

The Expansion of Intellectual Property Rights by International Agreement: A Case Study Comparing Chile and Australia's Bilateral FTA Negotiations With the U.S.

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I. Introduction

This paper is designed to explore the premise that less developed countries are less sophisticated negotiators and overly susceptible to the pressures of vast economic powers like the United States or the European Union (EU).¹ To test the viability of this premise, this paper uses a case study comparing a less developed country's negotiations with such an economic power and a developed country's negotiations with the same economic power by comparing Chile and Australia's recently successful completion of bilateral free trade agreement (FTA) negotiations with the United States. This case study will evaluate the historical and socio-economic conditions in both countries and how they may have impacted the respective countries' negotiations. In so doing, the results may show that less developed countries are not nearly as unsophisticated as commentators make them out to be.

Additionally, such a case study may provide insights into other theories. Specifically, it may indicate whether multilateral or bilateral treaty negotiations are the more equitable forum for negotiating the metes and bounds of intellectual property rights (IPRs). Related to this determination is the question of whether Non Governmental Organizations (NGOs) should be involved in IPR related negotiations between less developed countries and developed countries in an attempt to make such negotiations more equitable.²

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¹ See, e.g., Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 *FORDHAM INT'L L.J.* 1029, 1058-60 (2004); Peter Drahos, *Hope, Power, and Governance: Section One: Building Institutions of Hope: Trading in Public Hope*, 592 *ANNALS* 18 (2004).

² See Maura Blue Jeffords, *Turning the Protestors into a Partner for Development: The Need for Effective Consultation Between the WTO & NGOs*, 28 *BROOKLYN J. INT'L L.* 937, 987 (2003) ("NGOs can put a human face on the WTO. However, like the humans the NGOs represent, they need to be included."); but see Hasmy Agam, *Working With NGOs: A Developing World Perspective*, 13 *COLO. J. INT'L ENVTL. L. & POL'Y* 39, 42 (2002) ("Indeed, some NGOs in developing countries have assumed the attributes or functions of opposition political parties, without the responsibility and accountability of a political party. Although operating with virtual impunity, they expect governments to unquestioningly accept their criticisms and meekly accede to their demands."); Gregory F. Jacob, *Perspectives: Without Reservation*, 5 *CHI. J. INT'L L.* 287, 297 (2004)

(...NGOs exert tremendous influence over large numbers of delegates not because they are right on matters of substance, but rather because they are providing the only pro bono legal services available to delegates with no legal experience of their own. In filling this role, the NGOs certainly did not act as disinterested legal advisers, and along the way more than one delegation was hoodwinked into believing the NGOs' all-too-frequently distorted versions of the truth.);

Recently, the United States of America has signed bilateral free trade agreements with Chile and Australia that will greatly impact the intellectual property regimes of both Australia and Chile. For example, Chile and Australia are both required to essentially pass a form of the World Intellectual Property Organization (WIPO) Copyright and Performances and Phonograms Treaties and provide greater rights to other intellectual property, like trademarks.³ While the U.S. implementation of these treaties resulted in the Digital Millennium Copyright Act (DMCA), it may not be necessary for these countries to create such stringent laws to meet the terms of these treaties.⁴ However, prior to the execution of these FTAs, these countries were unwilling to implement the WIPO treaties because of their concerns with enacting intellectual property laws that could be detrimental to their citizens' well being.⁵

The expansion of IPRs through multilateral or bilateral treaties is a substantial concern for many commentators and activists who feel intellectual property rights have expanded to the detriment of "less sophisticated" signatories of such treaties.⁶ However, recent developments have shown that less developed countries are not necessarily as unsophisticated as originally thought.⁷

The results of this case study and how they relate to these topics are discussed more fully below. Section II of this paper provides background on multilateral and bilateral trade agreements, the bureaucratic systems created by such agreements, and the implications these systems have on intellectual property rights and intellectual property law development. Sections III and IV are a case study of Chile and Australia that provide historical, socio-economic, and political background for both countries. Moreover, each section explores the negotiation process used in

see generally, Erik B. Bluemel, *Substance Without Process: Analyzing TRIPS Participatory Guarantees in Light of Protected Indigenous Rights*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 671 (Sept. 2004).

³ See Australian Government, Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement*, http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/08_intellectual_property.html (last visited Feb. 21, 2005) and Robin D. Gross, *Chile-US Free Trade Agreement (FTA) on Circumvention of Technological Protection Measures (TPMs) that Control Copyrighted Works*, (Sept. 1, 2004), http://www.ipjustice.org/Chile_US_FTA.shtml# (last visited Feb. 21, 2005).

⁴ Robin D. Gross, *Chile-US Free Trade Agreement (FTA) on Circumvention of Technological Protection Measures (TPMs) that Control Copyrighted Works*, (Sept. 1, 2004), http://www.ipjustice.org/Chile_US_FTA.shtml# (last visited Feb. 21, 2005).

⁵ AUSTA, *Quick Briefs for Media – Issues Likely to Arise in an Agreement*, <http://austa.net/quickBriefs/quickBriefs3.htm> (last visited Feb. 21, 2005).

⁶ See Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819 (2003); Peter Drahos, *Hope, Power, and Governance: Section One: Building Institutions of Hope: Trading in Public Hope*, 592 ANNALS 18 (2004); *see generally* IP Justice, available at: <http://www.ipjustice.org> (last visited Feb. 21, 2005); Lawrence Lessig, *Lessig Blog*, <http://www.lessig.org/> (last visited Feb. 21, 2005).

⁷ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 9 (2004) ([Developing countries and NGOs] use regime shifting to maximize desired policy outcomes, to relieve pressure for acting in other international venues, to create treaties and soft law in tension with TRIPS, and to lay the political groundwork needed to integrate new principles, norm, and rules of intellectual property protection into the WTO and WIPO.).

making a bilateral agreement with the U.S. Section V evaluates the findings of this case study, exploring the similarities and differences found in each country's negotiation strategy, and rationale behind accepting the terms of a bilateral agreement with the U.S. Further, it explores the implications this case study may have on various theories commentators have developed in connection with intellectual property law evolution and free trade agreements.

II. International Intellectual Property Agreements, & Resulting Bureaucratic Structure

Countries that are net exporters of technology and copyright products created a new strategy to expand the scope of IPRs attributable to these products.⁸ The lead exporter of technology and copyright products, the United States, started to implement this strategy in the mid 1990's.⁹ The strategy revolved around three sometimes overlapping concepts, the first being the creation of effective dispute settlement for substantive intellectual property rights, the second being the expansion of the definition of investment to include intellectual property rights, and the third being the non-violation complaint alleging nullification or impairment of benefits.¹⁰

In 1994, this strategy was implemented successfully when the North America Free Trade Agreement (NAFTA) came into effect.¹¹ It was later expanded to all the members of the World Trade Organization (WTO) in 1995, when the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) came into force and required all WTO members to provide minimum standards of intellectual property protection.¹² Since these two agreements were signed, various bilateral and other multilateral agreements and negotiations have taken place

⁸ See Allen Z. Hertz, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Shaping the Trident: Intellectual Property Under NAFTA, Investor Protection Agreements, and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 261-62 (1997)

([C]ountries which are net exporters of technology and copyright product now see optimal IP protection in the shape of a trident. The centre prong is effective dispute settlement for the substantive intellectual property rights (IPRs) in NAFTA, TRIPS, the Paris Convention for the Protection of Industrial Property, and the Berne Convention for the Protection of Literary and Artistic Works. The left prong is made up of the investment disciplines set out in NAFTA, the Energy Charter Treaty, a possible Multilateral Agreement on Investment (MAI) and a growing network of Bilateral Investment Treaties (BITs) and Foreign Investment Protection Agreements (FIPAs), all of which define 'investment' as implicitly or explicitly including IPRs. The right prong is the non-violation complaint alleging nullification or impairment of benefits, first fully elaborated under the General Agreement on Tariffs and Trade (GATT 1947) and now incorporated in both NAFTA and the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 265 ("For international IP protection a new era began with the entry into force on January 1, 1994 for Canada, the United States, and Mexico of the NAFTA")

¹² Maria Julia Olivia, *Intellectual Property in the FTAA: Little Opportunity and Much Risk*, 19 AM. U. INT'L L. REV. 45, 51 (2003).

attempting to broaden the reach and enforcement of intellectual property rights to various other countries.¹³

A. TRIPS

The TRIPS agreement expanded and universalized the minimum levels of intellectual property protection for industrialized countries only after reaching a certain level of development.¹⁴ The agreed upon scope of protection for IPRs limited the options for developing countries in the design of their intellectual property systems.¹⁵ However, the TRIPS Agreement still allowed countries to adopt different strategies and definitions that could affect the scope and enforceability of these rights.¹⁶ This flexibility is critical for countries to be able to use their intellectual property legislation as a means of achieving a set of economic development, social development, and environmental protection objectives.¹⁷

To ease the economic and legislative burdens these new standards created, implementation of the TRIPS Agreement provisions was not universally required to occur simultaneously. Developed countries like Canada or the United States had to apply all TRIPS provisions by January 1, 1996.¹⁸ However, developing-country WTO Members did not have to apply most TRIPS provisions until January 1, 2000.¹⁹ In 2000, developing countries yet to extend product-patent protection to all technology areas, could further delay the domestic application of these protections to any area not covered (e.g., pharmaceuticals) until 2005.²⁰ A least-developed country WTO member could delay the implementation of most TRIPS provisions until the start of 2006, at which time it could further extend this transitional period by successfully persuading the TRIPS Council to exclude its transition period.²¹

¹³ *Id.* at 47; see also Allen Z. Hertz, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Shaping the Trident: Intellectual Property Under NAFTA, Investor Protection Agreements, and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 261-62 (1997).

¹⁴ Maria Julia Olivia, *Intellectual Property in the FTAA: Little Opportunity and Much Risk*, 19 AM. U. INT'L L. REV. 45, 52 (2003).

¹⁵ *Id.*

¹⁶ *Id.* For instance, the TRIPS Agreement does not define "invention," allowing countries to choose the definition that responds to their own needs.

¹⁷ *Id.*

¹⁸ Allen Z. Hertz, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Shaping the Trident: Intellectual Property Under NAFTA, Investor Protection Agreements, and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 265 (1997).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

However, the flexibility TRIPS allegedly provides has been called into question by commentators.²² Specifically, the TRIPS Agreement use of the Dispute Settlement Understanding has limited member state's policy choices due to the mandatory supranational adjudication that may be incurred by another member state's complaint.²³ These adjudications have resulted in the disallowance of various member states' attempts to implement various aspects of TRIPS while still maintaining some domestic favoritisms or prejudices that were arguably within the scope of the Agreement's terms.²⁴

Some commentators believe that multilateral negotiations are a more favorable forum for less developed countries.²⁵ In contrast, other observers believe that, at least in the instance of TRIPS, less developed countries negotiated away even more rights and flexibility than they would have in a bilateral setting with a superior power.²⁶ Thus, there is some dispute over which negotiating forum, bilateral or multilateral, is the more equitable forum. It is quite possible that, contrary to U.S. coercion theorists' claims, less developed countries may be wiser to use bilateral and regional multilateral agreements to negotiate with a larger, more developed country.²⁷

B. Bilateral and Multilateral Agreements

Since the signing of TRIPS, the most active international intellectual property law forum has been bilateral agreements.²⁸ Generally, these agreements are between a developed country, like

²² Ruth L. Okediji, *Public Welfare and the Role of the WTO; Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819, 820 (2003).

²³ *Id.* at 823.

²⁴ Specifically, examples comprise of Indian, American, and Canadian legislative actions that have been altered or overruled by such challenges. *See Id.* at 891-910

²⁵ JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 62 (2003) ("Matters are perhaps worse still when the U.S. acts unilaterally..."); *see also* Genetic Resources Action International, *"TRIPS-plus" Through the Back Door: How Bilateral Treaties Impose Much Stronger Rules for IPRs on Life than the WTO*, July, 2001, <http://www.grain.org/publications/trips-plus-en.cfm> (last visited Feb. 21, 2005) ("[T]he quietly crafted mini-pacts between Washington and Amman, or Brussels and Dhaka, are where more damage is sometimes being done."); Various other academics and commentators believe multilateral settings are the more equitable forum. *See generally* AUSTA, *Quick Briefs for Media – General Issues*, <http://www.austa.net/quickBriefs/quickBriefs1.htm> (last visited Feb. 21, 2005)

²⁶ Ruth L. Okediji, *Public Welfare and the Role of the WTO; Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819, 850 (2003) ("[T]he TRIPS Agreement guaranteed a surplus for developed countries greater than what each state could otherwise have obtained on its own, as well as a surplus for developing countries in the form of enhanced trade concession in the areas of textiles and agriculture.").

