

RULES, REGULATIONS, AND REBELLIONS – THE STRUGGLE FOR HUMAN
RIGHTS IN AN ERA OF NEO-LIBERAL TRADE AND DEVELOPMENT

By

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To Elaine Brown

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PREFACE

As a background to this thesis I would like to provide a short history of how I as an activist and academic became interested in this topic. I am including this section to show the process a person who is part of the first world hegemony and who receives more benefits from global trade than burdens can experience to understand and support movements that challenge this position. This support does not come from material benefits that might be received, but from an almost religious attachment to the ideals behind international human rights, a hope that these rights can be practiced and not simply protected, and an imagining that a better world can be achieved.

After a decade of working as a human rights advocate through groups that primarily focused on changing the system from within, in 2003 I was asked to assist in the formation of a legal support team for protests that were being planned around the Free Trade Area of the Americas (FTAA) ministerial meetings in Miami that November. This invitation excited me since I had worked as a “fair trade” campaigner with Oxfam’s “Make Trade Fair” campaign, had studied with questioning curiosity the reasons behind the “Battle in Seattle,” and as a human rights advocate, had strong concerns about this new trade agreement. I also recognized that the right to protest was a human right, and I wanted to help protect this right. Thus I joined what became known as Miami Activist Defense, a legal collective comprised of three lawyers, three law students and several dedicated counter hegemonic globalization activists.

In the months leading up to the protests it became very clear that while the FTAA meetings were welcomed by the city of Miami, the protests were not. Not only were law enforcement agencies from 45 jurisdictions being trained in tactics for counter terrorism and crowd control, 35 million dollars of federal funding that had been allocated for the Iraq War was earmarked for security for the protests. Full media attacks were launched against the activists who would be attending the protests, describing them as crazy anarchists hell bent on destroying the city. This included local news stories about how the anti-FTAA anarchists planned to come to Miami, bomb the schools, and destroy local businesses. When I heard this story I could not help but think, those training tapes were from Al-Qaeda not FTAA protestors. The media also contributed to a theory that split protestors into good protestors and bad protestors and redefined public understandings of free speech.

By focusing stories on well established groups like unions and NGO's who had the resources to get permits for one march, the media created the image of a good protestor: i.e., a person who worked within the system, went through the legal process of obtaining a permit and identified with an organization that had well defined statements and goals. While the first amendment allows public protest without a permit and does not require protestors to belong to a group or have a straightforward message, if a person protested without these things, she/he was considered a bad protester and an anarchist. While watching this media campaign unfold, the collective also learned that local city ordinances had been changed, based on suggestions from the U.S. Justice Department, so that a group of five people walking together would be considered a parade and would need a permit and seven people standing together in any public place were an assembly

and could be broken up, among other provisions on what people in parades and public assemblies could carry or have on their person. These ordinances were later challenged in a federal lawsuit, declared unconstitutional by a federal judge and changed, but they were passed so close to the start of the FTAA meetings that they could not be challenged until after the meetings.

In organizing with the legal collective, I was constantly amazed by the efforts the government and media were taking in order to de-legitimize and stop the protests. I had met many representatives of the so-called anti-FTAA anarchist groups and most were idealistic kids, poor immigrant workers, and peace groups. All of the groups were committed to non-violence, but many supported direct action and civil disobedience. In the face of the power of the U.S. government and world trade, I could not understand why these seemingly powerless people were so worrisome to the world power holders. However, I learned over the period of the protests that these seemingly powerless groups were part of a worldwide “movement of movements” that was challenging the power relations that allowed meetings where decisions with lasting negative impacts on marginalized communities were made behind twelve foot steel fences and rows of riot police and with no input from the communities that would be impacted. While global trade still plunged ahead, these “powerless” groups had stopped two WTO meetings, claimed ownership of factories, reclaimed indigenous land, freed imprisoned refugees, reclaimed privatized water, among other victories; essentially these movements of the supposed powerless were challenging deep rooted ideas of economic and legal order and creating alternatives that worked for their communities. The power holders were reacting so strongly because they realized their power was being challenged. Again and again

people at the protest referred to one movement that had been particularly successful and continued to redefine and exhibit new models for development, legal rights and trade. It was in this context that I was introduced to the Zapatista movement and began my research for this paper.

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This thesis examines various approaches that have been used to protect the human rights of marginalized communities, especially the right to a healthy environment, who have been negatively impacted by the expansion of neo-liberal trade and development policies. Three overarching approaches are examined, including 1) Rules based approaches like the Environmental Side Agreement of the North American Free Trade Agreements, 2) Regulatory based approaches like fair trade certification and corporate responsibility campaigns, and 3) Rebellion based approaches such as the Zapatista Rebellions in 1996 and the grassroots alternative globalization movements that have developed in communities across the world. Rules and regulation based approaches to human rights attempt to protect human rights through the current hegemonic processes have failed marginalized communities. These approaches rely on hegemonic definitions of human rights that were created to justify the supposedly neutral policies of free market economics, and that require outside actors with no sense of communities' needs to

determine what constitutes a human rights violation. Because the rules and regulatory approaches rely on the existing structure of law, economics and politics for change, they have failed to protect the human rights of marginalized communities because they are based on the needs of the powerful entities that have shaped these systems for the last century.

Rebellion based approaches, however, include strategies employed by communities that have developed systems of law, economics and politics based on the needs of community rather than the needs of multinational actors. Rebellions have helped form counter hegemonic globalization movements that challenge the current system of international trade and development by creating new networks for decision-making and economic exchange. Counter hegemonic globalization movements create spaces for marginalized communities to practice human rights and define these rights based on the development needs of their communities. Lawyers and anthropologists who seek to protect human rights as neo-liberal trade expands should support counter hegemonic globalization movements that are practicing human rights and creating new systems of trade that rely on markets created through relationships and the desire to promote human rights and a healthy environment.

CHAPTER 1 INTRODUCTION

Protecting and Practicing Human Rights in an Era of Global Trade

As formalized networks for international trade have grown over the last two decades, human rights advocates have become increasingly concerned about the impact of trade on human rights. While laws meant to protect human rights exist on paper through international agreements, recent jurisprudence has shown that these laws are not always codified or enforced within national boundaries and are often insufficient for protecting historically marginalized communities¹ harmed by trade related activities. This is particularly true for the human right to a healthy environment and indigenous rights to self-determination, which exist through “soft law” and through customary international law.² As more countries join the World Trade Organization (WTO), whose rules govern 97% of the world’s population (WTO 2002), theories of international human rights³ and environmental protection being enforced through trade agreements are being written in new academic articles and in the plans of organizations working for the protection of people and our planet.⁴ Several human rights advocates and non-governmental organizations, including legal scholars,⁵ Amnesty International and Human Rights First, argue that the entrenched global nature of trade law may present a forum for ensuring that these laws are enforced, especially if they incorporate human rights and environmental standards into trade agreements.

The preambles of major trade agreements echo this hope. For example, the *Preamble to the North American Free Trade Agreement* states that its purpose is to:

CREATE new employment opportunities and improve working conditions and living standards in their respective territories;

UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;

PRESERVE their flexibility to safeguard the public welfare;

PROMOTE sustainable development;

STRENGTHEN the development and enforcement of environmental laws and regulations; and PROTECT, enhance and enforce basic workers' rights. (NAFTA 2004).

However, the underlying purpose of these agreements, to lower barriers to world trade and increase capital,⁶ and their actual impact on historically marginalized communities and the environment demand that lawyers and academics concerned with the human right to a healthy environment critically analyze who and what trade agreements actual protect. This analysis is particularly important in light of the United States' role in pushing neo-liberal trade policy across the developing world and incorporating it into development policy, and its unwavering failure to enforce most international human rights law domestically (Powell 2004: 228-229). While the United States has vocally rejected human rights abuses and ratified several human rights treaties, neither the congress, the executive, or the judiciary have provided legal remedies for protecting social and economic rights and the right to a healthy environment.⁷ Furthermore in cases where international bodies, such as the Inter-American Commission on Human Rights, have issued opinions recognizing violations of human rights in relation to environmental destruction at the hands of corporations who have benefited from international trade, no action has been taken by governments to stop the violations or remedy past harm.⁸

Recognizing the failure of law to address the human rights abuses marginalized communities have experienced as a result of neo-liberal trade and the traditions of

applied anthropology, I am using this thesis to ask how lawyers and anthropologists can best serve the communities most negatively impacted by expanded neo-liberal trade? To answer this question I provide evidence that international trade is having a net negative impact on marginalized communities and offer examples of strategies that have been used in an effort to change the impact of trade from negative to positive.

To examine the efforts human rights advocates have made in response to this problem, I surveyed literature on the intersection between trade and human rights and found that three over-arching approaches emerged on how to best serve these communities: 1) link human rights directly to trade through trade agreements themselves, 2) pressure policy makers to incorporate different standards for developing countries that permit protectionism of developing economies and foster “fair trade” rather than “free trade,” 3) promote consumer and corporate responsibility campaigns including corporate codes of conduct that require minimum human rights protections in all goods production practices. I refer to the first of these approaches as a *rule* based approach because it requires that new laws and rules be written to protect human rights. I call the second and third approaches *regulation* based approaches, because they rely on self-imposed regulations for human rights protections.

While each of these approaches has merit and contributes to furthering human rights, each incorporates a quasi “fox guarding the hen house” approach to protecting the rights of communities that have suffered from neo-liberal trade and development policies. These approaches also fail to challenge the current legal and political structures that allow the benefits of trade to flow so unevenly and put faith in economic and legal systems that have systematically failed marginalized communities. Furthermore these

approaches often sideline the goals of marginalized communities who have challenged neo-liberal trade at the local level through protest and rebellion. These groups have rejected the existing social order because it “neither meets their interests nor is consonant with their image of the kind of society in which they wish to live”(CFGJ 2004). Through this rejection and the creativity that arises out of it these communities have shown that alternative orders can be established and can challenge the existing world order at very local levels.

