

Saint Louis University Public Law Review

Volume 28

Number 1 *The Changing Tide of Trade: The Social, Political and Environmental Implications of Regional Trade Agreements (Volume XXVIII, No. 1)*

Article 12

2008

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Recommended Citation

Pérez, Jorge (2008) "The Decay of Commercial Multilateralism in South America," *Saint Louis University Public Law Review*: Vol. 28 : No. 1 , Article 12.

Available at: <https://scholarship.law.slu.edu/plr/vol28/iss1/12>

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THE DECAY OF COMMERCIAL MULTILATERALISM IN SOUTH AMERICA

JORGE PÉREZ*

INTRODUCTION

Commercial multilateralism is losing spaces in South America to regional and bilateral agreements due to the lack of normative and empirical legitimacy of the World Trade Organization (WTO). This developing process is analyzed in the following article from the conceptual context of parts of the extensive and rich work by Julia Barragán. Her work also contributes with tools for acknowledging the strength of formal and informal institutions, value categorization and the relevance of normative goals in the search of better development options for South America. In the content, institutions are considered, as well as nominal and underlying dimensions, as the game rules which in negotiation define the commercial interaction structure; besides, they offer a causal link with the limits of the possible universe of expected utilities by the actors involved, consecration of acknowledged values and defining the goals that may establish a clean game in free trade agreements.

Most countries of South America have begun negotiation, subscription and operation processes for commercial agreements. Most of these negotiations are bilateral and, to a lesser degree, regional in scope.¹ These agreements start

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1. In the process of structuring trade agreements in South America, the following are considered important: (A) Sub-regional Processes: Andean Community (CAN), Southern Common Market (MERCOSUR), Caribbean Community (CARICOM), Bolivarian Alternative for the Americas (ALBA), Union of South American Nations (UNASUR), MERCOSUR-Bolivia and MERCOSUR-Chile; (B) Bilateral Free Trade Agreements: Chile-Colombia, Chile-Perú, Chile-Ecuador, Chile-México and México-Uruguay; (C) CAN-MERCOSUR Convergence: MERCOSUR-Perú and MERCOSUR-Colombia, Ecuador, Venezuela; (D) Selective Agreements: Argentina-Brazil, Argentina-México, Brasil-México, Brasil-Uruguay, Cuba-MERCOSUR, Cuba-Venezuela, MERCOSUR-México and México-Perú; (E) Other Agreements: Argentina-Bolivia-Brasil-Paraguay-Uruguay and Argentina-Ecuador; (F) Integration with other countries and areas of Latin America: Chile-Guatemala and Colombia-Central America; (G)

out with principles that intend to establish an interactive structure allowing for the possibility of establishing dynamics for exchanging goods and services that benefit the parties equally.² Although many free trade agreements have been signed, the WTO's multilateral normative space has been losing its influence in South America, which is an additional sign of business multilateralism decadence.³

Many causes could be established to explain the decay of the multilateral trade regulatory frame's decadence. Nevertheless, this article intends to point out the weaknesses in the normative legitimacy and application of the rules negotiated and approved by the WTO. This analysis⁴ is based on considerations of the strength of the transcendent force of the institutions as the rules that required an axiological base to support their normative legitimacy and the efficiency in the achievement of their goals in order to recognize their empirical legitimacy. Additionally, the content of this article establishes some nominal and real characteristics of the values, goals and ideas that signal the structure and properties of the formality of the instruments as well as the

Extraregional Negotiations: (1) Andean Community: Andean Community-European Union, Colombia and Perú-AELC, Colombia and Perú-Canada, Colombia-U.S. v. Perú-China, Perú-U.S. and Perú-Singapore; (2) MERCOSUR: MERCOSUR-Cooperation Council for the Arab States of the Gulf, MERCOSUR-South Korea, MERCOSUR-Israel, MERCOSUR-SACU and MERCOSUR-European Union; (3) Chile: Chile-Australia, Chile-China, Chile-Japan, Chile-Malaysia and Chile-Turkey; and (4) México: México-South Korea. *See generally* Latin American Integration Association (ALADI), *Informe Del Secretario General Sobre La Evolución Del Proceso De Integración Regional Durante el Año 2007* [Secretary General's Report on the Process of Regional Integration During the Year 2007], ALADI/SEC/di 2136, Mar. 7, 2008, available at <http://www.aladi.org/nsfaladi/estudios.nsf/inicio2004>.

2. *See* JOSEPH E. STIGLITZ & ANDREW CHARLTON, *FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT* 12, 19, 25 (2005) (explaining how free trade and its improvements in social well-being bases itself on the absolute advantage as articulated by Adam Smith (1776), comparative advantage as articulated by David Ricardo (1816), and Paul Samuelson's arguments on efficiency (1938)).

3. *See* World Trade Organization, *Regional Trade Agreements*, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Sept. 22, 2008) ("Regional Trade Agreements (RTAs) have become in recent years a very prominent feature of the Multilateral Trading System (MTS). The surge in RTAs has continued unabated since the early 1990s. Some 380 RTAs have been notified to the GATT/WTO up to July 2007. Of these, 300 RTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 22 under the Enabling Clause; and 58 under Article V of the GATS. At that same date, 205 agreements were in force. If we take into account RTAs which are in force but have not been notified, those signed but not yet in force, those currently being negotiated, and those in the proposal stage, we arrive at a figure of close to 400 RTAs which are scheduled to be implemented by 2010. Of these RTAs, free trade agreements (FTAs) and partial scope agreements account for over 90%, while customs unions account for less than 10%.")

4. The approach of the study is not limited and considers interdisciplinary legal analysis. *See* Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 777-78 (1987).

underlying net in the free trade agreements. Finally, many causal relationships are established between the structures of the game that define the rules in the agreements and their economical, social, environmental and political impacts.

The institution's, i.e., the free trade agreement's, strong economic performance is based on reducing the uncertainty by establishing a stable structure, but not necessarily an efficient one of equilibrium for the interaction of the parties who may participate in a common space. However, the relative certainty and reduction of trade costs given by the institutions does not imply, in any way, a symmetry or equality of conditions for the parties involved in its negotiation or application.⁵ The institutions may determine the opportunities between two societies and, as they evolve, influence the distribution of utilities of these participants in the transnational social game. Thus, the participants' utilities are directly proportional to the institutional framework that rules them.

