

HUMAN RIGHTS

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Many of the world's most important trading economies have introduced human rights language into their preferential trade agreements (PTAs). As a result, more than 70 percent of the world's governments now participate in PTAs with human rights requirements. The growing number and scope of these trade agreements reflects a new reality: policy makers understand that economic integration will not be successful without a stronger focus on improving governance among trade partners. If human rights provisions are designed carefully, they can work both to improve governance and to empower people to claim their rights. Yet policy makers, scholars, and activists still know very little about the effects of including human rights provisions in trade agreements.

As long as men and women have traded, they have wrestled with how to advance human rights while expanding trade. In some instances, policy makers have used the incentive of trade expansion; at other times they have used trade sanctions—the disincentive of lost trade—to punish officials from other countries that have undermined human rights. For example, after the United Kingdom and the United States outlawed the slave trade in 1807, the United Kingdom signed treaties with Denmark, Portugal, and Sweden to reinforce its own ban. After the United States banned goods manufactured by convict labor, Australia, Canada, and the United Kingdom adopted similar measures. These efforts stimulated international cooperation, and in 1919 the signatories of the Treaty of Versailles formed the International Labour Organization (ILO) to establish fair and humane rules regarding the treatment of labor (Bidwell 1939).

The United States and the European Union (EU) were the first trade entities to include human rights language in trade agreements. In the 1980s and 1990s, U.S. and EU officials began to include human rights conditionality clauses in their preference programs (Charnovitz 2005, 29, n. 103–05). The 1993 North American Free Trade Agreement (NAFTA),

signed by Canada, Mexico, and the United States, was the first PTA to include explicit human rights provisions. Trade policy makers agreed to include labor rights in a side agreement. They also included additional chapters and language focused on encouraging transparency (access to information) and public participation. These obligations went beyond the provisions of the General Agreement on Tariffs and Trade (GATT) and its successor organization, the World Trade Organization (WTO); scholars call this WTO+.

Some analysts see these provisions as “legal inflation” and assert that governments are using trade agreements to globalize their social policies or regulatory approaches. They argue that trade agreements are not the right place to address human rights issues, and they point out that trade agreements in themselves, even without special provisions, may have positive human rights spillovers. Whatever the arguments, the proliferation of human rights provisions signals the new reality for trade liberalization. Many PTAs go far beyond commercial policy; they are really governance agreements which contain thousands of pages of obligations related to topics ranging from corporate governance to environmental policy to human rights. Still, the association of trade and human rights in PTAs is a relatively new phenomenon. In a sense it is a shotgun wedding; and it is too early to tell whether this marriage will be effective and enduring. This chapter examines the who, what, when, where, how, and why of the trade–human rights linkage and why we should care about it.

Who? The demanders for the link include both industrial and developing countries, and at least 131 countries have accepted such links.¹

What? Human rights are rights and freedoms to which all humans are entitled. Our discussion is limited to only those human rights set forth in the Universal Declaration of Human Rights (UDHR).² This study finds that only some of the human rights contained in the declaration have been incorporated into trade agreements.

When? Policymakers first made an explicit link between human rights and trade in the U.S. generalized system of preferences (GSP) program in 1984. NAFTA, signed in 1993, was the first preferential trade agreement to include specific human rights language.

Where? The provisions may be found in the preamble, in side agreements, or in the body of the agreement.

How? Some countries condition the agreement on the partner's changing its laws to meet international standards (the U.S. approach); others commit governments "not to reduce" high standards in the interests of attracting investment or trade. Examples of the latter approach are the agreement between the European Free Trade Association (EFTA) and the South African Customs Union (SACU), and the PTA between the United States and Colombia (Bartels 2009a). The "how" can also relate to whether the demandeur and the target government adopt monitoring or enforcement strategies in concert with the agreement; whether they link the agreement to capacity building designed to build governance expertise and will; and whether one signatory can challenge human rights violations of the trade agreement or suspend it.

Why? We discuss below the reasons why nations might include human rights provisions and why states accept them.

So what? We also discuss the outcomes of efforts to link trade and human rights. Some governments have changed their attitudes and behavior toward particular human rights. We don't know if this change in attitudes and behavior toward human rights is temporary or permanent. This chapter does not cover all the human rights provisions in all PTAs. The discussion is limited to PTAs with explicit human rights objectives, language, or policies, no matter whether the language occurs in the preamble, in the provisions of the agreement, or in a side agreement.³ We also explore human rights spillovers from provisions related to access to information (transparency), political participation, and due process, according to which foreign and domestic producers can comment on policies or regulations affecting trade. Although property rights are important human rights, we do not focus on them except when trade agreements mention the intersection of property rights with other important human rights such as access to medicines (Drahos and Mayne 2002; WHO 2006).

The chapter is organized in three sections. The first section is foundational; it defines human rights, examines the history of the global trading system and the role of human rights, and reviews the literature in this area. The second section describes how and why the United States, the EU, EFTA, and Canada became the main demandeurs of provisions for human rights governance. Next, we examine

human rights language in PTAs negotiated by emerging economies. Finally, the third section explores some of the problems and questions raised by the union of trade and human rights. I then offer a conclusion about why governments are increasingly wedding trade and human rights and whether this policy union will thrive.

Definitions and Background on Human Rights

This section discusses the international law of human rights and the role of human rights in trade agreements, including the International Trade Organization (ITO), the GATT, and the WTO. We then briefly review the findings of scholars active in human rights and trade issues.

Human Rights Obligations of Trading Nations

States are obligated to act in certain ways in order to protect, respect, and advance human rights. These obligations are delineated in the Universal Declaration on Human Rights (UDHR), which was approved by the members of the United Nations in 1948 and which spells out more than 30 rights that member states are supposed to promote and protect. But the declaration does not legally bind member states (Petersmann 2000). To ensure that human rights would be binding obligations, policy makers developed two covenants that included all the UDHR rights: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴ The ICCPR enumerates the rights that a state may not take away from its citizens, such as freedom of speech and freedom of movement. In contrast, the ICESCR generally defines rights (often, necessities) that a state should provide for its citizens, such as basic education or health care. The signatories of the ICESCR recognize that governments need expertise and funds to provide all their citizens with rights such as access to education, jobs, and health care. But it is difficult for governments to advance, respect, and realize human rights; it takes considerable governance expertise, funds, and will. Accordingly, a government is only obligated to provide these cultural, economic, and social rights as far as "it is able."⁵

The declaration and the covenants have different standings in international law. The Universal Declaration of Human Rights is universal in scope; it applies to everyone, whether or not individual governments have formally accepted its principles or ratified the covenants. The covenants, by their nature as multilateral conventions, are legally binding only on those states that have accepted

them by ratification or accession. They did not go into force until 1976, when 35 member states of the United Nations ratified them. However, many nations have not ratified both covenants.⁶ In addition, the Universal Declaration does not include all the human rights found in national constitutions, nor does it include many new human rights, such as the right to a healthy environment. Since these newer rights are not embodied in the covenants, they are, thus far, not binding on states, and so they are not discussed in this chapter.

Of the 38 human rights set forth in the UDHR, some rights are not affected by or are not relevant to trade, but others, such as labor rights, have been explicitly mentioned in trade agreements (see table 21.1). Table 21.2 summarizes some of the human rights embedded in trade agreements, as of 2010. Some human rights provisions are in the preamble; others are in the body; and still others are expressed in side agreements. Some provisions are binding on the signatories of the agreement, and others are rhetorical.

Under international law, states are supposed to do everything in their power to respect, promote, and fulfill human rights. But advancing human rights is not easy. As noted above, many states are unable to meet all of their “international” human rights responsibilities. Moreover, few officials win or maintain office on the basis of their efforts to promote the human rights of noncitizens.

However, many people are not comfortable knowing that other human beings lack basic rights in other countries, or live in countries where government officials undermine human rights. These individuals may demand that policy makers take action to protect human rights in other countries. Trade policy is not the only or the best means of extending such protection, but policy makers

have few options short of force for changing the behavior of leaders of other countries. Market access can be an important instrument of leverage because it can affect the economic and political health of targeted countries. Furthermore, in recent years policy makers have come to understand that failure to protect human rights (such as labor rights) can affect market access conditions for their own producers.⁷

Although policy makers may respond to public pressure to use trade to advance human rights, most policy makers do not make human rights a top priority for trade policy making. In most countries, policy makers develop trade policies as though they were strictly commercial instruments. They weigh the interests of their producers and consumers, and although they may consider national security or political concerns, they rarely introduce the interests of the global community into such deliberations. Although policy makers are well aware of the human rights consequences of some of their trade decisions, they have few incentives to ensure that trade policies advance the human rights outlined under the UDHR. Moreover, trade policy makers are generally not charged with ensuring that trade policies or trade flows do not undermine specific human rights at home or abroad. In trade negotiations, governments are charged with pursuing national commercial interests, not global interests (Commission on Human Rights 2004; 3D 2005; Aaronson and Zimmerman 2007).

ITO, GATT, and WTO Provisions on Human Rights

During World War II, the postwar planners devised several international institutions to govern the global economy. They envisioned an International Trade Organization (ITO)

Table 21.1. Examples of Human Rights Embedded in PTAs: Demandeurs and Position of Provisions in Agreement

Labor rights	Democratic rights	Access to affordable medicines	Right to cultural participation	Freedom of movement	Indigenous minority rights	Political participation and due process	Privacy
Canada Preamble and side agreement	Mercosur Linked protocol	Costa Rica	Canada	EFTA/EEA Body	Canada Preamble and side agreements	Canada Body and side agreements	Canada Body
Chile Side agreement		United States Side letters	New Zealand	CARICOM Body	New Zealand		EU Body
Mercosur Body					Australia	United States Body	
United States Body							
New Zealand							

Source: Susan Ariel Aaronson.

Note: CARICOM, Caribbean Community; EEA, European Economic Area; EFTA, European Free Trade Association; EU, European Union; Mercosur, Southern Cone Common Market (Mercado Común del Sur); PTA, preferential trade agreement.

Table 21.2. The Universal Declaration on Human Rights and Its Two Covenants

International Covenant on Civil and Political Rights	International Covenant on Economic, Social and Cultural Rights
<i>Right to life (Art. 3)</i>	Right to marriage and found a family (Art. 16)
Right to liberty (Art. 3)	Right to social security (Art. 22)
Right to security (Art. 3)	<i>Right to work, free choice of employment, just and favorable conditions of work, and protection against unemployment (Art. 23.1)</i>
<i>Right to the abolition of slavery and slave trade (Art. 4)</i>	<i>Right to equal pay for equal work (Art. 23.2)</i>
Right to the prevention of torture or cruel, inhuman, or degrading treatment or punishment (Art. 5)	Right to just and favorable remuneration (Art. 23.3)
<i>Right to recognition before the law (Art. 6)</i>	<i>Right to form and join a trade union (Art. 23.4)</i>
Right to equality before the law and to equal protection of the law (Art. 7)	Right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (Art. 24)
Right to effective judicial remedy (Art. 8)	<i>Right to a sustainable standard of living (including food, clothing, housing, medical care, and necessary social services); right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control (Art. 25.1)</i>
Right to the prevention of arbitrary arrest, detention, or exile (Art. 9)	Right to special care and assistance for motherhood and childhood (Art. 25.2)
<i>Right to fair and public hearing by a neutral tribunal (Art. 10)</i>	Right to education (Art. 26)
Right to presumption of innocence (Art. 11.1)	<i>Right to cultural participation (Art. 27.1)</i>
Right to nonretroactive penal code (Art. 11.2)	<i>Right to the protection of intellectual property (Art. 27.2)</i>
Right to privacy (Art. 12)	
Right to freedom of movement and residence in the country (Art. 13.1)	
<i>Right to leave the country and return (Art. 13.2)</i>	
Right to seek and enjoy asylum from prosecution (Art. 14)	
Right to a nationality (Art. 15)	
Right to freedom of thought, conscience, and religion (Art. 18)	
Right to freedom of opinion and expression (Art. 19)	
Right to freedom of peaceful assembly and association (Art. 20)	
<i>Right to governmental participation, directly or through freely chosen representatives (Art. 21.1)</i>	
Right of equal access to public services (Art. 21.2)	
Right to periodic and fair elections (Art. 21.3)	

Source: Prepared by Philip Van der Celen; in Aaronson and Zimmerman 2007.