In this paper I argue for the support of a fourth approach to protecting the human rights of marginalized communities, which has been termed counter hegemonic globalization (Santos 2005:29). This approach uses *rebellion* to challenge hegemonic trade and development practices and to create new economies, development, political structures and laws that are accountable to the needs of communities rather than to trans-national institutions. Rather than seeking to work within the existing legal and economic framework, this approach places more emphasis on recognizing the power of communities to create their own political, economic, and legal solutions to neo-liberal trade and development related human rights violations, live alternatives to neo-liberalism, and challenge the hegemonic promises of free trade. Furthermore, this approach calls on lawyers and anthropologists to support these movements. As increasingly evidenced by the world-wide protests surrounding trade meetings and trade agreement signings, the growing expropriation of factories by workers, and the strengthening of cross-boarder alliances between civil society groups and communities negatively impacted by neo-liberal trade, communities who bare the burdens of trade have the ability and power to solve their own problems especially when they are supported by international alliances

frustrated by the hypocrisy of leaders that speak about human rights but refuse to protect them. Through a “movement of movements” marginalized communities are creating local solutions to global problems by embracing political action over legal action, and “challenging the unequal exchanges and power relations crystallized in politics and law” through alternative principles of politics, economy and law. (Santos 2005: 29-30). To support this fourth argument I draw on anthropological theories that recognize the role of the masses in legitimizing those in power, question strict power binaries, emphasize the importance of imagining and ideology over materialism, consider historical outcomes of social and economic policies, and promote activist academia.

In arguing for this fourth approach, I do not wish to diminish the importance of the work being done through groups like Oxfam and Amnesty International, and the importance of continuing to advocate for legal remedies for human rights protection. While as a master’s degree student I offer a critical analysis of their work, I support it financially and cannot overemphasize the impact Oxfam, and other similar groups, have had on bringing the issues of “fair trade” and the need for development reform to the table of global discourse. I argue for the fourth approach because it has often been ignored or rather dismissed by academics as unrealistic, simplistic, and utopian. I hope to present a convincing argument that it is quite the opposite, and to show that by rebelling against the institutions of hegemonic trade and development and creating their own systems of law and economics, the people who are often written about as powerless victims are creating solutions to practice human rights that challenge both governments and transnational corporations at a local level and show that another world is possible.

Methodology

To support the argument that providing support to counter hegemonic globalization movements can best protect human rights, I present stories that demonstrate the impact each approach to protecting the human right to a healthy environment has had in practice. Each story demonstrates one of four approaches that scholars and human rights activists have argued as an appropriate avenue for protecting human rights that have been harmed by trade. I examined each of these approaches in light of the story presented to show the impact of the approach in practice, and the success it has had on protecting human rights.

My analysis is heavily influenced by the work of Paul Farmer, a medical doctor and anthropologist, who calls on anthropologists and human rights advocates to consider the role of power and structural violence in the current human rights violations faced by poor communities across the world. Farmer argues that:

Human rights violations are not accidents; they are not random in distribution or effect. Rights violations are, rather, symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm. If assaults on dignity are anything but random in distribution or course, whose interests are served by the suggestion that they are haphazard? (Farmer 2003: 7)

When studying human rights violations faced by poor communities Farmer encourages us to look for sets of historically and economically driven situations that allow the violations to occur, to examine who has been served by these historical and economic situations, and to question claims that social and economic conditions are a result of market or policy “neutrality.” He also encourages human rights advocates to question appeals to pragmatism when considering economic and social rights, which are often dismissed as “unrealistic” or “asking for too much too fast.”

Farmer explains how these appeals can sometimes be hypocritical and meant to prevent human rights advocates from acting to fulfill immediate needs saying:

Pragmatism assuredly has its role even in utopian struggles: to attempt too much is often to achieve too little. But the hesitation of many in the human rights community to cross the line from a rights activism of pure principles to one involving transfers of money, food, and medicine betrays a failure, I think, to address the urgent needs of the people we are trying to defend. The proponents of harsh market ideologies have never been afraid to put money - and sometimes bullets - behind *their* minimal and ever-shrinking conception of rights and freedoms. But one alarming feature of structural violence is that bullets are increasingly unnecessary when defenders of social and economic rights are silenced by technocrats who regard themselves as "neutral." (Farmer 2003: 9-10)

Finally Farmer urges human rights advocates to question only using existing systems to meet the needs of the poor, stating:

Although it may seem impolitic to underline the inadequacy of existing measures, it is necessary, at some point, to acknowledge what the poor have been saying all along: that their rights cannot be protected while the present economic and social structures hoist injustice and exploitation upon the vast majority of ... people under the guise of law. These laws, even those designed to protect human rights, don't feel neutral at all. (Farmer 2003: 10)

My analysis is also influenced by Antonio Gramsci's theories on how class relations are maintained through hegemony, which is an exercise of power based on consent and driven by ideology and political leadership that allows one group to have domination over another (Gramsci 1988: 424). Gramsci argues that power is based on a relationship and can be altered at anytime. Ideologies are used to legitimize power relations and can have a stronger impact than material needs alone. The state, which regulates hegemony is usually tied to the ruling class but all of these relations can be challenged through civil society. Social change occurs when hegemony changes and a new ideology is expressed that garnishes stronger support than the hegemonic ideology. This usually happens when the ideology that the current hegemony was based on is no longer seen as legitimate. This can happen for a number of reasons, but often happens

when the state uses coercive measures to try and maintain hegemony or to gain control over resources.

Gramsci also challenged me to consider the ethno-political history of any given hegemony. This type of historical analysis requires that philosophical currents prevalent in a given historical period be evaluated not for what they profess, but for their actual societal outcome (Gramsci 1988: 195). This historical perspective especially influenced my analysis of trade and human rights law.

My analysis is also informed by Paul Magnarella's theory of Human Materialism, which encourages anthropologists to look past strict material explanations for human behavior and power relations and consider the role of human thought in maintaining and disrupting these relationships. Magnarella argues that socio-cultural systems can be analyzed at various levels that constantly interact. Thus, while material needs may dictate some behavior, personalities and ideologies can be just as influential, especially those of elite or charismatic leaders. Change happens when a new ideology enters the superstructure, which includes the symbols, ideologies, and rituals that work to mask power relations within a society. Magnarella concurs with Gramsci's idea that the rule of one class over another occurs when the ruling class convinces the ruled to accept a set of beliefs or ideologies, including cultural and moral values. But Magnarella expands on this idea explaining that ruling classes often control through a system of beliefs and cultural and moral values to which they do not actually adhere. He argues that:

Such false ideologies may contain the seed of a major contradiction, which in the long run can work to the detriment of those in power. The masses, who have been led by the words of democracy, may begin demanding democracy in fact, by agitating for just legislation and political reforms. Rulers may find it expedient in a cost/benefit sense to accede to some of these demands, rather than risk revealing their true agendas. Through time, however, the political process may become

progressively democratic, thus representing a threat to the prerogatives of those in power. In such a situation, rulers may attempt to overpower the democratic masses by military means and then change the process. Or they may redouble efforts to indoctrinate a large part of the masses into seeing what does not exist, or into not seeing at all. (Magnarella 1999: 243)

This expansion of Gramsci's theory on the role of ideology in legitimizing power helped me analyze the reasons behind linking development to privatization and trade, and democracy to capitalism, as well as to understand why so much faith remains in "free market" ideology. This theory is particularly useful in explaining how marginalized communities can garnish power by rejecting the ideology that has been used to oppress them and claiming new ideologies.

I also incorporate Benedict Anderson's theory of "imagined communities," because it provides a framework for understanding how groups of people from different backgrounds and with different strategies for change can imagine themselves as a community and frame their struggle as a global movement of movements, and in so imagining create alternative economies, politics, and laws that address global problems at the local level. It is these imaginings that provide inspiration for constructing new ideologies that can challenge existing oppressive hegemonies and replace them with something new.

Limitations to this Study

As a masters student I was unable to conduct field analysis or interviews to explore my argument that human rights are best protected by supporting counter hegemonic globalization movements and had to rely on the interpretations of others for information. The stories presented are from NGO's or legal scholars who conducted direct field analyses of the effectiveness of each approach for change. I have however been personally involved in counter globalization movements, international human rights legal work, and fair trade campaigning. I cannot separate myself from these experiences, and

they have influenced my analysis here. Despite economic arguments to the contrary, my personal interactions with people who have born the burdens of neo-liberal trade and development policies lead me to assume that the current international trade system is not working for poor people and especially people of color. Thus I only consider arguments from NGOs and legal theorists who also recognize the negative side of trade.

My language skills are limited to English only, thus I had to rely on translations of documents that could be obtained through the Internet. All translated documents are from either NGOs, media outlets, or government agencies. Finally, I have attempted to review perhaps too many theories and have come to perhaps rushed decisions on some of them, especially on my analysis of the fair trade movement. I was only able to find one case study of the movement, which is difficult to make a general conclusion from as I have done here. However, I very much respect the organization that conducted the study and believe its criticisms are legitimate in light of my other arguments.

Notes

¹ “Historically marginalized communities” means the groups of people who have systematically been oppressed by colonization, racism, and sexism. Included in these groups are indigenous peoples, people of color and poor women and children. These are the “environmental justice communities” whose rights I am concerned with in this paper and who have born the brunt of the negative impacts of trade.

² A plethora of “soft law” documents and the existence of environmental treaties recognizing the connection between the environment and human health and the need to balance development with environmental protection have created a *jus cogens* norm for protecting the environment when it will impact human health. These soft law documents include: the *Stockholm Declaration of the United Nations Conference on the Human Environment*, *United Nations Convention on the Law of the Sea*, *United Nations Conference on Environment and Development*, the *Rio Declaration* which includes the *Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of all Types of Forests* and the *Agenda 21*. Treaties scholars look to include the *Framework Convention on Climate Change* and the *Convention on Biological Diversity*. This right has also been recognized through regional agreements

like the *African Charter on Human and People's Rights of 1981* and the *European Charter on Environment and Health, Principles for Public Policy*.

The right to a healthy environment for indigenous people is recognized in developing laws including the *United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities: Draft United Declaration on the Rights of Indigenous Peoples*, and the *Draft Inter-American Declaration on the Rights of Indigenous Peoples*. Although its decisions are not binding, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission), a branch of the UN Human Rights Commission that consists of 53 members elected by the Economic and Social Council of the United Nations, has also recognized a human right to a healthy environment. In response to a report filed by the Sierra Club Legal Defense Fund in 1989, the Sub-Commission held that joint US-Guatemalan aerial fumigation programs in Guatemala violated the “right to life and security of the person, right to health and well-being, and the right to safe working conditions” by contaminating “local ecosystems, including groundwater sources, rivers and estuaries, fish and wildlife, nearby villages, food crops, and farm animals.” (Bolivar 1998: 137). In 1994, the Sub-Commission’s Special Rapporteur explicitly recognized the link between human rights violations and environmental degradation in the *Human Rights and the Environment, Final Report* (Bolivar 1998: 138). In this report, the Sub-Commission stated, “In the environmental context, the right to health essentially implies . . . freedom from pollution, . . . such as the continuous discharge of toxic and hazardous substances into air, soil and water.” (Bolivar 1998: 146).