The decreases in uncertainty levels and transaction costs that may lead to a free trade agreement do not apply only in the formative negotiation of rules. They also apply in the application of deontological limits on the actions developed under such agreements, the management of conflicts or transgressions, the control and sanctions, and the appropriate design of a body of incentives and fixing of values that the constructors of the rules may share. In the long term, those factors shall define the normative efficiency of the institutional agreements accomplished.⁶ In general, "institutions are the rules of the game in a society" that shape human, economic and social interaction.⁷ Ultimately, the institutions limit the range of choices for the individuals and define the form of the game. "Institutions are the rules of the game in a society or, more formally, are humanly devised constraints that shape human interaction. In consequence, they structure incentives in the human exchange, whether political, social or economic."⁸

When a free trade agreement is approved by the states and is tied to the current system, it not only becomes the institution that defines the rules of the game among the participant states, but it also acquires a coercive force that becomes mandatory for the regulated parties even when it does not refer to a common fundamental rule. Nevertheless, despite the mandatory fulfillment of the formal requisites by the parties, the rules of the game do not justify the

5. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 29 (1960).

6. See Julia Barragán, *Eficacia Normativa* [Effective Norms], in TEMAS FUNDAMENTALES DE ANÁLISIS ECONÓMICO DEL DERECHO 5-16 (Venezuelan Law & Economics Association 1997).

7. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

8. *Id.*

normative validity or empirical efficiency of the established norms.⁹ In fact, when a rule is imposed in the commercial interchange exchange between two parties or countries, it is based on the pretense of normative correction—i.e., it is supposed that its value base has a hierarchy by virtue of its particular correction.¹⁰ This sphere of axiological analysis is of special consideration in the study of commercial agreements because it goes beyond the formal reasons and introduces the transcendence of alternative systems of values that may establish great differences in the tendencies and results.

Besides the required coherence in the legal structure of the countries involved, the established rules must harmonize with the moral principles recognized by the parties.¹¹ Without such harmony, these agreements shall not have normative legitimacy and shall hardly accomplish empirical legitimacy. The decision of assuming a commercial agreement as mandatory necessarily implies an assumption of a system of values, which in many cases is not expressed *prima facie* because the system is not discussed openly, the values are considered as unquestionable by the participants or the values are confused with the facts. Nevertheless, the established norms shall not have their corrective function without a common system of values.¹² Whichever axiological system is adopted, it carries a process of comparison between the alternative values using ethical categories to choose the desired system of values, based on the reasons derived by the power of the parties or their experiences.¹³ Additionally, the decision that elevates one system of values

9. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 273–74 (1999) (considers that values emerge in four ways: (1) reflection, (2) imitating conventions, (3) public discussion, and (d) evolutionary solutions).

10. Barragán, *supra* note 6.

11. Julia Barragán, *Problemas de Formación de las Decisiones Normativas en Escenarios de Culturas Diversas* [Issues in Regulatory Decision Making Between Diverse Cultures], 13 RELEA 81–100 (Centro de Investigaciones Postdoctorales 2001).

12. See JULIA BARRAGÁN, *CÓMO SE HACEN LAS LEYES* [How Laws are Made] 78 (1994) (“Without any doubt, in order for the law to accomplish efficiently its regulatory function of social behavior, even in a situation of cultural diversity, must go beyond the positivist focus and accept that the law is a vehicle of an expression of values and directives of behavior related directly to what every society is and aspires to be.” (English translation)).

13. John Harsanyi, *Una Teoría de Valores Prudenciales y una Teoría de la Moralidad Utilitarista de la Regla* [A Theory of Prudential Values and a Theory of the Rule of Utilitarian Morality], 6 TELOS: REVISTA IBEROAMERICANA DE ESTUDIOS UTILITARISTAS 59, 67 (Julia Barragán trans., 1997) (“Consequently, the values and moral norms considered superior are those which produce the maximum benefit to society viewed as a whole, and judged from a point of view of equality and impartiality. In previous publications I tried to demonstrate that impartiality in the considerations of social well being can be measured by its function as social utility, which is defined as the mathematical measure of functional utility of all individuals in society. In that way, the basic principle of the utilitarian theory can also be expressed by affirming that the *criterio básico racional* evaluates our moral norms, moral values, and morality as a whole and its social utility.” (English translation)).

over another requires clarity over the principles of theoretical reason as well as the practical reasons.¹⁴ The election of the system of values may be established only by arbitrary criteria of value, which in a trade agreement is often inclined toward the party with more negotiating power. However, the criteria may be based in a rational election involving theoretical and practical elements, and it may lead to equilibrated utilities for the parties. The comparison of values effectuated in a regional or multilateral agreement shall be adapted to its specific context (it is not the same reality for the northern countries as it is for the southern countries) in order to establish the basic conditions of priority and order among the values that may or may not conflict. In this way the proper information is necessary in relation to the specific relative weight of the societies involved.¹⁵ On the value structures of trade agreements, the fact that there is not a universal order for establishing values makes it necessary to value these principles to establish a hierarchy under certain conditions.¹⁶ Ultimately, the sum of values produced by the negotiation is reflected in the established norms.

On the other side, the legitimacy of the agreements involves the understanding of the ends. A bilateral or regional agreement may have several alternative objectives. It may be limited to establishing rules for commercial interaction, extended as an instrument of geopolitical or geostrategic control or as a pretense to solve social problems of grave political incidence.

The reason for drafting a commercial agreement is mostly because a preceding calculus has detected some problem to be solved and the agreement offers a means to achieve a desired objective. If it is assumed that every rule in an agreement intends to solve a problem, expressed or not, it is accepted that one of the main phases in the negotiation of an agreement is the definition of goals. These goals are limited by the necessity of contribution to the social well-being.¹⁷ The difficulty of building common goals for two or more states

14. See generally IMMANUEL KANT, *NUEVA CRÍTICA DE LA RAZÓN PURA* [Critique of Practical Reason] (1984).

15. Clifford S. Russell et al., *Searching for Evidence of Alternative Preferences, Public As Opposed to Private* 2–3 (Vanderbilt Univ. Dep't of Econ., Working Paper No. 01-W01, 2001), available at <http://www.vanderbilt.edu/econ/wparchive/working01.html> (presenting an empirical study in Denmark and the United States, that supports the existence of preference for the public instead of private, highlighting thinkers such as Harsanyi, Arrow, Sen, Kolm, Becker and Pasek, and cites critics to the principle of utilities theory).

16. SEN, *supra* note 9, at 269 (discussing the efficient provisions of public goods, where it is necessary to consider not only state action and public provision, but also social values).