Note: Italics indicate that the right is included in one or more preferential trade agreements (PTAs).

to reduce barriers to trade. The draft treaty for the ITO was the first trade agreement to include explicit human rights language (related to labor rights). The ITO was designed to ensure that signatories to the agreement did not “export their unemployment” and thereby undermine the ability of workers to provide for their families. In addition, the draft ITO allowed signatories to breach its rules through an “exception” for domestic policies “necessary to protect public morals” or to protect human or plant life and health. (It also included a national security exception.) But the ITO was abandoned after the U.S. Congress failed to vote on implementing legislation (Wilcox 1949; Diebold 1952; Charnovitz 1987).

The end of the ITO was not the death knell of efforts to link trade and human rights. In 1995 the members of the

GATT agreed to join a new international organization, the World Trade Organization (WTO). The WTO contains the GATT agreement, and it has a stronger system of dispute settlement. GATT and WTO signatories must adhere to two key principles to reduce trade distortions: the most favored nation principle, and the national treatment principle. The most favored nation principle (MFN) requires that the best trading conditions extended to one member by a nation must be extended automatically to every other nation. The national treatment principle provides that once a product is imported, the importing state may not subject that product to regulations less favorable than those that apply to like products produced domestically. The WTO does not explicitly prohibit countries from protecting human rights at home or abroad, but its rules do

constrain the behavior of governments in providing that when member states seek to promote human rights, at home or abroad, they must not unnecessarily or unduly distort trade. It is hard to use trade to promote human rights when nations can't use trade to distinguish among those nations that may undermine the human rights of their citizens and those that strive to advance these rights.

The GATT and the WTO do not directly address how governments relate to their own citizens, and they say very little about human rights.⁸ But human rights are seeping into the workings of the WTO (Aaronson 2007). Some WTO members have used the GATT/WTO exceptions to advance human rights abroad or to protect human rights at home. Under Article XX, nations can restrict trade when necessary to “protect human, animal, or plant life or health” or to conserve exhaustible natural resources. This article also states that governments may restrict imports relating to the products of prison labor. Although it does not refer explicitly to human rights, the public morals clause of Article XX is widely seen as allowing WTO members to put in place trade bans in the interest of promoting human rights (WTO 2001; Howse 2002; Charnovitz 2005). Brazil used the Article XX exception to ban imports of retreaded tires, which could not easily be disposed of.

The national security exception, Article XXI, states that WTO rules should not prevent nations from protecting their own security. Members are not permitted to take trade action to protect another member's security or to protect the citizens of another member. If, however, the United Nations Security Council authorizes trade sanctions, WTO rules allow countries to use such measures to promote human rights, as when sanctions were instituted against South Africa's apartheid regime in the 1980s (Aaronson and Zimmerman 2007, 19).

Members of the GATT/WTO can use other avenues to protect human rights at home and within other member states (table 21.3). In recent years, member states have used temporary waivers of GATT rules to promote human rights. For example, after the UN called for a ban in trade in conflict diamonds, WTO member states agreed to temporarily waive WTO rules to allow trade in only those diamonds certified by the Kimberly process to be free of

conflict (Aaronson and Zimmerman 2007, 43). In addition, some members bring up human rights during accessions, when new members are asked to make their trade and other public policies transparent, accountable, and responsive. They have also discussed human rights issues at trade policy reviews, when member states review the trade and governance performance of other member states. Finally, members have discussed some human rights issues during recent trade negotiations: examples include food security, intellectual property rights (IPRs), and public health (Aaronson 2007).

Although the GATT/WTO contains no explicit human rights provisions, it does refer to human rights implicitly. Some of these provisions relate to economic rights such as the right to property, and others, to democratic and political rights. For example, under GATT/WTO rules, member states give economic actors “an entitlement to substantive rights in domestic law including the right to seek relief; the right to submit comments to a national agency or the right to appeal adjudicatory rulings” (Charnovitz 2001). Member states must also ensure that “Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.”⁹ These can be termed due process, information, and political participation rights (Powell 2005); see box 21.1.¹⁰

A Brief Review of the Literature on Trade and Human Rights

In recent years, scholars from many disciplines have examined the relationship between trade and human rights. Many economists argue that human rights is not a trade issue, but trade can have positive human rights spillovers. As trade expands, individuals exchange ideas, technologies, processes, and cultural norms and goods. With more trade, people in countries with fewer rights and freedoms become aware of conditions elsewhere, and with such knowledge, they may demand greater rights. Isolated

Table 21.3. Examples of Avenues and Actions at the WTO Related to Human Rights, 2005–10

Avenue	Human right affected
Accessions	Labor rights, access to information, due process (Vietnam, Saudi Arabia, Cambodia)
Trade policy reviews	Members discussed labor rights, women's rights, access to medicines
Disputes	Right to health (Brazil tires)
Negotiations	Access to safe, affordable food

Source: Susan Ariel Aaronson.

Box 21.1. Transparency, Due Process, and Democracy Spillovers from the WTO

From 1948 to 1964, contracting parties to the General Agreement on Tariffs and Trade (GATT) were required to promptly publish laws, regulations, and judicial decisions affecting imports and exports (GATT Article X). In this way, exporting interests could learn about legal developments affecting trade and respond to them. GATT contracting parties gradually strengthened these notification requirements, and members were required to administer trade-related laws, regulations, rulings, and agreements in a uniform, impartial, and reasonable manner. Today, the World Trade Organization (WTO) has strong rules for transparency and due process. It requires governments to make their trade laws and regulations transparent and public and to allow citizens to comment on and challenge these laws and regulations. However, neither the GATT nor the WTO *requires* that members involve their publics in trade policy making. Moreover, many countries do not have a free press, adequate funds, informational infrastructure, or the political will to effectively involve their citizenry in public policy making.

The GATT/WTO may also have some unintended human rights spillovers. Member states must provide the same rules and privileges to domestic and foreign actors. These provisions may prod policymakers to provide access to information and enforce rights to public comment in countries where governance is not transparent and participatory. In repressive states, WTO rules may empower domestic market actors (consumers and taxpayers, as well as producers) who may not have been able to use existing domestic remedies to obtain information, influence policies, or challenge their leaders (Aaronson and Abouharb forthcoming). In WTO countries without a strong democratic tradition, member states may make these changes because they want to signal investors that they can be trusted to enforce property rights, uphold the rule of law, and act in an evenhanded, impartial manner (Dobbin, Simmons, and Garrett 2007; Büthe and Milner 2008; Mansfield and Pevehouse 2008, 273).

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societies, by contrast, may be more prone to human rights abuses (van Hees 2004). Thus, many of these economists conclude that policy makers need not include human rights provisions in trade agreements (Bhagwati 1996, 1; Sykes 2003, 2–4). Other analysts disagree; they believe that human rights are trade issues, and they cite history and the increasing number of human rights provisions in PTAs as evidence for their perspective. Some legal scholars have proposed ways of finding common ground between WTO trade law and international human rights law (Charnovitz 1994; Dunoff 1999; Garcia 1999; Mehra 1999; Petersmann 2001). Some believe that the best strategy is to enhance the international human rights system and make it more like the WTO, with stronger dispute settlement and enforcement mechanisms. Others believe that the WTO should have explicit human rights provisions (Lim 2001). Some academics have used case studies to discuss the relationship between trade agreements and specific human rights, such as the right to food (Cottier, Pauwelyn, and Bürgi 2005). Others have suggested bridging mechanisms to ensure better dialogue and coordination between trade and human rights officials (Petersmann 2002). Finally, some scholars have examined how the WTO's dispute settlement system might address a trade dispute involving human rights (Bal 2001; Marceau 2001). However, as policymakers began to refocus their trade liberalization efforts on new PTAs, the debate over how best to reach trade and human rights goals has moved to examining the record of these PTAs.

Most of the scholars who have examined human rights provisions focus on labor and environmental language—what some call “trade and” provisions. Dawar (2008) finds that labor and environmental provisions “constitute an unnecessary, inefficient and inappropriate use of a trade

agreement.” Bourgeois, Dawar, and Evenett (2007) argue that the current approach to mainstreaming labor rights in PTAs is ineffective because the provisions commit parties to enforce domestic labor law only. Horn, Mavroidis, and Sapir (2010) conclude that U.S. and EU environmental and labor standards in PTAs are groundbreaking “means for the two hubs to export their own regulatory approaches to their PTA partners.” In short, some scholars see the link as ineffective; others as a means of exporting governance. But these scholars did not examine the panoply of trade–human rights links; they have focused only on labor rights

Scholars who have examined human rights provisions in PTAs agree that these provisions are intended to improve governance and advance human rights. Petersmann (2006), a legal scholar, has argued that governments use their PTAs to achieve extraterritorial political reform. As evidence, he cites the growing number of governments that explicitly refer to human rights as an objective or as a fundamental principle of economic integration. Damro (2006) argues that governments include extensive human rights and rule of law provisions in their PTAs because they recognize they must develop coordinated policies in order to address regional threats to security, such as environmental damage, illegal migration, drug smuggling, and international terrorism.

In a number of studies, Bartels examines how governments incorporate human rights into their trade agreements (Bartels 2005b, 2008, 2009a, 2009b, and, for an analysis of the objectives of the agreements, Bartels 2005a). He concludes that provisions linking trade and human rights are useful because they set up mechanisms for dialogue, allow civil society in multiple countries to monitor compliance with international norms, and make human

rights part of the trade relationship. Hafner-Burton (2009, 22) compares EU and U.S. approaches toward linking human rights and trade in their GSP and free trade agreements. She notes that although policy makers may be motivated by “protectionist intent,” the agreements appear to be having a positive impact on the realization of human rights in many countries. Aaronson and Zimmerman (2007, 207) compare how the United States, the EU, South Africa, and Brazil make trade policy and find that governments are increasing the scope of human rights, as well as the number of agreements with human rights provisions. They conclude that if people are the “wealth of nations,” policy makers that weigh human rights as they make trade policy are more likely to ensure that their citizens thrive at the intersection of trade and human rights.

Few scholars have examined the PTA–human rights nexus empirically. Hafner-Burton (2009, 160–64) focuses on physical integrity rights such as freedom from arbitrary imprisonment and finds that about 82 percent of the countries that have a PTA with the EU improve their human rights protection, as against 75 percent for countries without a trade agreement. However, she relies on personal integrity rights (for example, freedom from arbitrary imprisonment) to make a generic case about human rights, which is not fully convincing. PTAs may have different effects on different human rights. Finally, some scholars have examined whether PTAs serve as an anchor or lock-in mechanism for domestic reforms, including laws advancing human rights. U.S. International Trade Commission (USITC) economist Michael Ferrantino (2006) examined negotiations on PTAs with the United States. He argues that these agreements may improve governance but warns that it is difficult to ascertain whether a particular reform is stimulated by negotiations or by the

domestic reform process. Clearly, to better understand the impact of the PTAs, we need both more empirical work and country-specific case studies.