Each of these decisions link the right to life, health, and self-determination to environmental degradation, to create the right to a healthy environment. This right is linked to the right to life and health and the right to self-determination and is considered a third generation collective right that is necessary for the protection of individual rights but also for the existence of communities (Hernandez-Truyol 2002: 13). Despite these legal sources, when cases that address human rights abuses related to environmental degradation caused by trade related activity have come before U.S. courts, all levels of U.S. courts have failed to recognize a right to life, health, or self-determination. To succeed in litigation, these cases must prove that the harm experienced by plaintiffs was either extra judicial killing or torture; deprivation of health or life resulting from environmental destruction is not sufficient (Hertz 2000).

Because U.S. courts do not recognize these rights, I feel it is important to discuss the link between environmental degradation and the right to life, health and self-determination as the “human right to a healthy environment”. The fact that U.S. courts do not recognize the violation of a legal right when people are killed, poisoned or harmed for generations by mining or production activities does not diminish the ability of communities who have been harmed to claim this right or the value of international law that has articulated this right. For further discussions of calling this link the right to a healthy environment see *Human Rights and the Environment* by Y.K. Sabharwal, Chief Justice of India, *Establishing a Federal Constitutional Right to a Healthy Environment in the US and in our Posterity* by Bruce Ledewitz (Ledewitz 1998), *Environmental Justice for All: It's the Right Thing to Do* by Robert Bullard (Bullard 1994), *From Environmental to Ecological Human Rights: A New Dynamic in International Law?* by Prudence E. Taylor (Taylor

1998), and *Is The Human Right to Environment Recognized Under International Law? It Depends on the Source*, by Luis E. Rodriguez-Rivera (Rodriguez-Rivera 2001).

³For the purpose of this paper “human rights and environmental protection” refer to rights recognized under the *Universal Declaration Of Human Rights, Principles Of Environmental Justice, Proceedings, The First National People Of Color Summit xiii* which states:

We the People of Color, gathered together at this multinational *People of Color Environmental Leadership Summit*, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to insure environmental justice : promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples do affirm and adopt these Principles of Environmental Justice:

Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.

Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.

Environmental justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.

Environmental justice calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water and food.

Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.

Environmental justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.

Environmental justice demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation.

Environmental Justice affirms the right of all workers to a safe and healthy work environment, without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.

Environmental justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.

Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.

Environmental justice must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts) and covenants affirming sovereignty and self-determination.

Environmental justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources.

Environmental justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.

Environmental justice opposes the destructive operations of multinational corporations.

Environmental justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.

Environmental justice calls for the education of present and future generations, which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.

Environmental justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources to challenge and reprioritize our lifestyles to insure the health of the natural world for present and future generations.

Adopted today, October 24, 1991, in Washington, D.C.

(Gauna 2003: 22-23).

While the laws of the United States do not recognize all of these rights, this definition most fully encompasses all the types of the harm marginalized people experience. I also include the rights stated in the 1948 *Universal Declaration of Human Rights* (UDHR 1948) and all of the environmental agreements listed in *supra* note 1.

⁴ For example consider the argument, "At first glance, one might think that a trade agreement such as NAFTA is not the appropriate forum to address human rights issues. The European Union's experience, however, suggests that human rights and trade are inextricably linked and that they should be addressed together. History reveals that the United States understands this reality and, thus, has often linked its trade policy with concerns over human rights abuses in other countries. History also reveals, however, the United States' steadfast refusal to assure this linkage when doing so would require the United States to commit itself to binding multilateral human rights obligations." (Smith 1994: 793).

⁵ For further discussions on the argument that trade law is an appropriate place for addressing human rights violations related to trade see Jan McDonald's, *The Multi-Lateral Agreement on Investment: A Heyday or Mai-day for Ecologically Sustainable Development*, (McDonald 1998); Thomas J. Manley and Ambassador Luis Laurodo's *International Labor Standards in Free Trade Agreements of the Americas* (Laurodo

2004); and M. Gregg Bloche and Elizabeth R. Jungman's, *Health Policy and the WTO* (Bloche 2003).

⁶ North American Free Trade Agreement Article 102: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

- a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- b) promote conditions of fair competition in the free trade area;
- c) increase substantially investment opportunities in the territories of the Parties;
- d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law. (NAFTA 1994 b).

⁷ See, *Sarei v. Rio Tinto PLC*, 221 F.Supp.2d 1116 (C.D.Cal 2002). Westlaw Keycite 15, and *Litigating Environmental Abuses Under the Alien Tort Claims Act: a Practical assessment* by Richard Hertz (Hertz 2000).

⁸ see *The Human Rights Situation Of The Inhabitants Of The Interior Of Ecuador Affected By Development Activities*. Inter-American Commission on Human Rights. <http://www.cidh.oas.org/countryrep/ecuador-eng/chaper-8.htm>.

CHAPTER 2
THE INTERSECTION OF TRADE AND HUMAN RIGHTS
NAFTA, FTAA and Human Rights—A Historical Analysis

The history of trade and human rights in the Americas cannot be easily pieced together. It begins before recorded time with stories of migration and creation, people crossing the baring straits and growing out of the earth with stalks of corn. Because this long history cannot be easily told or known, the history told through this chapter will form a framework for understanding one of the most ambitious trade agreements in the Americas, the North American Free Trade Agreement (NAFTA) and another trade agreement that may never be realized, the Free Trade Area of the Americas (FTAA).

Parallel to the development of this history stands the development of international human rights law and development policy. While seemingly contradictory, the interaction of human rights, development and trade policy in the Americas can be placed into a larger picture that provides an explanation of how social policy serving the economic and politically elite whose position within the social infrastructure¹ allows them to function across boarders of states, and economic and humanitarian crisis, becomes established law. This history also shows how the stated purposes of trade laws can be manipulated to legitimize actions that contradict human rights norms but that are necessary for the maintenance of current power relations.

Despite these manipulations, marginalized communities that have embraced the rights ascribed in human rights treaties while at the same time have had these rights challenged through trade agreements, have used the negotiation of trade agreements as a

site for resistance. Through the resistance shown at these sites, indigenous peoples, farm workers, students, peasants, laborers, and other individual actors have used the power of public protest, popular education, and direct action to challenge the claims that United States policy makers have used to legitimize trade agreements that benefit a small number of multi-national actors while refusing to use the same types of claims to support legal protections for human rights.

I focus only on U.S. policy makers in making this argument because the theoretical background for free market ideology stems strongly from U.S. policy makers and NGO's (like the Cato Institute) who use claims of patriotism and libertarian ideals to support policy that benefits their corporate donors. This ideology stems from the theories of Adam Smith and was crafted at a time when many people who are harmed by trade agreements, woman workers and people of color in the developing world, were not considered people. Furthermore the ideals of the American Revolution and the patriotism often tied to this ideology, were developed and evoked to support the goals of the wealthy elite land owners and business men who no longer wanted to pay royalties to the crown but needed the support of the poor masses to win the battle against her. The history of this ideology provides a background for explaining how an economic theory that has its roots in systematic human rights violations (slavery and colonialism) can be evoked to support supposedly morally neutral economic policy.

I frame this discussion around NAFTA because it was one of the first US backed trade agreements to incorporate human rights and environmental rights language. It has also been in existence long enough to evaluate its actual impact on these rights. The establishment of NAFTA also brought about massive public outcry (Kingsolver 2001)

and resulted in massive public rejection of international trade agreements, including the Zapatista revolution in Chiapas, Mexico. Furthermore it used trade law to create new legal definitions of property and legal avenues for protecting property rights that challenged the sovereignty policy makers claim to protect when refusing to ratify human rights treaties. Furthermore it was the most recent historical background for understanding the large protest against the FTAA, and it was the model of trade evoked by demonstrators in Miami, FL to support their arguments for why the FTAA was an illegitimate body of law that sacrificed the wellbeing of the masses for the riches of a few. The state sponsored violence used to quell this protest gave counter globalization advocates more legitimacy in their claims that the current incarnation of world trade is dependant on the heavy hand of the state to protect property interests of transnational corporations, grounded in undemocratic principles, and unsuitable for meeting the goals of protecting the human right to a healthy environment.

The Post War Plan for Trade, Reconstruction and Peace

The current model for international trade, neo-liberal trade, laid out through the rules of the World Trade Organization and hundreds of regional and area trade agreements is the result of decades of debate and negotiations. This story does not begin with the post World War I trade negotiations between the United States and the United Kingdom; however, this is a good starting place for telling a story of trade, development and human rights. These negotiations stemmed from a period during the 1930's when, following the lead of the United States' enactment of the Hawley-Smoot tariff, Australia, Canada, Cuba, France, Italy, Mexico, Spain, and New Zealand all raised tariffs to some of the highest levels in history (Hudec 1990: 6). This action was soon followed by the

United Kingdom and the nations of the British Commonwealth. As trade historian, Clair Wilcox explained:

Intensive economic nationalism marked the rest of the decade. Exports were forced; imports were curtailed. All of the weapons of commercial warfare were brought into play: currencies were depreciated, exports subsidized, tariffs raised, exchanges controlled, quotas imposed, and discrimination practiced through preferential systems and barter deals. Each nation sought to sell much and buy little. A vicious restrictionism produced a further deterioration in world trade. (Hudec 1990:6)

Not only did leaders of this period see stringent restrictions on world trade, they saw the effects of World War I followed by the Great Depression. Many of the countries that participate in trade negotiations today were colonies of the United Kingdom or closely related to her through trading practices. It is this backdrop of the 1920's and 30's in which trade policy officials from major trading countries came together and discussed plans for increasing trade by reducing tariffs and other barriers. These discussions led to very defined bilateral trade agreements between many countries, based on trading theories developed by the United States and the United Kingdom (Hudec 1990: 8-9).

During the late 1930's as World War II began, the United States and the United Kingdom increased informal discussions on their goals for post war world economic policy, laying the framework for what would become the General Agreement on Trade and Tariffs (GATT). (Hudec:9). These discussions led to what became known as the 1943 Seminar, a two month period during which the informal discussion of working level career trade experts that had taken place without government approval became formalized and crafted policy for the stabilization of the post-war economy (Hudec 1990: 9).

Through these discussions, the trade experts of the United States and the United Kingdom set the agenda for what would later evolve into the International Monetary Fund, World Bank and the General Agreement on Trade and Tariffs (GATT) (Bank

2004). This agenda had several goals: to eliminate quotas, export taxes and subsidies; to lower tariffs; to end discrimination, the practice that gave favored trading partners advantages in trading, and finally to encourage state trading enterprises to act like private traders (Hudec 1990:10).

