) and the recent boom in regional trade agreements (“RTAs”), human rights advocates are now examining whether RTAs may be more effective avenues for human rights enforcement within the global trading system, given the impossibility that trade rules can any longer afford to ignore their widespread effects on human rights. This paper explores the framework of recent RTAs as a vehicle for compliance with a variety of UN-mandated human rights, in a manner that is consistent with the fundamental rules of the trading system, focusing on the rich history of RTAs in the Western Hemisphere. We justify exploration of a number of avenues through which RTAs can achieve further integration of human rights, from following frameworks for rights already established within the trade rules, such as labor, to the endless possibilities provided in less-recognized rights such as intellectual property protection. We conclude that nations have moral, legal, and economic

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obligations to take advantage of these possibilities to achieve greater economic integration as well as further protection for the welfare of their people.

## **I. Introduction**

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

In light of the slow progress in the recognition of human rights by the World Trade Organization (“WTO”) and the recent boom in regional trade agreements (“RTAs”), human rights advocates are now examining whether RTAs may be more effective and efficient avenues for human rights enforcement within the global trading system, given the impossibility that trade rules can any longer afford to ignore their widespread effects on human rights. This paper explores the framework of recent RTAs as a vehicle for compliance with a variety of UN-mandated human rights, in a manner that is consistent with the fundamental rules of the trading system. We will focus on the rich history of RTAs in the Western Hemisphere.

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<sup>1</sup> Stephen J. Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Free Trade Agreements*, 17 FLA. J. INT’L L. 59, 63 (2005). See Hernández-Truyol & Powell, *supra* note 1a, at 4-5.

Part II begins by describing the recent increase in regional trade agreements in the new wave of RTA dubbed “new regionalism.” Part III explores the protection of human rights standards in recent regional trade agreements in Latin America by providing a close evaluation of RTA provisions concerning (1) labor rights, (2) environmental protection, and (3) traditional knowledge. Part IV briefly analyzes the costs and benefits of including human rights in RTAs. Finally, in Part V, we offer recommendations on further integration of human rights in RTAs.

## **II. The Emergence of Regional Trade Agreements**

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

RTAs have been a feature of the world trading system for a long time.<sup>2</sup> In the 1980s, the uncertainty of a successful conclusion to the Uruguay Round of multilateral trade negotiations prompted an increased interest in regionalism. However, the surprisingly successful conclusion of the Uruguay Round and the establishment of the WTO did not diminish interest in RTAs.<sup>3</sup> In fact, there has been a boom in RTA negotiations in the last decade and a half. Reports show that members notified as many as 10 RTAs to the WTO in the short period from July 2009 to October 2009.<sup>4</sup> The currently stalled Doha Round Negotiations and the expansion of globalization into increasingly domestic regulatory arenas form “the perfect storm “for another surge of RTAs.

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

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<sup>2</sup> T.N. SRINIVASAN, *DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM: FROM THE GATT TO THE URUGUAY ROUND AND THE FUTURE* 59, 140 (Westview Press 1998).

<sup>3</sup>*Id.* at 60-61.

<sup>4</sup> *Goods Chair says 10 new regional trade agreements notified to the WTO*, WTO NEWS, Oct. 30, 2009 (World Trade Organization), at [http://www.wto.org/english/news\\_e/news09\\_e/good\\_30oct09\\_e.htm](http://www.wto.org/english/news_e/news09_e/good_30oct09_e.htm).

Although the concept of RTAs might seem contrary to the WTO's goals for free trade, an exception provision in the General Agreement of Tariffs and Trade ("GATT") permits maintenance of RTAs despite their discriminatory central attractions. Article I of the GATT, the most-favored-nation clause, restricts WTO Members from discriminating against the imports of other Members based on the country of origin. Article XXIV of the GATT provides Members with a way around that clause by providing for a special exception where members may enter into preferential trade agreements if that they meet certain strict criteria.

The Article XXIV exception has a series of requirements for consent to RTAs. They include RTA notification requirements, information provisions, and transparency requirements.<sup>5</sup> The WTO recently enacted the Transparency Mechanism for Regional Trade Agreements to strengthen further the transparency requirements.<sup>6</sup> The purpose of these procedures is to "ensur[e] that Regional Trade Agreements become building blocks, not stumbling blocks to world trade."<sup>7</sup> The mechanism requires Members to give early notification to the WTO of new RTA negotiations.<sup>8</sup> Formal notification is required once the WTO members ratify the RTA and this submission must include a list of more detailed information about the RTA.<sup>9</sup> The WTO Secretariat then makes a factual presentation, which is later followed by a single formal meeting of the Members.<sup>10</sup>

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<sup>5</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. XXIV, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17, 21, & 522-25 (Geneva: GATT Secretariat 1994).

<sup>6</sup> WTO General Council, *(Provisional) Transparency Mechanism for Regional Trade Agreements*, Dec. 14, 2006, available at [http://www.wto.org/english/tratop\\_e/region\\_e/trans\\_mecha\\_e.htm](http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm) (last visited June 22, 2010).

<sup>7</sup> Pascal Lamy, *Lamy Welcomes WTO Agreement on Regional Trade Agreements*, WTO Press Release, July 10, 2006, available at [http://www.wto.org/english/news\\_e/news06\\_e/rta\\_july06\\_e.htm](http://www.wto.org/english/news_e/news06_e/rta_july06_e.htm) (last visited April 29, 2010).

<sup>8</sup> *Transparency Mechanism for Regional Trade Agreements*, *supra* note 6.

<sup>9</sup> *Id.*

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

Currently, about 90 percent of RTAs are free trade agreements (“FTAs”), the rest being customs unions.<sup>11</sup> The principal difference between the two integration instruments is that parties to a customs union have not only lowered tariff barriers among themselves, but have harmonized their tariffs with respect to imports into the territory of the customs union.<sup>12</sup> Although the requirement of a report and recommendation regarding new RTAs may seem beneficial, the actual benefit of these new transparency mechanisms remains uncertain.<sup>13</sup> Even if the committees evaluating these RTAs remain efficient, the prospective increase of RTAs may very well overwhelm the process. In addition, commentators believe that because every WTO member is a party to at least one RTA, WTO members likely are under pressure to refrain from being critical of other RTAs..<sup>14</sup>

Although Members have not notified all RTAs to the WTO, it is safe to assume that most FTAs have indeed been submitted for approval.<sup>15</sup> Members have notified 462 RTAs to the WTO or to its predecessor, the General Agreements on Tariffs and Trade (GATT).<sup>16</sup> Most of these RTAs were notified to the WTO in accordance with the notification requirement of GATT Article XXIV (7)(a).<sup>17</sup> The recent appearance of numerous RTAs has laid the foundation for a serious debate regarding the costs and benefits of RTAs. This debate involves a consideration of

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<sup>11</sup> WTO: *Regional Trade Agreements*, [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm). (last visited April 29, 2010)

<sup>12</sup> DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 92 (New York: Aspen Pubs. 2008).

<sup>13</sup> DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE*, 41 (North Carolina, Carolina Academic Press 2009).

<sup>14</sup> *See id.*

<sup>15</sup> *See id.* at 57 (arguing that since there are 153 Members that are party to the WTO, it is unlikely that there are a significant number of RTAs that do not have at least one WTO Member, and, consequently, required to notify the new RTA to GATT).

<sup>16</sup> WTO: *Regional Trade Agreements*, *supra* note 11.

<sup>17</sup> *Id.*; *see also* GATT, *supra* note 5, at Article XXIV (7)(a)(stating that “[a]ny contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the Contracting Parties and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.”).



issues ranging from economic and political issues to security and human rights issues. The WTO believes that regional and multilateral integration could be complimentary in view of the fact that some members of regional agreements have accepted higher levels of obligation than existed in earlier multilateral negotiations.<sup>18</sup> As such, these agreements would lay a foundation for future multilateral progress in those areas not yet covered by multilateral agreements.<sup>19</sup>

The United States has been a key player in the recent boom of RTAs evidenced by the fact that since 2000, the USA has formed free trade agreements with several countries in the Americas including Chile, Peru, Mexico, Canada, Dominican Republic and Central American countries including Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.<sup>20</sup> In addition, the USA has been an active participant in the proliferation of RTAs in geographically distant countries which include Jordan, Singapore, Australia, Morocco, and Bahrain, among others.<sup>21</sup>

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

The old regionalism was characterized by regional trade agreements formed in the bipolar Cold War context of the 1960s and 1970s.<sup>22</sup> The goal of regional trade agreements during the “old regionalism” period was to substitute imports using strong protectionist standards.<sup>23</sup> Old regionalism especially depicted foreign exports with skepticism. States were weary of any future scenario where there would be a dependency on foreign products.<sup>24</sup>

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<sup>18</sup> SRINIVASCAN, *supra* note 2, at 61, 140.

<sup>19</sup> *Id.*

<sup>20</sup> Brian Cimboric, *The Impact of Regional Trade Areas on International Intellectual Property Rights*, 48 IDEA 53, 58 (2007).

<sup>21</sup> See Trade Agreements: Office of the United States Representative, <http://www.ustr.gov/trade-agreements>.

<sup>22</sup> Bjorn Hettne, *The United Nations and Conflict Management: The Role of the “New Regionalism”*, 4 TRANSNAT’L & CONTEMP. PROBS. 643, 653 (1994).

<sup>23</sup> See Robert Devlin and Antoni Esteveordal, *What’s new in the New Regionalism in the Americas?* 21 (Inter-American Dev. Bank, Working Paper No. 6, 2001).

<sup>24</sup> *Id.* at 14.

The debt crisis of the 1980s caused a recession of RTAs where regionalism technically shut down.<sup>25</sup> The resurgence of regionalism a few years later marked the beginning phases of what is now known as “new regionalism”. The first few of these agreements, formed in the late 80s, were relatively unsophisticated. The agreements enacted in the late 90s are more comprehensive and better reflect the sophistication of the new regionalism era.