Case Studies: PTAs and Human Rights

This section examines how Canada, the EU, EFTA, and the United States incorporate human rights provision into their PTAs: table 21.4 summarizes their approaches.¹¹ Table 21.5 examines these provisions according to specific human rights and shows that industrialized countries are not the only countries to link human rights and trade in PTAs. We begin our analysis with Canada, which has become an enthusiastic negotiator of PTAs.

Canada

Canada is a trade-dependent nation; trade represents more than 70 percent of its gross domestic product (GDP). In recent years the Canadian government has embraced PTAs, on the grounds that this strategy will ensure trade-related economic growth and international competitiveness.¹² Canadian policy makers assert that these agreements can help Canada foster a commitment to human rights, freedom, democracy, and the rule of law.¹³ In Canada the executive branch makes trade policy, which is then approved by the parliament. Although there is no explicit mandate regarding the relationship between trade and human rights, the Canadian government has included several types of human rights in its recent trade agreements: labor rights, cultural rights, indigenous rights, and rights to political participation and due process.¹⁴

Table 21.4. Human Rights in Preferential Trade Agreements: Comparing EFTA, the EU, the United States, and Canada

	EFTA	EU	United States	Canada
Strategy	Universal human rights	Universal human rights and specific rights	Specific human rights	Specific human rights
Which rights?		Labor rights, transparency, due process, political participation, and privacy rights	Transparency, due process, political participation, access to affordable medicines, and labor rights	Transparency, due process, political participation, labor rights, privacy rights, cultural and indigenous rights
How enforced?	No enforcement	Human rights violations lead to dialogue and possible suspension depending on nature of violation.	In newest agreements, labor rights can be disputed under dispute settlement body affiliated with the agreement. Process begins with bilateral dialogue to resolve issues.	Only labor rights (monetary penalties). Use dialogue first.
Any challenge?			First challenge: Guatemala Review of Jordan	

Source: Susan Ariel Aaronson.

Note: EFTA, European Free Trade Agreement; EU, European Union.

Table 21.5. Examples of Human Rights Embedded in Preferential Trade Agreements

Labor rights	Democratic rights	Access to affordable medicines	Right to cultural participation	Freedom of movement	Indigenous rights	Political participation	Privacy
Canada	Mercosur	Costa Rica	Canada	EFTA	Canada	Canada	Canada
Chile		United States	New Zealand	EEA	New Zealand	United States	EU
Mercosur				CARICOM	Australia		
United States							
New Zealand							

Source: Susan Ariel Aaronson.

Note: CARICOM, Caribbean Community; EEA, European Economic Area; EFTA, European Free Trade Agreement; EU, European Union; Mercosur, Southern Cone Common Market (Mercado Común del Sur).

As of March 2011, Canada has negotiated eight PTAs: the Canadian–U.S. Free Trade Agreement (CUSFTA, now part of NAFTA), and agreements with Peru, EFTA, Costa Rica, Chile, Israel, Jordan, Panama, and Colombia, of which 7 are in force. The Canadian government is soliciting public comment on negotiations with about 12 other countries or trading entities. It is engaged in active negotiations with many of these countries or entities.¹⁵

Canadian officials clearly see these trade agreements as governance agreements, although they do not call them that. The government asserts that “Canadians recognize that their interests are best served by a stable, rules-based international system. Countries which respect the rule of law tend to respect the rights of their citizens, are more likely to benefit from development.”¹⁶ The Department of Foreign Affairs and International Trade (DFAIT) also notes that “The UN Charter and customary international law impose on all countries the responsibility to promote and protect human rights. This is not merely a question of values but a mutual obligation of all members of the international community.”¹⁷

Overview of Canada’s human rights–trade strategy. Canada’s approach toward embedding human rights is both broad and specific. The preambles of recent agreements with EFTA, Jordan, Peru, and Colombia refer to human rights objectives, citing the UDHR, labor rights, cultural participation, and protection of human rights and freedoms.¹⁸ These agreements include chapters with language on labor rights, transparency, and the environment. The agreements also contain a chapter on exceptions (akin to those in the WTO) and a provision safeguarding the right to regulate and to maintain high standards. The exceptions chapter notes that nothing in the agreement is to apply to cultural sectors and mentions the need to be supportive of trade waivers.¹⁹

Labor rights. Because of the division of powers in the areas of environmental and labor regulation under the Canadian constitution, Canadian policy makers believe that

labor and environmental provisions cannot be included in the body of a trade agreement but must be in side agreements, termed labor cooperation agreements.²⁰ According to Human Development and Skills Resources Canada, which negotiates and monitors labor rights internationally, Canada has ratified six labor cooperation agreements in its PTAs with Chile, Costa Rica, Colombia, Jordan, Peru, and NAFTA. (Interestingly, Canada has also negotiated memorandums of understanding on labor cooperation outside its PTAs.)²¹ The labor side agreements state that signatories must ensure that their labor laws comply with ILO standards and must establish offices to evaluate complaints related to labor rights. In this way, the side agreements are clearly governance agreements, since they attempt to build labor rights governance capacity.

The recent agreements also include a nonderogation clause stating that neither party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labor laws in order to encourage trade or investment (Article 2). Both parties commit not only to core standards but also to acceptable occupational health and safety protection and acceptable minimum employment standards. They also agree to provide migrant workers with the same legal protections as nationals with respect to working conditions.

These provisions go beyond ILO core labor standards because they also focus on both the demand (public) and supply (policy maker) sides of good labor governance. Signatories are required to educate and involve their publics regarding their rights under labor law. Article 4 articulates a right to private action: “Each party shall ensure that a person with a legally-recognized interest . . . has appropriate access . . . to administrative or tribunal proceedings . . .”²² Article 5 contains procedural guarantees designed to ensure that proceedings “are fair, equitable, and transparent and respect due process of law.” Canadian policy makers seem to agree that by educating foreign workers as to their rights, these workers are more likely to use these rights.

Due process provisions. Canada has expanded on the WTO's due process provisions for trade-related policy making. Chapter 19 (transparency) in recent Canadian PTAs requires each party to "ensure that in its administrative proceedings . . . persons of the other Party that are directly affected by a proceeding are provided reasonable notice . . . and reasonable opportunity to present facts and arguments in support of their positions."²³ The environmental side agreement also contains due process requirements.²⁴ Here again, Canada uses human rights language to prod its PTA partners to make trade-related policies in a transparent and accountable manner.

Political participation provisions. The Canadian government has incorporated several references to political participation into its recent trade agreements. This language is included in Chapter 19, on transparency, as well as in the labor and environmental side agreements. The transparency chapter obligates signatories to include regulations guaranteeing public participation, public comment, and the ability to challenge relevant regulations. The environmental chapter commits the parties "to promote public awareness of environmental laws and policies by ensuring that information regarding environmental laws and policies, as well as compliance and enforcement is available to the public." These provisions also commit the countries to ensure that the public is able to participate in environmental assessment procedures. In addition, they include a provision allowing any person residing in or established in the territory of either country to submit a written question to either country obliging the country to make the questions and responses available to the public. Although the language is binding, it is also relatively weak: the signatories are asked to *strive to cooperate* in these areas, *endeavor to engage the public*, or as the Colombia labor side agreement says, "*encourage[e]* education of the public regarding its labor laws" (emphasis added).

Cultural reservations and exemptions. Canada includes provisions in all its PTAs to ensure that these trade agreements do not affect Canada's ability to maintain the cultural heritage of the Canadian people or to determine Canadian cultural policies. These provisions are contained in the agreements' chapters on exceptions. The agreements define Canada's cultural industries as persons engaged in the publication, distribution, or sale of books, magazines, periodicals, newspapers, music, films and videos, and so on.²⁵

Indigenous rights. The Canada–Colombia (as well as Canada–Peru) side agreement on the environment states, "The Parties also reiterate their commitment, as established by the Convention on Biological Diversity, to respect, preserve and maintain traditional knowledge, innovations and practices of indigenous and local communities that con-

tribute to the conservation and sustainable use of biological diversity, subject to national legislation."²⁶ Because the provision is aspirational, nonbinding, and not disputable, some Canadian nongovernmental organizations (NGOs) see it as inadequate.

Response of Canadian NGOs to these human rights provisions. Canadian NGOs working on development, human rights, and labor rights remain critical of the country's approach, and they demanded that Canada perform human rights impact assessments before it initials trade agreements with countries, such as Colombia, where the rule of law is inadequate.²⁷ They argue that such assessments must be conducted by international human rights bodies rather than by the two governments (CCIC 2009). This debate has influenced Canada's parliament, which seems increasingly interested in the relationship between trade agreement provisions and human rights and in whether Canada's approach to dealing with these rights is effective.²⁸ In 2010 Canada and Colombia agreed to perform yearly human rights impact assessments of their PTA.²⁹ Canada became the first nation to require such assessments with future trade agreements. However, as of March 2011, Canada has yet to do such a human rights impact assessment or to provide the public with information as to how it will evaluate human rights at home and abroad.

Canada's PTAs and human rights: A summary. The Canadian government has incorporated a wide range of human rights into its PTAs. Canada sees its human rights and trade work as complementary. Its approach is both hortatory and pragmatic, making use of language that sets forth explicit obligations and delineates objectives that the signatories will strive or endeavor to meet.

Some of this language, such as obligations focused on transparency and political participation, reflects longstanding Canadian norms on how to govern. Some of the provisions are designed to encourage some of Canada's trade partners to comply with international human rights norms such as labor rights. But Canadian policy makers recognize that it is not sufficient for outsiders to demand good governance. The public, both in Canada and in Canada's trade partners, must be informed about and involved in the development of rules if these rules are to be perceived as evenhanded and effective. Yet the Canadian public has not been very supportive of Canada's approach. Many Canadian NGOs see Canada's PTAs as opaque, ineffective at improving governance, and undemocratic (CCIC 2009).

Canada does not require all of its trade partners to adopt these human rights obligations. For example, it has not embedded many of these provisions in its PTA with EFTA, but, as the next section shows, neither EFTA nor

Canada “requires” such obligations in its PTAs. It will be interesting to see how Canada negotiates with the EU on labor and other human rights in preparation for a transatlantic free trade agreement. Negotiators working on scoping documents for these negotiations agreed that “it would be appropriate to address sustainable development issues through provisions on the environment and labor rights, including the core labor standards embodied in the 1998 ILO Declaration . . . Such provisions could include, inter alia: the right to regulate while aiming for high levels of protection; effective enforcement of environment and labor laws; a commitment to refrain from waiving such laws in a manner that affects trade or investment; a framework for cooperation; public involvement; and mechanisms to monitor and address disputes.”³⁰

European Free Trade Association (EFTA)

EFTA began in 1960 as a framework for liberalizing trade and promoting economic cooperation among several European nations. At that time, some EFTA member states were unwilling or unable (for reasons of sovereignty or neutrality) to join the EU. The membership of EFTA has changed over time; Austria, Denmark, Finland, Portugal, Sweden, and the United Kingdom left to join the EU. Iceland, Liechtenstein, Norway, and Switzerland are the members of EFTA as of March 2011.

In recent years, EFTA has become an active PTA negotiator. EFTA has 22 free trade agreements, covering 31 countries.³¹ It is now negotiating with Algeria; Bosnia and Herzegovina; Hong Kong SAR, China; India; Indonesia; Montenegro; the Russian Federation, Belarus, and Kazakhstan; and Thailand. EFTA's PTAs do not include explicit human rights provisions, although trade policy makers have included references to human rights in both the preamble and the investment chapters of several agreements (Bartels 2009a). The preamble typically mentions the desire to create new employment opportunities, improve working conditions and living standards, and promote sustainable development, and it reaffirms the parties' “commitment to the principles and objectives set out in the UN Charter and Universal Declaration.” But the agreements do not aim to improve human rights or strive toward sustainable development; they do not go beyond WTO exceptions regarding public morals, public health, and trade in goods made with prison labor.³² For FTAs with African states, EFTA includes language in its investment chapter noting that “the parties recognize that it is inappropriate to encourage investment by relaxing health, safety, or environmental standards.”³³ The agreements also note that the EFTA states are to provide technical assistance

to implement the objectives of the agreement and support partner countries' efforts to achieve sustainable economic and social development.³⁴ Some recent PTAs, such as those with Canada, Colombia, and the Gulf Cooperation Council (GCC), refer to ILO principles, but contracting parties have no obligations in the agreement regarding the ILO.