These basic principles were deeply rooted in the ideological belief that the “free market” would create economic stability and eventually lead to lasting peace. This idea had been prevalent in the United States for some time. Woodrow Wilson’s *Fourteen Points* speech, delivered to Congress in 1918 laid out his vision for post war reconstruction, and included a call for “the removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.” (Wilson 1918). U.S. and U.K.’s economic planners were particularly committed to this strain of thought, which gave them the necessary ideological cohesiveness to develop a plan for a worldwide economic trading system despite having different ideas of how such a plan would work. The U.S. Secretary of State from 1933-1944, Cordell Hull, believed that the insular trading systems of Nazi Germany and the British Empire were the root causes of both World Wars. He summed up this belief arguing that:

[U]nhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war... if we could get a freer flow of trade... freer in the sense of fewer discriminations and obstructions... so that one country would not be deadly jealous of another and the living standards of all countries might rise, thereby eliminating the economic dissatisfaction that breeds war, we might have a reasonable chance of lasting peace. (Hull 1948:81)

Harry Dexter White, the chief international economist at the U.S. Treasury Department during the 1940’s, echoed this belief stating that:

[T]he absence of a high degree of economic collaboration among the leading nations will...inevitably result in economic warfare that will be but the prelude and instigator of military warfare on an even vaster scale. (Pollard 1985: 8)

U.S. and U.K.'s economic policy makers believed this could be best achieved through private, opposed to state, ownership of goods and commodity production and through private channels rather than state trading. "These policymakers believed that steady economic growth under a modified capitalist system, rather than radical redistributive reforms under a socialist system, constituted the best way to remedy social ills." (Pollard 1985: 8-9). Over the next several years the promotion of this ideological belief drove the U.S. and U.K.'s market liberalization and development policy; however, this ideology was coupled with other pressing material concerns.

Britain, again the site of a devastating war, no longer had the economic resources to maintain her empire. Other countries ravaged by war needed economic support to rebuild their states. The United States, one of the only industrialized nations not touched by the war, was experiencing unprecedented economic growth, placing it in a uniquely powerful position given the needs of the war destroyed countries of Europe and Asia, and desired new markets for sales and resources. These markets needed to be politically stable and economically parallel to the U.S. market so that cross boarder sales could be easily accomplished without the burden of currency exchanges and tariffs. The United States had the means and the will, backed by corporate interests ready to find new markets, to help make this happen. Economists in the United States, who had seen the benefits of Keynesian economic policy implemented by the United States through the New Deal, understood that some governmental intervention in the form of foreign aid might be necessary to prepare the post war world for "free trade," but these aid programs would

need to emphasize “increasing production and efficiency over the social transformation of recipient countries.” (Pollard 1985: 9).

With these goals in mind, during July 1944 the United States invited the economic leaders of the forty-four leading trading nations in the world to come together for the United Nations Monetary and Financial Conference (Bretton Woods Conference) to develop the structure that would ensure a financing system and funds for the expansion of the free market. The Roosevelt administration strongly supported this conference and embraced the goals of expanding free markets and decreasing barriers to free trade, and set the agenda for the conference with these goals in mind. (Pollard 1985: 2). From June 15th through June 30th, 1944, to help secure this agenda several American financial experts held a pre-planning conference in Atlantic City with fifteen other countries in attendance (Bank 2004). The members of this planning meeting then traveled by train to New Hampshire for the start of the conference at Bretton Woods, New Hampshire. Delegates from forty-four nations attended the conference, but the intellectual “founding father” of the institutions that were born out of the conference was Harry Dexter White, the senior economist with the U.S. Treasury. The leadership of White coupled with the unique economic position of the United States ensured that the ideals of the Roosevelt administration were the framework for the conference agreement (Bank 2004).

This agreement was called the Bretton Woods Agreement and through it all forty-four delegates agreed to the goals of establishing a “postwar international monetary system of convertible currencies, fixed exchange rates, and free trade.” (Bank 2004). This agreement planned for establishing three institutions to provide the structure needed for meeting these goals. These institutions were the International Monetary Fund (IMF),

the World Bank (WB) and the International Trade Organization (ITO); however, only the IMF and WB were actually established through the agreement. The U.S. Congress would not support the ITO in the way it had been envisioned in the agreement and its formation was tabled for further debate. (Bank 2004). On December 27, 1945 the IMF agreement went into force and in June of 1946 the WB became operational with the naming of its first president.

Over the next two years a series of conferences were convened to continue discussions on the ITO. The original version recognized the importance of strong labor standards while liberalizing trade, and its charter stated that:

The members recognize that measures relating to employment must take into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The members recognize that unfair labor conditions, especially for export, create difficulties in international trade, and accordingly, each member shall take whatever actions may be appropriate and feasible to eliminate such conditions. (Foley 2000: 39-40)

In 1947 the United Nations held a conference in Havana, Cuba where the charter for the ITO was adopted. Trade economists in New York, London and Geneva conducted most of the preparations for the charter. Despite the adoption of this charter, the ITO was never adopted. Although other factors influenced this, the failure of the United States to ratify the charter sealed its history. However another agreement was made in place of the ITO, the GATT. This agreement incorporated the commercial provisions, including a reduction of tariffs among member nations of the ITO but not the labor provisions. In January of 1948, the GATT was signed by twenty-three countries including: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, the Czechoslovak Republic, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern

Rhodesia, Syria, South Africa, the United Kingdom, and the United States of America (WTO 2002).

Despite the fact that the United States never ratified the GATT it had a strong impact on U.S. economic policy. While some politicians were hesitant to allow the economic decisions of the United States to be influenced by international law, trade economists who actually wrote policy were big supporters of the GATT. They argued that the United States should follow its mandate because of a contract like responsibility owed to the parties that signed the agreement (Eckes 2000: 36).

Over the next forty years, as more countries joined the United Nations the GATT agreements were reworked and expanded to include not only the trade of goods, but also rules on international property rights and private party to state arbitration. The negotiations of an expanded GATT took place through the Marrakech Agreement and established the World Trade Organization (WTO) as of January 1, 1995. Most of the countries that were parties to GATT ratified the WTO, which incorporated the GATT, and agreed that the WTO would function in place of the GATT (WTO 2002).

The WTO set up the framework for countries to establish various regional trade agreements like the North American Free Trade Agreement (NAFTA) and the Free Trade Area of the Americas (FTAA). While corporate influence on the WTO was suspected, and in some cases clear (the WTO's trade related intellectual property agreements (TRIPS), which greatly extended patent rights over medicines were directly linked to lobbying by pharmaceutical companies), regional trade agreements have been undoubtedly heavily influenced by corporate interest. A report conducted by the Council of Canadians and published by the Sierra Club of Canada reveals great corporate influence

over FTAA negotiations. "In the US, corporate committees advise the American negotiators and, under the Trade Advisory Committee system, over 500 corporate representatives have security clearance and access to FTAA negotiating documents." (Elwell 2001). As a result of this corporate influence the Ministers of Trade of the Americas agreed to implement into the FTAA twenty "business facilitation measures" for fast customs clearance, which is feared will result in an increase in hazardous waste trade. No environmental provisions were adopted with these measures to counter this risk (Elwell 2001).

While 97% of the world's countries are members of the WTO, United States backed multi-lateral free trade agreements are becoming more difficult to achieve. To date the FTAA has failed, and the United States has moved to implementing bilateral trade agreements with Latin American countries who are still willing to agree to the terms of trade mandated by the United States and its corporate backers. Several countries have refused to agree to these agreements and are implementing their own agreements like the Common Market of the South (MECOSUR), which unites several Latin American countries as an alternative to the FTAA. The resistance of many countries can be linked to their observations of the impact NAFTA has had on Mexico.

The Impact of Neo-Liberal Trade and Development in Mexico

Since World War II the Mexican government has participated in various neo-liberal trade and development programs through agreements with the United States and development projects through the World Bank and the International Monetary Fund. While these projects have created some wealth in Mexico, the number of millionaires in the country has increased significantly, wealth disparity has increased at a much faster

rate. The country has also experienced significant fluctuations in its economy, such as the coffee crisis of 2002, which sent Mexican coffee prices to historical lows.

The North American Free Trade Agreement (NAFTA) was ratified by Canada, the United States, and Mexico. While proponents of the agreement claimed it would bring development and economic opportunities to Mexico, the reality of the agreement has had a different impact. During the seventh year of NAFTA's existence, many think-tanks and NGOs researched NAFTA's impact on investment, employment, job creation, worker's rights, poverty, and environmental protection. While the results may have been surprising to the Fox Administration, they were not to the many people that NAFTA left behind.

At a great cost to the indigenous and rural communities of Mexico, foreign investment in Mexico did boom in 1994 as a result of NAFTA requiring Mexico to open all sectors to investment. Because of this requirement, Mexico repealed Article 27 of its constitution, which had set aside communal land for use by the people, and began privatizing land for use by foreign companies. Prior to NAFTA, foreign ownership of land had been restricted to 49% of all land in Mexico. As a result of these changes of law, direct foreign investment in Mexico increased from 4.4 billion dollars in 1993 to 11.8 billion dollars in 1999. Unfortunately these investments did not lead to financial stability, and the same NAFTA rules allowing investment in Mexico have also allowed capital flight from investments. By the end of 1994, many investors changed their minds about Mexico and pulled billions of dollars out of the economy. This rapid capital loss led the Mexican government to devalue the peso in an effort to gain economic stability, and in turn drove up interest rates and caused many Mexican owned businesses to go bankrupt. This capital flight has continued as evidenced by the fact that Portfolio

Investments in the Bank of Mexico have decreased from ten billion dollars during the second quarter of 1994 to negative five billion dollars in the fourth quarter of 2000 (Anderson 2001).

NAFTA failed to bring financial stability to Mexico, and it also failed to meet the promises of reducing poverty, respecting workers rights, and creating good jobs. Since 1994, minimum wage and manufacturing wages in Mexico have dropped 18-21%. The NAFTA labor side agreement's citizen submissions have shown systematic repression of workers who try to organize for better pay. Poverty in Mexico has increased by 8% with the total percentage of Mexicans living in poverty going from 50.97% in 1994 to 58.40% in 2002. These negative impacts have led more and more people to immigrate to the United States in seek of work, while during this same period the United States has made immigration much more difficult (Anderson 2001).