17. See Julia Barragán, *La Función de Bienestar Colectivo Como Decisión Racional* [The Function of Collective Well-Being as a Rational Decision], in 9 DOXA 91, 92, 102, 109, 111, 116 (Centro de Estudios Constitucionales, 1991) (discussing how, in attempting to harmonize individual and social interests, Harsanyi's proposal contributes to overcome confusions on general well-being generated by KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); JAMES GRIFFIN, *WELL-BEING: IT'S*

involved in an agreement becomes more complicated when the time comes to compare value appreciations based only on the negotiating power of the parties and not by a normative authority as it happens in the interior of normative systems. It may be accepted that the decision related to the goals is an act of political will that it is not based only on formal requirements but goes beyond the spaces of rational negotiation¹⁸ or adaptability.¹⁹ For those negotiations to be considered rational,²⁰ the actors necessarily must be able to order their preferences coherently, value them and, at the same time, produce an interchange of utilities with their counterparts on the basis that there is a maximum benefit that is compatible with the expected benefits of the other. The criteria for evaluating the norms of an agreement in relation to the objectives idealized (i.e., the evaluation of its efficiency) leads to a determination of the empirical legitimacy of the established rule to regulate trade exchange. The follow-up of efficiency requires monitoring the norms in their ethical, logic-linguistic and pragmatic dimensions.²¹ Simultaneously, the three dimensions have relevant social, environmental and political aspects in prospective sceneries.

To analyze (ex-post), to prospect (ex-ante) or to monitor (during) a commercial agreement is a complex task that may integrate theoretical and methodological references of diverse disciplines where the paradigmatic concept of efficiency is introduced.²² To warrant the efficiency of an agreement requires more than just formal requirements. It is necessary to investigate the agreement's legitimacy and adaptability to the environment. To determine if the agreements comply with the expected goals, one must determine if the normative base is preserved. The variations of empirical

MEANING, MEASUREMENT, AND MORAL IMPORTANCE (1986)); JOHN RAWLS, *A THEORY OF JUSTICE* (The Belknap Press of Harvard University Press 1999) (1971)).

18. FRANCIS FUKUYAMA, *LA CONFIANZA* [Confidence] 56 (1998) (Expressly about the diversity of rationalities, "[modern economists have a tendency to identify rational objectives with the maximization of the utility, generally understood as the consumer's greater benefit. In this aspect, various traditional cultures (including the western traditional culture) are irrational or simply irrational. . . . Only a considerable intellectual arrogance is sufficient to believe that only your own economic objectives and be considered rational in the strict sense of the term.]" English translation)). See also ERASMO DE ROTTERDAM, *ELOGIO DE LA LOCURA* [Erasmus of Rotterdam, *In Praise of Folly*] (Rogelio Carvajal Dávila, ed., 2001) (highlighting in his work that the world is a theatre in which madness has the principal paper, even though one ought to be able to find happiness in the world, and the madness praises itself for the trifles it causes men to commit).

19. See ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION* 4, 47 (1997).

20. SEN, *supra* note 9, at 249. According to Sen, using reasoning to identify and promote better societies has been used in the past and continues to be used.

21. BARRAGÁN, *supra* note 12, at 85–86.

22. See Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817, 817 (1989).

validity are associated with the adaptability of the agreement to its directed social world, which may be related to the agreement per se or may just be one of many other factors that may be related with the beliefs or behaviors of the regulated subjects.

When the agreements separate themselves from their people's reality, they lose legitimacy. Even when an agreement is approved with all the legal requisites by the participant states, the normative and empirical legitimacy is a matter of fact and may be absent from a commercial agreement. Thus, it is necessary to analyze the agreements present in South America by comparing their expected goals with the goals they have achieved or may achieve while keeping in mind the tension they suffer when a conflict is present.²³

LEGITIMACY OF THE WTO

The intense economic relationships brought about through the competing regulatory capacities of the state participants in the international concert produced the WTO as a normative space based on institutional arrangements of multilateral character.²⁴ The main characteristic of the WTO is the supremacy of the states with the negotiating capacity to establish the values each supports and to achieve the goals that legitimize the organization normatively and empirically. Pre-normative times especially define the interaction structure among states involved in negotiations. The divergence of axiological backgrounds succumbs under the imposition of the strongest parties, which push away the possibility of solutions searching for equilibriums between the parties involved and deny the possibility of derivative solutions. According to Julia Barragán, "the games of negotiation and the confrontation happen continuously in the elaboration of the normative space correspondent with multilateral economic relations, thus it shall be naïve to calculate the possible results of the first if the second are not defined."²⁵

The GATT, as a predecessor instrument, has suffered a transformation from an intergovernmental agreement to a WTO supranational incipient regime that has generated diverse impacts, especially in the development politics of southern countries. In its trajectory, the normative space contained in the WTO has maintained privileges that weaken the confidence in the multilateral system, whether by maintaining privileges prior to the agreements, failing to apply norms in some countries, safeguarding interests in specific sectors, such

23. See generally Julia Barragán, *El Costo Social de las Autoexcepciones* [The Social Cost of Automatic Exceptions], 6 TELOS: REVISTA IBEROAMERICANA DE ESTUDIOS UTILITARISTAS 83 (1997).

24. See Julia Barragán, *La Construcción del Espacio Normativo de las Relaciones Económicas Multilaterales* [The Building of a Normative Space in Multilateral Economic Relations], OMC 13 (Venezuelan Law and Economics Association 2000).

25. *Id.* at 17.

as agriculture and textiles, and imposing subsidies and technical barriers by normalization.²⁶ The established practice of *side agreements* created gray areas that allowed for the violation of obligations.²⁷ Additionally, the rounds maintained a special interest in industrial products and the mobility of capital and services important for the North, and they simultaneously built barriers for strong sectors in the countries of the South, which led the southern countries to believe that they have nothing to win in a multilateral forum.²⁸

On the other hand, with the growth of globalization, the strong transnational players sponsor general rules that restrict the intervention of states in the construction of capacities to participate in international markets, creating the idea that governmental intervention creates an *unfair* advantage. Therefore, the strong nations put pressure on politics and instruments by the unification of thought on the basis that it is the best practice from the North's point of view. "The range of the multilateral system and the frontier of commercial politics expanded with topics previously contained by politics of development in general, with the characteristic of pretending to limit the capacity of governments to modify the pattern of comparative advantages and commercial flows."²⁹

Additionally, some countries in the South obtained positive results in some sectors, especially the Asian countries and South American countries like Brazil, Chile or Argentina, which attracted public attention and posed a threat to the northern countries.³⁰ Simultaneously, from 1980 to 1996, following the so-called *Washington Consensus*, the northern countries started to divulge the

26. Some call it the grandfather clause and a waiver to escape the rules.

27. Laura Rojas, *Políticas de Comercio e Industria después de la Ronda de Uruguay* [Policies of Commerce and Industry After the Uruguay Round], OMC 114 (Venezuelan Law and Economics Association 2000).

28. Elements of discomfort within the game structure caused northern countries to accept a special treaty different from the southern countries, but through the Non-Reciprocal Clause (GATT, Part IV, 1965) and the Enabling Clause (GATT, 1975), those treaties affected only unproductive sectors in the South.