Since late 2008, EFTA has been exploring whether to include environmental and labor and social standards in its PTAs. The Committee of Members of Parliament of the EFTA countries has commissioned a study on environmental policies and labor standards in PTAs but is not looking at human rights per se as an issue to be included in trade agreements.³⁵ Regarding the addition of labor and environmental provisions, the study notes that although a growing number of nations have such provisions, they may “breach” the regulatory framework of any of the parties to a PTA. The authors stress that much of the evidence regarding the quality of these provisions is qualitative rather than quantitative, and they conclude that it is difficult to assess the effectiveness of their inclusion.³⁶ EFTA has set up working groups to examine whether or how to embed such provisions, but as of the time of writing (March 2011), they had not reached a decision. Thus, EFTA does not seem to be enthusiastic or to see an urgency about including further provisions in its PTAs.

Human rights in the EEA treaty. Although EFTA has not played a leading role in linking trade and human rights, the European Economic Area (EEA) treaty—EFTA's main agreement with the EU—does use the language of human rights. This agreement, however, is much more than a trade agreement. It is designed to ensure “four freedoms”—free movement of goods, services, persons, and capital—throughout the 30 EEA states. The agreement guarantees equal rights and obligations within the internal market for citizens and economic operators in the EEA. The provisions on social security are meant to coordinate the respective national systems of the EEA states and thus to ensure social protection in case of, among other contingencies, sickness, maternity, invalidity, death, or unemployment. EFTA also has language to safeguard the pension rights of persons who exercise their fundamental right to move and reside freely within the EEA.

The preamble of the EEA agreement discusses “the contribution that a European Economic Area will bring to the construction of a Europe based on peace, democracy and human rights.” The preamble also notes the importance of “equal treatment of men and women” and cites the signatories' desire “to ensure economic and social progress and to promote conditions for full employment, an improved standard of living and improved working conditions.”³⁷ Part III, Article 28, of the agreement refers to free movement

of persons. It seeks to secure freedom of movement for workers through “the abolition of any discrimination based on nationality between [European Community] member states and EFTA states.”³⁸ Taken in sum, the EEA agreement is very much a human rights document.

EFTA's PTAs and human rights: A summary. Although EFTA includes some human rights language in its PTAs, it is just beginning to examine whether it should go further, by making human rights provisions actionable and/or disputable. EFTA policy makers might seek inspiration in their most important agreement, the treaty that set up the EEA. We can best understand this trade agreement as a governance agreement that harmonizes a wide range of laws and regulations that could distort trade but does so in ways that enhance human rights.

European Union (EU)

The EU is the behemoth of world trade; it is the world's largest trade bloc.³⁹ It is also the most enthusiastic proponent of the inclusion of human rights provisions in PTAs. With nearly 500 million citizens, the EU possesses approximately a quarter of the world's economic wealth. Given its size and political influence, its policies move markets.

The EU is an active participant in and negotiator of bilateral and regional PTAs. Since 1995, the European Commission Directorate General for Trade, which makes trade policy for the members of the EU, has included social and labor clauses in all its free trade agreements.⁴⁰ EU policy makers have incorporated social and labor clauses into more than 50 trade agreements involving more than 120 countries. The EU includes human rights in many of its agreements with other countries including its partnership and cooperation agreements⁴¹ and its generalized system of preference program with developing countries (GSP). However, in this chapter we focus only on the economic partnership agreements, such as that with the Caribbean Forum of African, Caribbean, and Pacific (ACP) States (CARIFORUM) and recent free trade agreements.

The EU and its member states have a long history of using trade agreements to promote human rights. In 1992 the European Commission included “an essential elements clause” in trade agreements with developing countries. The clause states that respect for human rights is an essential element of the agreement. The signatories to such agreements agree that either party may suspend the agreement without notice if these “essential elements” are violated. In 1995 the EU decided to include the human rights clause in all future international trade agreements, whether with developing or with industrial countries (Bartels 2005a).⁴²

This human rights clause is given operative effect through a “nonexecution” clause stating that a failure to fulfill an obligation under the agreement, including human rights obligations, entitles the other party to take appropriate measures, subject to a consultative procedure (Bartels 2009a).

As of October 2009, the EU also included human rights clauses in nine regional trade agreements (association agreements), with Algeria, the Arab Republic of Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, the Syrian Arab Republic, and Tunisia. Similar human rights clauses were also incorporated into stabilization and accession trade agreements with Croatia and the former Yugoslav Republic of Macedonia; in pending agreements with Albania, Bosnia and Herzegovina, and Montenegro; and in regional trade agreements with Chile, Mexico, and South Africa.⁴³ The EU is currently negotiating a PTA with Canada. As noted above, it will be interesting to see how the two reconcile their unique human rights and trade strategies.

Economic partnership agreements (EPAs). The nations of the EU have long-standing trade relationships with their former colonies. Not surprisingly, the EU is determined to maintain these relationships, but also to use them to foster development and economic growth and to improve governance. In 1975, the members of the EU and their 79 former colonies signed a treaty, the Lomé Convention, which set out standards for development cooperation. In 2000 the EU and its Lomé partners adopted the Cotonou Agreement.⁴⁴ The Cotonou Agreement was based on four principles: equality of partners; political participation; dialogue and mutual obligations, including human rights obligations; and differentiation, based on the idea that each country is unique. Under the Cotonou Agreement, the EU and its development partners agreed to develop regional trade agreements (called economic partnership agreements) with regionally specific rights and obligations. The EU is currently negotiating with, or has completed negotiations with, six regional groupings of countries: West Africa (Ghana); the Southern African Development Community (SADC), with Botswana, Lesotho, Namibia, Mozambique, and Swaziland as members; Pacific (Fiji and Papua New Guinea); Eastern and Southern Africa (ESA), encompassing the Comoros, Madagascar, Mauritius, the Seychelles, Zambia, and Zimbabwe; and the East African Community (EAC), composed of Burundi, Kenya, Rwanda, Tanzania, and Uganda.⁴⁵ The EU and the CARIFORUM countries concluded negotiations on their EPA in October 2008.⁴⁶ The EU uses the CARIFORUM EPA agreement as a model for delineating human rights obligations in other EPAs. Although several countries have signed these regional agreements, the European Commission is

waiting on other countries to approve these agreements, which are quite controversial both in Europe and in the developing world.⁴⁷

The CARIFORUM agreement refers to human rights, democratic principles, and the rule of law as essential elements of the Cotonou Agreement and cites “good governance” as a fundamental element.⁴⁸ The signatories agree to respect basic labor rights in line with their ILO commitments. Article 3 of the agreement states that the parties agree to work cooperatively toward the realization of “sustainable development centered on the human person.” Article 5 continues with that focus on human beings, noting that the parties will continuously monitor the agreement to ensure that benefits for people are maximized. Article 32 calls for transparent rules and for public explanation of legislation. Labor issues are delineated in Chapter 5; the EU refers to labor provisions as the “social aspects” of the agreement. In Article 191 the parties reaffirm their commitment to labor standards and decent work; in addition, the parties recognize the benefits of fair and ethical trade products. Finally, Article 193 is the non-derogation clause, which requires the parties not to try to gain competitive advantage by lowering standards or ignoring their laws. Article 195 sets out a process for consultation and monitoring and creates a committee of experts to examine compliance with the agreement. The committee can be called on to examine concerns among the members regarding “obstacles that may prevent the effective implementation of core labor standards.”⁴⁹ Chapter 6 of the agreement refers to trade in data. Articles 196 and 197 continue the focus on individuals; here the parties recognize their “common interest in protecting fundamental rights and freedoms of natural persons, and in particular, their right to privacy, with respect to the processing of personal data.”⁵⁰

Although these agreements contain considerable human rights language, most of it is aspirational and non-binding. Only the sustainable development chapters of the EPAs, on the environment and on social issues, employ public scrutiny, expert panels, and consultations as means of resolving disputes (Bartels 2005a, iv–vi). The agreements have no dispute settlement mechanism. The only way to hold governments to account is for citizens to monitor human rights violations and press policy makers to discuss any such violations bilaterally. In short, the EU relies on negotiations to monitor human rights linked to trade in these EPAs.

Free trade agreements (FTAs). In 2006 EU member states agreed to negotiate what it calls FTAs with several rapidly growing Asian nations. The EU made it clear that these trade agreements would include a wide range of issues not

typically covered in the WTO, such as investment, the environment, and social and labor clauses.⁵¹ As of March 2011, the EU was actively negotiating FTAs with Colombia, Peru, Central America, Canada, India, Malaysia, Singapore, the Southern Cone Common Market (Mercosur, Mercado Común del Sur), and Ukraine, as well as regional and bilateral Euro-Mediterranean agreements.⁵² The European Commission completed its first FTA, with the Republic of Korea, in 2009. In February 2011, the European Parliament approved by agreement.⁵³

The Korean agreement illuminates the EU’s new approach toward linking sustainable development (social and environmental) clauses to trade. The preamble reaffirms both parties’ commitment to the Universal Declaration of Human Rights and to sustainable development. It also notes the parties’ desire to “strengthen the development and enforcement of labor and environmental laws and policies, promote basic workers’ rights and sustainable development and implement this agreement in a manner consistent with these objectives.”⁵⁴ Like the CARIFORUM agreement, this FTA contains language protecting the right to privacy. Article 7.43, in the services chapter, states that each party should reaffirm its commitment to protecting the fundamental rights and freedoms of individuals and should adopt adequate safeguards for the protection of privacy.

The agreement with Korea includes a separate chapter on trade and sustainable development. Article 13.4 commits the two parties to respect, promote, and realize core labor rights. The parties also reaffirm their commitment to effectively implement the ILO conventions that both states have ratified. Article 13.6 states that the parties “shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade.” Article 13.7 contains the nonderogation clause, in which the parties agree to effectively enforce environmental and labor laws and not to weaken, waive, or derogate from those laws in a manner affecting trade or investment. Finally, Article 13.9 commits the parties to “introduce and implement any measures aimed at protecting the environment and labor . . . in a transparent manner with due notice and public consultation.” To achieve that goal, the agreement creates a unique domestic advisory group on sustainable development, as well as a civil society forum on these issues (Annex 13). Thus, the agreement sets up a citizen monitoring process.

The new paradigm includes a strategy for government consultations on social issues, as well as a panel of experts to examine issues that cannot be settled through governmental consultations. In contrast with the U.S. model, the EU has designed no formal mechanism for trade disputes

related to these issues; instead, civil society will monitor commitments (Articles 13.14 and 13.15).