The impact of NAFTA on the environment has also been significant. In Mexico, manufacturing related air pollution has doubled since 1994, while government environmental inspections of factories have dramatically decreased since this time. The destruction of natural resources has also increased in Mexico, as lands that were previously communally owned and that included some of North America's largest intact forests have been invested in by more than a dozen U.S. based wood production companies (Public Citizen 2001). The increase in large-scale agriculture associated with the expansion of trade across the Americas has increased pesticide exposure and pesticide residue on the Gulf coast of Mexico and in rivers. This has contributed to increases in childhood health problems, including birth defects, for children born in Mexico and born to migrant farm workers in the United States. It has also contributed to dead areas of

water in bodies in the Gulf of Mexico, where rivers full of farm related runoff feed into the Gulf.²

Other environmental impacts related to human health, water and air quality, have been linked to changes occurring in the maquiladora industry with the expansion of international trade. Clothing assembly and production were the main maquiladora industries during the 1960's and 1970's and have not been linked to significant environmental health impacts. However, during the mid-1980s the production shifted to furniture, electronics, and chemical production, and the number of factories increased significantly. Soon workers in the crowded areas felt many negative impacts on the environment in the increasingly polluted areas where they worked and lived. Through the mid-1990's many maquiladoras illegally dumped industrial related wastes, including toxics and raw sewage. Despite laws requiring repatriation to the United States of all hazardous wastes associated with production of goods for export made from U.S. raw materials, a 1991 study by the Texas Water Commission showed that over 40% of hazardous wastes were not being returned to the United States. Similarly, the Mexican Federal Attorney for Environmental Protection reported that over 25% of industrial related waste could not be accounted for in 1991. The impact of this included contaminated ground water, play areas that literally caused children to become intoxicated, and higher populations of workers exposed to improper disposal of chemicals (Williams 1995).

Maquiladora related pollution is a major cause of environmental related health problems in Mexico. Most of maquiladora workers are young, poor women, who are both politically and physically isolated from advocacy avenues that might lead to enforcement

of environmental or human rights policy in the area. A case study, which will be described in the next chapter, shows the impact this type disenfranchisement can have on a community forced to live with the toxic wastes of a maquiladora. These wastes threaten the land and water where workers live and work and are passed onto their children through breast milk and exposure during pregnancy. The cocktail of chemicals and wastes people are exposed to make direct links to specific chemicals hard to prove despite high rates of health problems, deformations, and sometimes death in areas where maquiladoras operate. Despite the lasting impact these wastes have on the life and health of people living near maquiladoras, the harm caused by them has not been recognized as a human rights violation by most courts.

Besides the maquiladora related harm, in the decades prior to the implementation of NAFTA, rural peasant and indigenous groups became increasingly impacted by development projects that encouraged structural readjustment. As a result of these development policies, low impact farming methods employed by subsistence farmers have been replaced with export based farming practices that include the use of genetically modified organism, heavy pesticides and deforestation. Not only have these methods impacted the ability of rural farmers and indigenous people to participate in subsistence farming, they have polluted water supplies and caused erosion. Furthermore, investment based farming methods have challenged the ability of indigenous people to survive on the land where they have historically lived and to practice the lifestyles they have chosen to practice (Weaver 2000). While not from a legal standpoint, this impact of trade and development, i.e. destruction of indigenous lands to a point that the people can no longer

live there, has been considered a form of genocide by many counter hegemonic globalization movements.

While this is a short simplistic analysis of the recent impact of trade and development under neo-liberalism, it provides a background for understanding why human rights advocates are concerned. The stories presented to illustrate some of the ways human rights advocates have attempted to make trade and development work for all people also give a more detailed analysis of the harm marginalized communities have experienced with the expansion of trade.

Notes

¹ For an explanation of social infrastructure see *Human Materialism: A Paradigm for Analyzing Sociocultural Systems and Understanding Human Behavior* by Paul Magnarella (Magnarella 1999: 240), where the author discusses the role of economic and political elites in maintaining power. These ideas are also discussed in Chapter 1 above.

² For an interesting discussion on the environmental impact that increased agriculture market NAFTA has had on women in the U.S., particularly farm workers; see *NAFTA Through a Gender Lens: Free Trade Agreements and Women* by Alexandra Spielloch (Spielloch 2004). This article discusses how expanded agricultural in the United States has increased toxic pesticide exposure to farm workers in the United States, many of whom are migrants from Central America. This has had a great impact on women who bear the bulk of the burden in caring for children with pesticide related health problems, and who themselves carry a high body-burden of harmful pesticides.

CHAPTER 3 RULES

The rule of law does not do away with the unequal distribution of wealth and power, but reinforces that inequality with the authority of law. It allocates wealth and poverty in such calculated and indirect ways as to leave the victim bewildered.

— Howard Zinn

Trade theorists, environmentalist and human rights advocates have argued that protect the best way to protect the human rights of marginalized communities as trade expands human rights protections is to incorporate human rights rules and regulations into trade agreements. These arguments accept the basic economic theory behind “free trade” as articulated by Paul A. Samuelson and holds:

There is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product for all nations, and makes possible higher standards of living all over the globe.
(Lowenfeld 2002: 7)

While accepting this argument theorists also recognize that trade has been related to environmental destruction and human rights violations and a concentration of wealth in the industrialized world. To counter these negative sides of trade agreements, these theorists argue that basic standards for protecting the human right to a healthy environment should be incorporated into trade agreements and that legal and regulatory measures should be taken to more evenly distribute the benefits of trade (Foley 2000: 43). Furthermore scholars in this camp argue that human rights protections must be regarded as more valuable than trade law and protection of human rights and the environment must be the basis of all trade policy (Bronson 2001: 1-7). Some argue that these rights should

be included in trade agreements themselves while others push for corporate codes of conduct and price guarantees to level the balance between human rights and trade. As more countries join the World Trade Organization, whose rules govern 97% of the world's population (WTO 2005), the inclusion of international human rights and environmental protection provisions is increasingly a contentious but essential part of bilateral and regional trade agreements.¹

While these approaches differ in application they all rely on the current hegemonic systems of trade and development to promote human rights and do not question how and why these systems developed. They accept free market ideology that claims market neutrality will promote development and make the world better for all people without questioning why those who have promoted this ideology have also benefited the most from it often at the expense of marginalized communities.

To explore the ability of trade agreements to protect human rights the first part of this chapter will examine the present avenues of relief for violations human rights to a healthy environment available through rule based approaches including NAFTA and the North American Agreement on Environmental Cooperation. The second part of this chapter will examine regulation based approaches including fair trade certification and corporate codes of conduct.

NAFTA's Paths for Addressing Trade Related Harm

The Citizen Submission Process

The preamble to NAFTA was the first international trade document in the Americas to link environmental and labor protection with economic development; however, the final form of the agreement contained no binding environmental commitments. In 1993, a year after the United States entered into NAFTA, the Clinton

administration responded to claims by environmental and community advocate organizations that NAFTA did not protect the environment, but rather created ways for investors to circumvent environmental regulations, by releasing a report conceding that environmental problems along the United States and Mexico borders needed to be addressed as trade expanded (Gracer 1999: 719). NAAEC Articles 14 and 15 and the Citizen Submission Process

With this admission and fear of losing support for the ratification of NAFTA, the Clinton administration supported the creation of the North American Agreement on Environmental Cooperation (NAAEC), also known as the Environmental Side Agreement. This agreement provided an avenue for individuals to submit complaints when their country failed to enforce domestic environmental law. The agreement became effective on January 1, 1994 and defined “environmental law” to include any statute enacted with the primary purpose of protecting human life or health, but not including statutes related to employment. These issues were covered in a separate but similar agreement, the North American Agreement for Labor Cooperation (NAALC) (Gracer 1999: 719).²

Articles 14 and 15 of NAAEC are of particular importance to citizens suffering trade-related harm. Through these articles, the Commission for Environmental Cooperation (CEC) oversees an avenue for addressing environmental harm by accepting citizen submissions that show failures of national governments to appropriately regulate the environmental impact of trade, including when trade violates the human right to a healthy environment. There are five basic steps to this submission process. First the submitter must adequately claim that a state party to NAFTA “is failing to effectively enforce its environmental law” (Knox 2001: 60), and that the submission “appears to be

aimed at promoting enforcement rather than harassing industry.” (Knox 2001: 60). Both of these requirements leave ample room for interpretation; however, the guidelines adopted by the Council, which is made up of one environmental minister from each Canada and Mexico and the United States³, suggests that the primary purpose of these requirements is to ensure complaints focus on the actions of state parties and not the actions of particular companies, even though company action may have caused the harm (Knox 2001: 60).

Second, the submission must convince the CEC Secretariat that it warrants a response from the state party the complaint was brought against. Once the CEC Secretariat receives the submission s/he makes a determination on the merits of a request to see if: 1) the submitter alleges in the submission that s/he or the organization s/he represents has experienced harm, 2) “the submission is drawn exclusively from mass media reports,” 3) the matters it raises could further the NAAEC’s goals, and 4) private remedies available to the submitter have been exhausted (Knox 2001: 61-63).

Once this stage is completed, the third hurdle presents itself in the Secretariat’s decision on whether to recommend to the CEC Council that the development of a factual record is warranted based on the information gathered from the first two steps. The NAAEC provides no guidelines for making this determination, except that if the party against whom the complaint is brought informs the Secretariat within 60 days that the disputed matter is the subject of pending administrative or judicial proceedings, the submission must be rejected (Knox 2001: 64-65).

Convincing the Council to determine by a 2/3 vote that the Secretariat should develop a factual record presents the fourth hurdle. Since a vote of representatives of the

three NAFTA parties determines if the factual record should be produced, states can vote to protect their image and not have a factual record produced. The agreement provides no instructions, constraints or guidelines as to how the council should base its vote (Knox 2001: 64-65).

Finally, if the council votes that a factual record is warranted, the Council asks the Secretariat to develop a factual record (Knox 2001: 66). Once the Secretariat completes the record, the concerned parties, the submitter, and the state are given forty-five days to check and comment on its accuracy. The comments are then, at the discretion of the Secretariat, edited into the final factual record and submitted to the Council who can decide to release it to the public by a 2/3 vote (Knox 2001: 67). The CEC's website states that the purpose of this entire process is to "[e]nable the public to play an active whistleblower role when a government appears to be failing to enforce its environmental laws effectively." (CEC).