29. Rojas, *supra* note 27, at 117.

30. Paul Krugman, *Does Third World Growth Hurt First World Prosperity?*, HARVARD BUS. REV., July–Aug. 1994, at 113–14 ("These new fears are exemplified in a letter circulated early this year by Klaus Schwab, president of the World Economic Forum, which hosts the famous Davos conferences. Schwab asked a large number of people to provide input for a document he had been asked to prepare for UN secretary general Boutros Boutros-Ghali, entitled 'Redefining the Basic Assumptions of Mankind.' To indicate what he had in mind, Schwab offered a sample redefinition. Traditionally, he wrote, the world was divided into rich countries with high productivity and high wages and poor countries with low productivity and low wages. But now, he noted, some countries combine high productivity with low wages. The growing presence of those countries in world markets is leading, Schwab argued, to a 'massive redeployment of productive assets,' which is making it impossible for advanced nations to maintain their standards of living. In other words, competition from the emerging economies of the Third World has become a threat, perhaps *the* threat, to the economies of the First World.").

thesis of the necessity to impose market rules on the South, forgetting that they needed to develop the markets of the South first. The need to level the playing field produced the application of a reverse, special and *differential treatment* that contained the devastating idea of imposing major disciplines in the South that restricted the development possibilities for fear of the South.

According to the experience, it is the contradiction between the nominal speech of trade liberalization and an underlying reality regarding the adequacy of the institutional legal structure of the world economy (supported collaterally by the International Monetary Fund and the World Bank) that confirms the stronger northern nations' intention of implanting a supranational order restricting the growth possibilities of South America.

The negotiation, formalization and application of WTO rules have been assumed as a game that has structured a zero-sum scenario and not as a convergence space that helps define the rules regarding symmetry toward interests of the parties involved.³¹

The maintaining of phases in the establishment of rules³² in the real structure of an asymmetric confrontation game and the duality of a nominal speech have delegitimized the normative and pragmatic influence and the benefits that the WTO may carry to the potentiality of resources in South America.³³ The WTO, by being far away from the functions of multilateral

31. According to Paul Krugman, literature has divulged an erroneous concept of international trade game in a series of books that do not follow scientific criteria of political economics. Paul Krugman, *Competitiveness: A Dangerous Obsession*, FOREIGN AFF., Mar./Apr. 1994, at 28 (citing WILLIAM S. DIETRICH, IN THE SHADOW OF THE RISING SUN: THE POLITICAL ROOTS OF AMERICAN ECONOMIC DECLINE (1991); JEFFREY E. GARTEN, A COLD PEACE: AMERICA, JAPAN, GERMANY, AND THE STRUGGLE FOR SUPREMACY (1992); EDWARD N. LUTTWAK, THE ENDANGERED AMERICAN DREAM: HOW TO STOP THE UNITED STATES FROM BECOMING A THIRD WORLD COUNTRY AND HOW TO WIN THE GEO-ECONOMIC STRUGGLE FOR INDUSTRIAL SUPREMACY (1993); IRA C. MAGAZINER & MARK PATINKIN, THE SILENT WAR: INSIDE THE GLOBAL BUSINESS BATTLES SHAPING AMERICA'S FUTURE (Vintage Books 1990); IRA C. MAGAZINER & ROBERT B. REICH, MINDING AMERICA'S BUSINESS: THE DECLINE AND RISE OF THE AMERICAN ECONOMY (Vintage Books 1983); KEVIN P. PHILLIPS, STAYING ON TOP: THE BUSINESS CASE FOR NATIONAL INDUSTRIAL STRATEGY (1984); CLYDE V. PRESTOWITZ, JR., TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD (1988); WAYNE SANDHOLTZ ET AL., THE HIGHEST STAKES: THE ECONOMIC FOUNDATIONS OF THE NEXT SECURITY SYSTEM (1992)); LESTER C. THUROW, HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE, AND AMERICA (1992); LAURA D'ANDREA TYSON, WHO'S BASHING WHOM? TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES (1993).

32. For an analysis on the steps of the normative formation process (pre-normative, normative and post-normative), see BARRAGÁN, *supra* note 12.

33. South America has a territory of 17.870.218 km², which equals 12% of the global area; a population greater than 377 million people, which equals 6% of the world's population; and important reserves of natural resources with more than 337 MMBLs of proven oil reserves, which includes extra-heavy oil, more than 254BPC of gas, 27% of the world's freshwater reserves, and important biodiversity.

normative solutions in South America,³⁴ has incentivized the search for alternative ways through regional and bilateral commercial agreements.

From another point of view, the exclusive benefits for social groups directly related to products in international markets originated with the concentration of utilities in a few local areas with the protection of the WTO.³⁵ With the exception of China, poverty has increased in the last fifteen years of the 20th century and this new 21st century. Out of the 6.5 billion people in the world, around fifty percent live in poverty.³⁶ According to World Bank statistics, 3.3 billion people live in rural areas.³⁷ One billion people live on less than one dollar per day and are unable to meet their basic needs. Of those one billion people, 850 million live in rural areas and depend on agriculture for their survival.³⁸ Another example of contradiction of speech that maintains the northern countries is presented in the grave problem that results in South American people emigrating toward Organisation for Economic Co-Operation and Development (OECD) countries.³⁹

In South America the normative space generated by the WTO also has loose space with bilateral and regional instruments that replace the international regulatory frame to secondary levels as a response to the

34. However, exports have increased (from \$50 billion to more than \$300 billion), as have imports (from \$100 billion to more than \$200 billion) from 1994–2005. South America's participation in world trade has been declining consistently from 1980 to 2001 when its participation equaled 20%. Latin American Integration Association, Statistics 2001/Analysis Boon Allen.

35. THEOTONIO DOS SANTOS, IMPERIALISMO Y DEPENDENCIA [Imperialism and Dependence] 307–09 (1986) (Santos discusses that the unit we define as a historical situation shapes a certain structure of the global economy and promotes economic development in some countries over others. In addition, the unit determines the possibilities of developing domestic economies, constituted as the economic and social realities that give the necessary linkage between the interests of hegemonic centers and dominant interests in the subsidiaries. The “external” is non-domination by practical principle. “It is only possible when the domination found support in national sectors that benefit from it.”).

36. UNDERSTANDING POVERTY xiii (Abhijit Vinayak Banerjee et al. eds., 2006). The authors base their findings on a \$2 poverty line.

37. See WORLD BANK INDEPENDENT EVALUATION GROUP, WATER MANAGEMENT IN AGRICULTURE: TEN YEARS OF WORLD BANK ASSISTANCE, 1994–2004 59 (2006).