²⁷ *Id.* If the developed countries have similar special interests groups and are capable of adequate collaboration due to similar interests, or special interests, then their aggregate negotiating power appears to be substantially larger than what any one developed country (even the U.S.) may have alone, in negotiations with one or perhaps a whole region of substantially similarly situated less developed countries with similar policy objectives or interests.

²⁸ Maria Julia Olivia, *Intellectual Property in the FTAA: Little Opportunity and Much Risk*, 19 AM. U. INT'L L. REV. 45, 52-53 (2003).

the United States, and a less developed country, like Chile.²⁹ Most commentators believe that the less developed countries agree to provide stronger IPRs, or TRIPS-plus, protections in exchange for greater access to the developed country's markets and investors.³⁰ These TRIPS-plus provisions define various IPRs or expand the scope or standard of an IPR beyond the minimal TRIPS standard, reducing the flexibility provided in the TRIPS Agreement.³¹ This same model is used for multilateral negotiations like the Central American Free Trade Agreement (CAFTA), the Middle East Free Trade Area (MEFTA), or the Free Trade Area of the Americas (FTAA).³²

Recently, the United States has been extremely prolific in its bilateral negotiations, reaching agreements with Singapore, Morocco, Chile, Australia, El Salvador, Jordan, and eight other countries.³³ It has also negotiated extensively with other Latin American and Caribbean countries on the FTAA.³⁴ Moreover, the U.S. is working toward a Middle East Free Trade Area by 2013 and is also in bilateral negotiations with five countries within the Southern African Customs Union.³⁵

Obviously, the United States, as the largest exporter of intellectual property driven goods, seeks to expand IPRs' scope and enforcement.³⁶ Moreover, because the U.S. represents about one fifth of the world economy, it has the most to offer less developed countries in terms of market access and investment opportunity.³⁷ Thus, it should not be very surprising that the U.S. has been so active and successful in expanding TRIPS-plus protection to so many countries.

C. Non Governmental and Intergovernmental Organizations

A third and emerging party to these bilateral and multilateral negotiations are non-governmental organizations (NGOs), which have increasingly been involved in challenging the TRIPS

²⁹ *Id.* at 53.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Mumbai-India U.S. Consulate, *U.S. and Bahrain Sign Free Trade Agreement*, Sept. 14, 2004, <http://mumbai.usconsulate.gov> (last visited Feb. 21, 2005).

³⁴ *Id.* (explaining that in addition to the FTAA negotiations, the U.S. is involved in bilateral negotiations with Panama, Peru, Columbia, and Ecuador.).

³⁵ In Africa, the U.S. is bilaterally negotiating with Botswana, Swaziland, South Africa, Lesotho, and Namibia. In Asia, beyond the Middle East, it is also negotiating with Thailand. *See Id.*

³⁶ Patrick Coleman, *The U.S. Competitive Advantage in Intellectual Property Trade*, 27 CHEMTECH 48 (1997), <http://pubs.acs.org/hotartcl/chemtech/97/sep/comp.html> (last visited Feb. 21, 2005).

³⁷ *See* NationMaster.com, *Map & Graph: Economy: GDP*, http://www.nationmaster.com/graph-T/eco_gdp# (last visited Feb. 21, 2005) (using 2002 values).

Agreement and various bilateral or multilateral agreements expanding TRIPS plus protections.³⁸ With the NGOs' political, or at least mass media, clout, less developed countries have become capable of renegotiating supposedly settled treaties. For example, less developed countries, acting in tandem with NGOs, were able to extract the Public Health Declaration during a new round of WTO trade talks in Doha.³⁹ This declaration applies to patented medicines, providing less developed countries access to such pharmaceuticals by granting them a longer transitional time before having to provide IPRs for such products.⁴⁰ In addition to NGOs, there are intergovernmental organizations, like the World Health Organization and the Food and Agriculture Organization, which are becoming heavily involved in international negotiations affected by intellectual property issues.⁴¹

This development has increased the number of forums available for different states or parties to attempt to affect policy to maximize their respective interests.⁴² Moreover, the various institutional structures, as they are designed, can provide a built-in bias in favor of developing countries. For example, WIPO administers implementation of existing intellectual property agreements and provides dispute settlement services, generating the revenue needed to fund its activities.⁴³ Moreover, WIPO's staff provides technical assistance and training to member states and their national intellectual property offices, the bulk of which is provided to developing countries.⁴⁴ To further meet these developing countries' needs, and raise more revenue, WIPO has expanded these services to include standing, expert, and intergovernmental committees that carry out studies on particular intellectual property topics and generate soft law guidelines and recommendations for consideration by WIPO member states.⁴⁵ Thus, while WIPO is attempting to provide services to facilitate the implementation of negotiated intellectual property agreements, it also interacts most often with and directly impacts the policies of developing countries. This likely creates some conflict of interest since the same organization, made up of the same personnel, are greatly affecting various states' policies and also adjudicating the

³⁸ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 4-5 (2004).

³⁹ *Id.* at 5. This declaration is often referred to as the Doha Declaration.

⁴⁰ *Id.*

⁴¹ *Id.* For example, these intergovernmental organizations have had intellectual property issues at or near the top of their agenda negotiations at the Convention on Biological Diversity Conference of the Parties and the Commission on Genetic Resources for Food and Agriculture.

⁴² *Id.* at 8.

⁴³ *Id.* at 12.

⁴⁴ *Id.*; Susan K. Sell, *Trade Issues and HIV/AIDS*, 17 EMORY INT'L L. REV. 933, 949 (2003).

⁴⁵ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 12 (2004)

validity of such policies in light of the various agreements they must follow.⁴⁶ This may be especially true in light of WIPO's increasingly important role in influencing both TRIPS dispute settlement and member states' proposals to amend or supplement TRIPS.⁴⁷ Consequently, it would seem that these organizations would have, at the least, some slight bias towards the developing countries with which they often interact.⁴⁸

D. Negotiation Forum Selection

Ultimately, the decision to use a bilateral or multilateral forum can have a large strategic impact on a country's negotiations. Generally, a multilateral forum decreases a country's control over negotiations because it dilutes a country's control. In fact, the number of countries involved and their political influence are likely the most important factors to determine whether multilateral or bilateral negotiations are the most strategically desirable forum.⁴⁹ For example, large multilateral forums can be very detrimental to developing countries if the developed countries (e.g. U.S., U.K., Canada, etc.) have similar tradeoffs and objectives to most proposals or topics while the developing countries' tradeoffs and objectives are more varied.⁵⁰ In this type of setting,

⁴⁶ *But see* Susan K. Sell, *Trade Issues and HIV/AIDS*, 17 EMORY INT'L L. REV. 933, 949 (2003) (explaining that WIPO receives 85-90% of its budget from PTC application filing fees. The majority of these filings result from large biotech or biolife science corporations.).

⁴⁷ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 26 & 59-60 (2004).

⁴⁸ *Id.* at 14 & 20-21. One consequence of this bias may be the United States and European Community (EU) to shift intellectual property lawmaking from WIPO to GATT due to dissatisfaction with treaty negotiations hosted by WIPO. Moreover, GATT is more likely biased in favor of the U.S. and the EU because these parties enjoy substantial negotiating leverage in this forum. *See also Id.* at 61 (“[R]egime shifting enhances developing states’ bargaining power within the WTO and WIPO. It facilitates a proactive negotiating strategy, enabling governments and NGOs to coordinate their efforts around hard and soft law proposals first vetted and refined in other international venues.”); Peter Drahos, *Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach*, 77 TEMP. L. REV. 401, 423 (2004) (“[O]ur nodal world is replete with opportunities for alliances, partnerships, and forum shifting, all of which enable the weak to exercise influence over agendas”).

⁴⁹ Ruth L. Okediji, *Public Welfare and the Role of the WTO; Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV., 819, 884-85 (2003) (“In the area of intellectual property particularly, state power is a critical variable for predicting outcome because intellectual ‘property’ is inherently a product of the exercise of state regulatory powers.”).

⁵⁰ *Id.* at 849-850

(While the proposals submitted by respective states generally fell within the categories of ‘developed’ and ‘developing’ countries, the divisions were neither that exact nor predictable. Indeed, over the period of negotiations, the coalition formation between developed countries altered as different issues arose. The same was true for developing countries. Within these descriptive categories, several different coalition configurations emerged with some countries ostensibly acting independently.);

Id. at 849 n.96

(For example, the Andean Group (Bolivia, Columbia, Peru, and Venezuela) and the Group of Ten (Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia) focused on different issues at different stages of the negotiations. The Group of Ten had early on opposed the idea of TRIPS while the Andean Group was involved in making proposals at later stages of negotiations.).

developed countries can essentially implement a “divide and conquer” strategy, playing the weaker factions off of each other to enhance their negotiating power more effectively and substantially than they could in a bilateral forum.⁵¹ Moreover, a single country, or even a small group can less afford the option of “walking away” from any deal when a multilateral forum consists of a large portion of the world. Other countries involved in the negotiations are likely to decide on standards that these countries will eventually have to accept to continue to be a viable global trading partner.

E. IPR Negotiation Theories

There are generally three types of theories that attempt to explain the use of bilateral and multilateral FTAs to expand IPRs: (1) U.S. or EU coercion of less powerful economic countries⁵², (2) multinational corporation lobbying⁵³, and (3) autonomous policy agreements, which are made to maximize a constituency’s well being.⁵⁴ The theories falling within the first category essentially argue that an international hegemon can mostly impose and enforce its desired rules and international policies upon weaker powers.⁵⁵ As a result of the hegemon’s power, it will usually act through independent decision making or through bilateral negotiation to maximize the relational power disparity.⁵⁶

The theories that fall under the second category, multinational corporate lobbying theories, essentially argue that multinational corporations effectively lobby all parties, even resorting to developing “false hopes,” which is a type of subterfuge, in order to obtain international policies that favor their business interests.⁵⁷ Thus, large multinational corporations, or entire industries explicitly or implicitly collude to obtain beneficial policies.⁵⁸ However, these entities usually lobby all, or a substantial amount of, the parties of a negotiation to obtain the desired result.⁵⁹

⁵¹Ruth L. Okediji discusses this in great detail. *See Id.* at 838-68.

⁵² *See* Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 *FORDHAM INT’L L.J.* 1029, 1032-41 (2004); *cf.* Ian L.G. Wadley, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Environment: U.S. and Them: Hubs, Spokes & Integration with Reference to Transboundary Environment and Resources Issues*, 21 *BERKLEY J. INT’L L.* 572, 572-73 (2003).

⁵³ *See* Peter Drahos, *Hope, Power, and Governance: Section One: Building Institutions of Hope: Trading in Public Hope*, 592 *ANNALS* 18 (2004).

⁵⁴ *See* Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 *FORDHAM INT’L L.J.* 1029, 1058-60 (2004).

⁵⁵ *Id.* at 1036-37.

⁵⁶ *Id.* at 1036.

⁵⁷ *See* Peter Drahos, *Hope, Power, and Governance: Section One: Building Institutions of Hope: Trading in Public Hope*, 592 *ANNALS* 18, 19-21 (2004).

⁵⁸ *Id.* at 25.

⁵⁹ *Id.* at 25 & 30.

The theories that fall under the third category, autonomous policy agreement theories, essentially argue that all parties to a negotiation come to an agreement that best serves the public welfare of their constituencies.⁶⁰ Thus, the parties to a negotiation implement various negotiating tactics or strategies to maximize their constituency's well being.⁶¹ While special interests and NGOs may play some role in the development of each party's negotiation strategy, these theories suggest that parties are sophisticated enough to determine what is actually in its constituency's best interests and act correspondingly.⁶²

F. Case Study – Testing Hypotheses

Keeping these three types of theories in mind, this paper will set out to test each one against real world bilateral FTA negotiations. A case study comparing negotiations between the U.S. and Chile with negotiations between the U.S. and Australia will be used to test the viability of these theories.

In this case study Chile will be used to represent a less developed country negotiating with an alleged hegemon, the U.S.⁶³ Chile is used because it has recently signed an FTA with the U.S. and because it is generally representative of most less developed countries. For example, Chile relies on natural resources and agriculture for a majority of its exports and domestic economy.⁶⁴ Further, Chile has only recently become a democracy, having been led by a military junta until around 1990.⁶⁵

Australia, on the other hand, will be used to represent a developed country negotiating with a more powerful, but relatively similarly sophisticated power, the U.S.⁶⁶ Australia has a very

⁶⁰ See Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L.J. 1029, 1053-54 (2004).

⁶¹ *Id.*

⁶² *Id.*; One example of this type of theory would be that the American negotiators knowingly act to maximize IPRs because it will maximize the net benefit to its citizens and a less developed country agrees in return for American concessions that will also yield a maximum net benefit to its citizens.

⁶³ See Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L.J. 1029, 1058-60 (2004).

⁶⁴ Export Council for Energy Efficiency, *Market Assessment of Chile*, (1999), <http://www.ecee.org/pubs/assess/Chile/Chile.htm> (last visited Feb. 21, 2005) (Chile's Economy and Investment Conditions Chapter/Section was specifically referenced.).