The new model PTA also has a transparency chapter (Chapter 12) requiring that information be made available to all interested persons, as well as rules for public comment (Article 12.3) and due process (Article 12.5, on administrative proceedings). This new chapter is very similar to the U.S. and Canadian transparency chapters, but it also includes a nondiscrimination section which provides, in part, “Each party shall apply to interested persons of the other Party transparency standards no less favourable than those accorded to its own interested persons, to the interested persons of any third country, . . . whichever are the best.” Finally, Protocol 3 provides for cultural cooperation and recognizes cultural diversity and cultural heritage.⁵⁵

The new FTA model, as embodied by the FTA with Korea, contains a wide range of human rights provisions, some of which are binding on the signatories. But, as with the EPAs, neither policy makers nor citizens can challenge another state’s nonperformance. Thus, this model is unlikely to satisfy the many NGOs that are critical of how the EU links trade and human rights.⁵⁶ Moreover, the EU does not examine the broad impact of its trade policies on human rights, but it does hire independent consultants to carry out sustainability impact assessments. These consultants look at income, poverty, and biodiversity; except in the area of gender inequality, they do not attempt to assess how the provisions of a free trade agreement might affect human rights conditions in trading-partner nations.⁵⁷

Given their concerns about the EU model, some NGOs have asked EU policy makers not to conclude or ratify trade or partnership agreements with countries that have questionable human rights records. They fear that such agreements could strengthen or reward repressive regimes.⁵⁸ EU policy makers, however, are not eager to cut off trade in the interest of promoting human rights, and they believe it is important to use trade as a tool for shaping relations with emerging markets.

The EU’s PTAs and human rights: A summary. At first glance, the EU’s approach is supportive of the human rights set forth in the UDHR. The EU takes the position that human rights are universal and indivisible and that these rights are key aspects of the rule of law. Although the trade agreements include considerable human rights language, much of it is rhetorical, nonbinding, and not disputable. In its new FTAs and EPAs, the EU not only refers to the UDHR; it also emphasizes sustainable development (social and environmental issues). This approach creates new advisory roles for experts and civil society, but neither states nor individuals can use these provisions to challenge human rights violations.

In considering a potential agreement, the EU hires consultants to assess the impact of its trade agreements on sustainable development. It seems strange that these assessments do not focus on the bulk of human rights delineated in the UDHR (Aaronson and Zimmerman 2007, 138–43; Bartels 2009a). EU policy makers believe that dialogue and capacity building are the best means of changing the behavior of other countries.⁵⁹ EU policies focus on the supply side of governance but seem to be less focused on empowering citizens in other countries. Moreover, the EU rarely cuts trade or adopts trade sanctions toward trade agreement partners that may violate human rights. Thus, despite the EU’s professed belief in the universality and indivisibility of international human rights, policy makers are sending a message that some rights are more important than others and that only some countries can be prodded with trade policy tools to change their behavior.⁶⁰

United States

The United States bears much of the responsibility for the world’s recent renewed focus on PTAs. In 2001 U.S. Trade Representative Robert Zoellick proposed that the U.S. government reorient trade liberalization toward bilateral and regional PTAs in the hope of encouraging “competitive trade liberalization.” He theorized that if countries saw significant progress in bilateral PTAs, they might accept deeper market access concessions at the WTO. But instead of stimulating a renewed commitment to multilateral trade talks, the U.S. focus on PTAs prodded other countries to negotiate their own PTAs, which in turn has stimulated ever more PTAs.⁶¹

U.S. policy makers don’t describe American PTAs as governance agreements, but the United States does use the lure of its huge market to encourage other countries to make significant policy changes. The United States has pushed for governance improvements that protect foreign investors. Recent research has found that these provisions have human rights spillovers—they seem to empower domestic as well as foreign actors who gain benefits from increased transparency, greater evenhandedness, and the due process rules promoted in these agreements. But the United States promotes only some human rights in its trade agreements. At the behest of labor unions and their congressional allies, the United States is most concerned about using these agreements to advance labor rights among U.S. PTA partners. U.S. trade policy is complicated, confusing, and often inconsistent, vacillating between market-opening strategies and protectionist measures. To some degree, this is because no one individual is in charge of trade policy making; authority is shared between the legislative and executive branches. The 535 members of

Congress and the president have divergent views about trade and about the linkage between trade and human rights (Smith 2006). Members of Congress “think local” and, in times of recession, are focused on local economic growth. Without a great understanding of what trade agreements do, many members have little enthusiasm for negotiating them. As a result, Congress has not provided authority to negotiate new trade agreements at the bilateral or multilateral level since 2002. Yet, during the eight years of the George W. Bush administration, the U.S. Trade Representative (USTR) negotiated trade agreements with Australia, Bahrain, CAFTA–DR (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominion Republic), Chile, Colombia, Jordan, Morocco, Oman, Panama, Peru, and Singapore (U.S. GAO 2009). As of March 2011, Congress had approved all but the agreements with Colombia, Korea, and Panama. The Obama administration has agreed to move these agreements forward, but it has also asked Korea, Panama, and Colombia to make additional changes in order to win congressional approval. As of March 2011, the Korean government had agreed to several changes, but the Obama administration continues to work with Panamanian and Colombian officials.⁶² With two wars and a burgeoning budget deficit, these agreements do not seem to be a top priority for either the administration or the Republican-denominated house. Congress sets the objectives for trade policy making, but it has not made the advancement of human rights through trade agreements a top priority. In the Trade Promotion Act of 2002 (hereafter, TPA), which grants the president “fast-track” authority to negotiate trade agreements, the words “human rights” never appear.⁶³ Congress has directed negotiators to focus on the following specific human rights: labor rights, access to information, public participation, and due process. In recent years, negotiators have also been directed to balance the rights of U.S. intellectual property rights (IPR) holders with U.S. obligations in the Doha Declaration on Public Health. Almost all recent PTAs contain language related to these human rights.

Negative spillovers of the focus on labor rights rather than on broader human rights. Activists and legislators have focused most of their attention on provisions addressing labor rights (see Elliott, ch. 20 in this volume). This is partly attributable to the clout of trade unions, but also to the failure of many U.S. trade partners to enforce the labor laws on their books. These partners’ difficulties regarding labor rights may be a symptom of a larger governance problem, and the focus on labor rights may make it more difficult to use the agreements to promote good governance and human rights. The dilemma is most visible in the case of Colombia.

The U.S.–Colombia FTA has been pending since 2006. Many Democratic members of Congress have signaled that they cannot vote for the agreement because of Colombia’s problems with labor rights. They note the high rate of violence (murders, arbitrary detentions, and kidnappings of trade unionists), as well as weak enforcement of labor laws. Colombia’s labor rights problems are part of a greater problem of impunity, inadequate governance, and corruption (Bolle 2009). The pending PTA is not designed to address these issues per se, yet its fate rests on the public’s and policy makers’ perception of these problems as mainly labor rights issues. In this way, the PTA illuminates the inadequacies of the U.S. focus on labor rights, rather than good governance per se.⁶⁴

Moreover, the United States seems to be moving from using these PTAs as an incentive to improve human rights to using them to hold nations accountable for specific human rights performance. In July 2009 the Obama administration announced that it would make important changes in trade policy making to advance “the social accountability and political transparency of trade policy” (USTR 2009). On July 16, 2009, U.S. Trade Representative Ron Kirk made it clear that the U.S. government was less interested in delineating labor rights provisions or providing incentives for international labor rights through its trade agreements than in establishing “a level playing field for American workers.” He added that the “USTR will, proactively monitor and identify labor violations and enforce labor provisions . . . When efforts to resolve violations have been expired, USTR will not hesitate . . . to invoke formal dispute settlement.”⁶⁵ However, as of March 2011, the United States has filed only one such case, against Guatemala, under the CAFTA-DR agreement, for alleged violations of obligations on labor rights.⁶⁶ Nonetheless, the United States has signaled that labor rights violations under FTAs will be investigated, and if violations are not remedied, the United States could bring the issue to a trade dispute. This new policy has clearly elevated labor rights.

Public participation, transparency, and due process. As noted above, the U.S. Congress requires its trade agreement partners to agree to PTA provisions related to transparency, due process, and political participation.⁶⁷ These provisions are embedded in the transparency, anticorruption, and regulatory practices sections of the TPA. The Congress declared that the United States aims to “obtain wider and broader application of the principles of transparency” through “increased transparency and opportunity for the participation of affected parties in the development of regulations.” The legislation also states that trade negotiators should “establish consultative mechanisms among parties to trade agreements to promote increased

transparency in developing guidelines, rules, regulations and laws.”⁶⁸ Finally, the act notes that to avoid corruption, the United States intends “to obtain high standards and appropriate domestic enforcement mechanisms applicable to persons from all countries participating in the applicable trade agreement.”⁶⁹

The United States has been promoting transparency and due process rights in multilateral trade agreements since the end of World War II (Aaronson and Zimmerman 2007). U.S. policy makers have long argued that “transparency is the starting point for ensuring the efficiency, and ultimately the stability of a rules-based environment for goods crossing the border.”⁷⁰ All U.S. PTAs approved since 2002 contain a chapter on transparency, and they thus go beyond the WTO rules—they are “WTO+.” (There are also transparency provisions in other chapters of the PTA.) Although the language in these chapters varies from agreement to agreement, in general, the passages are framed in the language of human rights. They require governments to publish, in advance, laws, rules, procedures, and regulations affecting trade, thereby giving “persons of the other party that are directly affected by an agency’s process . . . a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action.” These agreements also contain a section on review and appeal, designed to give the parties a reasonable opportunity to support or defend their respective positions.⁷¹ Such provisions are not intended to promote human rights as such, but they may have human rights spillovers.

In contrast, U.S. efforts to foster public participation are relatively new, dating from 1992. The United States and its partners first experimented with public participation provisions in the environmental side agreements to NAFTA. As part of that agreement, Mexico, Canada, and the United States set up a mechanism, the Citizen Submissions on Enforcement Matters, to enable members of the public from any of the three countries to submit a claim when a government is allegedly not enforcing its environmental laws.⁷² The commission investigates the allegation and issues nonbinding resolutions. These investigations have occasionally led governments to change course. For example, the Mexican government has become more responsive to the environmental side effects from trade. Based on public pressure from citizen submissions, the Mexican government promised remediation in the case of toxic pollutants abandoned at a lead smelter in Tijuana, and Mexico’s president declared the Cozumel Coral Reef a protected area (Silvan 2004).

The George W. Bush administration (2001–08) decided to enhance public participation provisions. Administration officials believed that trade agreements could act as an

incentive for democracy in the Middle East and might also cement democracy in Latin American nations such as Colombia and El Salvador that had experienced conflict.⁷³ These officials recognized that democracy could not simply be exported; they understood that some countries need help in strengthening democratic institutions, processes, and accountability.⁷⁴ They hoped that if the United States helped such countries to become more democratic and accountable to their publics, they (and the United States) would gain greater legitimacy, and over time these allies would become more stable. They also believed that trade agreements with the United States would gain public support if citizens in partner countries could comment on various versions of the agreement and in so doing shape key public policies.

Under pressure from several members of Congress, trade policy makers developed three models for public participation, which were incorporated first in the environmental chapters of PTAs and later in the labor chapters, as well. The first model was for developed democratic countries such as Australia, and it thus contained minimal public participation provisions in the environmental chapter. The second model was designed for countries with relatively weak systems of environmental regulation and accountability, or countries relatively new to democracy; it was used for Bahrain, Chile, Morocco, Oman, and Singapore.⁷⁵ Under this second model, the bilateral trade partners set up an advisory committee, an Environmental Affairs Council, that would meet regularly and engage the public in discussion on the environment.⁷⁶ Policy makers also agreed to provide capacity-building assistance to support public participation (USTR 2005).