Contrary to old regionalism, new regionalism was formed in a multipolar context, where former superpowers have become regional powers competing with emerging regional powers.<sup>26</sup> In this multipolar context, RTAs are further characterized as having a more comprehensive and multidimensional structure that not only includes economically oriented objectives, but also environmental, political, social, and democratic objectives.<sup>27</sup> New regionalism is also described as being “open”, contrary to the preferential treatment that defined old regionalism, and thus more compatible with the multilateral structure and an interdependent economy.<sup>28</sup> As such, trade liberalization is extended to all member partners. This new direction toward trade liberalization occurred through non-tariff and non- border reforms such as mutual recognition of product standards as well as customs harmonization.<sup>29</sup>

New regionalism is also distinguished because its framework provides for the involvement of non-state actors.<sup>30</sup> New regionalism emerged in a time when superpowers were no longer the dominant members in the WTO and when emerging market countries were more actively involved in the trade forum. As a result, agreements that are more recent are between developed and emerging market countries. This outcome follows the tenets of the new

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<sup>25</sup> *Id.* at 20.

<sup>26</sup> Hettne, *supra* note 22, at 653.

<sup>27</sup> Chun Hung Lin, *Regionalism or Globalism? The Process of Telecommunication Cooperation with the OAS and NAFTA*, 11-WTR CURRENTS: INT’L TRADE L. J. 30, 32 (2002); Hettne, *supra* note 22, at 653.

<sup>28</sup> Hettne, *supra* note 22, at 653.

<sup>29</sup> Hung Lin, *supra* note 27, at 32.

<sup>30</sup> Hettne, *supra* note 22, at 653.

regionalism, under which any country willing to accept the conditions of the agreement is welcome.<sup>31</sup>

### **III. The Integration of Human Rights in Regional Trade Agreements**

International trade laws were designed to allow parties to make full use of their comparative advantage, to break down barriers, and to promote freer trade. The WTO achieves this purpose primarily through several nondiscrimination provisions that support free movement of goods. As noted, the MFN Clause in the WTO's GATT requires that a WTO Member must accord to the products of every other Member any advantage or privilege the Member accords to the like product from any other nation.<sup>32</sup> Similarly, the WTO's National Treatment Clause requires that Members treat foreign products "no less favorably" than they treat "like" domestic products.<sup>33</sup> Although these trade rules work to achieve freer trade, they have had the effect of weakening the ability of governments to promote sustainable development, reduce the growing gap between rich and poor, protect core labor standards, and preserve indigenous identities.

Although the WTO Agreement makes no direct reference to human rights, an arsenal of WTO provisions could be used to promote conscious integration of human rights in trade agreements.<sup>34</sup> The World Trade Court<sup>35</sup> has in the past interpreted some WTO provisions as pertaining to human rights embracing the use of public international law, including customary

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<sup>31</sup> Hung Lin, *supra* note 27, at 32.

<sup>32</sup> GATT, *supra* note 5.

<sup>33</sup> Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT'L L. 219, 222 (2004).

<sup>34</sup> Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 29, 63 (Thomas Cottier, et al. eds., Oxford Univ. Press 2005); Stephen J. Powell & Paola A. Chavarro, *Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations*, 20 FLA. J. INTL LAW 93, 97 (2008).

<sup>35</sup> We use this substantially more descriptive term instead of "Appellate Body," the unfortunate title conferred by the WTO. See Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 404, 417 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)

and treaty sources of human rights law, in their interpretation of these provisions.<sup>36</sup> Specifically, the WTO's new World Trade Court interpretation of GATT's Article XX has paved the way for the elevation of human rights issues over economic ones.<sup>37</sup> Article XX can be used to protect human rights because it allows for trade limitations that serve to protect public morals, protect human, animal, or plant life or health, and conserve natural resources.<sup>38</sup> These rules clearly are relevant to the protection of a variety of human rights.

Since creation of the WTO, there has been a shift away from multilateral trade agreements toward regional and bilateral agreements. Today, RTAs supply rules linking markets to standards protecting people's human rights.<sup>39</sup> These standards are not considered relevant by the World Trade Organization.<sup>40</sup> Several economically powerful countries are now changing the politics and agenda of trade agreements by pushing human rights principles through the use of RTAs.<sup>41</sup> Most countries are not even considered for a trade partnership with the USA unless they demonstrate that their governments have made and continue to make domestic commitments toward the protection of human rights.<sup>42</sup>

The linkage of trade and social protection in RTAs has been taken up by a handful of developed countries and a limited number of emerging market countries.<sup>43</sup> Many of the regional trade agreements promise to "[p]romote economic development in a manner consistent with

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<sup>36</sup> Powell & Chavarro, *supra* note 34, at 95.

<sup>37</sup> *Id.*

<sup>38</sup> GATT, *supra* note 5, at art. XX. .

<sup>39</sup> EMILIE M. HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS* 6, 220 (Cornell Univ. Press 2009).

<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.* at 147.

<sup>43</sup> Lorand Bartels, *Social Issues: Labour, environment and human rights*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 342, 345 (Simon Lester & Bryan Mercurio eds., 2009).

environmental protection and conservation and with sustainable development.”<sup>44</sup> Other agreements reaffirm the commitment to human rights values without further explanation or insight into how these commitments are associated with the core business of the agreement.<sup>45</sup> Some agreements include provisions that set positive social standards in the territories of the parties.<sup>46</sup> RTA agreements have begun to consider protection of RTAs in the three general areas of human rights: (1) labor rights, (2) environmental protection, and (3) protection of the intellectual property critical to indigenous populations.

## **A. RTAs and the Integration of Labor Rights**

### ***1. Labor Rights in International Trade***

Since 1919, the main instruments promoting international labor standards have been the labor conventions adopted by the ILO.<sup>47</sup> In 1998, the ILO adopted the Declaration of Fundamental Principles and Rights at Work,<sup>48</sup> which established certain core labor standards: 1) the freedom of association and the right to engage in collective bargaining, 2) the elimination of forced labor, 3) the elimination of child labor, and 4) the elimination of employment discrimination.<sup>49</sup> These core labor standards parallel the international labor standards referenced in several human rights agreements, including the UN’s Universal Declaration of Human Rights , the International Convention of Civil and Political Rights , and the International Covenant on Economic, Social and Cultural Rights .<sup>49</sup> While the ILO’s core standards certainly represent the most fundamental of labor protections, it is important to note that agreement could not be

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<sup>44</sup> See, e.g., Preamble to the Free Trade Agreement between the Governments of Central America and Chile, available at <http://www.comex.go.cr/acuerdos/chile/Texto%20del%20acuerdo/Preambulo.pdf>.

<sup>45</sup> Bartels, *supra* note 43, at 346.

<sup>46</sup> *Id.*

<sup>47</sup> Virginia A. Leary, “Form Follows Function:” *Formulations of International Labor Standards in INTERNATIONAL LABOR STANDARDS* 179, 179 (Robert J. Flanagan & William B. Gould IV eds., Stanford Univ. Press 2003).

<sup>48</sup> Michael J. Trebilcock and Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 263. (2005).

<sup>49</sup> *Id.*

reached on inclusion of other, extremely important, worker rights, such as the rights to a fair wage and to reasonable rest.

The linkage between trade and labor rights has become one of the most contentious issues in trade and labor policy debates.<sup>50</sup> Although there are several well-founded rationales for linking trade policies and labor standards, leaders of emerging market countries passionately oppose enforcing labor restrictions through trade sanctions.<sup>51</sup> This opposition stems from the fear that concessions to labor standards will reduce the advantage of emerging markets in the global trading system. Studies of labor standards and free trade suggest that developed countries have superior labor and health conditions.<sup>52</sup> Thus, arguably, companies in the emerging markets will never gain the economic ability to comply with these stricter labor standards until the countries industrialize using lower working standards, as did today's developed countries in their day.<sup>53</sup> Thus, it is argued, trade-enforced labor standards would give the developed countries a comparative advantage.

Emerging market countries also argue that implementation of higher labor standards as a condition in trade agreements could be used as a disguised form of protectionism,<sup>54</sup> thus aggravating an already unequal distribution of trade's bounty.<sup>55</sup> However, the ILO's Work Declaration specifically disclaims any use of the labor standards for protectionist purposes,<sup>56</sup> which provides a firm basis for a dispute settlement challenge. Nevertheless, many countries

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<sup>50</sup> *Id.* at 261.

<sup>51</sup> Powell & Chavarro, *supra* note 34, at 97.

<sup>52</sup> Robert J. Flanagan, *International Labor Standards and International Competitive Advantage*, in *INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY* 15 (Robert J. Flanagan & William B. Gould IV eds., Stanford Univ. Press 2003).

<sup>53</sup> See Powell & Chavarro, *supra* note 34, at 97.

<sup>54</sup> Flanagan, *supra* note 52, at 15.

<sup>55</sup> Andrea R. Schmidt, *A New Trade Policy for America: Do Labor and Environmental Provisions in Trade Agreements Serve Social Interests or Special Interests?*, 19 *IND. INT'L & COMP. L. REV.* 167, 174 (2009).

<sup>56</sup> Powell & Chavarro, *supra* note 34, at 99.

continue to fear that high labor standards in trade agreements will open the door for developed countries to hide behind to protect their domestic producers.

The opposing view is that countries that do not adopt core labor standards gain a competitive advantage over countries that do abide by these standards.<sup>57</sup> Thus, exporting countries that produce the goods by processes that fail to comply with fundamental worker protections would be engaging in unfair competition, ultimately depriving countries that do abide by these standards of legitimate market share.<sup>58</sup>

The ILO Constitution states that “the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”<sup>59</sup> The ILO mostly pursues its mandate through investigations, public reporting, and technical assistance rather than formal sanctions.<sup>60</sup> Arguably, attempting to enforce a universal set of labor standards as to all states without accounting for their level of economic development will affect their ability fully to participate in the global market.<sup>61</sup> There is no universal formula that prescribes an efficient way to incorporate labor rights into trade agreements.<sup>62</sup> Because conditions will be different for every party to a trade agreement, the worker rights provisions must account for these specific circumstances. Thus drafted, RTAs will provide greater opportunity to ensure the establishment of more relevant labor standards and achieve increased enforcement of human rights through trade.