⁶⁵ JOHN HICKMAN, *NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE 200* (1998).

⁶⁶ AUSTA, *Can Australia Negotiate with the US?*, <http://www.austa.net/analyst/analyst5.html> (last visited Feb. 21, 2005).

sophisticated economy, with services being its economy's largest sector.⁶⁷ Moreover, Australia has been a very stable politically and economically, and has experienced great economic growth over the past twenty years.⁶⁸

III. Chile

In this case study, Chile is an example of a less developed country. Chile should provide a good model because it has only recently become a democracy after a fifteen year junta followed a coup of the democratically elected socialist government. In large part, the junta occurred due to mismanagement, massive corruption, and hyperinflation. Thus, Chile is a less developed country essentially rebuilding its economic and political infrastructure, a situation likely to face any new government established amid the current turmoil of many less developed countries (e.g. Iraq, Afghanistan, Pakistan, Ukraine, etc.). Similarly, Chile is rich in agricultural (e.g. fruit) and mineral resources (e.g. copper). This situation is similar to many other less developed countries that are rich in natural resources.

Based on various theories presented by commentators, one could expect Chile's bilateral FTA with the U.S. to have resulted from various scenarios: it could be a result of the U.S. leveraging its "hegemonic" power by attempting to coerce Chile into an FTA⁶⁹, it could be Chile's attempt to further its economic policy by negotiating away IPRs for greater access to the U.S. market⁷⁰, or it could be the result of massive multinational corporations furthering their own economic interests.⁷¹

In order to test these theories, a brief background of Chile's recent history is necessary to appreciate and understand the potential motivations and objectives that may have been implicated in entering into an FTA with the U.S.

⁶⁷ Economist Intelligence Unit, Australia Economic Structure, THE ECONOMIST (Feb. 24, 2004), <http://www.economist.com/countries/Australia/profile.cfm?folder=Profile-Economic%20Structure> (last visited Feb. 21, 2005).

⁶⁸ CIA World Fact Book, *Australia*, <http://www.cia.gov/cia/publications/factbook/geos/as.html> (last visited Feb. 21, 2005).

⁶⁹ See Ruth Gana Okediji, *Symposium on Globalization at the Margins: Perspectives on Globalization from Developing States: Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEG. STUD. 117, 133 (1999).

⁷⁰ Chilean Government, *Trade Policy Review*, at 7-12 (Nov. 4, 2003), <http://www.wto.org> (last visited Feb. 21, 2005).

⁷¹ Peter Drahos, *Hope, Power, and Governance: Section One: Building Institutions of Hope: Trading in Public Hope*, 592 ANNALS 18, 20-21 (2004); see also Christopher T. Marsden, *Cyberlaw and International Political Economy: Towards Regulation of the Global Information Society*, 2001 M.S.U.-D.C.L. L. REV. 355, 400-04 (2001) (LEXIS cites this journal as L. REV. M.S.U.-D.C.L.).

A. Democracy Produced by a Totalitarian Response to the Failures of Socialism

Chile has likely enjoyed the most political and economic stability of any country in South America for the last 10-15 years. In fact, over the last six years it has experienced annual inflation below 5% and realized an 8% annual GDP growth throughout the 1990s.⁷² In contrast, it seems hard to believe Chile was a country in chaos around 1970.

Under the Frei government, the Chileanisation of major copper mines and an agrarian reform allowed the Chilean government to expropriate any landholding of more than 80 hectares.⁷³ These reforms included the nationalization of copper mines formerly controlled by American investors.⁷⁴ These socialist reforms were passed into law during the mid 1960s.⁷⁵ They were originally hailed as successful, and were expanded in the early 1970s.⁷⁶ Moreover, most of the banks and other important financial and manufacturing concerns were nationalized by 1972.⁷⁷ Because these reforms were initially successful, the socialist political parties responsible for them gained more support, instituted wage increases and froze prices in late 1971.⁷⁸ The expansion of such reforms ultimately led to skyrocketing inflation and massive governmental budget problems.⁷⁹ While the Chilean economy grew at around 7.7% in 1971, it also experienced 22% inflation.⁸⁰ By 1972, due to expanded socialist economic reforms, inflation rose to 260% and by 1973 inflation had risen even higher, to 600%.⁸¹ Ultimately, these conditions became untenable, and similar to other countries that have experienced severe economic misfortune, a military coup occurred, replacing the old, democratically elected socialist government with a junta.⁸²

⁷² U.S. Department of State, U.S. – Chile Free Trade Agreement Fact Sheet, July 22, 2003, <http://www.state.gov> (last visited Feb. 21, 2005).

⁷³ JOHN HICKMAN, NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE 78-79 (1998).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 98-99.

⁷⁷ *Id.* at 95-96.

⁷⁸ *Id.* at 102-103.

⁷⁹ *Id.* at 102-103 (explaining that from 1970-71, Chile's governmental budget went from a \$113 million surplus to a \$309 million dollar deficit.).

⁸⁰ *Id.*

⁸¹ *Id.* (explaining that Chile's economy was also affected by a drop in world copper prices. However, this had a relatively slight impact when compared to the conditions created by the Allende government's economic mismanagement.).

⁸² *Id.*; cf. George J.W. Goodman, *The German Hyperinflation*, http://www.pbs.org/wgbh/commandingheights/shared/minitextlo/ess_germanhyperinflation.html. (last visited Feb. 21, 2005). Nazi Germany, for example, was created in part, due to the economic conditions created, for the most

This junta, led by General Pinochet, eliminated the elected socialist government with the goal of extirpating the communists out of Chile.⁸³ Unfortunately, like other coups or violent uprisings, this goal was taken to its extreme.⁸⁴ Ultimately, Chile's army was responsible for about 3,200 deaths or disappearances.⁸⁵

By 1980, the Military began softening its control, allowing the creation of a Constitution.⁸⁶ This eventually led to elections in 1981 which, unsurprisingly, led to the election of General Pinochet for an eight year term.⁸⁷

B. Economic Reforms Initiated by the Pinochet Regime

By 1973, Chilean inflation was over 600% and rising.⁸⁸ The government debt accounted for 25% of Chile's GDP, which was likely to rise because the nationalized industries were losing about \$500 million a year.⁸⁹ However, by Pinochet's election, GDP had risen by 5% in three consecutive years and inflation was down to 31%.⁹⁰ The economic reforms that laid the groundwork for Chile's recovery was the result of a Point IV exchange program that sent Chilean students to U.S. universities to receive higher degrees.⁹¹ Many of these students went to the University of Chicago where they studied the monetarist theory of economics validated and made famous by Milton Friedman.⁹² Some of these students held government posts and were

part, from the Versailles treaty. These conditions led to inflation rates that, at its worst, resulted in food prices doubling or tripling in a matter of hours.

⁸³ JOHN HICKMAN, NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE 117 (1998).

⁸⁴ *Id.* at 123. (explaining that the specific targets for most of these deaths and disappearances were the MIR and similar communist related groups. They were progressively tracked down and destroyed by the DINA, which was the secret police force of Pinochet's junta. While the MIR and communist groups were potentially "legitimate" targets for their abusive overseeing of the agrarian reforms and their terrorist-like tactics, DINA went beyond this original mandate. Ultimately, it became powerful enough to scare or destroy any type of opposition group and even earned senior junta members' distrust for its ruthless tactics.)

⁸⁵ *Id.*; See also Jen Ross, *Legal Momentum Gathers in Chile Against Pinochet*, WASHINGTON POST, Dec. 25, 2004, at A16, available at: <http://www.washingtonpost.com/wp-dyn/articles/A24890-2004Dec24.html> (explaining that General Pinochet is now being prosecuted in Chile for his involvement in overseeing DINA's actions).

⁸⁶ JOHN HICKMAN, NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE 134 (1998).

⁸⁷ *Id.* at 135-36.

⁸⁸ *Id.* at 135.

⁸⁹ *Id.*

⁹⁰ *Id.*; see also BRIAN LOVEMAN, CHILE: THE LEGACY OF HISPANIC CAPITALISM 288 (3d ed. 2001) (explaining that while Pinochet may have used his influence to create conditions favorable to his election, the economic recovery he oversaw from 1973-80 likely also contributed to his election.)

⁹¹ JOHN HICKMAN, NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE 136 (1998).

⁹² *Id.*

promoted to administer the economy by the Pinochet junta by the middle of 1973.⁹³ Consequently, these economists, known as the Chicago Boys, drastically cut government spending, significantly dropped tariffs on foreign goods, and abolished price controls.⁹⁴ For two years, the economy suffered enormous setbacks, including substantial GDP loss, unemployment increases, and high inflation.⁹⁵

While these reforms were certainly difficult for a supermajority of Chileans, by 1980, they began having a positive effect, resulting in high GDP growth and much lower inflation.⁹⁶ By 1981, inflation was down to 9.1%, GDP was growing at a 5.5% clip, the fiscal deficit had turned into a surplus, and a real rise in salaries had seen consecutive years of substantial growth.⁹⁷ Moreover, the policy of promoting export-driven growth was beginning to produce impressive results.⁹⁸ Natural resources like fruit, timber, and fishing products were being increasingly produced and exported, diversifying Chile's economy and reducing Chile's reliance on its mining industries.⁹⁹ As prosperity grew, profits and benefits did begin to "trickle down," both in wages and in social welfare as the policy focus began to shift to labor law development, education, justice, and other social policies.¹⁰⁰ These social reforms ultimately outlived the Pinochet government and have served as models for many other Latin American countries.¹⁰¹

C. The Fall of Free Markets and the Demise of Pinochet

In 1982, oil prices skyrocketed and triggered, along with wild investment speculation, a massive recession that caused Chile's GDP to fall by over 14%.¹⁰² This crash decreased standards of living and resulted in an outburst of street protests by many people in the lower and middle classes.¹⁰³ By 1984, Chile's free market model was being reassessed from the positive influence

⁹³ *Id.*

⁹⁴ *Id.* at 140.

⁹⁵ *Id.* (showing that inflation was at 343% in 1975, which was half of what it was in 1973. Also, GDP fell by 13% and unemployment dropped from 1974 levels. However, the reforms instituted by the Chicago Boys predicted such results from their policies, their thinking being that there would be no lasting, long term gain without some massive short term pain.); *see also* BRIAN LOVEMAN, CHILE: THE LEGACY OF HISPANIC CAPITALISM 269 (3d ed. 2001).

⁹⁶ *Id.* at 145.

⁹⁷ *Id.* (defining real rise in salary as gross salary increase adjusted for inflationary affects.).

⁹⁸ JOHN HICKMAN, NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE 145 (1998).

⁹⁹ *Id.* (Chile has about 20% of the world's copper supply.).

¹⁰⁰ *Id.* at 148-49.

¹⁰¹ *Id.* at 149.

¹⁰² BRIAN LOVEMAN, CHILE: THE LEGACY OF HISPANIC CAPITALISM 280-82 (3d ed. 2001).

¹⁰³ JOHN HICKMAN, NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE 181 (1998).

high tariffs and export incentives had in creating a mild reflation.¹⁰⁴ However, fears of a return to the prior socialist system surfaced, and many of the free market policies instituted in the late 1970s were slowly reinstated.¹⁰⁵

At this time, the Pinochet government was fielding harsh criticism. Because of his regime's violent and autocratic tactics and Chile's lack of progress toward democracy, U.S. policy turned against Pinochet in 1984.¹⁰⁶ In 1988, Chile held a plebiscite to determine if Pinochet and the Chilean military would reign for another 8 years or whether Chile would implement democratic elections.¹⁰⁷ Pinochet lost by nine percentage points.¹⁰⁸

After elections were held in 1989, elected president Patricio Aylwin agreed with the opposition parties to accept a free market economic system along the main lines of the economic policy established during the military regime.¹⁰⁹ By the end of the 1980s, Chile's average per capita income was about \$2,000.¹¹⁰ The 1990s saw Chilean economic policies of encouraging free markets result in high GDP growth while unemployment decreased.¹¹¹ Six years after free elections, Chile's average per capita income had risen by 250% to \$4,740.¹¹² Moreover, Chile instituted government programs to enhance the "trickle down" effect of this economic growth, decreasing the proportion of Chileans living in poverty from 40% to 24% by 1996.¹¹³ Chile's policies have been wildly successful, resulting in its per capita income doubling from \$4,740 in 1996, to \$9,140 in 2002.¹¹⁴

¹⁰⁴ *Id.* at 184.

¹⁰⁵ *Id.* at 185.

¹⁰⁶ *Id.* at 186.

¹⁰⁷ *Id.* at 199.