Senator Max Baucus, a Democrat from Montana, played an important role in developing a third, more extensive, approach. In 2004 he called on the USTR to put the public participation provisions directly in the trade agreement, to develop benchmarks and “ways to measure progress over time,” and to find ways to encourage objective monitoring and scrutiny by the public (Aaronson and Zimmerman 2007, 174–76). The CAFTA–DR agreement was the USTR’s first test of the third model. In February 2005 the United States and its six partners in CAFTA–DR agreed to establish a mechanism and secretariat allowing the general public to submit petitions regarding the operation of the agreement’s labor or environmental provisions. If members of the public from any party to CAFTA–DR believe that any party is not effectively enforcing its labor or environmental laws, they can make a new submission to this subbody, which reports to the Environmental Affairs Council. The agreement states that each party should review and respond to such communications in accordance with

its own domestic procedures.⁷⁷ CAFTA–DR also authorizes the tribunal “to accept and consider amicus curiae submissions from a person or entity that is not a disputing party.” To develop a workable system, the United States agreed to fund the first year of the secretariat’s work.⁷⁸ The USTR has replicated this model in more recent PTAs, such as those with Colombia, Korea, Panama, and Peru.⁷⁹ The labor chapter of these PTAs, Article 19.4, notes, “Each party shall ensure that persons with a recognized interest under its law in a particular matter have appropriate access to tribunals for the enforcement of the Party’s labor laws.” In addition, “Each party shall promote public awareness of its labor laws including by (a) ensuring that information related to its labor laws and enforcement and compliance procedures is publicly available; and (b) encouraging education of the public regarding its labor laws.”⁸⁰ The United States and its trade partners have also established Labor Affairs Councils with other PTA partners.⁸¹

As readers might imagine, the placement of participation provisions in trade agreements cannot magically stimulate democracy. Such an approach may not work in countries lacking a tradition of political participation or free speech, and it may appear to violate another country’s sovereignty or cultural mores. However, these provisions might push partner governments to allow more public participation and could gradually teach citizens how to engage and challenge policy makers. Since signing a free trade agreement with the United States, PTA partners Chile, the Dominican Republic, Jordan, Kuwait, Mexico, and Morocco have established channels through which organized civil society can comment on trade policies (Cherfane 2006; Aaronson and Zimmerman 2007).

Access to affordable medicines. Congress has long viewed protecting intellectual property rights (IPR) holders as a top priority. The United States is by far the most assertive country in defending intellectual property rights within the context of trade policies and agreements, even when trade partners and human rights activists argue that U.S. policies undermine the ability of policy makers or citizens to obtain access to affordable medicine or to protect indigenous knowledge. U.S. assertiveness stems from a long-standing belief among policy makers that the country’s economic future is rooted in America’s global economic dominance of creative industries such as software, biotechnology, and entertainment.⁸² These intellectual property–based industries represent the largest single sector of the U.S. economy.⁸³ To protect that future, U.S. policy makers work with their overseas counterparts to enforce intellectual property rights, seize counterfeit goods, pursue criminal enterprises involved in piracy and counterfeiting, and “aggressively engage our trading partners to join our efforts” (CEA 2005, 226).

U.S. policy makers are increasingly sensitive to public concerns that there are costs to elevating IPR protection. Drugs and vaccines are increasingly expensive, and the policy does not encourage the development of generic brands. Moreover, some argue that the policy does not adequately protect indigenous knowledge—knowledge passed down through familiar and cultural ties, but not protected under domestic law. In the 2002 TPA, Congress required the Bush administration to rethink its approach, and “secure fair, equitable, and nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection; and to respect the Declaration on the [Trade-Related Aspects of Intellectual Property Rights (TRIPS)] Agreement and Public Health.”⁸⁴ The executive branch, however, was not given a mandate to ensure access to affordable medicines.

Beginning in April 2004, all PTAs include a letter entitled “Understandings Regarding Certain Public Health Measures” that is signed by representatives of both governments. The letter, found in the Bahrain, CAFTA–DR, Colombia, Morocco, Oman, and Peru PTAs, says that the IPR provisions of the agreement “do not affect a Party’s ability to take necessary measures to protect public health.”⁸⁵ But the letter does not make it clear that governments can breach IPR obligations in order to ensure that their citizens have access to affordable medicines. These side letters do not assuage critics, including the World Bank (Mercurio 2006, 234–35). Interestingly, this policy may not change dramatically under the Obama administration. There is no mention of public health in the President’s Trade Policy Agenda, and the Trade Agreements Report, like others before it, simply stresses that strong intellectual property protection is essential for protecting public health (USTR 2011).

U.S. PTAs and human rights: A summary. The U.S. approach to linking PTAs and human rights is contradictory. On the one hand, it ignores the internationally accepted notion that human rights are universal and indivisible, yet on the other hand, the United States works hard to promote specific human rights and now makes some of these rights binding. The United States is essentially saying to its partner nations: make the rights we value top priorities. In this way, the U.S. strategy toward linking human rights is insensitive toward other cultures, which may have different human rights priorities. This strategy may inspire U.S. trade partners to do more to advance some human rights, but it is unlikely to inspire these governments to devote more resources to human rights in general.

The United States (like Canada) uses its trade agreements to improve governance and, in so doing, to empower citizens to demand their rights. However, the United States

uses the leverage of trade agreements to induce other nations to invest in the governance priorities valued by U.S. policy makers instead of in human rights as delineated in international law.

South-South Agreements

Although developed countries are the main demandeurs of human rights provisions in PTAs, a number of emerging economies include such links in their trade agreements. Policy makers have incorporated language dealing with access to affordable medicines, indigenous or minority rights, due process, cultural rights, and labor rights. These provisions are usually located in the preamble of the agreement, with a few in the body of the text.

Some developing countries link trade and human rights by building on the exceptions in GATT/WTO Article XX described earlier. For example, Article 8 of the agreement between Egypt and Jordan allows measures “for *religious*, hygienic, security or environmental reasons as long as they are in conformity with the applicable laws and regulations in both countries.” (This is the only provision that we have found that associates trade and freedom of religion.) Other countries target different human rights. For example, the Caribbean Community (CARICOM) allows for the free movement of university graduates and those in listed occupations. Some countries have more restricted provisions regarding free movement of people. (See Stephenson and Hufbauer, ch. 13 in this volume, on labor mobility.) For example, NAFTA and the Canada–Chile and U.S.–Chile PTAs contain chapters on temporary entry of business persons.⁸⁶ Article 6 of the treaty establishing the Common Market of Eastern and Southern Africa (COMESA) commits members to promote democracy and human rights.⁸⁷ Several human rights are embedded in the Mercosur agreement between Argentina, Brazil, Paraguay, and Uruguay.⁸⁸ If any party to Mercosur fails to protect ILO core labor standards, a supranational Commission on Social and Labor Matters can review allegations at the behest of another member state, although it cannot impose trade sanctions or other penalties in the event of such a violation.⁸⁹

Like the EU, Mercosur is built on the recognition that if the members want to jointly expand trade, they must collaborate on a wide range of issues. Thus, it is more of a governance agreement than simply a trade agreement. In 1998 Mercosur members adopted the Ushuaia Protocol on democratic commitment, which prohibits the entry of undemocratic states into the common market. Although the protocol text itself makes no explicit mention of human rights, Mercosur members invoked the protocol as a joint response to a 1996 coup d'état in Paraguay, and the Brazilian delegation

cited numerous human rights motivations when it presented the protocol to the United Nations in 2000. For instance, when explaining the rationale for a democracy clause, Brazilian policy makers argued that “democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”⁹⁰ Thus, although the Mercosur trade agreement contains no binding human rights commitments, Brazil and its Mercosur partners see the protection of human rights and democracy as a rationale for, and a side effect of, the agreement (Anderson and Zimmerman 2007, 106). Nevertheless, Mercosur refused to investigate allegations of human rights abuses by member state Argentina (Garcia 2003).

Chile has incorporated labor rights language into several of its more recent bilateral PTAs. For example, as noted by Elliott (ch. 20 in this volume), the trade agreement between Chile and China includes two labor and environmental side agreements. Article 108 commits both parties “to carry out cooperation activities in the fields of employment and labor policies and social dialogue.” Although Chile’s language is aspirational, this language does underscore the importance of labor rights.⁹¹ In addition, Chile’s agreements with Costa Rica, Colombia, and Korea, as well as the CARICOM–Costa Rica PTA, refer to social protection (Bartels 2009a).

Summary

These South-South trade and human rights provisions, as well as those in the U.S., European, and other agreements, reflect a changing attitude about what trade agreements should include and what they are about. According to Bartels, “the idea that these links are valid seems to be gaining its own dynamic” (Bartels 2009a, 365). Moreover although many of these provisions are aspirational and not binding, such provisions may not remain rhetorical. Bartels concludes that as the number of agreements containing preambular references to human rights grows in number and scope, “this may well lead to operative provisions at a later stage,” as happened with EU human rights provisions (*ibid.*).

The Effects of the Marriage of PTAs and Human Rights

Although the wedding of trade and human rights is new, this marriage is leading to important changes in the way policy makers make trade policy. The sheer number and dispersion of PTAs with human rights links seem to be changing some policy makers’ opinions about human rights. These provisions have thus contributed to the recognition and

internationalization of human rights norms. Second, these provisions are changing the behavior of government officials in a wide variety of countries, as described below.

Mauritania. The European Commission used consultations to warn the new government of Mauritania that the government's behavior breached that country's commitments under the Cotonou Agreement. Soon thereafter, the new Mauritanian regime pledged to hold free and fair elections and initiated a process to establish an independent National Commission for Human Rights. In 2007 the government held free and fair elections. While one can't say that the PTA's human rights provisions pushed the military government to protect human rights, political scientist Hafner-Burton concludes that these provisions gave the EU leverage over the government's progress toward reforms (Hafner-Burton 2009, 151–60).

Thailand. In 2003 Thailand entered into PTA negotiations with the United States. In 2005 the Thailand National Human Rights Commission drafted a report on the human rights implications of the proposed trade agreement, expressing concern about traditional knowledge and intellectual property rights. The report concluded that Thailand would have to adopt US laws if it agreed to the trade agreement.⁹² The Thai public began to oppose the agreement. The Thai prime minister pledged to ensure greater public involvement in the negotiating process to shape the agreement.⁹³ However, the negotiations ended after a military coup.

El Salvador and Guatemala. The USTR asserted that El Salvador and Guatemala held their first public hearings on trade as they negotiated CAFTA. These governments continue to engage their citizens in trade. During the negotiations of the Central American Free Trade Agreement (CAFTA), with such hearings, individuals and NGOs learn how to influence trade policy. Trade policy makers in these countries may have acted under U.S. pressure, but they may also have recognized that they must involve their publics if they don't want to engender significant opposition to such agreements (Aaronson and Zimmerman 2007, 176). As noted earlier, other nations with little tradition of civil society or even business involvement in trade, such as Bahrain, Jordan, and Oman also created public advisory bodies (Cherfane 2006; Lombardt [2008]).

Mexico. Since joining NAFTA, Mexican trade policy has become more responsive to public concerns. For example, the Mexican government revamped its agricultural policies. It has also begun to work internationally to protect its citizens' labor rights. For example, in September 2009, Mexican consulates attempted to educate Mexican guest workers in the United States regarding their labor rights. NAFTA leaders meet regularly, and human rights and the rule of law have become important parts of their discussions.

Thus, at their meeting in August 2009, the leaders of the three NAFTA countries discussed public health, border controls, and public safety—all issues relating to human rights.⁹⁴

Linkages and Knowledge Gaps: Some Problems Presented by Current PTAs

The many variants of PTAs raise questions about the linkage of trade and human rights and what it means for both the international human rights regime and the status of human rights.

1. Countries have a Wide Range of Views about Using Trade to Advance Human Rights Abroad.

The United States, the EU, and Canada are quite comfortable using their trade agreements to advance human rights in other countries. While some developing and middle-income countries have included some human rights provisions in their PTAs, policy makers in these countries may not believe it is appropriate to intervene in the affairs of other nations, even in the most extreme cases of human rights abuse.