## ***2. The Effect of Labor Rights Provisions in Current RTAs***

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<sup>57</sup> Flanagan, *supra* note 52, at 26.

<sup>58</sup> Trebilcock, *supra* note 48, at 266.

<sup>59</sup> International Labour Organization Const., preamble, available at <http://www.ilo.org/ilolex/english/constq.htm> (last visited June 23, 2010).

<sup>60</sup> Trebilcock, *supra* note 48, at 262.

<sup>61</sup> Powell & Chavarro, *supra* note 34, at 99-100.

<sup>62</sup> See Kristi Schaeffer, *Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States*, 45 COLUM. J. TRANSNAT'L L. 829, 857 (2007).

There are two important distinguishing features to look for regarding the integration of labor rights in RTAs. The first is whether the framework scheme of the RTA includes integration of labor harmonization. The second is whether or not the RTA includes some enforcement mechanism to implement the labor standards, in particular, whether the RTA provides for trade sanctions for the violation of labor standards.

RTAs that include labor rights provisions generally address both substantive as well procedural labor rights. Substantive labor rights include such rights as maximum working hours, minimum wages, and health and safety protections.<sup>63</sup> Procedural labor rights include such rights as the right of association and the right to collective bargaining.<sup>64</sup>

The three main RTAs discussed herein mark the progress of labor rights in Latin American trade. The first Latin American RTA discussed is MERCOSUL, which is a geographical regional trade agreement. This RTA is followed by a discussion of labor rights under the NAFTA side agreement and the recently adopted Peru-USA FTA. However, the first RTA discussed below is the USA Oman FTA. Although this paper focuses on Latin American regional agreements, the US-Oman provides for a noteworthy example where the negotiations of a trade agreement began a process that prompted workers rights which might otherwise have not occurred.

*a. The US-Oman Bilateral Free Trade Agreement*

Omani had long wanted to enter into a trade agreement with the USA. Before entering into an agreement, the USA State Department analyzed human rights violations in their annual report.<sup>65</sup> According to this report, Oman has for a long time “severely restricted” workers’

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<sup>63</sup> Michael A. Cabin, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, 109 COLUM. L. REV. 1047, 1051 (2009).

<sup>64</sup> *Id.*

<sup>65</sup> Hafner-Burton, *supra* note 39, at 148.



human rights.<sup>66</sup> Reports also showed that Omani laws prevented workers from having procedural labor rights including creating or belonging to labor unions, to strike, or bargain collectively.<sup>67</sup> Further, the few labor laws Omani implemented, only applied to nationals and did not protect foreigners; thus, allowing foreign workers to suffer conditions that could almost be tantamount to forced labor.<sup>68</sup>

Negotiations with the USA for the creation of an RTA that included human rights standards pressed Oman to create better domestic labor standards.<sup>69</sup> By 2006, the Omani government had reformed its labor laws in an attempt to bring its laws into compliance with the International Labor Standards.<sup>70</sup> For example, in 2003, Oman extended many of its labor laws to create foreign workers.<sup>71</sup>

The treaty between the USA and Oman was first signed on January 19, 2006.<sup>72</sup> By the summer of 2006, Oman had already issued a royal decree that revised Omani laws to meet certain ILO core labor standards.<sup>73</sup> These revisions provided workers with the right to belong to labor unions, to bargain collectively and take part in union actions.<sup>74</sup> In this case, the developed country's push for stricter labor standards has resulted in a significant change for the human rights of the Omani people.

The USA-Oman Trade Agreement was finally entered into on January 1, 2009. Since this date, the USA and Oman continue to cooperate to increase labor rights as well as

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; Mary Jane Bolle, *USA-Oman Free Trade Agreement*, CRS REPORT FOR CONGRESS, October 10, 2006, 13 <http://fpc.state.gov/documents/organization/75249.pdf>

<sup>68</sup> Hafner-Burton, *supra* note 39, at 148.

<sup>69</sup> *Id.*

<sup>70</sup> Donna Borak, *House Debate Oman Labor Rights in USA FTA*, UNITED PRESS INT'L, April 6, 2006, available at [http://citizenstrade.org/pdf/upi\\_housedebatsomanlabor\\_04062006.pdf](http://citizenstrade.org/pdf/upi_housedebatsomanlabor_04062006.pdf).

<sup>71</sup> Hafner-Burton, *supra* note 39, at 148.

<sup>72</sup> *Id.* at 147.

<sup>73</sup> *Id.* at 149.

<sup>74</sup> *Id.*

environmental rights.<sup>75</sup> The significant change in Omani law is exemplary proof of how RTAs can be an important avenue for the enforcement of human rights. In addition, the USA-Oman example of how RTAs can prove to be quicker response to human rights enforcement than global treaties. In this instance, a human rights change that might have taken decades under a multilateral setting was addressed more efficiently in a regional setting.

*b. MERCOSUL*

The signing of the Treaty of Asuncion in 1991 established the Southern Common Market (MERCOSUL<sup>76</sup>). MERCOSUL's members include Argentina, Brazil, Paraguay, and Uruguay, making it the largest trade block in South America.<sup>77</sup> The MERCOSUL framework was initially modeled after the European Community.<sup>78</sup> The Common Market Group is the major executive body of MERCOSUL, and is charged with decision-making functions including monitoring compliance and enforcement against violations.<sup>79</sup> It is composed of four representatives of each Member, and may reach a decision only by consensus.<sup>80</sup> In this way, MERCOSUL appears to achieve integration through a political process, but delegates little power to the institutions themselves. This is viewed by some critics as showing the lack of commitment that

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<sup>75</sup> At a February 7, 2010 meeting with the Sultan of Oman, Assistant USA Trade Representative Christopher Wilson reiterated the USA commitment to labor rights and environmental protections and stated that “[t]he meetings in Oman are an important example of the United States’ commitment to ensuring that our trade agreements...promote enhanced protections for labor rights and the environment.” *United States and Oman Hold Joint Committee USA-Oman Free Trade Agreement*, Press Release, OFFICE OF THE USA TRADE REP., (Feb. 12, 2010), <http://www.ustr.gov/united-states-and-oman-hold-joint-committee-meeting-us-oman-free-trade-agreement> (last visited June 25, 2010).

<sup>76</sup> This is the treaty's acronym in Portuguese; in Spanish, it is known as MERCOSUR.

<sup>77</sup> When Hugo Chávez withdrew Venezuela in 2006 from the Andean Pact of Northwestern countries in South America, Venezuela's full membership in MERCOSUL seemed assured. Brazil and Paraguay soon had second thoughts about Chávez's plans to add political objectives to MERCOSUL's trade mission and Venezuela's membership no longer is active. See Joanna Klonsky & Stephanie Hanson, *MERCOSUR: South America's Fractious Trade Bloc*, BACKGROUNDER, Aug. 20, 2009 (Council on For. Rels.), available at [www.cfr.org/publication/12762/mercosur.html](http://www.cfr.org/publication/12762/mercosur.html) (last visited Jun. 25, 2010).

<sup>78</sup> Ljiljana Biukovic, *Dispute Resolution Mechanisms and Regional Trade Agreements: South American and Caribbean Modalities*, 14 U.C. Davis J. Int'l L. & Pol'y 255, 270 (2008).

<sup>79</sup> Kristi Schaeffer, *supra* note 62, at 834.

<sup>80</sup> *Id.*

MERCOSUL Members have for deep economic integration<sup>81</sup> (note that the same structure is employed in the NAFTA and the WTO, neither of which seeks comprehensive economic integration). Nevertheless, the decisions made by the Common Market Group and by the Council are binding on the Members.

The MERCOSUL agreement does not have any human rights language within the treaty that establishes the common commercial policy among Members.<sup>82</sup> However, MERCOSUL Members have made efforts to improve human rights standards; thus acknowledging a link between trade and human rights. For example, MERCOSUL has commitments to the ILO core labor standards. If a Member believes another Member has violated one of these ILO commitments, the Commission on Social and Labor Matters will review the allegations. However, similar to the Mercosur Trade Commission, the Commission on Social and Labor Matters cannot impose sanctions. The power to enforce and monitor sanctions remains with the national governments.<sup>83</sup>

MERCOSUL members frequently meet in working groups and discuss policy objectives that can be affected by trade policies. Officials from Members occasionally discuss human rights concerns.<sup>84</sup> Directly under the Common Market Group are the Working sub-groups. These groups conduct studies on specific MERCOSUL concerns. With its eight committees and an ever-expanding mandate since its 1992 creation, Working Sub-Group 10 on Labor Relations, Employment, and Social Security has taken important steps in the areas of labor relations, employment and labor migration, professional development, health and safety, and social

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<sup>81</sup> See Biukovic, *supra* note 78, at 271.

<sup>82</sup> Susan Ariel Aaronson and Jamie M. Zimmerman, *TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING* 106 (Cambridge University Press 2008).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

security.<sup>85</sup> Sub-Group 10 also carries the responsibility of defining substantive labor rights norms for MERCOSUL. In making its recommendations, the Sub-Group called for Members to ratify 34 ILO Conventions determined to be essential in achieving fair labor standards.<sup>86</sup> Further, Working Sub-Group 10 created the Labor Market Observatory, which researches and analyzes issues relating to the labor markets of the Members.