¹⁰⁸ *Id.* at 200. These plebiscites, as required by the 1980 Constitution developed after the military replaced the corrupt socialist leaders of 1972, were to be held every eight years until the military (Pinochet) lost. After the military lost, democratic elections were to be implemented.) (Pinochet had the support of the Vice Commander-in-Chief of the Army and the Chilean army to ignore the election result. However Pinochet refused this opportunity, claiming he had sworn to uphold the 1980 Constitution and would abide by the results. Thus, the military's control ended after 15 years.

¹⁰⁹ *Id.* at 205.

¹¹⁰ *Id.* at 206.

¹¹¹ *Id.* at 212 (showing that in 1988, per capita income was \$1,890, inflation was 14.7%, and unemployment was 8.3%. By 1995, inflation was 8.2% and unemployment was 5.5%. Moreover, GDP had risen 250% to \$4,740.).

¹¹² *Id.*

¹¹³ *Id.* at 213.

¹¹⁴ See NationMaster.com, *Map & Graph: Economy: GDP (PPP) (per capita) (Top 50 Countries)*, http://www.nationmaster.com/graph-T/eco_gdp_ppp_cap# (last visited Feb. 21, 2005).

Thus, in the last 30 years, which involved a coup and resulting junta that caused fifteen years of highly volatile and oftentimes repressive policies, Chile has grown its economy and its citizens have achieved the 16th highest GDP growth rate in the world.¹¹⁵ Moreover, it has been the only Latin American country to achieve this growth in a steady, stable manner, while diversifying its economy by expanding its manufacturing base.¹¹⁶

While Chile has a large portion of its population still living in poverty, there is little support for government intervention to redistribute the rewards of its economic growth.¹¹⁷ Instead, Chilean policies are focused on increasing economic efficiency, expanding access to markets, and exploiting all of Chile's comparative advantages to create the wealth needed to provide for greater overall prosperity.¹¹⁸ Thus, to effectuate these policies, the last decade has seen Chile at the forefront of negotiating FTAs of varying scope.

D. Chile's International Policies and Negotiations

Since the early 1990's Chile has pursued its trade objectives through a multidimensional trade policy.¹¹⁹ This involved consolidating its unilateral policy of openness as well as negotiating new bilateral free trade agreements, fine-tuning existing agreements, and actively participating in regional and multilateral forums and negotiations.¹²⁰

Having suffered for a long time from intermittent boycotts by the U.S. and a general reluctance by Western countries to maintain more than formal relationships with Chile throughout the Pinochet regime, Chile was interested in ensuring uninterrupted trade relationships.¹²¹ Thus, Chile began negotiations to enter into various new regional and inter American agreements that emerged at the end of the 1980s.¹²² In 1990, President Bush stated that Chile would be the United States's first choice for inclusion in NAFTA.¹²³ However, in spite of this policy announcement and numerous promises from various U.S. delegations that included visits from

¹¹⁵ See NationMaster.com, *Chile Economy*, http://www.nationmaster.com/country/ci/Economy&b_define=1 (last visited Feb. 21, 2005).

¹¹⁶ World Bank, *Economy*, at 3 (2002), <http://www.worldbank.org/data/wdi2002/economy.pdf> (last visited Feb. 21, 2005); see also Export Council for Energy Efficiency, *Market Assessment of Chile*, (1999), <http://www.ecee.org/pubs/assess/Chile/Chile.htm> (last visited Feb. 21, 2005) (Chapter/Section 1 entitled, "Chile's Economy and Investment Conditions," was specifically used).

¹¹⁷ JOHN HICKMAN, *NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE* 225 (1998).

¹¹⁸ *Id.*

¹¹⁹ Chilean Government, *Trade Policy Review*, at 7 (Nov. 4, 2003), <http://www.wto.org> (last visited Feb. 21, 2005).

¹²⁰ *Id.* at 7-8.

¹²¹ JOHN HICKMAN, *NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE* 215 (1998).

¹²² *Id.*

¹²³ *Id.*

various U.S. senators, the U.S. failed to incorporate Chile into NAFTA or negotiate a bilateral agreement similar to NAFTA for fourteen years.¹²⁴

Because Chile's foreign trade is relatively evenly distributed between the U.S., Latin America, the European Union, and Asia, Chile's international focus was not limited to the U.S. market. Thus, Chile expanded its search for other free trade or reduced tariff agreements with various trading partners.¹²⁵ For example, Chile entered into bilateral FTAs with Mexico in 1991, Venezuela and Colombia in 1993, and Ecuador in 1994.¹²⁶ Moreover, while negotiating these bilateral trade agreements, Chile was involved in various multilateral negotiations, many of which came to fruition by the mid 1990's.¹²⁷ In 1996, Chile became a formal associate member to Mercosur, a free trade agreement between Brazil, Argentina, Uruguay, and Paraguay.¹²⁸ Chile also joined the APEC agreement, which consists of the U.S., Canada, and all the principal countries of the Pacific Basin, and entered into an association agreement with the European Union.¹²⁹ While all this was being negotiated, Chile was also actively involved with the WTO, with its primary focus on promoting further and more far reaching multilateral trade agreements.¹³⁰

From 1998-2002 Chile was able to negotiate even more FTAs, making pacts with South Korea, Canada, and Central American countries.¹³¹ Moreover, Chile was able to move beyond its association agreement by entering into a full FTA with the European Union.¹³² These agreements led to these countries' goods displacing American goods in the Chilean market.¹³³ In fact, the U.S. went from having a slight trade surplus with Chile to running a trade deficit as Chileans substituted cheaper European goods for American goods.¹³⁴ After two years of decreasing sales,

¹²⁴ *Id.* at 216.

¹²⁵ *Id.* at 217.

¹²⁶ World Trade Organization, *Trade Policy Review: Chile 1997*, (Sept. 10, 1997), <http://www.wto.org> (last visited, Feb. 21, 2005).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Lindsay M. Faine, Note, *The Internationalization of Chilean Agriculture: Implications of the United States-Chile Free Trade Agreement*, 13 MINN. J. GLOBAL TRADE 383, 390-91 (2004); Chilean Government, *Trade Policy Review*, at 7 (Nov. 4, 2003), <http://www.wto.org> (last visited Feb. 21, 2005).

¹³² Chilean Government, *Trade Policy Review*, at 7 (Nov. 4, 2003) <http://www.wto.org>.

¹³³ Lindsay M. Faine, Note, *The Internationalization of Chilean Agriculture: Implications of the United States-Chile Free Trade Agreement*, 13 MINN. J. GLOBAL TRADE 383, 399 & 401 (2004).

¹³⁴ *Id.* at 401.

the U.S. reasserted its desire to negotiate an FTA.¹³⁵ While the Americans had been slow to act under the Bush and Clinton administrations of the 1990s, the economic losses it experienced provided the necessary motivation and urgency for Chile to make an FTA it had coveted for over ten years.¹³⁶

The history of Chile's economic and political development may provide a basis for analyzing which hypothesis, or combination of hypotheses best explains Chile's decision to enter into a bilateral FTA with the U.S.

IV. Australia

Australia is really the only developed country other than Canada to agree to some type of FTA with the United States, and is the only one to do so in a bilateral forum. Moreover, Australia provides a good comparison with Chile because both countries' main exports to the U.S. are mineral (e.g. gold, iron ore, coal) and agricultural (e.g. wool, wheat, beef) goods.¹³⁷ However, Australia has been more stable politically and has a much more developed economy, with services and manufacturing making up much larger parts of its economy.¹³⁸

Based on various theories presented by commentators, one could expect Australia's bilateral FTA with the U.S. to have resulted from various scenarios: it could be due to the U.S. leveraging its "hegemonic" power by attempting to coerce Australia into an FTA,¹³⁹ it could be Australia's attempt to further its economic policy by negotiating away IPRs for greater access to the U.S. market,¹⁴⁰ or it could be the result of massive multinational corporations furthering their own economic interests.¹⁴¹

¹³⁵ *Id.*; see also Aaron Schavey, *How Trade Promotion Authority Would Bolster the Manufacturing Industry*, THE HERITAGE FOUNDATION BACKGROUNDER NO. 1561 (June 21, 2002), <http://www.heritage.org/Research/TradeandForeignAid/BG1561.cfm> (last visited Feb. 21, 2005).

¹³⁶ *Id.*; JOHN HICKMAN, *NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE* 215 (1998).

¹³⁷ American Australian Association, *Australia Fact Sheet*, at 1 (Feb. 7, 2005), <http://www.americanaustralian.org/Corporate/pdf/australiafactsheet.pdf> (last visited, Feb. 21, 2005).

¹³⁸ Compare CIA World Fact Book, *Australia*, <http://www.cia.gov/cia/publications/factbook/geos/as.html> (last visited Feb. 21, 2005) and CIA World Fact Book, *Chile*, <http://www.cia.gov/cia/publications/factbook> (Feb. 21, 2005) (Specifically, compare the export and import commodities of both countries. Australia's main imports (machinery and transport equipment, computers and office machines, telecommunication equipment and parts) are generally for more advanced/sophisticated industries than Chile's (consumer goods, chemicals, motor vehicles, fuels, electrical machinery, heavy industrial machinery, food)).

¹³⁹ See Ruth Gana Okediji, *Symposium on Globalization at the Margins: Perspectives on Globalization from Developing States: Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEG. STUD. 117, 133 (1999).

¹⁴⁰ Chilean Government, *Trade Policy Review*, at 7 (Nov. 4, 2003), <http://www.wto.org> (last visited Feb. 21, 2005).

¹⁴¹ Peter Drahos, *Hope, Power, and Governance: Section One: Building Institutions of Hope: Trading in Public Hope*, 592 ANNALS 18, 20-21 (2004) see also Christopher T. Marsden, *Cyberlaw and International Political Economy: Towards Regulation of the Global Information Society*, 2001 M.S.U.-D.C.L. L. REV. 355, 400-04 (LEXIS cites this as L. REV. M.S.U.-D.C.L.).

In order to test these theories, a brief background of Australia's economy and recent history is discussed below to appreciate and understand the potential motivations and objectives that may have been implicated in entering into an FTA with the U.S.

A. Traditionally Stable First World Economy

Australia's economy traditionally has relied on natural resources, specifically wool and gold, to achieve its political and economic success.¹⁴² In the 1890's, Australia was a moderately protectionist country with Free Traders and Protectionists compromising to achieve efficient production and redistribution policies.¹⁴³ Protectionists in Australia thought that tariff increase could increase employment and redistribute income to the less wealthy.¹⁴⁴ However, as mining industries became a large portion of Australia's income and a major source of its exports, this attitude became less popular.¹⁴⁵

Australia's system of protection relied heavily on administratively allocated quotas that were designed to protect items of mass consumption like textiles, footwear, and clothing.¹⁴⁶ However, this policy closed off opportunities for the expansion of Australia's most productive industries, which was necessary to increase wages, employment, and government services.¹⁴⁷ For example, the industries that received the major benefit from these quotas (textiles, clothing, and footwear) experienced steep declines in domestic consumption during the 1970s.¹⁴⁸ However, as these industries were compared to less protected ones, their employment rates fell by a similar proportion.¹⁴⁹ Thus, in spite of the fact that protectionist measures redistributed income to the protected industries in a much larger proportion, it yielded no improved result.¹⁵⁰ Moreover, the government subsidy was being used to artificially enhance goods that disproportionately and detrimentally affected poor Australians' purchasing power because these measures were applied to necessities (clothing and footwear).¹⁵¹

¹⁴² ROSS GARNAUT, SOCIAL DEMOCRACY IN AUSTRALIA'S ASIAN FUTURE 131 (2001).

¹⁴³ *Id.* at 44.

¹⁴⁴ *Id.* at 45.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* Quotas were not like tariffs because it affected only selected income. Thus, they essentially acted as a government subsidy to certain some groups at the expense of other groups.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 41.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 41 & 46.

As it became more apparent that Australia's protectionist measures and system were flawed, disproportionately affecting the economic well being of the poor, Australia began to rethink its economic and trade policies.¹⁵² As a result, Australia began liberalizing its trade policies in the early 1980's.¹⁵³ This decreased Australia's reliance on wool and mineral exports by raising international competitiveness of all production of tradeable goods.¹⁵⁴ While wool and mineral exports expanded, manufacturing and services expanded even more.¹⁵⁵ However, in spite of all this diversification, wool and mining industries still represent the bulk of Australian exports.¹⁵⁶

The net effect of Australia's trade liberalization policy is that it suddenly made Australia a credible participant in bilateral, regional, and multilateral negotiations in textile trade, which would greatly affect its large wool industry.¹⁵⁷ Thus, one of Australia's primary objectives was to advance textile trade liberalization in order to further increase its market access into the global wool and textile markets.¹⁵⁸

B. International Economic Policies

Australia's trade liberalization has a large impact on its policy outlook. Australia is committed to achieving free and open trade with all the developed Asian Pacific Economic Cooperation countries by 2010, and the less developed ones by 2020.¹⁵⁹ Specifically, Australia is focused on investment liberalization and expanding and encouraging business cooperation.¹⁶⁰ Moreover, Australia has sought to strengthen IPRs, but not copyright related IPRs.¹⁶¹

¹⁵² *Id.* at 46.