2. Countries have a Wide Range of Views as to Whether They Should Accept Human Rights Provisions In Trade Agreements.

Some nations, such as Australia, have actually refused to negotiate trade agreements with human rights provisions. Yet China has accepted human rights provisions in its PTAs with Chile and New Zealand. How do we explain these differences? Some countries are comfortable using their economic power to promote political change; some countries are neutral and noninterventionist; and others may be using their acceptance of these provisions to signal investors and funders. Perhaps China sees adopting these provisions as a way to signal foreign investors that it is evenhanded and is attempting to promote the rule of law.

3. Incentives Work Better than Disincentives to Change Behavior.

Some countries have decided to use disincentives as a means of advancing the human rights embedded in particular trade agreements. However, sanctions or fines can do little to build demand for human rights or to train governments or factory managers in how to respect human rights. Isolating a government or punishing it will do little to increase the targeted country's commitment to human rights over time. Other countries rely on dialogue to prod changes, but dialogue may do little to encourage a country to change its behavior. Still others rely on incentives. We

need to understand whether these incentives are really effective and if so, when these incentives should be offered.

4. There is a Lot Scholars Don't Know about this Relationship.

Scholars are just beginning to examine the relationship between human rights and trade performance.⁹⁵ Aaronson and Zimmerman did a simple correlation and found that states that protect human rights signal investors that they are evenhanded and promote the rule of law (Aaronson and Zimmerman 2007, 193–95). Scholars also don't know if human rights provisions in trade agreements lead to greater trade distortions.

5. These Provisions have Costs as Well as Benefits.

The world and its people benefit when more governments protect, respect, and realize human rights. Yet some human rights provisions are expensive for developing countries to implement. These governments often have few resources, and yet under many recent trade agreements, they must choose to protect intellectual property, provide access to affordable medicines, and/or invest in education. Trade agreements may prod policy makers to make the human rights priorities of their trade partners their human rights priorities. We don't know if this strategy ultimately increases the demand for and supply of human rights. To gain better understanding of the costs and benefits of the association of trade and human rights, scholars, policy makers, and activists could use qualitative studies; empirical studies; or human rights impact assessments. Scholars have several global datasets they can use to do empirical research (for example, the CIRI human rights dataset or the now open World Bank datasets).⁹⁶ Human rights impact assessments are relatively new; they are designed to measure the potential impact of a trade agreement on internationally accepted human rights standards. Trade and human rights policy makers should collaborate with scholars, NGOs, and others to develop a clear and consistent methodology for evaluating such impact (3D 2009; Walker 2009).

Conclusion

More countries are marrying trade and human rights. If this marriage is to endure, we need greater understanding as to whether this union is effective and whether it can and should endure. We can begin by doing a comprehensive study of which PTA strategies encourage policy makers to do a better job of advancing human rights and if particular trade agreements help people realize their human rights under law.

Notes

1. The United States has included human rights language in all its PTAs (17 in force and 3 pending), except that with Israel, as well as in its generalized system of preferences (GSP) program with 131 countries. The EU has PTAs with 14 countries, and 13 of these agreements include human rights provisions; about 120 countries are subject to human rights provisions in the EU's GSP program.

2. United Nations High Commissioner for Human Rights website, <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>.

3. See the databases at the World Trade Law website, <http://www.worldtradelaw.net/fta/ftadatabase/PTAs.asp>; WTO, Regional Trade Agreements Information Service, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>; and, for the latest news, [Bilaterals.org](http://www.bilaterals.org), <http://www.bilaterals.org>.

4. The two covenants and the UDHR together form the International Bill of Rights.

5. United Nations High Commissioner for Human Rights, "Fact Sheet," <http://www.unhcr.ch/html/menu6/2/fs2.htm> (accessed February 12, 2006).

6. *Ibid.*

7. For example, if a government ignores its own labor laws, it is effectively allowing its labor-intensive firms to become more cost-competitive with imports (see GATT 1989; Bagwell and Staiger 1998; Brown 2001, 29–31).

8. *Some* WTO agreements require governments to accord due process rights (such as the right to recognition before the law) to importers as well as exporters. For example, under the WTO's Safeguards Agreement, when workers or industries petition their government for import relief, the responding government must give public notice and hold hearings in which interested parties can respond to a safeguard investigation (Interpretation and Application of Article 1 of the WTO Agreement on Safeguards, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/safeguards_02_e.htm#). The Agreement on Safeguards envisages that the interested parties will play a central role in the investigation and that they will be a primary source of information for the competent authorities. The Agreement on Technical Barriers to Trade requires governments to publish standards and technical regulations and allow interested parties (whether foreign or domestic) to become acquainted and respond to the regulation (http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#p). The Customs Valuation Agreement requires governments to establish in law the right of the importer to appeal a determination of customs value. Appeal may first be to a higher level in the customs administration, but the importer shall have the right in the final instance to appeal to the judiciary (Text of Interpretive Note to Article XI, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/cusval_02_e.htm#article11A).

9. Paragraph 2(a) General 319, GATT Analytical Index, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_04_e.htm#articleXA.

10. Powell (2005) notes, as an example, that provisions to implement transparency are embedded in NAFTA Articles 510, 909, 1036, and 1411.

11. See World Trade Law database, <http://www.worldtradelaw.net/fta/ftadatabase/PTAs.asp>; WTO Regional Trade Agreements Information System database, <http://rtais.wto.org>.

12. See discussion in House of Commons Committee, "Government Response to the Seventh Report of the Standing Committee on International Trade," March 2007, 39th Parliament, 1st Session, 1–3.

13. "Speaking Notes for Honorable Jean-Pierre Blackburn, Minister of Labor and Minister of the Economic Development Agency of Canada at Montreal Council on Foreign Relations, Montreal, Quebec, February 29, 2008," <http://www.hrsdc.gc.ca/eng/corporate/newsroom/speeches/blackburnjp/2008/080229.shtml>.

14. Foreign Affairs and International Trade Canada (DFAIT), "Negotiations and Agreements," <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx>. Canada's four most recent PTAs

are with Peru (in force as of August 1, 2009); Jordan (signed June 28, 2009, but not yet approved by Parliament); Colombia (signed November 28, 2008, but not yet approved); and EFTA (in force as of January 28, 2009).

15. DFAIT, "Negotiations and Agreements."

16. United Nations Association in Canada (UNAC), "Canada and Human Rights," <http://www.unac.org/rights/actguide/canada.html><http://www.unac.org/rights/actguide/canada.html>.

17. DFAIT, "Canada's International Human Rights Policy," <http://www.international.gc.ca/rights-droits/policy-politique.aspx>.

18. The Peru, Colombia, and Jordan agreements share the same basic preamble.

19. DFAIT, "Canada-Peru Free Trade Agreement," <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/can-peru-perou.aspx?lang=en><http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/can-peru-perou.aspx?lang=en>; DFAIT, "Canada-Jordan Free Trade Agreement," <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/chapter15-chapitre15.aspx?lang=eng>.

20. Canada's approach to labor rights is discussed by Elliott, in chapter 20 of this volume; the present chapter focuses on how the labor rights side agreement addresses other important human rights. Canadian officials state that labor and environmental provisions need to be embedded in side agreements rather than in chapters because the provinces, which regulate labor, could challenge the right of the federal government to force them to adhere to a treaty in their areas of jurisdiction. The side agreements allow for voluntary adherence by the provinces. This arrangement respects provincial jurisdiction on labor matters but gives Canada the ability to immediately access the dispute resolution process, regardless of the level of provincial participation in the labor cooperation agreement.

21. Human Resources and Skill Development Canada, "International Labour Affairs," <http://www.hrsdc.gc.ca/eng/lp/ila/index.shtml>.

22. See the 32-page "Agreement on Labour Cooperation" between Canada and Colombia, http://www.hrsdc.gc.ca/eng/labour/labour_agreements/ccalc/Canada-Colombia_LCA.pdf.

23. DFAIT, "Canada-Peru Free Trade Agreement, Chapter 19, Transparency," <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng>.

24. DFAIT, "Canada-Colombia Free Trade Agreement, Chapter 19, Transparency," <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/EN%2019%20Colombia%20FTA%20-%20Transparency.pdf>.

25. Media Awareness Network, "Canada's Cultural Policies," http://www.media-awareness.ca/english/issues/cultural_policies/canada_cultural_policies.cfm; DFAIT, "Culture," <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/index.aspx?lang=en>.

26. For Colombia, <http://www.ec.gc.ca/caraib-carib/default.aspx?lang=En&n=F24F07DD-1>; for Peru, <http://www.ec.gc.ca/caraib-carib/default.aspx?lang=En&xml=5CBDD77-6054-4FD3-A348-125840CEDF29>.

27. Human Rights Impact Resource Center, [http://www.humanrightsimpact.org/news/newsitem/article/roundtable-on-human-rights-impact-assessments-in-canada-on-16-november-178/?tx_ttnews\[backPid\]=769&cHash=0a3f7f441d60fba25cc641a768a1a1c](http://www.humanrightsimpact.org/news/newsitem/article/roundtable-on-human-rights-impact-assessments-in-canada-on-16-november-178/?tx_ttnews[backPid]=769&cHash=0a3f7f441d60fba25cc641a768a1a1c); Canadian Labour Congress, <http://www.canadianlabour.ca/news-room/publications/canada-colombia-free-trade-agreement-round-two-0>.

28. Hearing on Canada-South America Trade Relations, 40th Parliament, 2nd session, Standing Committee on International Trade, June 16, 2009, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4000400&Language=E&Mode=1&Parl=40&Ses=2>.

29. International Centre for Trade and Sustainable Development (ICTSD), "Canada-Colombia FTA Gets Human Rights Amendment," <http://ictsd.org/i/news/bridgesweekly/73372/>.

30. DFAIT, "Canada-European Union Joint Report: Towards a Comprehensive Economic Agreement," <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-can-ue-rapport.aspx?lang=eng>.

31. EFTA, "Free Trade Agreements," <http://www.efta.int/free-trade/free-trade-agreements.aspx>.

32. See, for example, EFTA-Colombia, <http://www.efta.int/free-trade/free-trade-agreements/colombia/fta-en.aspx>; for Chile, <http://www.efta.int/free-trade/free-trade-agreements/chile/fta.aspx>, Article XXI.

33. World Trade Law, "Free Trade Agreement between the EFTA States and the SACU States," http://www.worldtradelaw.net/fta/agreements/SACU_EFTA_FTA.pdf.

34. *Ibid.*, Article 30.

35. Committee of Members of Parliament of the EFTA Countries, "Environmental Policies and Labor Standards in PTAs," August 24, 2009, Brussels.

36. Committee of Members of Parliament of the EFTA Countries, "Environmental Policies and Labor Standards in PTAs," Ref. 1090382, March 18, 2009, Brussels, 3-4.

37. EFTA, <http://www.efta.int/eea/eea-agreement.aspx>, 5-6.

38. European Commission, Employment, Social Affairs, and Inclusion, "Free Movement of Workers," <http://ec.europa.eu/social/main.jsp?catId=458&langId=en>; "Equal Treatment," <http://ec.europa.eu/social/main.jsp?catId=462&langId=en>.

39. The European Community was founded as the European Economic Community on March 25, 1957; in 1993 it was renamed the European Union.

40. European Commission, Trade, "FTA Negotiations," http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf; Aaronson and Zimmerman (2007, 139).

41. European Union, "Partnership and Cooperation Agreements (PCAs)," http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm.

42. Bartels and other analysts have noted that Australia refused to accept a human rights clause in its trade agreement and thus, the EU and Australia were unable to negotiate a PTA.

43. European Union, "EC Regional Trade Agreements," http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_111588.pdf.