In addition to the working sub-groups, MERCOSUL members addressed labor concerns through the 1998 adoption of the Socio-Labor Declaration.<sup>87</sup> This Declaration asserts a variety of labor rights, including non-discrimination, equality, freedom of association, the right to strike, elimination of forced labor, and the rights of the unemployed.<sup>88</sup> However, the Socio-Labor Declaration's main shortcoming is that it explicitly separates labor from trade because "it is prohibited, in particular, to apply [the declaration] to trade, economic or financial matters."<sup>89</sup> Further, the Socio-Labor Declaration lacks a mechanism for enforcement.<sup>90</sup>

While MERCOSUL lacks explicit protections for worker rights within the instrument itself, Members take labor protection seriously and have continuously engaged in a standard-setting process to guide the national governments in improvement of their human rights record with respect to workers. On July 24, 2009, MERCOSUL created the Institute of Public Politics for Human Rights.<sup>91</sup> Headquartered in Buenos Aires, the Institute's purpose is "to strengthen the rule of law, through the design and monitoring of public policies on human rights, thus contributing to consolidating the same, considering them as a key to the identity and

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<sup>85</sup> Schaeffer, *supra* note 62, at 836.

<sup>86</sup> *Id.*

<sup>87</sup> Socio Labour Declaration, Mercosur, December 10 1998, *available at* <http://www.mercosur.int/innovaportal/types/file/downloadfilecontent.jsp?contentid=103&site=1&channel=secretaria>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; *see also*, Schaeffer, *supra* note 62, at 838.

<sup>90</sup> Schaeffer, *supra* note 62, at 838.

<sup>91</sup> *See* Agreement for the Establishment of the Institute of Public Politics for Human Rights, *available at* <http://www.mercosur.int/show?contentid=383> (last visited July 12, 2010).

development in the region.”<sup>92</sup> The Institute will conduct human right studies and serve as a forum for further discussions among Members of human rights issues.<sup>93</sup> Although the Institute seems on paper a positive step toward further integration of human rights issues into the MERCOSUL culture, it is unclear at this early stage what effect, if any, it will have as a future enforcement mechanism for human rights violations.

c. North American Agreement on Labor Cooperation

NAFTA was one of the first RTAs with significant links to labor rights.<sup>94</sup> The original NAFTA agreement did not directly address labor rights. However, increased U.S. concern about the effect that RTAs in general, and NAFTA in particular, would have on jobs prompted officials to reconsider the integration of labor rights into NAFTA. One of the biggest concerns was the Mexican labor laws in place at that time. Although Mexican labor laws abide by most of the rules included in the ILO Conventions, Mexican labor practices were not believed to be fully-enforced.<sup>95</sup> These concerns eventually led to the promulgation of the labor side agreement to NAFTA known as the North American Agreement on Labor Cooperation (NAALC). However, NAALC lacks an effective enforcement mechanism and explicitly allows each party “to establish its own domestic labor standards.”<sup>96</sup> As we noted earlier,<sup>97</sup> failure of an RTA to harmonize standards to an objectively acceptable level, twinned with weak enforcement of even this lower threshold, portend an inauspicious beginning of efforts to protect workers from human rights violations in the workplace.

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<sup>92</sup> *Id.*

<sup>93</sup> See News Ministerio de Justicia, Seguridad y Derechos Humanos de Argentina, July 27, 2009 Mercosur’s Creation of the IPPDDHH, available at <http://www.derhuman.jus.gov.ar/institucional/prensa/2009/jul.html>

<sup>94</sup> Cabin, *supra* note 63, at 1055.

<sup>95</sup> Trebilcock, *supra* note 48, at 295.

<sup>96</sup> North American Agreement on Labor Cooperation [hereinafter NAALC], art. 2., available at <http://www.naalc.org/naalc/naalc-full-text.htm>.

<sup>97</sup> See text at paragraph preceding note 63.

NAALC, along with its environmental counterpart, the North American Agreement on Environmental Cooperation, are also notable because they provide for an adjudicative process that is open to governmental and non-governmental groups.<sup>98</sup> NAALC has a citizen petition process that allows private persons to file a complaint.<sup>99</sup> Complaints alleging that a NAFTA party is not enforcing its labor laws are sent to one of the three National Administrative Offices (NAO) representing each member country.<sup>100</sup> NAO reviews the complaint, commissions a legal study, and issues a report with findings and recommendations.<sup>101</sup>

NAALC goes beyond many RTAs because it provides for the possibility of using sanctions to enforce labor violations. NAALC has a three-step process for the systematic enforcement of domestic labor laws.<sup>102</sup> The process is a ladder structure where only some of the complaints can proceed to the second and third steps.<sup>103</sup> The first step involves the consultation of parties whereby the parties in dispute must make a full attempt to arrive at a mutual resolution of the matter at issue.<sup>104</sup> If a dispute is not resolved by ministerial consultations, then a party can request the establishment of an Evaluation Committee of Experts (ECE) to review such matters.<sup>105</sup> Notably, disputes regarding procedural labor laws, which include the freedom of association, the right to bargain collectively, and the right to strike have no option for dispute mechanism and cannot be heard by the ECE under NAALC.<sup>106</sup> In addition,

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<sup>98</sup> Ruth Buchanan and Rusby Chaparro, *International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labor Cooperation*, 13 UCLA J. INT'L & FOREIGN AFF. 129, 131 (2008).

<sup>99</sup> *Id.* at 132.

<sup>100</sup> NAALC, *supra* note 96, at art. 15.

<sup>101</sup> Buchanan and Chaparro, *supra* note 98, at 138.

<sup>102</sup> NAALC, *supra* note 96, at art. 22-24, 29. The NAALC three-step process toward adjudication has three steps: (1) anything within the scope of the agreement can request ministerial consultations with another party, (2) establishment and evaluation by the Evaluation Committee of Experts, (3) establishment and evaluation by an arbitral panel. *Id.*; *see also*, Buchanan and Chaparro, *supra* note 98, at 138.

<sup>103</sup> Buchanan and Chaparro, *supra* note 98, at 138.

<sup>104</sup> NAALC, *supra* note 96, at art. 27.

<sup>105</sup> Evaluation Committees of Experts and Arbitral Panels, NAALC, <http://www.naalc.org/naalc/ece.htm> (last visited on May 1, 2010).

<sup>106</sup> *Id.*

the ECE may not be convened if the matter at issue is not trade-related or is not covered by the mutual recognition of labor laws.<sup>107</sup>

In the third and final step, an arbitral panel is established.<sup>108</sup> However, the third step can only be invoked in relation to three areas of labor laws: child labor rights, minimum wages, or occupational safety and health.<sup>109</sup> This detail is crucial because the only significant avenue of enforcement is to reach the third step given that the arbitral panel has the power to levy a “monetary enforcement assessment”.<sup>110</sup> Given these limitations, the possibility that any labor disputes will survive this arduous process and that a monetary assessment ultimately will be imposed on a labor violation seems questionable.

NAALC has been criticized because it does not establish a common regimen of labor standards and does not have an effective enforcement method.<sup>111</sup> However, some critics believe that the publicity surrounding the NAO recommendations create pressure for governments to improve their human rights record with respect to their workers.<sup>112</sup> Many of the later USA RTAs, such as the Chile-USA FTA and the DR-CAFTA-USA, followed NAALC’s structure in implementing labor rights, causing increased concerns over the rapid spread of “soft law” agreements with respect to workers. However, as described in the next section, the United States would take an important step toward genuine enforcement of labor rights in its negotiations with Peru.

### US - Peru FTA

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<sup>107</sup> *Id.*

<sup>108</sup> NAALC, *supra* note 96, at art. 29; *see also*, Buchanan and Chaparro, *supra* note 98, at 138.

<sup>109</sup> NAALC, *supra* note 96, at art. 27.1; *see also*, Buchanan and Chaparro, *supra* note 98, at 138.

<sup>110</sup> Schaeffer, *supra* note 62, at 841; Trebilcock, *supra* note 48, at 297.

<sup>111</sup> Buchanan and Chaparro, *supra* note 98, at 137; Stephen F. Diamond, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 199, 216 (Lance A. Compa & Stephen F. Diamond eds., Univ. of Penn. Press 1996).

<sup>112</sup> *See* Buchanan and Chaparro, *supra* note 98, at 139.

In 2006, Peru and the United States signed a bilateral free trade agreement<sup>113</sup> that, in the pattern set by other recent USA-negotiated agreements, contained labor and environmental provisions.<sup>114</sup> However, a significant difference in the Peru-USA FTA is that the labor protections are enforceable obligations that provide for the same settlement procedures and remedies as the commercial obligations.<sup>115</sup>

The Peru-USA FTA requires that parties abide by the ILO Work Declaration's principles. Article 17.2 of the Peru-US FTA specifically states that each party must "adopt and maintain...the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*."<sup>116</sup> Some of the principles explicitly stated in the Peru-USA FTA include: (a) the freedom of association, (b) right to collective bargaining, (c) elimination of forced labor (d) abolition of child labor, and (e) elimination of employment discrimination.<sup>117</sup> Thus, both members have committed to ensuring that its domestic laws are in accordance with the ILO's fundamental worker rights principles.

The Peru-USA FTA also created a Labor Affairs Council whose specific charge is implementation and development of the labor obligations in the agreement.<sup>118</sup> In addition, the Peru-USA FTA provides for cooperative labor consultations of the Council. If the disputed matter has not been resolved within 60 days of the consultation request, the complaining party

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<sup>113</sup> Office of the USA Trade Representative, Peru Trade Promotion Agreement, <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>, (last visited July 12, 2010).

<sup>114</sup> Office of the USA Trade Representative, Trade Facts, Free Trade with Peru: Brief Summary of the United States-Peru Trade Promotion Agreement 2 (2007), available at [http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file585\\_13067.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file585_13067.pdf)

<sup>115</sup> Office of the USA Trade Representative, Real Results on Labor Rights 1 (2007), available at <http://www.ustr.gov/sites/default/files/Real-Results-on-Labor-Rights.pdf>

<sup>116</sup> Peru-USA FTA, art. 17.2, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

<sup>117</sup> *Id.*

<sup>118</sup> Powell & Chavarro, *supra* note 34, at 119.



has the option to bring the matter to the dispute settlement mechanism.<sup>119</sup> Unlike other RTAs, the Peru-USA agreement allows for the same remedies available for trade violations to apply to labor and environmental violations.<sup>120</sup> In contrast with NAALC, violations of both procedural and substantive labor rights could result in dispute resolution mechanisms or sanctions.