38. According to OECD, more than 200 million people in Latin America are living in poverty. See Organisation for Economic Co-Operation and Development, *Latin American Economic Outlook 2008* 14 (2007), available at http://www.oecd.org/document/40/0,3343,en_2649_33973_38789800_1_1_1_1,00.html.

39. Asymmetry can be seen in the rules imposed by the North. The European Union Return Directive is one example where there is present a tit for tat dynamic, or eye for an eye, tooth for a tooth of the Old Testament. The European Parliament has voted 369 in favor, 197 against and 106 abstentions for the norms of repatriation of immigrants.

historical tendency to keep intraregional trade at low levels.⁴⁰ The turn of South America from multilateral commerce toward bilateral agreements is based on the hope of finding a way to spur economical, social and political development, which is based on the belief that these agreements may help to increase the access of goods and services, increase local productivity, decrease technology costs and create an equilibrium environment that allows peaceful living.

Perhaps the greatest divergence between normative legitimacy and its empirical approximation⁴¹ is the contradiction between the values supporting the WTO and the reality of the behavior of its strong actors. Trade liberalization is one of the WTO's main principles. There is, however, a contradiction between the organization's values and the facts, mainly in agricultural subsidies. From 1986 to 1988, the sector subsidies constituted fifty-one percent of total agricultural production of OECD. In 2002, they were more than \$300 million, which was forty-eight percent of production.⁴² In addition, the barriers to entry present another reason to question the legitimacy of the WTO, as they are four times higher in the northern countries than in the southern countries.⁴³ Finally, do not forget the importance of subtle taxation barriers.⁴⁴

40. Since World War II, the primary objectives left behind the development of neighboring countries. This is a reality that may be overcome with the new regional coalitions. In the case of Mercado Común del Sur (MERCOSUR), there is only 25% in intraregional trade. The situation is worse for Comunidad Andina, with only 10% of intraregional trade. WORLD BANK, *WORLD DEVELOPMENT INDICATORS* (2002).

41. *See generally* JULIA BARRAGÁN, *LA CIENCIA Y LOS CRITERIOS DE VERDAD EN LA METODOLOGÍA DE LA INVESTIGACIÓN EMPÍRICA* [Science and the Criteria of Truth in Empirical Research Methodology] (1975).

42. *See* JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 85 (2006) ("The average European cow gets a subsidy of \$2 a day (the World Bank measure of poverty); more than half of the people in the developing world live on less than that. It appears that it is better to be a cow in Europe than to be a poor person in a developing country.").

43. After implementation of the Uruguay Round, the average OECD tax on imports from developer countries was four times higher than exports with OECD origin. Sam Laird, *Market Access Issues and the WTO: An Overview*, in *DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK* 97, 101–02 (2002).

44. *See* STIGLITZ & CHARLTON *supra* note 2, at 174–77, 235.

FORMAL AND UNDERLYING FUNDAMENTALS

Free trade agreements are based on formal and informal institutions,⁴⁵ similar to the two faces of the Roman god *Janus*—the formal institutions correspond with *Jano Patulsio* and the informal ones with *Jano Clusivio*.⁴⁶ As the god *Janus* has a double function, formal institutions converge with logical-linguistic structures that appear in texts on the front door, along with an underlying system of informal institutions that include knowledge, aptitudes and beliefs that appear on the back door.

According to Julia Barragán, the search for efficiency in ethical solutions without the proper functioning of the underlying set of rules of normative ethics runs the risk of constituting another legal system.⁴⁷ This situation becomes even more complex in the case of the free trade agreement, due to the involvement of nations with different backgrounds and situations. Law, as a regulating instrument of social relations, often encounters the fact that inside the limits that define its application, several cultural diversities coexist.⁴⁸ The formal components of free trade agreements contain values and goals derived from the parties' accepted beliefs, which are maintained by a value of imminent and transcendental truth.⁴⁹ These values and goals are mostly imposed by the dominant negotiating culture in the processes of negotiation that gets to define the structure of the game as a solution for the difficulty derived from heterogeneity that characterizes the symbolic diversities of each nation involved. The base component of the formality of most free trade agreements is the consideration that the behavior of regulated subjects and regulating subjects is not strategic. This is to suppose that the subject's decisions do not consider the actions or reactions of others and that competence is perfect.⁵⁰

45. See NORTH, *supra* note 7, at 36 ("In the modern Western world, we think of life and the economy as being ordered by formal laws and property rights. Yet formal rules, in even the most developed economy, make up a small (although very important) part of the sum of constraints that shape choices; a moment's reflection should suggest to us the pervasiveness of informal constraints. In our daily interaction with others, whether within the family, in external social relations, or in business activities, the governing structure is overwhelmingly defined by codes of conduct, norms of behavior, and conventions. Underlying these informal constraints are formal rules, but these are seldom the obvious and immediate source of choice in daily interactions.").

46. In Rome, *patulsius* is related to the face of the god on the front door of his temple in Roman forum, and *clusivius* the opposite face.

47. See generally Julia Barragán, *La Realizabilidad de los Sistemas Éticos* [Realization of Ethic Systems], 4 TELOS: CUADernos DE COMUNICACIÓN, TECNOLOGÍA Y SOCIEDAD (1995).

48. See JULIA BARRAGÁN & ARMANDO RODRÍGUEZ, LA PLURALIDAD DE LOS UNIVERSOS CULTURALES Y LA UNIDAD DEL DERECHO [PLURALITY OF CULTURAL UNIVERSES AND LAW] 141–76 (1993).

49. J. HESSEN, TEORÍA DE CONOCIMIENTO [Knowledge Theory] 115–19 (1981).

50. Julia Barragán, *El Juego de la Competencia*, in LOS DILEMAS DE LA COMPETENCIA [Problems of Competence] 20 (1999) ("The model of equilibrium, both individually and market,

A market of perfect competence may be defined by four conditions, which warrant that economic agents operate without any consciousness of strategic interaction among themselves.⁵¹ The first condition requires the number of buyers and sellers to be big enough to inhibit an operator to influence the price.⁵² The second condition prohibits the establishment of barriers for entrance of potential buyers or sellers.⁵³ The third condition requires the goods to be “perfectly homogeneous,” and the fourth warrants that all agents have all the information on price distributions announced by the sellers.⁵⁴

Additionally, the formality supposes the existence of a cooperative game⁵⁵ with transference of utilities, where a solution is a coalition and share of payments proposal that warrants stability (i.e., none of the participants is interested in breaking the agreement). In cooperative games, the possibility of some players arriving at mandatory agreements is present, so the negotiations for those rules defining the mandatory agreement restrict the utilities that each party of the coalition may obtain from the normative solution. In free trade agreements, if the idea is that states believe the future is important to them and if all states’ abilities to produce events is expanded, then cooperation is possible even in a world of selfish states with no central authority.⁵⁶