Unfortunately, there is no evidence that citizen involvement in the process as whistleblowers provides any remedy for violations of the human right to a healthy environment experienced by citizens or any incentive for concerned parties to change their behavior. If a citizen's submission is successful the outcome results in the production of a factual record; however, no judgment as to whether the government has or has not enforced its environmental or human rights laws is made. Furthermore, the ability to obtain actual remedy for harm relies upon the action of the government whose inaction catalyzed the complaint in the first place (Gracer 1999:721). Article 6 of NAAEC creates a duty for countries to ensure that legally recognized persons under their law have some access to administrative, quasi-judicial or judicial processes to make their

country enforce its environmental policies. This can include monetary damages, but does not require such damages.

As of November 4, 2004, forty-nine submissions had been filed with the CEC since the Citizen Submission process began in 1995; seventeen from Canada, twenty-three from Mexico, and nine from the United States. Thirteen submissions are currently under review. Of these thirteen submissions, the Council has instructed that factual records be developed for four and the Secretariat is in the process of creating the records. The remainders of the submissions are at various stages in the submission process ranging from waiting for acceptance of the submission under Article 14 to waiting for the Council's determination on whether a factual record should be developed. Of the thirty-six submissions that have completed the processes: thirteen have been dismissed because they did not meet the requirements for consideration under Article 14(1) or (2); two have been disregarded under Article 14(3)(a); seven have been disregarded under Article 15(1); two have been withdrawn by the Submitters; ten have led to the creation of factual records which have been prepared and released to the public; and two have been dismissed by the Council after the Secretariat recommended that a factual record be prepared (Millan 2004). The case story below examines the outcome of a citizen group that successfully negotiated the NAAEC process.

The creation of factual records has led to greater transparency in environmental enforcement proceedings in terms of uncovering specific events, processes and circumstances where these proceedings have failed. It has also created a framework for allowing the public to initiate a review of governmental accountability and compliance with the purposes of the NAAEC (Knox 2001: 74 n30). However, case studies of the

after effects of a factual record in the community where the complaint originated have shown a failure to achieve substantive results in terms of environmental remedies, enforcement, and improvement, and increased public participation in governance of environmental health matters (Yang 2005).⁴ Professor Tseming Yang of Vermont Law School argues that this result should not be surprising for three reasons:

First, the nature of international institutions and the international system creates difficulties in the enforcement of environmental treaties as well as in ensuring the political accountability of such institutions to particular individuals and communities. Second, the political economy of the United States-Mexico border region and the marginalization of the communities living there are an inherent obstacle to the effective functioning of governmental and regulatory processes. Third, the operation of markets and social norms is not conducive to promoting voluntary compliance in situations (Yang 2005: 477).

The problem with the political accountability to particular individuals results because the citizen submission process does not and cannot force a party to comply with its duty under the NAAEC to enforce its own environmental regulations and laws and to provide a remedy for violations of these laws. Furthermore the actions of the Secretariat and Council members in relation to the submissions process are not subject to political accountability. Once a submission is filed, the Secretariat and the Council have the ability to entirely control and manage it, without even the anticipation that the submitter will be involved in the fact-finding activities. Basically the submission process simply alerts the Secretariat to noncompliance with obligations of the NAAEC by one of the parties to the agreement. Within this process exists the hope that the factual records produced will

provide the basis for government or citizen actions, such as sanctions or boycotts that will force compliance. Unfortunately, there is no evidence of this hope resulting in real change after the production of the factual record (Yang 2005: 477).

The second issue raised by Yang is the fact that communities whose human right to a healthy environment are violated and exposed by factual records also tend to have very little political economy or resources to use the bureaucratic quasi-legal process established through the NAAEC. As with environmental justice communities in the United States, the communities in Mexico that are striving to assert the right to a safe and healthy environment lack political power because they are poor and disenfranchised from the political processes of their governments. Their poverty also makes actually using the submission process difficult because it is expensive. This lack of political power makes it much easier for the government to ignore the concerns of these communities and to weigh the benefits and burdens of enforcing environmental regulations to favor entities with political clout. Further compounding this problem is the actual physical location of the communities affected. Many of the communities negatively impacted by trade are located in border regions of Mexico and the United States or in very remote areas away from the physical centers of government policy and decision-making. Thus, even if substantive opportunities for public comment on governmental actions did exist, these communities would have a difficult time participating in them because of their physical location (Yang 2005: 477).

A final reason these communities fail to receive adequate relief through the citizen submission process is because voluntary compliance with environmental and human rights regulations is not always necessary to comply with market rules, social norms, and

the law. In some situations the bad behavior of a company can impact its profits if this behavior is exposed to the public at large. However, companies and investors will not act to comply with social norms or market rules if the community affected does not affect its image in the general public's eye or if there is not well-established law on the subject. Again as with environmental justice communities in the United States, the economic clout of the communities affected negatively by trade lends little power to force governments and companies to change their practices (Yang 2005: 477-478).

The content of the factual records exposes many issues that link environmental impacts of "free trade" to human rights abuses. Many of the unsuccessful submissions also show this link, especially the ones which were dismissed based on Article 14(1) or (2). Closer examination of the dismissed complaints reveals that most were not dismissed for failure to state grounds for the complaint. Rather the dismissals resulted when the complaining party failed to submit revised complaints within a 30-day period (Millan 2004). The submitter of one of the complaints dismissed for this reason, *Alca-Iztapalapa I*, resubmitted the complaint as *Alca-Iztapalapa II* and is now awaiting the Council's decision on whether to develop a factual record as recommended by the Secretariat. Very little in the facts of the case changed between the two submissions; however, the first complaint failed because the submitter lacked the resources to amend the original complaint within the 30 day time period allotted. Because of the marginalization of the affected communities, what authorities report as a dismissal may actually be a community's inability to meet bureaucratic guidelines due to lack of resources. Thus, the dismissal of a complaint does not mean a complaint was not warranted. Rather than challenging hegemony; this process requires marginalized

communities to tell their stories so they fit the requirements of hegemonic legal systems. Thus many stories that would support claims of environmental injustice are disregarded because they do not conform to hegemonic standards of evidence.

NAFTA Chapter 11

While Articles 14 and 15 discussed above were adopted through the Environmental Side Agreement after Clinton admitted that NAFTA had no provisions for redressing violations of the right to a healthy environment, another set of agreements impacting this right were included in the text of NAFTA itself. Chapter 11 of NAFTA guarantees investors access to international arbitration for seeking damages when certain substantive protections created through NAFTA are breached (Coe 2003:1381). Many of these breaches have resulted from the enforcement of environmental protection laws or the establishment of laws meant to protect the health of communities. Case law resulting from claims under Chapter 11 also affirms that foreign investors can file an arbitration claim before exhausting local remedies, which is contradictory to customary international law that requires both parties to exhaust local remedies before taking complaints to international tribunals (Coe 2003: 1418-1421). The provision of Chapter 11 most related to environmental and human rights law is Article 1110, which guarantees investors full compensation⁵ for any “measure tantamount to ... expropriation” (*NAFTA Chapter 11 Article 1110(1)*) of their property (Coe 2003: 1384).

Since the birth of NAFTA, investors have used Chapter 11 arbitration mechanisms twenty-two times to challenge either effective expropriation or discriminatory treatment. (Deardorff 2005). Seven of these actions involved pollution control or natural resource regulations imposed by governments to the detriment of investment (OAS). Five of these cases have resulted in decisions and the remaining have been settled or withdrawn. The

impact of these cases on the enforcement of environmental laws has been hard to judge.⁶ However, what is unique about Chapter 11 and troubling to many environmental health advocates is that it applies not only to direct expropriation, but also to indirect expropriation. The decisions from arbitration panels thus far suggest that this creates an avenue for an investor to receive damages when a governmental policy change impacts the value of foreign investment. This provision impacts environmental and human rights laws because it allows investors to challenge the enforcement of these laws if such enforcement infringes on profit. This idea of expropriation covering future lost profits expands the definition of property rights included under the domestic laws of NAFTA countries (Public Citizen 2001).

Also unprecedented is Chapter 11's creation of a private right of action through which investors can sue in private international tribunals the government of another country, including state and municipal governments within that country (Public Citizen 2001:11). Previously only governments could use these tribunals for trade disputes related to the actions of other governments; under Chapter 11 investors can bypass its own government and directly file the case against another country's government. Furthermore, Chapter 11 allows foreign investors to have more rights than citizens and companies in terms of compensation for "regulatory takings" and to receive monetary awards for "damages" resulting from governmental enforcement of laws and regulations. Ironically, Articles 14 and 15 of the Environmental Side Agreement do not allow any form of compensation to individuals who have suffered as a result of their government's failure to enforce environmental laws. Further complicating this issue is Article 2021 of NAFTA, which expressly forbids any Party from providing a right of action within its

domestic law to challenge another party's actions as inconsistent with NAFTA (Coe 2003: 1386 n 9).

Thus, under NAFTA related agreements, a government can be forced to pay for enforcing its laws and regulations to the detriment of future profit, but cannot be forced to pay for failing to enforce such laws and regulations to the detriment of the human right to a healthy environment. Professor J. Martin Wagner, the Director of International Legal Programs for Earthjustice Legal Defense Fund, explains the logical result of such laws:

As these NAFTA cases make clear, giving companies the right to base compensation claims on the economic impact of environmental regulations has a serious chilling effect on the ability and willingness of governments to implement such regulations. Governments that do so risk being penalized by having to divert precious governmental resources to defend the regulations against expropriation claims and to pay compensation payments if the defense is unsuccessful. (Wagner 1999:467)

Stories of communities that have used the NAAEC, expose the Mexican government's failure to protect the its peoples' human right to a healthy environment despite the fact that national law, international law, and trade related regulatory mechanisms existed that gave Mexico the legal basis to protect the environment and human health, and to prosecute the corporate executive who caused the harm. This failure of the law and regulations to result in positive change for people experiencing trade related harm speaks to the importance of not relying solely on the law or regulatory mechanisms for protecting human rights and the environment in an era of global trade.

Article 14 and 15 and Chapter 11 in Practice

To compare the potential outcomes of an Article 14 and 15 complaint to a Chapter 11 complaint, this section will examine case studies that show a complete use of both legal documents. In both of the cases below, the complaining parties succeeded in having

their complaint recognized by the governing international body, a victory that few groups have accomplished while using either avenue.

Actions through the NAAEC Articles 14 and 15: *Metales y Derivados*.