However, the labor chapter adds a trade relationship test to its broadened enforcement reach reminiscent of the softer language in the NAALC.<sup>121</sup> In order to qualify for dispute settlement, the challenged party must fail to adopt or maintain the questioned regulation or practice “in a manner affecting trade or investment between the Parties.”<sup>122</sup> At some level, all violations of worker rights affect trade, but we do not know how broadly this limitation will be interpreted by dispute settlement panels. Nevertheless, the Agreement’s enforceable labor and environmental provisions signify an important step toward efficient integration of human rights and trade. If the Peru-USA’s labor provisions prove successful, they may become the standard for future RTAs intending to implement human rights.

## **B. Environmental Protection through Trade Agreements**

Environmental protection and human rights go hand in hand. Clean water, clean air, adequate food and shelter depend on a healthy environment. There is an undeniable link between trade and environmental protection. Trade not only promotes the consumption and use of sustainable resources, but it also inevitably exacerbates pollution. Notably, experts in human rights and trade do not address environmental protection in the same discipline as human

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<sup>119</sup> Peru-USA FTA, *supra* note 116, at art. 21.5.

<sup>120</sup> Cabin, *supra* note 63, at 1072.

<sup>121</sup> *See* text at *supra*, note 102.

<sup>122</sup> Peru-USA FTA, *supra* note 116, at art. 17.2 note 1.

rights.<sup>123</sup> The failure to include environmental protection as a human right bars environmental issues from reaching many international human rights forums.

### ***1. The effects of Trade on the Environment***

Economists believe that economic integration has direct and indirect effects on the environment and on sustainable development.<sup>124</sup> Many environmentalists view economic liberalization as driving the demand for a greater consumption of natural resources.<sup>125</sup> Theoretically, the liberalization of trade will likely increase economic efficiency and productivity between the trading members, causing an increase in economic activity.<sup>126</sup> An increase in the production of goods and services likely leads to higher consumption of natural resources, and increased pollution.<sup>127</sup> These environmental effects may reach the importing country as well as the exporting country.<sup>128</sup>

A good example of the direct impact trade liberalization can have on the environment is the Brazil tire dispute. Brazil has an active tire retreading industry. Its companies import used tires, retread them, and sell the resulting product. However, many of the tires imported cannot be retreaded. Because Brazil did not have tire disposal policies in place, these tires were simply abandoned at any vacant parcel of land available, where they collected water during the country's rainy seasons.<sup>129</sup> The stagnant water collected in the tires provided the perfect

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<sup>123</sup> HERNÁNDEZ-TRUYOL AND POWELL, *supra* note 1a, at 86.

<sup>124</sup> Kevin P. Gallagher and Jacob Werksman, *International Trade and Sustainable Development: An Integrative Approach*, in INTERNATIONAL TRADE & SUSTAINABLE DEVELOPMENT 3, 5 (Kevin P. Gallagher and Jacob Werksman eds., 2002).

<sup>125</sup> *Id.* at 4.

<sup>126</sup> Sanford E. Gaines, *Environmental Protection in Regional Trade Agreements: Realizing the Potential*, 28 ST. LOUIS U. PUB. L. REV. 253, 256 (2008).

<sup>127</sup> *Id.* at 256; Charles E. Di Leva, *International Trade and the Environment*, 18 PACE INT'L L. REV. 227, 227 (2005).

<sup>128</sup> See Gaines, *supra* note 126.

<sup>129</sup> ARONSON & ZIMMERMAN, *supra* note 82, at 94.

breeding ground for mosquitoes that cause dengue, malaria, and yellow fever.<sup>130</sup> In 2002, Brazil suffered a severe outbreak of dengue, a potential deadly tropical disease spread by mosquitoes that pick up the virus by feeding on infected persons and then spread it when they bite others.<sup>131</sup>

In an attempt to address the health epidemic caused by these abandoned tires, the Brazilian Ministry of Development, Industry and Foreign Trade banned imports of retreaded and used tires.<sup>132</sup> Two dispute settlement proceedings, however, frustrated Brazil's attempt at a total ban of old tires. Uruguay, a member with Brazil of MERCOSUL, challenged the ban before the MERCOSUL's dispute settlement tribunal, which found that under the terms of that Agreement, Brazil must exclude all MERCOSUL members from the ban.<sup>133</sup> Importers of used tires, deprived of input, successfully challenged the ban of "used" tires in the Brazilian court system.<sup>134</sup>

With this background, the European Union challenged the (now partial) ban under the WTO's dispute settlement system, among other arguments noting that the partial ban had the result of completely protecting Brazil's retreading industry from outside competition while providing ready access to that industry of old tires needed for the retreading process. The World Trade Court ultimately declared that, although a general ban could be justified under Article XX(b)'s exception for measures necessary to protect public health, Brazil's selective ban was "unjustifiably discriminatory" because exclusion of MERCOSUL members and of used tires

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<sup>130</sup> *The Brazil-Retreaded Tires Case*, Background Paper (Center for Int'l Env'l Law March 2006), at [http://www.ciel.org/Publications/Brazil\\_Tires\\_3Apr06.pdf](http://www.ciel.org/Publications/Brazil_Tires_3Apr06.pdf) (last visited July 13, 2010).

<sup>131</sup> Gaines, *supra* note 126, at 256.

<sup>132</sup> ARONSON ZIMMERMAN, *supra* note 82, at 95. Retreaded tires are also, of course, "used." However, they are classified separately under the Harmonized Commodity Description and Coding System, a detailed and logical numerical system for distinguishing some 5,000 commodities administered by the World Customs Organization and used by about 200 countries to set up their national customs tariff and for the collection of economic statistical data. *What is the Harmonized System (HS)?*, World Customs Org., at [http://www.wcoomd.org/home\\_hsoverviewboxes\\_hsoverview\\_hsharmonizedsystem.htm](http://www.wcoomd.org/home_hsoverviewboxes_hsoverview_hsharmonizedsystem.htm).

<sup>133</sup> ARONSON & ZIMMERMAN, *supra* note 82 at 96.

<sup>134</sup> *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, Rep. of the Panel, at para. 7.291 (Jun. 12, 2007).

clearly did not contribute to the protection of public health and, in fact, had the opposite effect.<sup>135</sup>

As this example provides, the linkage between trade and environmental protection is easily proven. The commitment parties make by joining trade agreements inevitably affects the ecosystem in which that trade takes place. This symbiotic relationship argues strongly for including environmental protection as part of trade agreements.

In addition to concerns for the effects in countries that lack local environmental regulations, some commentators believe that the lack of linkage in trade rules to the environment causes negative regulatory effects on existing local environmental regulations. One of the concerns is that because they so not allow Members to discriminate against imported goods, trade rules are forcing countries to accept products that are produced or manufactured in a manner that is below their environmental and standards.<sup>136</sup>

Another negative effect that a lack of environmental standards in trade agreements might have is what has been dubbed the competitiveness effect. The theory behind this effect is that producers that are required to meet higher environmental standards will be at a competitive disadvantage when competing with foreign producers with lower environmental standards.<sup>137</sup> The political consequence is that the competitive political pressure in protecting domestic business will strengthen opposition to higher environmental standards; thus creating a chilling effect on governmental agencies considering higher environmental regulatory standards.<sup>138</sup>

On the other hand, opponents of the integration of environmental policy with trade rules argue that requiring imports to meet domestic environmental standards restricts emerging

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<sup>135</sup> *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, Rep. of the Appellate Body, at para. 228 (Dec. 3, 2007).

<sup>136</sup> Gaines, *supra* note 126, at 254.

<sup>137</sup> *Id.* at 255.

<sup>138</sup> *Id.*

market countries from access to larger markets.<sup>139</sup> In addition, there is a fear that countries will use protection of the environment as a pretext for protectionism.<sup>140</sup> Emerging markets fear that stricter environmental policies will become a trade barrier depriving them of the wealth they need for further development.<sup>141</sup> Basically, the theory is that countries will use environmental policies to prohibit access to their market by foreign products that are more expensive than domestic like products.<sup>142</sup> Thus, trade liberalization will be negatively impacted by environmental burdens.<sup>143</sup>

## ***2. Regional Trade Agreements and Environmental Policies***

One of the main advantages that regional trade agreements have is their very regionality, that is, most RTAs bind geographically proximate nations. The geographical proximity means that these nations will more likely have ecologically similar environments.<sup>144</sup> Those agreements between countries with shared ecologies would especially benefit from environmental protection because the environmental behavior in one country will directly affect the other country.<sup>145</sup> This is especially true for South America, where the Amazon Rainforest encompasses regions belonging to nine countries. In addition, specific environmental issues that should be addressed can more readily be identified at a regional level. As such, the development of environmental solutions and a mutual consensus to the development of specific mechanisms addressing those issues is easier at a regional level than a multilateral level.<sup>146</sup> Therefore, theoretically, RTAs

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<sup>139</sup> JOHN J. AUDLEY, *GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS* 39 (Georgetown University Press 1997).

<sup>140</sup> Daniel C. Esty, *Bridging the Trade-Environment Divide*, in *INTERNATIONAL TRADE & SUSTAINABLE DEVELOPMENT* 186, 190 (Kevin P. Gallagher and Jacob Werksman, ed. 2002).

<sup>141</sup> Di Leva, *supra* note 127, at 227.

<sup>142</sup> AUDLEY, *supra* note 139, at 39.

<sup>143</sup> Esty, *supra* note 140, at 190.

<sup>144</sup> Gaines, *supra* note 126, at 262-65.