Social sciences have explored the problems of cooperation from diverse perspectives. Even if the rational idea of maximizing the parties’ utilities is accepted, it may be found that for some players it is worth cooperating with other players when the game is repeated because they will then possess information regarding previous actions by the small number of players. It is difficult to sustain cooperation when the game is not repeated (or when the game is final), when there is not enough information on the players or when the number of players is large. In general, cooperative behavior is observed when individuals act repeatedly, the parties have enough information and the group is characterized by few participants.⁵⁷

The correlation between behavior intended to maximize wealth and the results of that behavior has constituted a key factor in the evolution of the game theory. The classic prisoner dilemma suggests a discouraging perspective on cooperation and coordination among actors and offers a static nature

generally acknowledges a “model of perfect competence” as the core framework for interpretation of the rules governing competence. The assumptions on which the basic model is built are: (1) both bidders are plaintiff price acceptors; (2) the market entry is free; and (3) there is a non-strategic behavior of the bidders.” (English translation)).

51. JEAN J. GABSZEWICZ, *STRATEGIC INTERACTION AND MARKETS* 1 (1999).

52. *Id.*

53. *Id.*

54. *Id.*

55. JOAQUIN PEREZ ET AL., *TEORÍA DE JUEGOS* [Game Theory] 48 (2004).

56. *See* ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* 174 (1984).

57. *Id.* at 130–31.

because the game is only played once. However, the reality of interaction among players shows interaction with more than one move. In a repeated game of the prisoner dilemma, there is no dominant strategy. Besides, the dilemma is diminished when it is accepted that the established regulatory structure does not offer a better option than betrayal.

Norms offer a powerful mechanism to regulate conflict or cooperation among actors. The most common definitions of norms are based on expectations, values and behavior. Definitions based on expectations or values are preferred by the study of norms, for they exist in a determined interaction. This perspective may show the actors' beliefs and values, but observing real behavior is more difficult. Robert Axelrod offers a definition that includes the different perspectives: "A norm exists in a determined social situation in the way individuals act in a certain way and are frequently punished when they act differently."⁵⁸ According to this definition, a norm is determined by how often a behavior is repeated and how an actor is punished by not behaving in such a way.

An evolutionary approximation of norm dynamics is based in the pragmatic principle that something good for a player has more possibilities of being repeated, while something that offers poor results is discarded.⁵⁹ Additionally, there is no need for rational calculus to identify the best strategy. Instead, according to Axelrod, the analysis is based on the idea that effective strategies have more chances of being repeated than ineffective ones.⁶⁰ Besides, this approximation allows the apparition of new strategies as "random mutations of old strategies."⁶¹ The players learn by trial and error, maintaining effective strategies and altering the ones offering poorer results.⁶² Lastly, on the influence of norms, players watch each other and players with poorer results tend to imitate the strategies of players with better results. In any case, it is not necessary to suppose that an actor is rational and comprehends all implications of a strategy.

The formality of free trade agreements requires mechanisms to maintain the approved norms because norms offer legal security. The agreements become the formalization of certain rules that search for the achievement of a number of objectives through the instrument. According to this principle, it is important to establish some mechanisms to support rules, which is the previous requirement for game cooperation, according to the ideas of Robert Axelrod on metanorms, predomination, internalization and membership.⁶³

58. AXELROD, *supra* note 19, at 47.

59. *Id.*

60. *Id.* at 47–48.

61. AXELROD, *supra* note 56, at 130–31.

62. AXELROD, *supra* note 19, at 48.

63. *Id.* at 65.

The existence of a formal meta-norm may be an effective way to execute a norm and protect it once it is established. By relating vengeance with punishment, the meta-norm offers an enforcement mechanism. In summary, a meta-norm is one that punishes those individuals who do not care if others obey the norms.

Another mechanism to sustain the norm is the dominance of one group over another. Competence between two groups may be modeled, assuming that desertions of a player only hurt the members of the other group and thus may only be punished by the other group. An illustrative example may be the case of a big power interacting with smaller nations. For example, when the United States interacts with a South American nation, the United States not only has a favorable position in a determined bilateral interaction, but they also may have more simultaneous interactions than other nations. Thus, its behavior has a stronger impact on the development of rules in South American countries.

The greatest objective of a free trade agreement is achieving the internalization of the established norms. Frequently, norms are internalized, which means that breaking them is psychologically hurtful even when material benefits are positive. In terms of a norm game, internalization means that the temptation of breaking the norms generates negative results instead of positive ones. If the parties in a bilateral agreement internalize the norms, there is no incentive for breaking them and the norm is stable.⁶⁴

Voluntary membership into a group that works together for a common goal is also a method of maintaining norms. Agreements may bring a certain power to impose obligations on the actors involved. According to Axelrod, the power of membership works in three ways, in that it:

- a) Affects the utility function (of one party in the agreement);
- b) Allows the actors with similar ideas to interact among themselves, and this self-selection makes it easier to execute the implicit norm of the agreement; and
- c) The proper agreement defines what is expected from each participant.⁶⁵

From another perspective, the free trade agreements are also determined by an underlying structure related to commercial interaction that is more complex when it is integrated by nations with different cultural backgrounds. This

64. See JOHN FINLEY SCOTT, *INTERNALIZATION OF NORMS: A SOCIOLOGICAL THEORY OF MORAL COMMITMENT* 88 (1971).

65. AXELROD, *supra* note 19, at 59.

underlying net is filled with diverse beliefs that determine the achievement or failure of the objectives.⁶⁶

Free trade agreements, from construction to operation, are the result of the permanent dynamic among formal and informal institutions, between the formality of normative decisions and its connection with the underlying structures filled with cultural and behavioral diversities.⁶⁷

The main component of the underlying structure is the maximization of the players' utilities, supported by their strategic behavior inside the limits established by the norms. This is the importance of pre-normative space where the negotiations happen to establish the limits of strategic behavior because once the free trade agreements are established, the possibilities of utility redistribution are limited. Hence, the legitimacy of the free trade agreements is based mostly on the influence of the formally established rules on the underlying structure. One option is for players to adjust their behavior to the legal framework. But the subject is more complex because players decide their behavior after calculating the maximization of utilities, the possibilities of obeying or disobeying the norm and the risk of sanction.⁶⁸

On the other hand, informal underlying structures are closely related to the reality of scenarios of interaction through a conceptual context integrating imperfect competence as one of its pillars. Imperfect competence also abandons the unrealistic model of perfect competence,⁶⁹ which is just a simulation instrument.⁷⁰ A market that comes from the model "From Perfect

66. NORTH, *supra* note 7, at 8 (stating that the economic history of the 19th century in the United States showed growth due to the reinforced incentives of the institutional framework for organizations participating in productive activities).