44. European Commission, "The Cotonou Agreement," http://ec.europa.eu/development/geographical/cotonouintro_en.cfm; European Commission, Trade, "Economic Partnerships," <http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/>.

45. EU, "Economic Partnerships."

46. European Commission, "An Overview of the Interim Agreements," http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142188.pdf; and, according to www.bilaterals.org as of 2009,

EU-ACP

subgroup

Status of agreement

- | | |
|----------------|---|
| Caribbean | <ul style="list-style-type: none"> • Full EPA initialed in December 2007 and signed in October 2008 (but not by Haiti) and approved by the European Parliament (March 2009). |
| Central Africa | <ul style="list-style-type: none"> • Interim EPA initialed (December 2007) and signed by Cameroon only (January 2009). • Seven countries have not initialed anything yet. |
| West Africa | <ul style="list-style-type: none"> • Interim EPA initialed (December 2007) and signed by Côte d'Ivoire (November 2008) and approved by the European Parliament (March 2009). • Interim EPA initialed by Ghana (December 2007). • Fourteen countries have not initialed anything yet. |
| East Africa | <ul style="list-style-type: none"> • Interim EPA initialed by Zimbabwe, the Seychelles, Mauritius, the Comoros, Madagascar, and Zambia (November-December 2007) and signed by Zimbabwe, the Seychelles, Mauritius, and Madagascar only (August 2009). |

- Interim EPA initialed by East African Community members Burundi, Kenya, Rwanda, Tanzania, and Uganda (November 2007).
 - Five countries have not initialed anything yet.
- Southern Africa
- Interim EPA initialed by Botswana, Lesotho, Namibia, Swaziland, and Mozambique (November–December 2007) and signed by Botswana, Lesotho, Swaziland, and Mozambique only (June 2009).
 - Angola has not initialed anything yet.
- Pacific
- Interim EPA initialed by Papua New Guinea and Fiji (November 2007) and signed by Papua New Guinea only (July 2009).
 - Thirteen countries have not initialed anything yet.

47. TradeMark Southern Africa, <http://www.trademarksa.org/node/485>; <http://ictsd.org/i/news/tni/57509/>; Forbes.com, “Africa–E.U. Economic Agreement Stalls,” <http://www.forbes.com/2010/08/11/eu-africa-epa-business-oxford-analytica.html>.

48. European Commission, *Official Journal of the European Community*, “Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part,” http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf.

49. The EPAs can be examined at <http://www.bilaterals.org/spip.php?rubrique17>.

50. *Ibid.* Canada has similar provisions.

51. European Commission, Trade, “European Competitiveness,” http://ec.europa.eu/trade/creating-opportunities/trade-topics/european-competitiveness/index_en.htm; European Commission, “Global Europe: Competing in the World,” <http://ec.europa.eu/trade/creating-opportunities/trade-topics/european-competitiveness/global-europe/>.

52. European Commission, Trade, “Overview of FTA and Other Trade Negotiations,” updated March 3, 2011, http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

53. European Commission, Trade, “Overview of FTA and Other Trade Negotiations.”

54. European Commission, “Free Trade Agreement between the European Community and Its Member States, of the One Part, and the Republic of Korea, of the Other Part,” http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145139.pdf.

55. On transparency, European Commission, Trade, http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145184.pdf; on the cultural protocol, http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145194.pdf.

56. Much of the text that follows is from Aaronson and Zimmerman (2007, 139–47).

57. European Commission, Trade, “Sustainability Impact Assessments,” <http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/>.

58. Human Rights Watch, Christian Solidarity Worldwide, and International Crisis Group, “No Trade Agreement for Turkmenistan–Joint Letter,” March 20, 2006, <http://hrw.org/english/docs/2006/03/20/turkme13040.htm> (accessed April 24, 2006).

59. EU, “Human Rights and Democracy in the World: Report on EU Action July 2008 to December 2009,” 2010, http://www.eeas.europa.eu/human_rights/docs/2010_hr_report_en.pdf.

60. European Commission, Communication from the European Commission to the Council and the European Parliament, “The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries,” COM(2001)252 final, May 8, 2001, Brussels.

61. For two views of “competitive liberalization,” see Evenett and Meier (2008) and Aaronson (2002).

62. USTR (2011); for Colombia, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta>; for Korea, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>; for Panama, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa>.

63. Public Law 107-210, August 6, 2002, Section 2102 (a) Trade Negotiating Objectives of the Bipartisan Trade Promotion Authority Act of 2002; USTR (2009).

64. “The President’s 2011 Trade Policy Agenda,” http://www.ustr.gov/webfm_send/2587.

65. USTR, “Trade Policy: A Level Playing Field for America’s Workers,” July 16, 2009, <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/july/trade-policy-level-playing-field-american-workers>.

66. USTR, “Guatemala Submission under CAFTA-DR,” <http://www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>; USTR, “USTR Kirk Addresses Workers in Pennsylvania on Obama Administration Enforcement of U.S. Trade Agreements,” http://www.ustr.gov/node/6046_4; USTR, “The 2010 National Trade Estimate Report: Key Elements,” <http://www.ustr.gov/about-us/press-office/fact-sheets/2010/march/-2010-national-trade-estimate-report-key-elements>.

67. Transparent, accountable governance can foster democracy, capitalism, and political stability. Thus, by promoting transparency, the rule of law, and political participation, policy makers can promote many human rights. See UNDP (2002), 2–4.

68. Bipartisan Trade Promotion Authority Act, Section 2102 (b) (5), (8).

69. *Ibid.*, Section 2102 (b) 6 (A).

70. U.S. communication on Article X of GATT 1994, G/C/W/384, June 7, 2002; Robert B. Zoellick, “Free Trade and the Hemispheric Hope,” Council of the Americas meeting, May 7, 2001, http://ctr.sice.oas.org/geograph/westernh/zoellick_3.pdf.

71. For example, Chapter 20 of the Australia–U.S. FTA, http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_20.html; Chapter 17 of the U.S.–Bahrain FTA; Section 19 of the Peru FTA, www.ustr.gov/Trade_Agreements/Bilateral.

72. Commission for Economic Cooperation of North America, “A Guide to Articles 14 and 15,” <http://www.ccc.org/Page.asp?PageID=122&ContentID=1388&SiteNodeID=210>.

73. According to President Bush, “open trade . . . spurs the process of economic and legal reform. And open trade reinforces the habits of liberty that sustain democracy over the long term.” Quoted in testimony by USTR Robert Zoellick to the Senate Finance Committee, “America’s Trade Policy Agenda,” March 5, 2003.

74. Robert B. Zoellick, “Global Trade and the Middle East: Reawakening a Vibrant Past,” World Economic Forum, Jordan, June 23, 2003; statement by Peter F. Algeier, Acting U.S. Trade Representative, before the Senate Finance Committee, April 13, 2005, 6–8. On Central America, see Robert B. Zoellick, “A Free Trade Boost for Our Hemisphere,” *Wall Street Journal*, November 17, 2003; Zoellick, “The Route From Miami to Economic Freedom,” *Financial Times*, December 9, 2003.

75. Interview with Mark Linscott, Assistant USTR for the Environment, and Jennifer Prescott, Deputy Assistant USTR for the Environment, August 1, 2006.

76. See Article 19.3 and 19.4 of the U.S.–Chile FTA, http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

77. Part of the agreement’s work program is to build capacity to promote public participation in environmental decision making. The agreement was negotiated by the Department of State; see Environmental Cooperation Agreement, February 1, 2005, <http://www.state.gov/g/oes/env/trade/caftacooperation/142688.htm>. Also see “U.S., Central America, Dominican Republic Sign Environment Pacts,” U.S. Department of State, <http://www.america.gov/st/washfile-english/2005/February/20050218133452GLnesnoM0.3828546.html>. The Environmental Affairs Council met for the first time on May 24, 2006.

78. On dispute settlement, see CAFTA-DR, Article 10.20. 3; “Communiqué of the Environmental Affairs Council of the Dominican Republic–Central America–United States Free Trade Agreement,” May 24,

2006, http://www.worldtradelaw.net/fta/agreements/CAFTADR_RelDoc_CommEnvAff.pdf.

79. Interview with Mark Linscott and Jennifer Prescott, Office of the USTR, August 2, 2006. For the Peru agreement, see www.ustr.gov/trade_agreements/bilateral/; for the draft Colombia FTA, see http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Draft_Text/Section_Index.html.

80. Chapter 19, Labor, in the Korea, Panama, Peru, and Colombia FTAs. See, for example, Chapter 19 in the U.S.-Korea FTA, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file934_12718.pdf; Article 20, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file852_12719.pdf.

81. USTR (2011, 149–51). “As part of increased engagement in 2010, Labor Affairs Council and labor subcommittee meetings, as provided for under the FTAs, were held with several FTA partners, including first-time meetings with Peru, Morocco, and Bahrain. (For additional information, see Chapter III.A.)”

82. “House Chairmen Warn USTR against Patent Changes in Doha Round,” *Inside U.S. Trade* (April 14, 2006), 7.

83. Press release, “Commerce Secretary Carlos Gutierrez Unveils Initiatives to Fight Intellectual Property Theft,” September 21, 2005, http://www.commerce.gov/opa/press/Secretary_Gutierrez/2005_Releases/September/09-21-05%20IPR%20initiatives.htm. Keyder (2005) has an interesting scholarly take on this issue.

84. Trade Promotion Authority Act of 2002, Section 2102, (4) (A) (B) (C).

85. See, for example, “Understandings Regarding Certain Public Health Measures,” Colombia, http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Draft_Text/Section_Index.html (accessed August 7, 2006).

86. Basically, free movement of skills entails the right to seek employment in any member state and the elimination of the need for work permits and permits of stay. See CARICOM, http://www.caricom.org/jsp/sin_gle_market/skill.jsp?menu=csme.

87. COMESA’s Integration Agenda also rests on the belief that the consolidation of democracy and the rule of law are the foundation stones for regional socioeconomic development and political stability.

88. Mercosur is incorporated into the Latin America Integration Association/Asociación Latinoamericana de Integración (LAIA/ALADI) legal regime, as Economic Complementarity Agreement 18. These agreements are open to accession by any LAIA/ALADI country.

89. See “Treaty Establishing a Common Market,” March 26, 1991, UN Doc. A/46/155 (1991), reprinted in 30 I.L.M. 1041 (1991).

90. For the full text of the Brazilian delegation’s speech, see <http://www.un.int/brazil/speech/00d-mercotel-human-rights-2610.htm>.

91. Memorandum of Understanding, http://www.sice.oas.org/Trade/CHL_CHN/CHL_CHN_e/Labor_e.asp.

92. The English version of the draft report is available at http://www.measwatch.org/autopage/show_page.php?t=5&s_id=3&d_id=7.

93. MCOT News, “PM Calls for More Public Participation in FTA Deals,” http://www.bilaterals.org/article.php3?id_article=953&var_recherche=public+information (accessed August 3, 2006). Meanwhile, the EPA is reviewing its public participation efforts.

94. USTR, “Joint Statement of the 2009 NAFTA Commission Meeting,” <http://www.ustr.gov/about-us/press-office/press-releases/2009/october/joint-statement-2009-nafta-commission-meeting>.

95. In a widely cited, albeit out-of-date, study, the Organisation for Economic Co-operation and Development (OECD) examined the relationship between freedom of association and trade and investment patterns and found that, the more successful is trade reform, the greater is respect for association rights. The authors concluded that freer trade does not lead industrialized countries to lower their standards, and higher standards do not jeopardize trade reforms (OECD 1996, 9, 105).

96. <http://ciri.binghamton.edu/>; <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:20388241~menuPK:665266~pagePK:64165401~piPK:64165026~theSitePK:469382,00.html>.

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