<sup>145</sup> *See id.*

<sup>146</sup> *Id.* at 265.

such as MERCOSUL, NAFTA, CAFTA, and the Andean Pact have the geographical advantage to provide the inarguable premises for environmental preservation through trade.

### ***3. North American Agreement for Environmental Cooperation***

As mentioned *supra*, in addition to NAALC, NAFTA members succeeded in adopting NAAEC, the environmental side agreement. NAAEC established the Commission for Environmental Cooperation (CEC), charged with mitigating regional environmental concerns and conflicts, and with encouraging the enforcement of environmental laws.<sup>147</sup> However, NAAEC does not set any environmental standards and simply provides that each party ensure that their domestic laws include *high* standards of environmental protection.<sup>148</sup>

In contrast to the ILO, there is no single global environmental organization to which the WTO or national trade authorities could defer to for environmental standards. However, there are a number of environmental agreements, like the Convention on Biological Diversity (CBD), that could potentially be used as a basis for establishing minimum environmental commitments through trade. Nevertheless, currently, RTAs like the NAAEC and Peru-USA still only pose blanket provisions by simply requiring the establishment of “high” environmental standards.

Regardless of the problems that lie with the enactment of these weak environmental provisions, NAAEC does provide several mechanisms for environmental transparency and for dispute resolution. For example, similar to NAALC, NAAEC also provides a citizen submission process where citizens are able to submit a complaint to the CEC when a Party is failing to enforce environmental laws.<sup>149</sup> If the Secretariat considers the submission and warrants the need for a factual record, the Secretariat may only prepare a record with a two-third approval by the

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<sup>147</sup>North American Agreement on Environmental Cooperation [hereinafter NAAEC] art. 10, USA-Can-Mex, Sept. 14, 1993, available at <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567>.

<sup>148</sup> *Id.* at art. 3.

<sup>149</sup> *Id.* at art. 14-15.

Council.<sup>150</sup> To date, there have been a total of 73 complaint submitted to the CEC.<sup>151</sup> Of these, only 16 factual records have been produced.<sup>152</sup> These statistics leaves some critics doubting the effectiveness of this procedure.

In addition, although any citizen may submit a complaint, most of the submissions have been made by non-governmental organizations, suggesting that submission procedures might be too cumbersome or that individuals lack the time or financial resources to complete these submissions.<sup>153</sup> Some critics also argue that the citizen submission process can be easily undermined by the Council.<sup>154</sup> These critics specifically point out the result of the Ontario Logging Submission, where despite the Secretariat's recommendation for a factual record, the Council initially refused to review the submission.<sup>155</sup> Although the complainants in that instance submitted factual models estimating the environmental damage that would be caused by Canada's logging operations, the Council demanded that complainants submit data that showed the actual environmental damage that the logging had already caused.<sup>156</sup> In the absence of a treaty mandate that the Council take a "precautionary approach," the citizen submission process will remain remedial at best, and cannot be used as an anticipatory means of environmental protection.

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<sup>150</sup> *Id.* at art. 15.

<sup>151</sup> CEC Registry of Citizen Submissions, available at <http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250>.

<sup>152</sup> *Id.*

<sup>153</sup> Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT'L ENV'T'L L. REV. 129, 138 (2007).

<sup>154</sup> Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 229-30 (2008).

<sup>155</sup> CEC, Council Res 03-05, CEC, C/C.01/03-02/RES/05/final (Apr. 22, 2003) available at [http://www.cec.org/Storage/72/6574\\_02-1-RES-E.pdf](http://www.cec.org/Storage/72/6574_02-1-RES-E.pdf).

<sup>156</sup> Complainant's alleged that Canada was failing to enforce the Migratory Bird Regulations and destroying eggs and nests of migratory birds by their logging actions. Submission to the Commission on Environmental Cooperation. A14/SEM/02-001/01/SUB (Feb. 6, 2002)(SEM-02-001), available at [http://www.cec.org/Page.asp?PageID=2001&ContentID=2375&SiteNodeID=250&BL\\_ExpandID](http://www.cec.org/Page.asp?PageID=2001&ContentID=2375&SiteNodeID=250&BL_ExpandID).

Further, even if a factual record of a complaint is published, a party is under no obligation to provide the CEC with information as to any corrective measures it has taken.<sup>157</sup> Without any enforcement or follow-up mechanisms, it is easy for parties simply to ignore the findings of the CEC. Nevertheless, the CEC has succeeded in accomplishing some notable environmental outcomes. One of the most evident is the CEC's establishment of clear strategies for managing toxic chemicals through its North American Regional Action Plans (NARAPs).<sup>158</sup> The CEC has successfully eliminated the use of DDT and chlordane, and is in the process of reducing the use of mercury.<sup>159</sup>

There are several studies completed which evaluate the effects of the NAFTA agreement. Notably, regardless of the fears that the integration of environmental protection in trade would pave the ground for a "race to the bottom" scenario, some studies of NAFTA effects have concluded that although trade liberalization could have been a factor leading some USA companies to move to Mexico, there is little evidence showing that "large-scale shifts in industrial investment and relocation to pollution havens have occurred."<sup>160</sup> Despite strong criticism NAAEC procedures, many of the USA negotiated RTAs following NAFTA have adopted NAAEC's enforcement framework and have ignored the valuable lessons CEC studies may afford.<sup>161</sup> The success of future integration might benefit from the careful review of the negative and positive results of preceding RTAs.

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<sup>157</sup> Notably, the Joint Public Advisory Committee recommended in 2001 that the Council adopt a follow-up scheme requiring a report by the relevant Party to the Council after release of the factual record. However, the Council objected to the recommendation, concluding that follow-up schemes were the responsibility of domestic law. Dorn, *supra* note 153, at 140-41.

<sup>158</sup> Wold, *supra* note 154, at 226.

<sup>159</sup> North American Regional Action Plan on Chlordane art. 4.2 (June 1997), available at [http://www.cec.org/Page.asp?PageID=122&ContentID=1263&SiteNodeID=312&BL\\_ExpandID=#3countries](http://www.cec.org/Page.asp?PageID=122&ContentID=1263&SiteNodeID=312&BL_ExpandID=#3countries);

<sup>160</sup> Wold, *supra* note 154, at 223.

<sup>161</sup> Wold, *supra* note 154, at 205. Wold further argues that although the USA has claimed that they have achieved further environmental integration in subsequent agreements to NAAFTA by including the environmental



### C. The Effects of Intellectual Property (IP) Regulation on Local Populations

Advances in technology have brought about new forms of trade in the global market, most prominently the transfer across borders of IP—primarily patents and copyrights to original inventions and other works. As much as half of the value of USA exports resides in its IP content, such as the patent on a new malaria medicine, the trademarked emblem on the hood of a Cadillac Escalade, the copyright on a Stephen King novel, or the mask works on a semiconductor chip. A strong indicator of the value of these goods of creative minds is the fact that it is stolen (the polite term is “infringed”) at an appalling pace: estimates of the annual cost to world wealth of IP piracy range as high as \$983 billion.<sup>162</sup>

In 1995, the WTO stepped into the enforcement arena left wanting by dozens of years of soft-law treaty making in the World Intellectual Property Organization (WIPO), a specialized agency of the UN. With its 150-plus Members and its near-automatic dispute settlement system, the WTO’s adoption of the tenets of the WIPO treaties into its own Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS ) made the prior treaties both broader in reach and significantly more powerful.<sup>163</sup>

Intellectual property rights generally give creators exclusive right to use their work for a specified period of time (*e.g.*, 20 years for patents) and have been recognized in many international instruments, including article 27, paragraph 2, of the Universal Declaration of

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provisions in the RTA itself, “this benefit is more imagined than real” because there is no legal difference to placing environmental provisions in the agreement itself as opposed to placing them in a side agreement. *Id.* at 236.

<sup>162</sup> HERNÁNDEZ-TRUYOL & POWELL, *supra* note 1a, at 214; Int’l Chamber of Commerce, quoted in Rick Mitchell, *Global Business Lobby Says IP Piracy Costs World Economy \$900 Billion a Year*, WTO REPORTER, June 23, 2010 (Bur. Nat’l Affs.), available at [http://news.bna.com/wtln/WTLNWB/split\\_display.adp?fedfid=17354497&vname=wtobulallissues&wsn=498444500&searchid=11826282&doctypeid=1&type=date&mode=doc&split=0&scm=WTLNWB&pg=0](http://news.bna.com/wtln/WTLNWB/split_display.adp?fedfid=17354497&vname=wtobulallissues&wsn=498444500&searchid=11826282&doctypeid=1&type=date&mode=doc&split=0&scm=WTLNWB&pg=0).

<sup>163</sup> HERNÁNDEZ-TRUYOL & POWELL, *supra* note 1a, at 213-14. Non-signatories to the WIPO treaties were bound to their terms because the WTO allowed only one kind of adherence, that is, to receive the irresistible trade benefits of some of the WTO Agreements, Members must agree to abide by the terms of all 24 of its agreements. This single-undertaking approach added great weight to the WTO Agreements, both individually and jointly. See Petros C. Mavroidis, George A. Bermann, & Mark Wu, *THE LAW OF THE WORLD TRADE ORGANIZATION (WTO): DOCUMENTS, CASES & ANALYSIS 9* (West 2010).

Human Rights, which states that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>164</sup>

The WTO divides IP rights into two main categories: (1) copyright material and (2) industrial property.<sup>165</sup> The latter generally includes patent rights, trademarks, and trade secrets. Patent rights and patent laws are most relevant in our discussion because it is the IP right that has recently had direct impact on certain of the other human rights elucidated in the UN’s Universal Declaration. As discussed below, the regulation of patents specifically affects two distinct human rights: (1) indigenous population rights and (2) the public right to health.