67. See Julia Barragán, *La Influencia de las Decisiones Normativas en la Construcción del Lenguaje Social* [The Influence of Normative Decisions on the Construction of the Social Language], 12 RELEA 95–106 (2000).

68. LEWIS A. KORNHAUSER, THE NEW ECONOMIC ANALYSIS OF LAW: LEGAL RULES AS INCENTIVES 27–55 (Nicholas Mercuro ed., 1988) ("The naïve theory that agents generally adapt their behavior to the pattern required by legal norms is based in the idea that the norm itself offers enough reason for action.").

69. See David M. G. Newbery & Joseph E. Stiglitz, *Pareto Inferior Trade*, 51 REV. OF ECON. STUDIES 1–12. According to Joseph Stiglitz, the free market is an inferior part of autocracy. This is a contrary opinion to the usually accepted one. Stiglitz considers that the idea of free market advantages is far away from reality when assuming a perfect competence and by supposing: (1) The existence of full employment in the models; (2) The existence of perfect risks; (3) Prices offer all the required coordination for markets to work; (4) Net earnings of liberal business are positive for the winners may compensate the losers and balance the general situation in a country; and (5) Inexistence of informatics externalities. See also JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 54–78 (2006).

70. GABSZEWICZ, *supra* note 51, at 2 ("[P]erfect competition is a *cas d'école* which is rarely observed in real market situations. Far from being strategically 'isolated', economic agents seem on the contrary to behave in a way which is the most advantageous to them from the viewpoint of their strategic interaction. . . . This is essentially due to the *normative* properties of perfect

to Imperfect Competition” may be examined from the following structural elements:

1. The number of agents: entry, barriers to entry and collusion:

A small number of sellers: monopoly and duopoly;

The role of investment as barrier to entry;

The stability of collusive agreements.

2. Product differentiation:

Monopoly and product differentiation;

Duopoly and product differentiation.

3. Imperfect information:

Imperfect information about prices;

Imperfect information about quality.

4. Imperfect competition:

Equilibrium and attractor;

Cooperation vs. non-cooperation;

Search for rentals;

Institutions asymmetric;

Regulatory Capture.⁷¹

The underlying structure tends to be based on a non-cooperative approach that has the players’ desire of utility maximization as a natural pillar. A non-cooperative approach tends to explore which decisions a player would make in order to maximize its utilities, even with a preexisting agreement. Game theory emphasizes the non-cooperative approach, illustrates cooperation problems and explores specific strategies while also sharing neoclassic models by assuming that the players’ only desire is to maximize their utility.⁷² Nevertheless, the players’ behavior is more complex because cooperation is the element that maintains the collective cohesion allowing games to be played.⁷³ Players often act with incomplete information and subjective models, which is why institutions and rules have helped to decrease costs in the interaction of players, whether they are companies or states. The formal rules created by actors, as an agreement between two countries, are instituted to obtain the expected results, to offer new interaction ideas and to understand shared

competition: while pursuing their private interests as price-takers, economic agents spontaneously realize their collective advantage.”).

71. *Id.* See generally MONOPOLISTIC COMPETITION AND INTERNATIONAL TRADE (Henryk Kierzkowski ed., 1984) (compiling a collection of articles representing research on imperfect competence and international trade).

72. AXELROD, *supra* note 19, at 47.

73. See *id.*

development. From its base, a non-cooperative approach starts from the definition of interaction structures, which limit the transfer of utilities.⁷⁴ In this approach the actor looks forward to maximize utilities without considering external social or environmental factors. The desire, not the reason, gives the action the true cause of the aptitudes. This approach integrates, as a main value, selfishness and the desire of utility concentration without considering external negativities that may be generated.

LINKS BETWEEN FREE TRADE AGREEMENTS AND IMPACTS

The links that may be derived from the free trade agreements and their economic, social, environmental and political impacts are not based in a Newtonian causality of the celestial machine translated into the social sciences (if it is *A*, it is *B*).⁷⁵ Nor are these links based in the imputation link of Hans Kelsen's pure theory of law (if it is *A*, it must be *B*).⁷⁶ They do not go to the extreme of negation between cause and effect as articulated by David Hume.⁷⁷ The tendency is to be placed between the spheres of certainty and uncertainty by presenting the possibilities that are determined by free trade agreements, where circumstances limit the projections of probable impacts and ultimately define the structure of interaction between the states and the other structures of the game among players. The mentioned sphere is placed among the concepts of Aristotelian roots,⁷⁸ passing by Kant⁷⁹ and arriving to Werner Heisenberg's principle of uncertainty that is reflected in the results of free trade agreements and their consequences.⁸⁰

74. See generally Barragán, *supra* note 50.

75. Newton's second law establishes variation in linear momentum is proportional to resultant force action upon it. See Glenn Research Center, *Newton's Second Law: Definitions*, NASA, <http://www.grc.nasa.gov/WWW/K-12/airplane/newton2.html> (last visited Nov. 10, 2008).

76. See generally HANS KELSEN, *TEORÍA PURA DEL DERECHO* [Pure Theory of Law] (1999) (Chapter 2 discusses legal norms as object of legal science. See Hans Kelsen's observations of causal science and normative science, causality and imputation, natural and legal law, imputation principle on primitive thoughts, the origin of the causality principle on imputation, causal social science and normative social science, differences between causality and imputation principles.).

77. GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 551 (4th ed. 1973) (explaining that, according to David Hume, if we limit ourselves to accept only experience, it is not possible to observe power in *A* to produce *B*, nor the relation between *A* and *B* when *A* and *B* occur together).

78. See MAURICIO SALDAÑA RODRÍGUEZ & MANUEL DÍAZ CID, *ANÁLISIS POLÍTICO CONTEMPORÁNEO: HERRAMIENTAS SELECTAS* [Contemporary Political Analysis] 91 (2005) (explaining that Aristotle established four causes: (1) Essential cause; (2) Material cause; (3) Efficient cause; and (4) Final cause).

79. IMMANUEL KANT, *CRITIQUE OF JUDGMENT: INCLUDING THE FIRST INTRODUCTION* (Werner S. Pluhar trans., Hackett Publishing Company 1987) (1790).

80. Julia Barragán, *El Manejo de la Incertidumbre* [The Operation of Uncertainty], in *RESOLUCIÓN DE CONFLICTOS* 13–33 (Victor A. Pizani ed., 2004).