Despite Mexican law and the La Paz Agreement requiring the repatriation of hazardous wastes generated by maquiladora plants, since 1986 the residents of Colonia Chilpancingo who lived near Mesa de Otay Industrial Park, in Tijuana, Mexico had been exposed to the wastes generated by a factory called *Metales y Derivados* which produced refined lead and phosphorized copper from recycled wastes. Metales was incorporated as a maquiladora plant so New Frontier Trading Company, a California corporation, and Jose Kahn Block, who operated out of San Diego, CA, and owned Metales could export raw materials into Mexico where they would be processed and re-exported as finished products by the cheap labor readily available in Mexico (Yang 2005: 447).

However, unlike most maquiladoras, which operate mainly as assembly plants, Metales recycled wastes including: lead-containing soils, telephone cable sheathing, lead oxide, discarded automotive and industrial batteries, and other types of lead scrap. (Metales 1998). The batteries were manually opened with an axe, and the materials were processed with two lead smelting furnaces, two copper smelting furnaces, and two lead refining crucibles that had no emission control systems. The furnaces ran on diesel and fuel oil (Yang 2005: 448).

The factory was in trouble from the day it opened. Although its main purpose was to recycle toxic waste, its toxic waste storage consisted mostly of open-air piles. The wastes stored in these piles included lead and copper slag, sludge from heavy metal, empty arsenic containers, and service elevator waste oils. After the plant had been operating for a while, the hazardous wastes were moved and stored in various ways

including “in an enclosed area, in an open roofed area, on concrete floors on racks; and on bare ground on the property.”(Yang 2005: 448). Between 1987 and 1993 the government inspected the factory five times and found serious violations of environmental laws each time. In 1991, Mexico ordered the factory to temporarily shutdown; however, it soon re-opened. On March 28, 1994, Mexico permanently shut the factory down (Yang 2005: 449).

In 1993, during the closure proceedings for the plant, criminal charges were filed against Jose Kahn Block. In 1995 an arrest warrant was issued for him and for his wife Ana Luisa de la Torre. At this point New Frontier and Kahn Block abandoned Metales and fled to the United States. Back in the United States the Los Angeles District Attorney’s office brought a 26-count criminal felony indictment against Kahn Block for illegally transporting hazardous materials to the Metales plant. After pleading guilty to two charges, he received a \$50,000 fine and three years probation, but served no time (Yang 2005: 450). By the time Metales was closed, the site had been exposed to over 6,000 metric tons of lead slag; sulfuric acid; and heavy metals such as copper, cadmium, antimony, and arsenic.

As part of his probation, Kahn was supposed to “build a retaining wall around the facility and to contain the existing lead slag pile to prevent releases into the air or into the ground,” (Yang 2005: 450) and to “pursue all licensing and permitting applications for the implementation of an electrowinning process that could further recycle existing and future supplies of slag at the site.” (Yang 2005: 450). Furthermore, his plea agreement required that he “obey all laws of California, the United States and Mexico, including the ‘La Paz’ agreement which requires that all waste materials imported from the United

States be 'repatriated' upon completion of processing.'" (Yang 2005: 449 n30). The agreement also allowed Kahn Block to expunge his record and have his charges dropped to a misdemeanor by applying to the court, even though he never repatriated the wastes to American soil (Yang 2005: 449-450).

Once the facility closed, the Mexican government completely ignored the area, and the U.S. government separated itself from the problem stating that it had no authority over the facility since it was in Mexico. With the hazardous wastes remaining in such close proximity to people's homes, community activists began demonstrating outside of the facility, at government offices, at the offices of New Frontier, and even at the San Diego home of Mr. Kahn Block. Finally, Mexican officials covered the lead slag piles with plastic tarps and repaired part of the cinder block wall around the facility. Over 4000 kg of red phosphorous, an explosive, was removed in December 1994 and January 1995. With these minimal measures taken to prevent the materials from being exposed to wind and rain, the Mexican Government did nothing else (Yang 2005: 451).

Soon the Environmental Health Coalition, a citizens group from San Diego, and some women from Colonia Chilpancingo, a community 135 meters down a ravine from the facility, painted warning signs on the walls near the path that led to the community (Metales 1998: 23). All of the environmental health problems remained. With every rainstorm, toxic wastes washed down the ravine into the residential community. Children easily slipped through the two-strands of barbed wire fence surrounding the property to play (Yang 2004: 451), inadvertently exposing themselves to the lead, arsenic, cadmium and antimony that contaminated the soil (Metales 1998: 59).

Fed up with the government's lack of action, the Environmental Health Coalition and the Comité Pro Restauración del Cañón del Padre y Servicios Comunitarios decided to use the NAAEC's citizen complaint process on behalf of the people living near the facility. On October 23, 1998, the Secretariat of the CEC received the citizen submission regarding *Metales*. In the submission the community groups alleged that Mexico failed to enforce several environmental laws including: 1) LGEEPA (Ley General del Equilibrio Ecológico y la Protección al Ambiente) Article 170 by "failing to take the measures necessary to contain or neutralize the hazardous waste abandoned by Metales y Derivados so as to avert an imminent risk of harm to the environment and public health;" (Metales 1998: 13-14) 2) LGEEPA Article 134 by "failing to take suitable action to control or prevent soil contamination at the site and its surroundings including remediation of the site;" (Metales 1998: 14) 3) "Article 415 of Mexico's criminal Code, Article 3 of the International Extradition Law, and articles 1 and 2 of the Extradition Treaty Between the United States of America and the United Mexican States" for failing to extradite Jose Kahn Block and prosecute him pursuant to his arrest warrant (Metales 1998: 14).

On March 6, 1999 the Secretariat notified the Council that the submission regarding *Metales* warranted the development of a factual record on the issues related to the Mexican government's violation of LGEEPA Article 170 and LGEEPA Article 134. (Metales 1998: 14). However, the allegations concerning the extraditions could not be reviewed under Articles 14 and 15 of NAAEC, because they were not appropriately linked to environmental law at the time the submission was filed (Metales 1998: 14 n2).

On May 16, 2000 the Council voted unanimously for the development of a factual record on *Metales*. Within the month, the Secretariat began the process of developing the record. The final completed record was released to the public on February 11, 2002. While no judgment on whether Mexico failed to enforce its environmental laws could be made, the record does show that the area was contaminated by highly dangerous substances that pose a high potential risk to health in the long run and that no efforts had been made to remediate the area (Metales 1998: 19). Further the report confirmed that the contaminants at the site of the facility had a high likelihood of being carried to the neighboring residential communities through wind and rain unless given suitable treatment (Metales 1998: 25). Two scientific studies of the area were conducted and included in the final factual record. Both showed that the Submitters were wrong in their estimate of the amount of contaminated material at the site; the submitters reported 6,000 tons of contaminated materials, while the reports estimated a total up to 8,595.45 tons. In order to secure the site and prevent the contaminated materials from further harming the nearby communities, one of the scientific studies referenced in the factual record suggested that certain measures should be taken immediately:

1. Keep the contaminated materials in the piles covered and, as applicable, repair the tarps on the piles that have been damaged, using geomembranes or polyethylene, since the results obtained from the control samples taken outside the Metales y Derivados, S.A. de C.V. site demonstrate that the lead in the inadequately covered piles can easily be dispersed by the wind, causing an increased risk of lead poisoning to persons living and working near the site.
2. Secure the site so as to bar access to any person.
3. Keep the site under surveillance to prevent it from being occupied, as it is currently totally abandoned.
4. Initiate restoration measures immediately.

5. If possible, secure the zone with some type of physical barrier to prevent dispersal of contaminated dust.

6. Request the cooperation of the United States for the repatriation of the wastes generated through the use of materials imported from the US, or as applicable, that they be treated to eliminate the health hazard they represent. (Metales 1998: 27)

Despite these concrete recommendations and the release of the factual record, the impact of the report has been less than sufficient to make either Mexico or the United States contribute to the clean-up process. In 2002 after continued protests and demonstrations by community activists one of the scientific groups that conducted research on the area that was used in the factual record, put up new warning signs and new plastic tarps on the waste piles. Below is an excerpt from a case study on the impact of the citizen submission process in the case of Metales y Derivados. The study was conducted and written by Tseming Yang, a professor at Vermont Law School. He writes:

By early 2003, when I visited the facility, the tarps were gone. No other significant remedial action had been taken. In fact, the fencing and walls surrounding the site had deteriorated further and were largely in a state of disrepair. People could enter the site easily, and the contaminated wastes were readily carried off the site by wind and rain.

Mexican government officials have never pressed for Jose Kahn's extradition. As a result, California and federal authorities in the United States have not sought to execute the warrant for his arrest. In the summer of 2003, Victor Lichtinger, then head of the Mexican environmental ministry, promised to address the contamination. Unfortunately, not more than a month later Lichtinger was dismissed from his job by President Vicente Fox. On the positive side, Mexican legislators familiar with the Metales matter have discussed the possibility of creating a Mexican equivalent of the United States Superfund program as a way of providing cleanup funds for future abandoned hazardous waste sites.

As for Jose Kahn, he has not set foot in Mexico since abandoning the Metales plant. Kahn has served no time related to the Metales violations. He still lives only miles away from the border in San Diego, California. New Frontier remains an active San Diego-based corporation. Kahn did apply to the North American Development Bank for a \$850,000 loan to cap the site with asphalt or concrete, the most rudimentary of options to address the hazards of the wastes. However, the loan application was denied in 2003. As of early 2004, the residents of Colonia

Chilpancingo and environmental activists still held protest rallies on a regular basis, but government officials remained substantively unresponsive. (Yang 2005: 456)

What this case shows is a complete failure for the NAACE citizen submission process to impact a government's enforcement of its environmental policies, and to protect the health, safety, and welfare of its citizens. Nevertheless, the following case shows the ability of an investor to receive relief from the government for damage to the investor's property when the government does enforce its environmental laws.

Action Under NAFTA Chapter 11: *Metalclad v. Municipality of Guadalucazar, Mexico*

In 1990 Coterin, a Mexican company, received authorization from the federal Mexican government to operate a hazardous waste transfer station in the State of San Luis Potosi. However, in 1991 and 1992 when Coterin sought to expand the waste site to include a hazardous waste dump, the local municipality of Guadalucazar denied Coterin the municipal construction permit needed for the project. In 1993 Metalclad, a U.S. corporation bought Coterin and attempted to expand the waste transfer station to include a toxic landfill on the same land Coterin had tried to build the dump. Metalclad purchased the facility, knowing that it had a history of local groundwater contamination, and then spent 22 million dollars to prepare it for the expansion. At the time of purchase, Metalclad was aware that the toxic waste business in Mexico was highly regulated under Mexican environmental law, which regulates hazardous waste facilities' construction and operation, and requires environmental impact studies and permits from federal, state, and local agencies (Coe 2003; Wagner 1999).⁷

Soon after purchasing Coterin and obtaining the necessary state and federal building permits, Metalclad began construction on the project, although it had not yet obtained the local permit necessary for the construction.⁸ After being denied the required

municipal permit, Metalclad first attempted to have the decision on the permit reversed by petitioning the municipality. This petition did not succeed and the permit denial was upheld.⁹ In late 1996, using an environmental impact analysis of the site performed by the University of San Luis Potosi as support, Governor San Luis Potosi ordered Metalclad to shut down the waste facility and “declared the site part of a 600,000 acre ecological zone.” (Wagner 1999: 485). While the company funded assessment found the site to be geologically suitable for a toxic waste dump, the University funded assessment discovered an underground alluvial stream directly below the facility that put the municipality’s water supply at risk of contamination (Wagner 1999: 485).