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

During TRIPS negotiations, many emerging market countries argued for reduced patent protection to pharmaceuticals.<sup>166</sup> Though policy-based at first, these objections quickly turned toward a human rights justification.<sup>167</sup> Critics of the proposed WTO/WIPO patent-protection system claimed that the push for stronger IP rights infringed the right of access to medicines essential to the health of a country’s population. Stronger patent rights allowed pharmaceutical companies to charge higher prices for medicines, thereby taking these “essential medicines” from the reach of most, if not all, of the sick in emerging market countries.

Developed countries have used RTAs as a way of increasing protection to their pharmaceutical industries<sup>168</sup> through TRIPS-plus protection for IP. These added conditions

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<sup>164</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), available at <http://www.un.org/en/documents/udhr/>.

<sup>165</sup> WTO Secretariat, *What are intellectual Property Rights?*, at [http://www.wto.org/english/tratop\\_e/trips\\_e/intell\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intell_e.htm).

<sup>166</sup> Holger Hestermeyer, *HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES* 76 (Oxford Univ. Press 2007).

<sup>167</sup> *See id.*

<sup>168</sup> *See Cimboric, supra*, note 20, at 58.

ensure tighter IP protection than that required by TRIPS.<sup>169</sup> Although the TRIPS Agreement powerfully protects pharmaceutical companies through its patent provisions, it also creates an exception for countries in dire need of the medicine by permitting them to issue patent-busting compulsory licenses.<sup>170</sup> These licenses allow a country undergoing a health crisis, such as HIV-AIDS or malaria, to license production of generic equivalents without consent of the holder of the medicine's patent.<sup>171</sup> The WTO, in the Declaration on the TRIPS Agreement and the Public Health, clarified Article 31 of TRIPS by stating that “[e]ach member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.”<sup>172</sup> This statement gives WTO Members free reign to create barriers to compulsory license access in RTAs without fear of violating WTO provisions.

Developed countries have taken advantage of RTAs to prevent these compulsory licenses from being granted. For example, the USA has placed a 5-year shield on the production of generic pharmaceuticals in its most recent RTAs.<sup>173</sup> The USA achieved this result by prohibiting generic producers from using pre-existing safety data tests, essentially obligating the producers to conduct the same time-consuming and costly tests themselves.<sup>174</sup> Moreover, the United States punishes emerging market countries that fail to agree to these TRIPS-plus

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<sup>169</sup> Mindahi Cresencio Bastida-Munoz and Geraldine A. Patrick, *Traditional Knowledge and Intellectual Property Rights: Beyond TRIPS Agreements and Intellectual Property Chapters of FTAs*, 14 MICH. ST. J. INT'L L. 259, 287 (2006).

<sup>170</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 31, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 381 (1994); Cimboric, *supra* 20, at 58.

<sup>171</sup> The Member must nonetheless negotiate in good faith to arrive at agreement with the company on “reasonable commercial terms” for the license. *Id.*

<sup>172</sup> This document was one of the principal agreements during key stages in the 9<sup>th</sup> “round” (since GATT’s creation in 1947) of multilateral trade negotiations launched by the November 2001 Doha Ministerial Conference. Declaration on the TRIPS Agreement and Health of 14 November 2001, para. 5(b), WT/MIN(1)/DEC/2, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (last visited July 13, 2010).

<sup>173</sup> Cimboric, *supra* note 20, at 59.

<sup>174</sup> *Id.* at 59.

measures by using the so-called “Special 301” list to label them as threats to IP rights.<sup>175</sup> This listing will scare away investors with IP that needs protection.

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

## **2. Acknowledgment of Traditional Knowledge and its Exclusion from IP Rights**

Consistently with the standards of the Western patent system, the TRIPS Agreement makes patent protection available only to inventions that are new, inventive, and capable of industrial application.<sup>176</sup> We explain in this section that, while recognizing property rights, TRIPS standards thus essentially ignore the identities and collective rights of indigenous peoples.<sup>177</sup>

In recent years, there has been a movement toward the recognition and appreciation of the correlation between the culture and biodiversity of a particular region.<sup>178</sup> The knowledge and practices that local and indigenous communities have passed on through generations have been linked closely to the conservation and sustainable use of biodiversity in their communities.<sup>179</sup> This new awareness for the importance of the knowledge of the communities living in close

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<sup>175</sup> Tony Dutra, *Health Activists Say Special 301 List Targets Developing Countries Beyond TRIPs Minimum*, WTO Reporter, July 22, 2010 (BNA), available at [http://news.bna.com/wtln/WTLNWB/split\\_display.adp?fedfid=17524187&vname=wtobulallissues&fn=17524187&jd=a0c3u5h2g1&split=0](http://news.bna.com/wtln/WTLNWB/split_display.adp?fedfid=17524187&vname=wtobulallissues&fn=17524187&jd=a0c3u5h2g1&split=0).

<sup>176</sup> TRIPS, *supra* note 170, at art. 27(1); Prabhash Ranjan, *International Trade and Human Rights: Conflicting Obligations*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 311, 313 (Thomas Cottier et al. eds., Oxford Univ. Press 2005); Cimboric, *supra* note 20, at 53.

<sup>177</sup> See TRIPS, *supra* note 170 at art. 27.3(b); see also, Bastida-Munoz and Patrick, *supra* note 169, at 259.

<sup>178</sup> Susette Biber-Klemm and Danuta Szymura Berglas, *Problems and Goals*, in RIGHTS TO PLANT GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: BASIC ISSUES AND PERSPECTIVES 3,15 (Susette Biber-Klemm and Thomas Cottier ed. 2005).

<sup>179</sup> David R. Downes, *How Intellectual Property Could be a Tool to Protect Traditional Knowledge*, in INTERNATIONAL TRADE & SUSTAINABLE DEVELOPMENT 372, 372 (ed. Kevin P. Gallagher and Jacob Werksman Earthscan 2002).

relationship with biodiversity has been coined “traditional knowledge.”<sup>180</sup> Traditional knowledge specifically refers to the historical use of natural resources by indigenous populations for medicinal, curative, and agricultural purposes; as such, indigenous people remain the keepers of traditional knowledge. With countries such as Peru, whose total populations consist of 25 percent to 48 percent indigenous peoples,<sup>181</sup> it is evident why traditional knowledge is an important concern in South American trade.

Traditional knowledge has been used as a tool for new product development in the pharmaceutical, agricultural, cosmetic, and food and beverage industries.<sup>182</sup> However, indigenous people have been stripped of their use of this knowledge by other intellectual property rights, specifically patent rights. Although traditional knowledge has been increasingly recognized, it is generally deemed as nonpatentable; thus, providing fertile ground for multinational companies to appropriate traditional knowledge freely.<sup>183</sup>

Although RTAs have proved to be a fertile ground for enforcing “TRIPS-plus” provisions, no such provisions have been used in recent RTAs to further protect traditional knowledge. Traditional knowledge has become a frequent subject in recent RTA negotiations, but has failed to be included in the final provisions. In fact, the USA recently rejected several proposals for increased protection of traditional knowledge in its negotiations with Colombia and Peru.<sup>184</sup>

However, one of the most intense debates in the Doha Declaration discussions concerns IP rights. Paragraph 19 of the 2001 Doha Declaration states that the TRIPS Council should

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<sup>180</sup> Biber-Klemm, *supra* note 178, at 15.

<sup>181</sup> 2002 Census, ILO.

<sup>182</sup> Downes, *supra* note 179, at 372.

<sup>183</sup> See Powell and Chavarro, *supra* note 34, at 101.

<sup>184</sup> David Viva-Eugui, *Landmark Biodiversity, TK provisions accompany EFTA-Colombia FTA*, 3 BioRes Rev 1 (2009), available at <http://ictsd.org/downloads/bioresreview/biores3-2.pdf>.

study the relationship between TRIPS, the UN's Convention on Biological Diversity, and the protection of traditional knowledge and folklore.<sup>185</sup> Some of the suggestions at the Doha Round for future protection from biopiracy is to require inventors to disclose the source of genetic resources and traditional knowledge as a prerequisite for patent protection. WTO Director General Pascal Lamy has recently stated that, although the latest discussions have focused on new ways to avoid biopiracy and misappropriation of patents, members disagree on whether the solution lies in the inclusion of specific protections for traditional knowledge in the TRIPS agreement.<sup>186</sup>

### 3. CAFTA-DR-USA<sup>187</sup>

Central America has the second highest rate of communicable disease in Latin America.<sup>188</sup> Guatemala suffers from high incidences of malnutrition and starvation. In addition, Guatemala has critical shortages in health care professionals, medicine, and affordable health care. Consequently, the majority of deaths in Guatemala can be attributed to easily treatable diseases like respiratory infections, diarrhea, and malaria.<sup>189</sup> Further, Guatemala has an

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<sup>185</sup> WTO Doha Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), ¶19 available at [http://www.wto.org/English/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm). [hereinafter Doha Declaration].

<sup>186</sup> Pascal Lamy, WTO Director, Address at the Open-ended Informal Consultation on GI Extension and on TRIPS/CBD as Outstanding Implementation Issues (March 12, 2010), available at [http://www.wto.org/english/news\\_e/news10\\_e/trip\\_12mar10\\_e.htm#fulltext](http://www.wto.org/english/news_e/news10_e/trip_12mar10_e.htm#fulltext). Director Lamy explained that the differences in consensus that the countries had “concern[ed] whether a disclosure mechanism, if introduced more widely, would be useful and effective, whether the presumed benefits for the system and for the holders of the genetic resources and traditional knowledge would be experienced in practice, whether those benefits would outweigh administrative costs, and whether the disclosure requirement would enhance or undermine the predictability, clarity and public policy role of the patent system. In sum, there is general agreement on the public policy objectives, including ensuring equitable benefit sharing, but differences clearly remain on how to arrive at those goals in practice.”

<sup>187</sup> U.S. Trade Representative, Dominican Republic-Central America FTA, Final Text, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (last visited July 13, 2010).

<sup>188</sup> Rahul Rajkumar, *The Central American Free Trade Agreement: An End Run Around the Doha Declaration on TRIPS and Public Health*, 15 ALB. L. J. SCI. & TECH. 433, 436 (2005).