¹⁵³ *Id.* at 132; *see also* Australian Government, *Trade Policy Review: Australia 2002*, (Sept. 25, 2002), <http://www.wto.org> (last visited Feb. 21, 2005) (explaining that tariff reduction from 1970-2001 has seen a drop from 35% to 4.8% for manufacturing and 28% to 6% drop for agriculture. Australia also continues to disproportionately favor clothing and footwear sectors, but has dropped this support significantly, and plans to continue decreasing the disproportionate favoring.).

¹⁵⁴ ROSS GARNAUT, *SOCIAL DEMOCRACY IN AUSTRALIA'S ASIAN FUTURE* 131 (2001).

¹⁵⁵ *Id.* at 132 & 134.

¹⁵⁶ *Id.* at 139.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Australian Government, *Trade Policy Review: Australia 2002*, (Sept. 25, 2002), <http://www.wto.org> (This is pretty significant because APEC represents about 50% of global trade, including the U.S. and Chile.).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* While it may say this in a governmental report to the WTO, it seems that Australia is certainly not interested in strengthening, or expanding IPRs in the biotech/pharmaceutical industry that would negatively affect its Pharmaceutical Benefits Scheme. Moreover, it was not willing to ratify the WIPO Copyright and WIPO Performances and Phonograms treaties until signing an FTA with the U.S. (The U.S. implementation of these WIPO treaties was the Digital Millennium Copyright Act (DMCA)). *See* AUSTA, *Quick Briefs for Media – Issues Likely to Arise in an Agreement*, <http://www.austa.net/quickBriefs/quickBriefs3.htm> (last visited Feb. 21, 2005).

Australia also has signed an FTA with New Zealand and, in addition to its objectives within APEC, is looking to expand FTAs with other regional associations, particularly The Association of South East Asian Nations (ASEAN).¹⁶²

C. Decision to Enter Into an FTA with the U.S.

Australia also recently entered into an FTA with the U.S. Unlike Chile, there was extensive internal debate as to whether entering into this FTA was in its best interests. The proponents of entering into a bilateral FTA with the U.S. cited various reasons, some of which were similar to Chile's. For example, Australia wanted to increase its access to U.S. markets, increase American foreign investment, and increase protections for its American investments.¹⁶³ Unlike Chile, which lacks significant anti-globalization organizations or political parties, Australia has political parties that are anti-globalization or anti-United States.¹⁶⁴ Moreover, Australia has other influential commentators that are against bilateral agreements because of their feared negative impact on forming multilateral agreements.¹⁶⁵ However, the political parties against an FTA with the U.S. only made up about ten percent of Australia's electorate.¹⁶⁶

¹⁶² Australian Chamber of Commerce and Industry, *ASEAN-Australia / New Zealand Free Trade Agreement Worth Pursuing*, at 1, (Aug. 20, 2004), http://www.acci.asn.au/text_files/issues_papers/Trade/ASEAN-Aust-NZ%20_August%202004_.pdf (last visited Feb. 21, 2005).

¹⁶³ Alan Oxley, *Report on the New Year*, THE AUSTRALIAN FINANCIAL REVIEW (Jan. 2, 2002), <http://www.austa.net/publicForum/publicForum4.htm> (last visited Feb. 21, 2005); FTA Analyst, AUSTA, *Increasing Investment Too*, (ed. Alan Oxley, Sept. 5, 2003), <http://www.austa.net/analyst/analyst16.html> (last visited Feb. 21, 2005) (42% of Australia's foreign investment was distributed to the United States); see also David Richardson, *Foreign Investment and the Australian United States Free Trade Agreement*, at 5 (Mar. 8, 2004), <http://www.aph.gov.au/library/pubs/cib/2003-04/04cib07.pdf> (last visited Feb. 21, 2005) (U.S. foreign investment represented 33% of the total value of foreign investment in 2002-03.).

¹⁶⁴ AUSTA, *Quick Briefs for Media – Issues Likely to Arise in an Agreement*, <http://www.austa.net/quickBriefs/quickBriefs3.htm> (last visited Feb. 21, 2005).

¹⁶⁵ AUSTA, *Quick Briefs for Media – Issues Likely to Arise in an Agreement*, <http://www.austa.net> (last visited Feb. 21, 2005); see generally, The Australian Interest, <http://www.australianinterest.com> (last visited Feb. 21, 2005) (various websites and links and articles provided on the FTA with the U.S.) and compare with Business Council of Australia, *Free Trade Agreement with the United States*, (Feb. 10, 2004), <http://www.bca.com.au/content.asp?newsID=94430> (last visited Feb. 21, 2005). It seems rather surprising that various arguments are made by groups against an FTA that claim Australian business will suffer, while business groups are generally very optimistic about the FTA and the new prospects it may create. Seeing that Australia's government even thinks its trade liberalization policies are a major reason for its economic success of the past 10-15 years, this argument, at least, does not appear to make much sense. However, it is possible that some Australians may be negatively affected in other ways that may not affect businesses as much as it may affect individuals. For example, it is claimed by some sources that drug prices will go up as a result of this FTA. Thus, while an FTA may have a net positive impact on business, it could have a net negative impact on individuals or possibly just health related sectors of Australian society/business (assuming prices do go up as a result of the FTA). Regardless, it seems that most of these claims of a net negative economic impact are likely over exaggerated because both a vast major of political parties and business leaders promoted the FTA.

¹⁶⁶ ABC News Online, *Election 2004 Results*, <http://www.abc.net.au/elections/federal/2004/results> (last visited Nov. 28, 2004). Both the Labor (leading minority party) and Liberal (Prime Minister Howard's party) parties in Australia

Thus, while there was more public debate in Australia, the supermajority of its electorate appear to have come to a similar conclusion, which was: even if it had to strengthen IPRs, an FTA with the U.S. was in its best interests.¹⁶⁷

Australia's economic development and history over the past few decades should provide some insight into determining which hypothesis or hypotheses best explains Australia's decision to enter into a bilateral FTA with the U.S. These hypotheses are more extensively assessed below.

V. Summary of Findings

This part of the paper will analyze the results discovered in parts III and IV to assess each country's experience through the lens of each generalized theory: U.S. hegemony, multinational corporate lobbying, and autonomous policy implementation. Additionally, this section will project these findings into other areas of discourse. Specifically, it will discuss the ramifications these results may have on determining whether a bilateral or multilateral forum is more equitable for less developed countries negotiating with developed countries and whether NGOs should be involved in IPR related negotiations.

A. Chile

Chile obviously was not coerced into an FTA with the United States. Instead, Chile had to negotiate for over a decade and first enter an FTA with the EU before the United States would agree to meaningful negotiations. In fact, were it not for the loss of market share U.S. goods experienced as a result of Chile's previously made agreement, it is possible the U.S. would have continued to shun Chile, especially considering the potential political ramifications the agreement could have made in the 2004 elections.¹⁶⁸ Thus, Chile's negotiating tactics show an experience or sophistication that is capable of both balancing the interests of various partners, and also negotiating with various other parties. Chile wasn't just negotiating with the U.S during this time. It was also and is also involved in numerous other organizations and bilateral agreements, ranging from APEC to bilateral talks with various other countries like South Korea, Canada, and other Latin American countries. If anything, the U.S. was coerced into an agreement with Chile by Chile's successful negotiation of an FTA with the EU, which arose, in part, because the EU knew it would become much more competitive with American goods by agreeing to such an FTA.¹⁶⁹

were for the FTA with the U.S. While people vote on numerous issues, this supermajority illustrates, at the least, that an FTA with the United States was a minor issue for most voters in this election.

¹⁶⁸ Cf. Paul Blustein, *Central American Agreement Could Have Been Big Campaign Issue*, WASHINGTON POST, May 28, 2004, at E4.

¹⁶⁹ See Lindsay M. Faine, Note, *The Internationalization of Chilean Agriculture: Implications of the United States-Chile Free Trade Agreement*, 13 MINN. J. GLOBAL TRADE 383, 401 (2004); see also The Heritage Foundation *Backgrounder No. 1561* (June 21, 2002), <http://www.heritage.org/Research/TradeandForeignAid/BG1561.cfm> (last visited Feb. 21, 2005).

Thus, it appears that both a developed and less developed country have various tactics and powers available to them in bilateral negotiations that aren't inherently unfair or biased. In fact, this case study suggests that less developed countries are just as capable and sophisticated negotiators as developed countries. Specifically, Chile's decision to engage in bilateral negotiations actually provided it the necessary freedom to make an agreement with the U.S. A multilateral setting would not have allowed Chile to play the U.S. against other large interest groups like the EU, because the EU and the U.S. would have been much more likely to be aligned against a less developed country like Chile.¹⁷⁰ Moreover, because Chile has only been a stable government for about 15 years, it is not necessarily true that a significantly long time period is required to develop negotiation expertise.¹⁷¹

Chile, as a democracy, represents the will of the majority of its people in negotiating FTAs and other international agreements. Because it views its trade liberalization policy as the main reason for its quintupled per capita income over the last fifteen years, its decision to continue to further this policy goal is unlikely due to outside coercion.¹⁷² Instead, it appears to reflect the apparent success its policies have had and its populations desire to continue to expand these policies. Specifically, agreeing to increased IPRs, when few, if any, significant Chilean interests are exposed to potential problems in order to expand its competitiveness and market access to core economic interest groups appears to be a well reasoned and politically justifiable action.¹⁷³ Moreover, as history has indicated, it appears to be working and will provide the opportunity for Chile to increasingly develop a manufacturing base and educational institution expertise.¹⁷⁴ It takes excess money to create institutions capable of improving education and environmental goals, which provide educated work forces capable of more technologically sophisticated production of goods related to pharmaceuticals, software, or electronics.¹⁷⁵ Moreover, Chilean dependence on American foreign investment and its desire to increase or at least maintain this

¹⁷⁰ Ruth L. Okediji, *Public Welfare and the Role of the WTO; Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819, 850 (2003).

¹⁷¹ Mehdi Shafaeddin, *How Did Developed Countries Industrialize? The History of Trade and Industrial Policy: The Cases of Great Britain and the USA*, at 11 (Dec. 1998), http://www.unctad.org/en/docs/dp_139.en.pdf (last visited Feb. 21, 2005) (explaining that very fast and timely policy implementation may be necessary for a less developed country to have any success at effectively implementing their economic policy goals).

¹⁷² Chilean Government, *Trade Policy Review*, at 7 (Nov. 4, 2003), <http://www.wto.org> (last visited Feb. 21, 2005).

¹⁷³ See *Id.*

¹⁷⁴ See CIA, *The World Fact Book – Chile*, <http://www.cia.gov/cia/publications/factbook> (last visited Feb. 21, 2005) (economy overview section) and European Trade Commission, *Bilateral Trade Relations-Chile*, (Oct. 2002), http://www.europa.eu.int/comm/trade/bilateral/chile/index_en.htm (last visited Feb. 21, 2005) ("Chile is widely recognized as having the most open, stable and liberalized economy in Latin America ... It is not for nothing that the World Economic Forum has rated the Chilean economy as the most competitive in Latin America.").

¹⁷⁵ Mehdi Shafaeddin, *How Did Developed Countries Industrialize? The History of Trade and Industrial Policy: The Cases of Great Britain and the USA*, at 6 (1998), http://www.unctad.org/en/docs/dp_139.en.pdf (last visited Feb. 21, 2005) and cf. BJORN LOMBORG THE SKEPTICAL, ENVIRONMENTALIST 176-77 (2001).

same level of investment is directly benefited from increasing various measures.¹⁷⁶ Thus, Chile appears to have given up very little in order to gain greater access to one fifth of the world's economic marketplace.

1. Testing Hypotheses

i. U.S. hegemony

Based on the long period of time it took the U.S to enter into a bilateral FTA with Chile, it appears unlikely the FTA resulted from any direct application of American hegemonic power. In fact, because the U.S. only entered into meaningful negotiations after Chile successfully negotiated an agreement with the EU, it seems that Chile used different negotiating tactics in order to facilitate an FTA with the U.S, which had been one of its major policy goals since 1990.¹⁷⁷

In fact, Chile has engaged in various forums to further its trade liberalization policies. From entering Mercosur, to bilateral FTAs with the EU, Mexico, Canada, and other countries, to entering APEC, it appears unlikely this activity can be truly attributed to U.S. hegemonic power or influence. Instead, it seems Chile actively seeks to implement its policies by promoting agreements and effectuate occurrences it believes will increase its citizens' well being.¹⁷⁸ At the very least, the Chilean government does not appear to feel it was coerced into the bilateral agreement.¹⁷⁹ As the Chilean government wrote in its most recent WTO report:

[The] Free Trade Agreement [with the U.S.] shows that a developing country can reach a mutually satisfactory and comprehensive agreement with a developed country, an agreement which does not merely focus on market access, but also attaches importance to institutional matters that contribute to transparency and improved conditions of competition which, over time, will benefit all countries that trade with Chile.¹⁸⁰

In view of the Chilean government's understanding of its FTA negotiations with the U.S. and the economic occurrences underlying the American negotiation and agreement to the FTA, it does not appear that American hegemony or coercion played any role in the negotiations.¹⁸¹

¹⁷⁶ See Evgenia V. Sorokina, *Chile's Free Trade Agreements: Can Their Benefits Survive Chile's Continuing Controls on Foreign Capital?*, 18 AM. U. INT'L L. REV. 1217, 1218 (2003).