Relating the social, environmental and political consequences of the free trade agreements created in South America and analyzing them from an interdisciplinary perspective brings out the causal link⁸¹ that is built in the pre-normative spaces represented and clarifies the strengths or weaknesses of negotiation in the free trade agreements between the northern and southern countries.⁸²

Free trade agreements have impacts with emergent properties in various areas⁸³ that go beyond the expected results in the commercial dimension to evaluate success, thus making it much harder to predict the total consequences in even simple interactions. Therefore, restricting the universe of variables would only constitute an analytical barrier that could leave out some hidden aspects that keep South America in a state of dependency with a high cost for southern countries and with grave consequences for northern countries due to the social problems created. These problems relate to the amount of people mobilized and incentivized to emigrate by institutions that create game rules with asymmetric goods and services trade structures. The problems include undervaluing raw materials exported by southern countries, troubling agricultural subsidies in the North and barriers to entry.

There is a causal link between the establishment of a trade agreement and its social, environmental and political consequences. In the case of the WTO, these consequences are evidenced by subsidies and entrance barriers for the agricultural sector that, with the world food crisis, have generated special effects in South America. Subsidized price policies discourage agricultural production⁸⁴ and international trade, may be considered as causes for the decadence of multilateralism and the contradictions that have promoted the search for business integration alternatives.

The subventions and protectionism of the nations of the North impose costs on the southern nations in the amount of twenty-four billion dollars.⁸⁵ In Latin America and the Caribbean, eight billion dollars are lost every year as income in agriculture.⁸⁶ The WTO's normative decisions have impacted more than sixty-five million small producers in South America. The northern

81. SEN, *supra* note 9, at 257 (considering that causal analysis may predict impermissible effects).

82. STIGLITZ, *supra* note 2, at 35, 167–70.

83. See AXELROD, *supra* note 19, at 4.

84. See DENNIS R. APPEYARD & ALFRED J. FIELD, *ECONOMÍA INTERNACIONAL* [International Economy] 447-448 (1997) (analyzing the subvention concept equivalent to the producer, which offers general proofs with respect to this matter). See also *id.* at 828–29 for a study of distortions in Pakistan agriculture.

85. Xinshen Diao et al., *How Much Does it Hurt? The Impact of Agricultural Trade Policies on Developing Countries 2* (2003), available at <http://www.ifpri.org/media/trade/trade.pdf>.

86. *Id.*

subsidies have impacted millions of artisanal small producers in the region.⁸⁷ In 2007, the United States produced seven billion gallons of bio-fuel, which cost taxpayers at least eight billion dollars in subsidies.⁸⁸ The subsidies totaled more than thirty-seven billion dollars between 1995 and 2003, which equaled twice the subsidies for wheat, three times the subsidies for soybeans and seventy times the subsidies received by the cultivation of snuff. Subsidies averaged seventy cents per gallon of ethanol from corn in the United States for bio-fuels.

The superior negotiating capacity of the North originates not only in government organizations, for in many cases the causes are global transnational players who capture sales⁸⁹ for the benefit of small groups in the South and the North and prejudice citizens on both sides. For example, an issue of *Time Magazine* was titled: “*Politicians and Big Business are pushing bio-fuels like corn-base ethanol as alternatives to oil. All they’re really doing is driving up food prices and making global warming worse—and you’re paying for it.*”⁹⁰

In the food universe, corn represents special importance for alimentary security for many countries in South America.⁹¹ This situation becomes more complicated when an important part of the population is occupied in the agricultural sector producing for self-survival. World Bank studies show that about thirty-seven percent (approximately sixty-five million people) of the poor in Latin America and the Caribbean live in rural areas, and according to the Food and Agriculture Organization (FAO), in most poor countries agriculture accounts for fifty to eighty percent of employment. With production costs that are distorted, the effect of norms allowing such self-exceptions generate a series of economic impacts that result in a loss of jobs, as well as environmental,⁹² social and political impacts.⁹³

Finally, facing the possible distortions of free trade agreements, it is important to remember that the main objective of ethics is to preserve the

87. DIAO, *supra* note 85.

88. Michael Grunwald, *The Clean Energy Myth*, TIME, Apr. 7, 2008, at 44.

89. See generally BARRY M. MITNICK, LA ECONOMÍA POLÍTICA DE LA REGULACIÓN [The Political Economy of Regulation] (Fondo de Cultura Económica 1989).

90. Grunwald, *supra* note 88, at front cover.

91. In Colombia for example, the area planted in 2002 was 547,290. Annual production was approximately 1.2 million tons. The technical grade was between traditional and sophisticated. The traditional crop was prevalent in 75% of the area in small tracts, with non-certified seed, low consumption of pesticides and fertilizers in particular. The national average was 1.7 tons per hectare. Most of the production is geared toward consumption.

92. Widening of misery belts in big cities, public sanitation and housing issues, forest logging, water pollution, destruction of biodiversity and erosion serve as examples.

93. Un-governability, ineffective normatives, illegal production with damages in consumer countries, money laundering and illegal immigration serve as examples.

conditions necessary for a clean game—i.e., a system with incentives that do not promote desertion or transgression of rules.⁹⁴ According to Julia Barragán, the hypotheses of economic theory that allow the market to be a space for clean game are:

1. The price character for buyers and sellers; and
2. The absence of entrance barriers to such scenery.⁹⁵

CONCLUSION

To achieve the benefits of free trade agreements, normative and empirical legitimacy is required. Non-compliance with these two requirements produces the deterioration of the instruments. If the values supporting them and the expected goals are not fulfilled, they enter into a process of decadence that generates its own destruction. As such, free trade agreements cannot be unrelated with the development objectives of the integrating countries, given the enormous influence that they have on their existence. The links between its application and the social limits have dimensions, and, if these dimensions are surpassed, it produces political consequences.

In the selection of values and ends, there are two options. The first option is to favor values that promote asymmetries through rules that favor the strongest players without considering the consequences in equilibrium and stability of normative solutions. The second option is to establish values and ends that structure rules looking for a clean game.

In all current trade agreements in South America, the market is maintained as the basic structure to assign resources and as an instrument to maintain social stability. Thus, taking care of the clean game in the markets until operation of free trade agreements is like taking care of the Crown Jewels. The conditions for a clean game require the market and the parts accepting it to preserve it. In summary, the values supporting the normative and empirical legitimacy of free trade agreements require for its preservation the maintenance of the principles that enable a practical application of a clean game.

94. Julia Barragán, *La Ética Empresarial y la Confianza en el Mercado* [Business's Ethics and Confidence in the Market], in *ÉTICA EMPRESARIAL: UNA RESPONSABILIDAD DE LAS ORGANIZACIONES* 51 (2004) (Barragán states that the best example of an unclean game is presented by the Prisoner Dilemma. The game's structure promotes only treason.).

95. *Id.* at 43.