<sup>189</sup> Emily M. Cowley, *The Right to Health: Guatemala's Conflicting Obligations under the Central American Free Trade Agreement and the International Covenant on Economic, Social and Cultural Rights*, 11 MICH. ST. U. J. MED. & L. 227, 239 (2007).

accelerating AIDS epidemic. The World Health Organization estimates that there are currently 80,000 people living with HIV/AIDS in Guatemala.<sup>190</sup> Access to antiretroviral medicines is crucial in order to combat this epidemic. Thus, local IP legislation and trade commitments have an important effect on the welfare of the Guatemalan people.

The issues related to IP were hotly debated during the CAFTA-DR-USA negotiations. The USA point of view was clear, and the USA showed no restraint in pushing its ideals forward. The USA wanted the CAFTA-DR-USA to be subject to patent rules similar to those in place in the USA. This demand meant that members would have to abide by TRIPS-plus obligations. Under CAFTA-DR-USA, pharmaceutical safety data were exclusive for a period of 5 years; thus, making it extremely difficult for generics to compete with brand-name pharmaceuticals.<sup>191</sup> It was clear to Guatemala and other Central American countries during the CAFTA-DR-USA negotiations that such provisions posed a clear threat to the right to access affordable medicines. In 2004, to combat the health crisis, the Guatemalan government issued a decree that permitted the marketing of generics with their brand-name equivalents.<sup>192</sup> However, because of USA pressure later that year during CAFTA-DR-USA negotiations, Guatemala eventually repealed the decree.

As the case of Guatemala shows, intellectual property rights can have direct consequences to the right to health. It is unclear what the consequences of CAFTA-DR-USA will have on Guatemala. Intellectual property rights are still a very crude area in international law. As such, it is important that future intellectual property rights take into account such human rights as traditional knowledge and the right to health.

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<sup>190</sup> Epidemiological Country Profile on HIV and AIDS, Guatemala, World Health Organization, available at [http://apps.who.int/globalatlas/predefinedReports/EFS2008/short/EFSCountryProfiles2008\\_GT.pdf](http://apps.who.int/globalatlas/predefinedReports/EFS2008/short/EFSCountryProfiles2008_GT.pdf)

<sup>191</sup> CAFTA-DR-USA, *supra* note 187, at art. 15.10.1(a); GANTZ, *supra* note 13, at 194.

<sup>192</sup> Decree 34-2004 (Guat., 2004)(repealed Mar. 10, 2005).

#### **IV. Cost-Benefit Analysis for the Integration of Human Rights Standards in RTAs**

Debate whether trade agreements are appropriate forum for implementation of human rights continues apace. However, the inevitable and undeniable linkage between trade and human rights has led to dozens of contractual provisions in trade agreements that attempt positively to integrate human rights concerns into the substantial corpus of both global and regional trade rules. As multilateral trade negotiations progress at an almost stagnant pace toward human rights considerations, the question now becomes whether RTAs are a more efficient, appropriate, and effective forum for the integration of human rights. We discuss in this section several positive and negative considerations in response to that question.

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

Like a “wolf in sheep’s clothing,” some fear that, although disguised as a concern for labor and environmental rights, the real purpose behind advocates for the inclusion of human rights provisions in RTAs is protectionism.<sup>193</sup> For example, domestic industries might seek to shield themselves from competition from lower-priced imports by advocating the inclusion of high labor standards in trade agreements with the exporting countries.<sup>194</sup> Thus, although higher environmental and labor standards might seem to serve a greater purpose, the integration of these specific provisions might serve principally to protect domestic industries from foreign competition. In addition, the enforcement of higher human rights standards of course will raise production costs in these exporting countries, thereby increasing the competitive advantage of their international competitors.<sup>195</sup>

Second, some experts argue that the integration of human rights in RTAs inevitably increases the North-South divide. Since the signing of the GATT, the authority of developed

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<sup>193</sup> See Schmidt, *note* 55, at 168.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*



countries to “dictate” terms in multilateral negotiations has decreased. Currently, approximately two-thirds of WTO members are emerging markets.<sup>196</sup> The effects caused by the change in membership class are reflected in current WTO negotiation goals. Evidenced by statements made in the 2001 Doha “Development” Round, a key goal is enforcing the WTO commitment to improve the level of participation in global trade of emerging market countries:

“We shall continue to make positive efforts designed to ensure that emerging market countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.”<sup>197</sup>

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

Third, inclusions of even relatively ineffective standards may pacify human rights groups that would have otherwise opposed the agreement. For example, many of the RTAs that began addressing human rights simply had provisions promising to “promote” human rights.<sup>198</sup> These provisions have the effect of being illusory because there is no method of dispute resolution or enforcement. Thus, the theory is that adding these provisions are simply a method of giving an

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<sup>196</sup> *Id.* at 178.

<sup>197</sup> Doha Declaration, *supra* note 185.

<sup>198</sup> *See, e.g.*, Preamble to the Free Trade Agreement between the Governments of Central America and Chile, available at <http://www.comex.go.cr/acuerdos/chile/Texto%20del%20acuerdo/Preambulo.pdf>.

appearance of human rights concern without having to take a step further. By taking this illusory step, some believe that human rights advocates will be complacent and less ardent in seeking stricter human rights standards.

Finally, the increasing amount of RTAs might also unintentionally advance protectionist interests simply because of the number of agreements.<sup>199</sup> As RTA numbers increase, it becomes impossible to identify which agreements connect to which parties and on what terms. As a consequence, human rights and environmental protection advocates lose power and influence over the outcome of these agreements. Further, the “spaghetti bowl” of RTAs might overburden the WTOs review process of these agreements. Thus, the WTO will have more difficulty keeping track of violations and keeping consistency in their recommendations. In the possibility that future multilateral provisions will require minimum human rights requirements, many RTAs lacking these requirements will simply fall through the cracks.

### **B. Arguments in favor of the integration of Human Rights in RTAs**

There are several reasons why the integration of human rights standards in RTAs will be beneficial for the members of that trade agreement. First, members of RTAs that are “regional,” in the true sense of the term, will likely share more similarities with each other. The geographical proximity is beneficial in many respects, including most importantly, similar ecological concerns. Because a nation’s environmental behavior may have detrimental effects in neighboring countries, inclusion of environmental provisions will be more acceptable at the regional level than on a 150+ member global level.

In addition, geographical proximity may not only imply environmental similarities, but almost certainly ensures comparable cultural and economic factors, including agricultural production, language, and indigenous populations. These factors may result in an easier ability

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<sup>199</sup> Schmidt, *supra* note 55, at 174.

to reach consensus regarding inclusion of human rights provisions in the agreement. Basically, “[a]greements among smaller groups of ‘like-minded’ states...are easier to negotiate” than agreements at the multinational level.<sup>200</sup>

Second, some commentators believe that the greater influence of developed countries is a positive force for the inclusion in RTAs of human rights provisions. Many believe that, unlike for multilateral agreements, political forces in RTAs are more influential and will likely lead to the inclusion of human rights provisions that otherwise would not even be considered.<sup>201</sup> Consequently, it would also be more likely that economic sanctions will be used to enforce human rights violations.<sup>202</sup> Although some believe that protectionist reasons may be behind the inclusion of human rights provisions, the harm that opponents claim these provisions will cause to the emerging market countries is yet to be seen. Additionally, enforcement mechanisms at a regional level can be monitored better than at the multilateral level.

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

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

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<sup>200</sup> Gantz, *supra* note 13, at 18.

<sup>201</sup> See Pengcheng Gao, *Rethinking the Relationship Between the WTO and Int’l Human Rights*, 8 Rich. J. Global L. & Bus. 397, 422 (2009).

<sup>202</sup> See *id.*

provisions, it is evident that the trade agreement will undoubtedly affect human rights in that member country.

## **V. Conclusion**

RTAs have a number of advantages that are not shared by the 150+-Member WTO. For instance, RTAs generally create more transparency, accountability, and due process.<sup>203</sup> These qualities can be attributed to the new regionalism's multidimensional structure. The geographical closeness of most RTA parties and the small number of countries involved in RTAs provide ideal conditions for tailored provisions that specifically apply to the members' needs.

Nevertheless, there is ongoing debate as to the extent, if any, human rights should be incorporated in trade agreements. The most common claim opposing human rights integration is the allegation that human rights provisions will promote protectionist use. However, these claims seem weak in light of the negative effects that non-integration would have on the individual rights of civil society in the Member countries.

Recently, RTA members have begun to include human rights provisions in their agreements. The notable differences in human rights provisions from earlier agreements, such as MERCOSUL, to more recent agreements, like Peru-USA FTA, show a significant trend toward providing enforcement mechanisms for human rights violations. The Peru-USA FTA seems to be the closest an RTA in the Americas has reached to provide the use of trade sanctions to remedy human rights violations. Despite the recent increase in the inclusion of human rights provisions in trade rules, the language of these trade agreements clearly shows the insistence of members in drawing a bright line between trade and human rights. MERCOSUL, for example, specifically prohibits labor requirements to apply to instances where trade is affected.

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<sup>203</sup> See Powell & Chavarro, *supra* note 34, at 96.

The clearest and most established example of the link between human rights and trade is, of course, that of labor rights. The effects that the lack of strong labor laws have on trade is evident in the North-South divide. Unfortunately, neither emerging market countries nor developed countries have taken the much-needed and far-reaching step toward the enforcement of stricter labor laws. Although the Peru-USA FTA enforcement mechanism enables actual trade sanctions, the tough procedural limitations and requirements encumber the ability of these sanctions to apply to any actual dispute over human rights.

There are many avenues through which RTAs can achieve further integration of human rights, from following established frameworks for rights already established within the trade rules, such as labor, to the endless possibilities provided in less-established rights such as patents. Nations have an obligation to take advantage of these possibilities to achieve greater economic integration as well as further protection for the welfare of their people.