¹⁷⁷ JOHN HICKMAN, *NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE* 216 (1998).

¹⁷⁸ Chilean Government, *Trade Policy Review*, at 7 (Nov. 4, 2003), <http://www.wto.org> (last visited Feb. 21, 2005).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See also Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L.J. 1029, 1064 (2004) ("[T]he Southern Cone countries are now makers and not simply takers of international policy.").

ii. Multinational Corporate Lobbying

This theory appears to have more applicability than American hegemony. After all, the Americans were not actively interested in negotiating an FTA with Chile until after Chile had an FTA with the EU, which negatively affected American trade.¹⁸² Thus, while corporate lobbying over the FTA likely occurred in both countries, it does not appear that there was any concerted effort to lobby or present some type of “false hope” or misleading claim to either government. Instead, it seems that the interested and affected corporations and other parties of each respective country lobbied to further their inapposite corporate interests.

The one “hope,” or effective lobbying that could be attributable to some multinational or large American corporation(s) is the FTA’s provision requiring capital market reforms to create increased foreign investment in Chile.¹⁸³ However, this appears to have been something Chile recognized and has attempted to address using a variety of policies.¹⁸⁴ Moreover, the increased liberalization of Chile’s capital market actually supports its policy of growing exports through the increased market access gained through the FTA.¹⁸⁵ Thus, it does not appear that Chile agreed to this provision as a result of effective lobbying of some multinational corporation because medium sized Chilean corporations were greatly affected by Chile’s current capital market regulatory structure.¹⁸⁶ Consequently, lobbying from affected corporate interests within its constituency seems to be the most likely influence on Chile’s acceptance of this provision, which is more akin to typical politics than geopolitical objectives driven by large corporate interests.

iii. Chile’s Autonomous Policy Implementation

It appears that the most likely explanation for Chile’s decision to enter into a bilateral FTA with the U.S. was to further its own interests. In light of Chile’s struggles in the 1970s and 80s, and its belief that its free market and trade liberalization policies have been a major reason for its recent

¹⁸² Aaron Schavey, *How Trade Promotion Authority Would Bolster the Manufacturing Industry*, THE HERITAGE FOUNDATION BACKGROUNDER NO. 1561 (June 21, 2002), <http://www.heritage.org/Research/TradeandForeignAid/BG1561.cfm> (last visited Feb. 21, 2005).

¹⁸³ See Chilean Government, *Trade Policy Review*, at 7 (Nov. 4, 2003), <http://www.wto.org> (last visited Feb. 21, 2005).

¹⁸⁴ Evgenia V. Sorokina, *Chile’s Free Trade Agreements: Can Their Benefits Survive Chile’s Continuing Controls on Foreign Capital?* 18 AM. U. INT’L L. REV. 1217, 1228-29 (2003).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (“[T]he brunt of protection against capitales golondrina is borne by Chilean companies, and in particular, by medium size companies that cannot raise cheaper capital to finance their operations and expansion.”).

economic success, its desire to enter into a trade liberalization agreement with the U.S. appears consistent with this policy.¹⁸⁷ In fact, it seems to further this policy.¹⁸⁸

One can certainly argue that Chile's economic policies are wrong or improperly developed, but Chile has certainly found stability and amazing success compared to other countries, especially in the past 15 years.¹⁸⁹ Moreover, these policies are strongly supported by the country's populace.¹⁹⁰

In fact, Chile's decision to enter into a bilateral FTA with the U.S. without really seeking to diminish American agricultural subsidies, a problem that greatly affects Chileans' large farming industry, may even be a strategic negotiating decision. Currently, the FTAA has become bogged down due to an impasse over American agricultural subsidies, strengthening of IPRs, and other issues.¹⁹¹ Consequently, this FTA may be a decision by Chile to make more immediate and certain gains in the American market with the current FTA. This allows Chile to continue to address problems associated with American subsidies in the FTAA forum, where it may have greater success due to the presence of Brazil and other Mercosur countries which, are largely responsible for the FTAA negotiation impasse.¹⁹² As these issues specifically relate to IPRs and agrarian subsidies, it is Brazil and Argentina that have the most to lose in granting stronger IPRs because both countries have relatively large generic pharmaceutical and agricultural industries.¹⁹³ In contrast, Chile does not have substantial industries relying on IPRs and does not appear to be overly concerned with American farm subsidies, either because it is secretly hoping for Brazil's success in FTAA negotiations or because it is not overly concerned with the long term effects of subsidies on Chilean products.¹⁹⁴

¹⁸⁷ Chilean Government, *Trade Policy Review*, at 7 (Nov. 4, 2003), <http://www.wto.org> (last visited Feb. 21, 2005).

¹⁸⁸ See Evgenia V. Sorokina, *Chile's Free Trade Agreements: Can Their Benefits Survive Chile's Continuing Controls on Foreign Capital?* 18 AM. U. INT'L L. REV. 1217, 1218 (2003).

¹⁸⁹ JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 18 (2003).

¹⁹⁰ JOHN HICKMAN, *NEWS FROM THE END OF THE EARTH: A PORTRAIT OF CHILE* 224-25 (1998).

¹⁹¹ Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L.J. 1029, 1051-52 (2004).

¹⁹² *Id.* at 1062 (2004) (“[T]he United States had threatened to build the FTAA with or without Brazil, but it soon became apparent that without Brazil there would be no real FTAA.”). Of course, in the FTAA negotiations, Chile has taken a more pro-American stance as compared to the other Latin American countries. This could be due to the above mentioned strategy of relying on Brazil to further Chile's policy hopes without preventing Chile from obtaining a further delayed bilateral FTA with the U.S., or it could be due to Chile being less concerned with U.S. subsidies than its compatriots or being more influenced by American economic power. Since Chile is already an associate member of Mercosur, it appears Chile is essentially on both sides of the negotiating table, receiving a net positive outcome regardless of the FTAA negotiations (i.e. wins if Mercosur gains concessions from U.S., but doesn't face the prospect of losing greater access to American markets if the FTAA falls apart or is greatly delayed due to its current FTA).

¹⁹³ *Id.*

¹⁹⁴ *Id.*; see also Daniel A. Sumner, *Agricultural Trade Disputes and U.S. Farm Subsidies: Implications for Latin America*, (Oct. 4, 2004), <http://www.clas.berkeley.edu:7001/Events/fall2004/10-04-04-sumner> (last visited Feb. 21,

Consequently, it appears that Chile entered a bilateral FTA with the U.S. to further its own trade policies. Moreover, it does not appear that Chile has much concern with any potential problems stronger IPRs may present to its economic or technological development.¹⁹⁵ This is likely due to Chile's economy not having any relatively substantial industries that rely on intellectual property rights, like a pharmaceutical industry. Another explanation is that Chile hopes the FTA may increase the rate of transfer and dissemination of various technologies, which would either offset or be a net benefit when compared to any negative implications associated with granting stronger IPRs.¹⁹⁶ Since Chile relies on exports to fill most of its manufacturing and technological needs, it is likely that technological transfer increases will increase its citizens well being without having many negative affects to its industrial interests.¹⁹⁷

B. Australia

As compared to Chile's fifteen year FTA negotiation process, it appears the U.S. was much more willing to negotiate with Australia. This seems surprising in light of many commentators' claims that developed countries are less willing to be coerced by the U.S, which is allegedly why the U.S. does not entertain bilateral talks with many developed countries, specifically the EU.¹⁹⁸ In contrast, it took a relatively short time to make a similar pact with Australia. This may be due to Australia having more accessible and experienced negotiators when talks were initiated, or it may be due to artificial or inherent prejudices American policy has with countries that do not share its Anglican heritage and language. However, as with Canada (but to a lesser extent), Australia is dependent upon the American market for a large amount of its agriculture and gold mining exports.¹⁹⁹ Since these two industries are quite large, they obviously had a great impact on the political decision to acquiesce in an FTA that provided greater IPRs.²⁰⁰ Moreover, such an

2005) and cf. Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004). Chile may feel American subsidies are more properly limited through regime change in the WTO or through the FTAA negotiation process.

¹⁹⁵ Maria Julia Olivia, *Intellectual Property in the FTAA: Little Opportunity and Much Risk*, 19 AM. U. INT'L L. REV. 45, 54 (2003) ("Intellectual property systems designed for highly industrialized countries may actually hinder innovation relevant to developing countries").

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Cf. Ian L.G. Wadley, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Environment: U.S. and Them: Hubs, Spokes & Integration with Reference to Transboundary Environment and Resources Issues*, 21 BERKLEY J. INT'L L. 572, 578-80 (2003).

¹⁹⁹ Economist Intelligence Unit, *Australia Economic Structure*, Economist (Feb. 24, 2004), <http://www.economist.com/countries/Australia/profile.cfm?folder=Profile-Economic%20Structure> (last visited Feb. 21, 2005) (mining and agricultural products, while respectively making up 4.6 % and 2.8% of Australia's GDP, are its principal exports.); see also HERMAN KAHN & THOMAS PEPPER, *WILL SHE BE RIGHT? THE FUTURE OF AUSTRALIA* 61 (1980).

²⁰⁰ See AUSTA, *Latest Developments*, <http://www.austa.net/index.php> (last visited Feb. 21, 2005) and Economist Intelligence Unit, *Australia Fact Sheet*, ECONOMIST (Apr. 6, 2004), <http://www.economist.com/countries/Australia/profile.cfm?folder=Profile-FactSheet> (last visited Feb. 21, 2005).

agreement is consistent with recent Australian policies, which has focused on expanding its IPRs over the last few years.²⁰¹ This is probably particularly true when considering Australia's small entertainment and software industries.²⁰² Moreover, because Australia has increasingly expanded its manufacturing industries over the past 10-15 years, the increased market access provides an avenue to create more and accelerating growth.²⁰³ Likewise, as with Chile, Australia relies heavily on American foreign investment. Thus, as with Chile, Australia had much to gain and little to lose in agreeing to expanding IPRs for greater foreign investment access.²⁰⁴

Australia was also concerned that less developed countries were becoming more competitive and gaining greater access to American markets as a direct result of FTAs with the U.S.²⁰⁵ Thus, it appears, at least in the case with Australia, that the less developed countries may be greatly impacting developed countries' decisions in making bilateral agreements.²⁰⁶

More importantly, as with Chile, Australia considers its trade liberalization policies of the last 15-20 years as being a major reason for its success in expanding its economy and growing its manufacturing and other industries. Thus, its agreement also reflects its population's decision to continue implementing a policy that has been credited with greatly increasing its financial well being. Moreover, to most Australians, greater IPRs are likely to provide a negligible problem when compared to the positive impacts the FTA and stronger IPRs will have on Australia's other industries.²⁰⁷

²⁰¹ Australian Industry Group, *Trade Access, Negotiating for Better Market Access*, at 2, (Feb. 7, 2004), <http://www.austa.net/pdf/AIGfeb04.pdf> (last visited Feb. 21, 2005).

²⁰² Allen Consulting Group, *The Economic Contribution of Australia's Copyright Industries*, at ii-iii (2001) available at: [http://www.copyright.com.au/reports%20&%20papers/\(c\)_Value.pdf](http://www.copyright.com.au/reports%20&%20papers/(c)_Value.pdf) (last visited Feb. 21, 2005).

²⁰³ Australian Industry Group, *Trade Access, Negotiating for Better Market Access*, at 2, (Feb. 7, 2004) <http://www.austa.net/pdf/AIGfeb04.pdf> (last visited Feb. 21, 2005).

²⁰⁴ Compare *Id.*, and Bruce Rasmussen, *An Analysis of the Biomedical Sectors in Australia and Canada in a National Innovation Systems Context*, at 7 (July, 2004), http://www.cfses.com/pharma/documents/21-Biomedical_Sect_Aust_&_Can_Innovation_Rasmussen.pdf (last visited Feb. 21, 2005), with Allen Consulting Group, *The Economic Contribution of Australia's Copyright Industries*, at ii-iii (2001), [http://www.copyright.com.au/reports%20&%20papers/\(c\)_Value.pdf](http://www.copyright.com.au/reports%20&%20papers/(c)_Value.pdf) (last visited Feb. 21, 2005), and cf. Kimberly A. Czub, *Argentina's Emerging Standard of Intellectual Property Protection: A Case Study of the Underlying Conflicts Between Developing Countries, TRIPS Standards and the United States*, 33 CASE W. RES. J. INT'L L. 191 (2001).

²⁰⁵ See AUSTA, *Quick Briefs for Media – General Issues*, <http://www.austa.net/quickBriefs/quickBriefs1.htm> and AUSTA, *Public Forum*, <http://www.austa.net/publicForum/publicForum20.htm> (last visited Feb. 21, 2005).

²⁰⁶ See AUSTA, *Quick Briefs for Media – International Economic Issues*, <http://www.austa.net/quickBriefs/quickBriefs2.htm> (last visited Feb. 21, 2005).

²⁰⁷ See AUSTA, *Quick Briefs for Media – Issues Likely to Arise in an Agreement*, <http://www.austa.net/quickBriefs/quickBriefs3.htm> (last visited Feb. 21, 2005). This could change if the IPRs do provide a substantially negative impact on Australia's pharmaceutical entitlement program, but this is not expected to occur.

1. Testing Hypotheses

i. U.S. Hegemony

It appears that U.S. negotiations with Australia went relatively smoothly. While Australia was willing to agree to stronger IPRs, it also gained the greater access to U.S. markets and foreign investment it desired. In lieu of the fact that Australia has relatively small IPR oriented industries, it appears Australia sacrificed very little to achieve its objectives.²⁰⁸

In agreeing to an FTA with the U.S., it seems Australia was reacting to various factors.²⁰⁹ The largest of these being increased competition in the American agricultural markets from FTAs the U.S. had made or was planning to make with various Latin and Central American countries.²¹⁰ Australia was also concerned with recent anti-free trade actions, like the tariffs placed on American steel imports that did not come from countries the U.S. had some type of FTA with, and Australia's desire to further its trade liberalization policies.²¹¹

Thus, it seems there could be some support for a U.S. coercion hypothesis in relation to Australia because of American anti-free trade tariffs and subsidies. However, the steel tariff was only transitory in nature and repealed after a WTO ruling invalidated the tariff fifteen months after it was created.²¹² Moreover, Australia was able to exempt its largest steel exporter, BHP Steel, from most of these tariffs.²¹³ Thus, while this may have been an Australian concern, it appears that there were already avenues in place to deal with this issue and cannot adequately explain Australia's desire for an FTA.

²⁰⁸ This could prove to be inaccurate if this FTA impedes Australia's drug program, which it is not supposed to have done and appears to not be something Australia would knowingly have negotiated away. See AUSTA, *Quick Briefs for Media – Issues Likely to Arise in an Agreement*, <http://www.austa.net/quickBriefs/quickBriefs3.htm> (last visited Feb. 21, 2005).

²⁰⁹ See AUSTA, *Quick Briefs for Media – International Economic Issues*, <http://www.austa.net/quickBriefs/quickBriefs2.htm> (last visited Feb. 21, 2005).

²¹⁰ See AUSTA, *Quick Briefs for Media – International Economic Issues*, available at: <http://www.austa.net/quickBriefs/quickBriefs2.htm> (last visited Feb. 21, 2005) and AUSTA, *Quick Briefs for Media – General Issues*, available at: <http://www.austa.net/quickBriefs/quickBriefs1.htm> (last visited Feb. 21, 2005).

²¹¹ AUSTA, *Quick Briefs for Media – General Issues*, <http://www.austa.net/quickBriefs/quickBriefs1.htm> (last visited Feb. 21, 2005) and AUSTA, *Public Forum*, <http://www.austa.net/publicForum/publicForum20.htm> (last visited Feb. 21, 2005).

²¹² The Autobeat Daily, *U.S. Steel Tariffs Officially Ruled Illegal*, THE AUTOBEAT DAILY, July 14, 2003, at 1, <http://www.autobeatdaily.com/pdfs/07-14-03.pdf> (last visited Feb. 21, 2005).

²¹³ AUSTA, *Can Australia Negotiate with the US?*, <http://www.austa.net/analyst/analyst5.html> (last visited Feb. 21, 2005).

Moreover, Australia felt it had adequate negotiating power.²¹⁴ This feeling seems to be validated because business and political leaders seem, generally, very happy with the FTA.²¹⁵ Consequently, it does not appear that Australia was really coerced into making this agreement. Instead, it appears Australia was more interested in making the agreement to further its own interests and maintain or increase U.S. attention in the Pacific region, which is another one of Australia's policies.²¹⁶

ii. Multinational Corporate Lobbying

This theory appears to have much more applicability to the Australian-U.S. FTA than it did for the Chilean-U.S. FTA. Some of the major proponents of this FTA were Alcoa, Kellogg's, Caterpillar, IBM, and Mobil.²¹⁷ Moreover, mining, metals, and manufacturing are expected to make the largest gains from the FTA for Australian industries.²¹⁸ These results would clearly help Alcoa and Caterpillar.

However, the FTA signed by Australia and the U.S. appear to help a vast array of Australian business, especially agricultural interests, and its automotive industry.²¹⁹ Consequently, it appears that Australia attempted to help all of its industries in making the FTA, not just large multinational corporations. Unsurprisingly, the U.S. was likely more willing to make concessions that could help companies that also do have a substantial business presence in the U.S. due to effective lobbying. However, the magnitude of this effect remains unclear. Moreover, the fact that this agreement increased Australian financial investment into the U.S. and will also help Australian firms of various sizes enter American markets indicates that the agreement was not aimed solely at multinational corporate interests.²²⁰

Thus, while multinational corporate interests were involved in the FTA negotiation process, it does not appear to have been the sole or even major aim of Australia in negotiating the

²¹⁴ See AUSTA, *Quick Briefs for Media – General Issues*, <http://www.austa.net/quickBriefs/quickBriefs3.htm> (last visited Feb. 21, 2005) and AUSTA, *Can Australia Negotiate with the US?*, <http://www.austa.net/analyst/analyst5.html> (last visited Feb. 21, 2005).

²¹⁵ See AUSTA, *Latest Developments*, <http://www.austa.net/index.php> (last visited Feb. 21, 2005). One major exception would be Australia's failure to obtain greater access to the U.S. sugar market. However, some commentators believe it is best to deal with this issue in the WTO. Moreover, numerous commentators use Canada as an example to indicate that Australia will still greatly gain from the FTA, in spite of this failure.

²¹⁶ The Australian APEC Study Centre, *An Australia-U.S. Free Trade Agreement: Issues and Implications*, at 77 (2001), <http://www.austa.net/pdf/chapter7.pdf> (last visited Feb. 21, 2005).

²¹⁷ AUSTA, *Who are we?*, <http://www.austa.net/whoAreWe.htm> (last visited Feb. 21, 2005).

²¹⁸ Australian Industry Group, *Trade Access, Negotiating for Better Market Access*, at 2, (Feb. 7, 2004), <http://www.austa.net/pdf/AIGfeb04.pdf> (last visited Feb. 21, 2005).

²¹⁹ *Id.*

²²⁰ AUSTA, *Australian Business Reviews the FTA*, <http://www.austa.net/reaction.html> (last visited Feb. 21, 2005).

agreement.²²¹ Instead, it appears Australia was much more interested in promoting Australian business interests, especially agricultural and mineral interests, which make up a large portion of Australia's economy and exports.²²²

iii. Australian Autonomous Policy Implementation

It appears that, while there is some evidence of U.S. coercion or multinational corporation lobbying, the largest factor affecting Australian negotiations were indigenous Australian interests in furthering its trade liberalization policies and economic opportunities for principally Australian businesses.²²³ Australia is very committed to promoting economic policies that have proven successful to growing Australia's economy, which essentially consist of trade liberalization policies.²²⁴ In fact, Australia is lowering its tariffs unilaterally through 2005 as part of this robust policy.²²⁵

Additionally, Australia has been committed to expanding IPRs.²²⁶ Consequently, Australia's decision to acquiesce to U.S. demands on expanding IPRs is consistent with this policy. Additionally, strengthening IPRs is unlikely to negatively affect Australia's overall economy. Stronger IPRs will likely help Australia's biotechnology industry, which is considered to be "world class."²²⁷ However, the greater rights are expected to negatively affect Australia's computer and technology industries.²²⁸ In spite of this negative impact, the FTA may have

²²¹ Australian Industry Group, *Trade Access, Negotiating for Better Market Access*, at 2, (Feb. 7, 2004) <http://www.austa.net/pdf/AIGfeb04.pdf> (last visited Feb. 21, 2005) (explaining that agricultural, mineral, and Australian automotive industry gains appear to be major winners from bilateral FTA negotiations. None of these industries, with the exception of minerals, involves extensive multinational corporate involvement that would be detrimental to Australian employment or business interests.).

²²² Federal Minister for Agriculture, Fisheries, and Forestry, *Australian Farmers to Reap Benefits from an FTA*, (Nov. 14, 2002), <http://www.maff.gov.au/releases/02/02321wt.html> (last visited Feb. 21, 2005).

²²³ Australian Industry Group, *Trade Access, Negotiating for Better Market Access*, at 2, (Feb. 7, 2004), <http://www.austa.net/pdf/AIGfeb04.pdf> (last visited Feb. 21, 2005).

²²⁴ Australian Government, *Trade Policy Review Body: Australia*, (Sept. 25, 2002), <http://www.wto.org> (last visited Feb. 21, 2005).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Bruce Rasmussen, *An Analysis of the Biomedical Sectors in Australia and Canada in a National Innovation Systems Context*, at 7 (July, 2004), http://www.cfses.com/pharma/documents/21-Biomedical_Sect_Aust_&_Can_Innovation_Rasmussen.pdf (last visited Feb. 21, 2005) *compare with* Australian Trade Commission, *Biotechnology Capability Overview*, (Nov. 11, 2004), http://www.austrade.gov.au/overseas/layout/0,,0_S3-1_-2_-3_PWB1108372-4_-5_-6_-7_,00.html (last visited Feb. 21, 2005) (explaining that Australia considers its Biotech industry, while relatively small, to be an "emerging" one.) *and* Australian Trade Commission, *Film Capability Overview*, (Nov. 11, 2004), http://www.austrade.gov.au/overseas/layout/0%2C%2C0_S3-1_3zo-2_-3_PWB1109329-4_-5_-6_-7_%2C00.html (last visited Feb. 21, 2005).

²²⁸ Peter Higgs & Louise Van Rooyen, *Australia's Digital Content Future and the FTA The view from Australian Interactive Media Industry Association (AIMIA)*,

created a sufficiently substantial net benefit to Australian commerce that it was willing to risk negatively affecting this relatively small segment of Australia's economy.²²⁹

C. Implications of These Results

1. Bilateral vs. Multilateral

It would appear that the success Chile had in its bilateral negotiations, especially when compared to the highly unfavorable results attributable to the multilateral TRIPS negotiations, suggest that the best forum for less developed countries are bilateral negotiations.²³⁰ This probably allows each country to fully analyze the claims made by its trading partner and discern which are "false hopes" and which are not. This is particularly true when the negotiators are highly capable, which appears to be the case in some less developed countries like Chile or Brazil.²³¹

It appears that a multilateral setting may not be necessary, and is likely even harmful to less developed countries' interests during any negotiation process. Thus, these countries are probably better off using bilateral negotiations or negotiations between one developed country and a group of less developed countries, similar to the FTAA negotiations.²³² This would provide a less overwhelming forum that is less likely to be coordinated by a vast array of powerful special interests that are capable of separating any cohesion that may exist between the less developed countries' negotiation tactics or strategy.²³³

2. NGO Involvement

These results appear to impact some aspects of the current commentary regarding NGO involvement in intergovernmental negotiations.²³⁴ Specifically, the notion that NGOs should be

http://www.aimia.com.au/i-cms_file?page=533/AIMIA_FTA_Preso_Final.pdf (last visited Feb. 21, 2005); Dr. Andrew Tridgell, *FTA Disastrous for Australian Computer Industry and Users*, (July, 2004), http://samba.org/~tridge/fta_statement.html (last visited Feb. 21, 2005).

²²⁹ Allen Consulting Group, *The Economic Contribution of Australia's Copyright Industries*, at ii-iii (2001) available at: [http://www.copyright.com.au/reports%20&%20papers/\(c\)_Value.pdf](http://www.copyright.com.au/reports%20&%20papers/(c)_Value.pdf) (last visited Feb. 21, 2005) (explaining that Australia's copyright industries combine to comprise 3.3% of Australia's GDP. Moreover, Australia is a net importer of copyright materials by over \$1 billion.).

²³⁰ Success here is viewed from the viewpoint that Chile wanted and won an FTA agreement with the U.S.

²³¹ Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 *FORDHAM INT'L L.J.* 1029, 1051-52 (2004).

²³² *Compare Id.* with Ruth L. Okediji, *Public Welfare and the Role of the WTO; Reconsidering the TRIPS Agreement*, 17 *EMORY INT'L L. REV.* 819, 850 (2003).

²³³ See Ruth L. Okediji, *Public Welfare and the Role of the WTO; Reconsidering the TRIPS Agreement*, 17 *EMORY INT'L L. REV.* 819, 850 (2003).

²³⁴ See Maura Blue Jeffords, *Turning the Protestors into a Partner for Development: The Need for Effective Consultation Between the WTO & NGOs*, 28 *BROOKLYN J. INT'L L.* 937, 987 (2003) ("NGOs can put a human face on the WTO. However, like the humans the NGOs represent, they need to be included."); see generally, Erik B.

involved in bilateral and multilateral negotiations would appear to make little sense if less developed countries are capable negotiators that ably negotiate their population's best interests. Moreover, when dealing with democratically elected officials, it seems unnecessary to involve parties that have no constituency or concrete interest in the results of the negotiations. If the population doesn't agree with its government's policies, it votes for a change; this is particularly true for bilateral negotiations, where each country's interested parties have the loudest voices in whether policies or tradeoffs are acceptable.²³⁵ What positive influence NGOs could have in this environment appear to be minimal, unless another barrier to finding mutually agreeable terms is considered a positive influence on a negotiation process.²³⁶ Moreover, it is unlikely NGOs would somehow be less corruptible than government officials, particularly because these groups lack any connection to some elected constituency.²³⁷ Thus, even if NGOs are given a place at the

Bluemel, *Substance Without Process: Analyzing TRIPS Participatory Guarantees in Light of Protected Indigenous Rights*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 671 (2004) and Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 50 n.227 (2004).

²³⁵ The recent action by the population in Ukraine to improper and corrupt leadership and voter fraud is one example of the power and voice of a democratic population that is inherently present when two democratic countries enter negotiations. See Yuliya Tymoshenko, *Ukraine's Orange Christmas*, (Dec. 23, 2004), http://www.tompaine.com/articles/ukraines_orange_christmas.php (last visited Feb. 21, 2005)

(Nobody ever doubted that Ukraine had changed vastly in its twelve years of independence. Yet, caught in the sights of a gun barrel, nobody – not even the brave men and women who camped in their hundreds of thousands in the snow before Ukraine's parliament – knew with certainty whether those changes had wrenched Ukrainians from the grip of fear and apathy. The success of their defiance shows the power of the idea that bewilders outgoing President Leonid Kuchma and his acolytes: that democracy means taking responsibility for one's fate into one's own hands.).

²³⁶ See Susan K. Sell, *Trade Issues and HIV/AIDS*, 17 EMORY INT'L L. REV. 933, 949 (2003). (explaining that WIPO gets about 85-90% of its operating budget from Patent Cooperation Treaty patent applications, which are mostly used by global life science corporations that advocate high intellectual property protection.).

²³⁷ Cf. The lack of transparency or constituency that most bureaucrat UN employees represent creates an atmosphere that is much more likely to lead to corruption. The following sources provide various recent examples of this. See Lisa Meyers & the NBC Investigative Unit, *U.N. Worker Accused of Genocide in Rwanda*, (Dec. 2, 2004), <http://msnbc.msn.com/id/6637384> (last visited Feb. 21, 2005) ("A U.N. worker was accused of genocide and yet was allowed to stay on the U.N. payroll... The decision not to prosecute him was made on the grounds of expediency, not legal grounds, however the U.N. wants to dress it up...He killed many, many people.") and Judith Miller & Waren Hoge, *Inquiry on Food-for-Oil Plan Cites U.N. Diplomat for Conflict*, NEW YORK TIMES, Feb. 4, 2005, at A1, <http://www.nytimes.com/2005/02/04/international/04food.html> (last visited Feb. 10, 2005)

(Reaction to the report from Congressional investigators was mostly supportive of Mr. Volcker's work. Representative Henry J. Hyde, the Illinois Republican who is the chairman of the House International Relations Committee, said in a statement that the report painted a picture of 'mismanagement, neglect and political manipulation that resulted in significant corruption of the oil-for-food program.' 'I am reluctant to conclude that the U.N. is damaged beyond repair,' he said, 'but these revelations certainly point in this direction.' A similar, but even harsher reaction came from Senator Norm Coleman, a Minnesota Republican and chairman of the Senate Permanent Committee on Investigations, who called on Mr. Annan to lift Mr. Sevan's diplomatic immunity immediately. 'The report shows that he repeatedly lied to investigators, has misled the inquiry about the source of \$160,000 in cash deposits and unethically steered oil-for-food contracts to close associates and lied about those relationships to authorities,' he said.);

compare Ruth Gidley, *UN Says Refugee Exploitation is Serious, but not Widespread*, REUTERS, Oct. 25, 2002, <http://www.alertnet.org/thefacts/reliefresources/5541377.htm> (last visited Feb. 21, 2005) ("It's difficult to escape the

negotiation table, lacking a constituency and clear accountability, it is uncertain that they will have a positive influence.²³⁸

However, for autocratic or communist governments, such NGO involvement likely wouldn't present the same problems because these governments are less likely to be invoking policies favorable to the majority of its population, or for the greater good. Instead, these governments are more likely to be corrupt and more likely to benefit the empowered at the expense of their populations.²³⁹ Thus, in these instances, NGOs, particularly NGOs that are focused on increasing

trap of those (NGO) people; they use the food as bait to get you to sex with them.") and Joseph Loconte, *The U.N. Sex Scandal*, WEEKLY STANDARD, Jan. 10, 2005, <http://www.weeklystandard.com/Content/Public/Articles/000/000/005/081zxez.asp?pg=1> (last visited Feb. 21, 2005)

(The sexual abuses committed, or ignored, by U.N. personnel violate the institution's Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the principles enshrined in the Universal Declaration of Human Rights. A 2002 U.N. report characterized the sexual exploitation issue as 'a betrayal of trust as well as a catastrophic failure of protection.'),

and Mark Steyn, *U.N. Forces? Just a Bunch of Thugs*, THE DAILY TELEGRAPH, Feb. 15, 2005, <http://www.telegraph.co.uk/opinion/main.jhtml;sessionid=EWMD2C5GC5G1PQFIQMFSM5OAVCBQ0JVC?xml=/opinion/2005/02/15/do1502.xml&sSheet=/opinion/2005/02/15/ixopinion.html> (last visited Feb. 21, 2005)

(All this derives from a UN culture in which the free nations have met the thug states so much more than half way that they now largely share the dictators' view of their peoples - as either helpless children who need every decision made for them, or a bunch of dupes whose national wealth you can reroute to your Swiss bank account, or a never-ending source of fresh meat.),

with Secretary-General of United Nations Security Council Report, *Children and Armed Conflict*, (Sept. 7, 2001), www.un.org/special-rep/children-armed-conflict/KeyDocuments/Printable/Report/A-56-342-S-2001-852English.html (last visited Feb. 21, 2005)

(I sincerely hope that Member States, the United Nations system, non-governmental organizations, civil society and others will take decisive action to protect children and to actively dissuade, and seek to expose and sanction, those whose actions are beyond the pale. This is a matter of international cooperation and political will, and it is my hope that concrete commitments will be made by the Security Council and Member States such that all parties to armed conflict, and actors whose conduct indirectly fuels conflict, cannot but realize that the international community will accept nothing less than full compliance with child protection obligations and commitments in time of war and in its aftermath.).

²³⁸ See Gregory F. Jacob, *Perspectives: Without Reservation*, 5 CHI. J. INT'L L. 287, 297 (2004)

(...NGOs exert tremendous influence over large numbers of delegates not because they are right on matters of substance, but rather because they are providing the only pro bono legal services available to delegates with no legal experience of their own. In filling this role, the NGOs certainly did not act as disinterested legal advisers, and along the way more than one delegation was hoodwinked into believing the NGOs' all-too-frequently distorted versions of the truth.);

cf. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 88 (2003)

([C]ountries need to consider the alternatives and, through democratic political processes, make these choices for themselves. It should be – and it should have been – the task of the international economic institutions to provide the countries the wherewithal to make these *informed* choices on their own... The essence of freedom is the right to make a choice – and to accept the responsibility that comes with it.).

²³⁹ See Pavol Stracansky, *Corruption in Eastern Europe: Communism Leaves a Long Hangover*, (Nov. 4, 2004), <http://www.worldrevolution.org/article/1625> (last visited Feb. 21, 2005); Peter Eigen, *Corruption Perception Index 2004*, (Oct. 20, 2004), http://www.transparency.org/cpi/2004/cpi2004.pe_statement_en.html (last visited Feb. 21, 2005) ("Corruption robs countries of their potential. As the Transparency International Corruption Perceptions Index

the financial well being and freedoms of the unrepresented, could provide a necessary voice that is inherently present during negotiations between democratic countries in a bilateral setting, but missing in negotiations with tyrannical or communist countries.²⁴⁰ Moreover, even if these groups were corrupted or corruptible, it would be little different than what is already likely to be the case with a communist or tyrannical government.²⁴¹

VI. Conclusion

As this case study illustrates, less developed countries are not as unsophisticated as many may have claimed when negotiating FTAs that may provide for stronger IPRs. Instead, it appears that the internal political capacity and stability of each country are the determinative factors of whether a country is capable of adequately representing itself in such negotiations.²⁴² Thus, the willingness and likelihood of a less developed country with a democratic government entering an FTA providing stronger IPRs is likely to be directly related to the substantial industrial interests or constituency of each country.²⁴³

shows, oil-rich Angola, Azerbaijan, Chad, Ecuador, Indonesia, Iran, Iraq, Kazakhstan, Libya, Nigeria, Russia, Sudan, Venezuela and Yemen all have extremely low scores. In these countries, the oil sector is plagued by revenues vanishing into the pockets of western oil executives, middlemen and local officials.”); cf. Transparency International, *Public Outrage is Calling Governments to Account and Forcing Corrupt Leaders out of Office*, at 1 (Oct. 15, 2001), http://www.globalcorruptionreport.org/download/gcr2001/press_release.pdf (last visited Feb. 21, 2005) (“Corruption deepens poverty around the globe by distorting political, economic and social life.”).

²⁴⁰ This would also apply to “democracies” that are highly suspect like Venezuela, Egypt, or Russia, where their current leaders have been elected with dubiously high majorities. These countries are slightly more democratic than China, Cuba, Iran, or North Korea. For an example of this type of “democracy,” see Mortimer B. Zuckerman, *Cracking Down on Caracas*, U.S. NEWS & WORLD REPORT, Feb. 14, 2005, at 72 (explaining the strong likelihood of fraud and coercion used by the Chavez government in the last Venezuelan election. MIT and Harvard professors issued a report estimating that there was at least a 99% chance the election in Venezuela was a fraud.).

²⁴¹ See Pavol Stracansky, *Corruption in Eastern Europe: Communism Leaves a Long Hangover*, (Nov. 4, 2004), <http://www.worldrevolution.org/article/1625> (last visited Feb. 21, 2005).

²⁴² Compare Chris Herlinger, *Sudan: Darfur is a Tinderbox of War, Dread, and Very Little Hope*, REUTERS, (Dec. 20, 2004), <http://www.alertnet.org/thenews/fromthefield/110418301235.htm> (last visited Feb. 21, 2005) with Carlos M. Correa, *TRIPS and Access to Drugs: Toward a Solution for Developing Countries without Manufacturing Capacity?*, 17 EMORY INT’L L. REV. 389 (2003). While many commentators focus on problems stronger IPRs may incur in India or Argentina’s generic drug industries’, most appear to ignore the mostly negative or highly unstable political or economic conditions that affect the majority of less developed countries in Africa and parts of Asia or the Middle East. Moreover, they tend to ignore the general absence of these industries in these countries with weaker IPRs and the drastic poverty rates that makes even less costly pharmaceuticals still well beyond the means of the far majority of the affected populace. Cf. Susan K. Sell, *Trade Issues and HIV/AIDS*, 17 EMORY INT’L L. REV. 933, 949 (2003). For example, Zambia’s public health budget is about \$50 million per year. This value is placed in a context by comparing it to the UNAIDS December 1999 estimate finding that about 1,000,000 adults and children have HIV or AIDS in Zambia. Thus, for Zambia, even if pharmaceutical companies sold AIDS drugs for 50 cents a pill, Zambia’s government could, at best, only afford 100 million pills, which would supply these affected people for less than one third of a year while ignoring any other health issues affecting their populace.

²⁴³ See Dr. Mario E. Carranza, *Latin American Perspective: Mercosur, The Free Trade Agreement of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT’L L.J. 1029, 1051-52 (2004); cf. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 32 (2003) (explaining how Ethiopia rejected IMF funding and demands due to its concerns with the negative impacts the IMF demands would have on their farming industry.).