Even though it had not exhausted all of its local remedies (Coe 2003: 1421), on January 2, 1997 Metalclad filed a claim against the Mexican Government with a NAFTA tribunal under the World Bank’s International Center for the Settlement of Investment Disputes (ICSID). It based its claim on NAFTA Article 1110’s investment provisions, which outlaw “expropriation without compensation” and failure to provide “fair and equitable treatment” in accordance with the NAFTA Article 1105.69.¹⁰ “Having been denied the right to operate its constructed and permitted facility”, Metalclad argued in its complaint, “[Metalclad’s] property has therefore been, as a practical matter, expropriated, entitling the Company to the fair market value of the facility as damages” (Wagner 1999: 485-486). The fair market value Metalclad claimed it was entitled to amounted to 90 million dollars.

On August 30, 2000, the three-member arbitration panel held that the Mexican government’s denial of the local permit and creation of an ecological reserve were direct expropriation in violation of Chapter 11.¹¹ The panel also held that the Mexican

government misinterpreted its constitution by allowing the municipality to deny a local construction permit,¹² while at the same time holding that, “[the tribunal] need not consider the motivation or intent for the adoption of the Ecological Decree,”¹³ which led to these “expropriations”. It also held that Mexico failed in providing “a transparent, clear and predictable framework for foreign investors,”¹⁴ and thus Metalclad “was led to believe the federal and state permits it secured allowed for the construction and operation of the landfill.”¹⁵ The tribunal made this ruling in light of the fact that Metalclad had been reprimanded by the local municipality for continuing construction without a permit and had been the target of very public opposition that contributed to the denial of the permit. The tribunal awarded Metalclad \$16,685,000 to be paid by Mexico for the “indirect expropriation” of its property.

Alleging arbitral error, in October of 2000 the Mexican government made an unprecedented move and used the Canadian Court to challenge the tribunal’s decision. The Supreme Court of British Columbia ended up hearing the case, which resulted in a split decision. In the end, the judges struck the tribunal’s decision regarding Article 1105 saying that NAFTA governments had no responsibility for creating “a clear and predictable environment for investors.” (Public Citizen 2001: 13). However, the tribunal’s decision in regards to the Governor’s actions were upheld as expropriation, but in doing so acknowledged that the way the tribunal defined expropriation was, as stated by the Honorable Mr. Justice Tysoe, “sufficiently broad to include legitimate re-zoning by a municipality or other zoning authority.” (Public Citizen 2001: 13). The court reduced Metalclad’s award by calculating the amount lost from the time the Governor declared the land the facility stood on an ecological zone. On June 13, 2001, Mexico

announced it would appeal no further and pay the final award of 15.6 million dollars (Public Citizen 2001: 13).

These processes show how current legal remedies for protecting the right to a healthy environment fail marginalized communities. The ideology that drives these legal systems place property rights as the foundation of all other rights, thus when human rights conflict with a nation's sovereignty or an investor's property interest, human rights generally lose out. This is not surprising when the history of these laws is analyzed. At the time when property interest became the foundation of hegemonic legal systems, the marginalized communities most negatively impacted by trade were totally excluded from decision making processes and were more likely to be counted as property than as humans with rights. The property interests that are protected through trade have little to do with the use of property for living and have more do with the ability of those who own land titles to make profit. Thus when one's ability to live is challenged by another's ability to make profit, profit usually wins out. Until the ideology of legal system changes so that human rights and the ability to live are more highly protected than property interest of investors, the needs of marginalized communities will not be meet by the hegemonic legal system.

Notes

¹ "At first glance, one might think that a trade agreement such as NAFTA is not the appropriate forum to address human rights issues. The European Union's experience, however, suggests that human rights and trade are inextricably linked and that they should be addressed together. History reveals that the United States understands this reality and, thus, has often linked its trade policy with concerns over human rights abuses in other countries. History also reveals, however, the United States. steadfast refusal to assure this linkage when doing so would require the United States to commit itself to binding multilateral human rights obligations." *quoting* Smith 1994: 793. Most Post-NAFTA bilateral investment treaties between countries in the Americas, such as CAFTA

and the Andean FTA include environmental provisions or environmental side agreements similar to the one the in NAFTA framework.

² The North American Agreement for Labor Cooperation (NAALC) works in essentially the same manner as the NAAEC, except it addresses labor concerns and worker protections. The NAALC also went into affect with NAFTA, however to cover both agreements is beyond the scope of one paper. For a discussion of the impact of the NAALC on worker's rights see Linda Delp, et. al., *NAFTA'S Labor Side Agreement: Fading into Oblivion? An Assessment of Workplace Health & Safety Cases*. (Delp 2004).

³ Environmental ministers from each NAAEC signatory make up the Council. (Yang 2004).

⁵ The enforcement of Chapter 11 awards is similar to the enforcement of ordinary commercial awards, primarily as established by the New York Convention (Coe 2003: 1386 n8).

⁶ See Public Citizen, an NGO especially concerned about the public impact of "free trade", examined a series of cases settled as a result of this process in its 2001 report, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy. Lessons for Fast Track and the Free Trade Area of the America* (Public Citizen 2001). This report showed that Chapter 11 has further solidified a legal fiction allowing foreign investors to redefine "regulatory takings" so that future lost profits resulting from the enforcement of publicly created laws (i.e., zoning and land use regulations, permitting processes, etc.) must be paid as damages to the investors by the governments who enforce the laws. This definition of "regulatory taking" creates a right belonging solely to foreign investors and challenging the sovereignty of U.S. law making bodies that have refused to establish such a right. Essentially this provision establishes a legal fiction, property interests in future lost profits, which it also protects through another legal fiction, foreign investors having the same rights as people, and in this case, more rights. While the idea that foreign investors and corporations have the same rights as people is a well established in American jurisprudence, this new property right has been repeatedly rejected by U.S. lawmakers. Public Citizen explains this problem saying: "Yet such a notion of "regulatory takings" does not exist for U.S. citizens or companies because it has been rejected by Congress and the courts. Attempts to legislate a broader definition of property rights through regulatory takings legislation has been repeatedly rejected by Congress. In addition, the U.S. Supreme Court held in the 1993 *Concrete Pipe* case that mere diminution of the value of an investment is not sufficient to establish a taking. Yet it is precisely a diminution of value resulting from compliance with government regulations that is at issue in most of these NAFTA cases. In short, these NAFTA cases are giving foreign investors greater rights and remedies on U.S. soil than are available to U.S. companies here at home." (Public Citizen 2001: iv).

⁷ See Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*,

International Center for Settlement of Investment Disputes, Aug. 25, 2000.
www.worldbank.org/icsid/cases/mm-award-e.pdf.

⁸ Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000.

Public Citizen presents an interesting analysis of the situation explaining that in 1994 Metalclad was ordered to stop construction because the required local permit was still pending. In 1995, following a company funded environmental assessment, which found the site suitable for Metalclad's plans, local environmental groups and Greenpeace Mexico pressured the local municipality to deny the permit because of dissatisfaction with the assessment. In March 1995 the construction project was completed; however, the facility could not open because of local demonstrations and opposition. In December of 1995, criticizing Metalclad for completing the construction without a permit, the municipality of Guadalcazar denied the permit request. *See* Public Citizen, *supra* note 67 at 11.

⁹ *See* Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000.

¹⁰ Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000.

¹¹ Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000.
www.worldbank.org/icsid/cases/mm-award-e.pdf at 29.

¹² Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000.
www.worldbank.org/icsid/cases/mm-award-e.pdf at 25.

¹³ Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000.
www.worldbank.org/icsid/cases/mm-award-e.pdf at 35-36.

¹⁴ Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000.
www.worldbank.org/icsid/cases/mm-award-e.pdf at 32.

¹⁵ Final Award in the Matter of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Center for Settlement of Investment Disputes, Aug. 25, 2000.
www.worldbank.org/icsid/cases/mm-award-e.pdf at 32.

CHAPTER 4 REGULATIONS

Corporate and Consumer Codes of Conduct as Regulatory Systems for Protecting Human Rights

Related to arguments for the inclusion of human rights and environmental protections in trade agreements are arguments in support regulations that promote human rights including corporate codes of conduct and “Fair Trade.” While not rejecting the underlying purpose of trade agreements, several NGOs have supported and lobbied for “fair trade” over “free trade.” These arguments incorporate the voices of many marginalized communities, but primarily rely on the hegemonic market economy to solve human rights crises, without question the role this economic system has played in creating human rights abuses. As Kevin Watkins, Senior Policy Advisor of Oxfam, explained:

Our starting point is that participation in trade has the potential to contribute to poverty reduction in developing countries. But the benefits are not automatic. Trade can also create poverty, inequality, and environmental damage. Realizing the positive potential of trade requires rules, policies, and institutions that make markets work for the poor. And it is the failure to develop these provisions that is at the heart of the legitimacy crisis facing the current multilateral trade order. (Watkins 2002a)

Oxfam goes onto explain that:

For all the potential benefits of trade, actual results have been disappointing. In the midst of the enormous increase in wealth generated through globalization, more than one billion people continue to live on less than \$1 a day. Inequalities between rich and poor countries are widening. Indeed ... the world as a whole is more unequal than its most unequal country - and it is becoming more unequal.

International trade is reinforcing these inequalities. With only 14 per cent of the world's population, rich countries account for over three-quarters of world exports.

At the other end of the spectrum, low-income countries account for less than three percent. While a handful of developing countries are 'catching up', most - notably those in Africa - are falling further behind. (Watkins 2002b)

To address this inequality Oxfam has developed the “Make Trade Fair” campaign.

The “Big Noise” petition is part of this campaign and has been signed by over 17 million people with 80% of the signatures coming from developing countries (Oxfam 2005).

Several celebrities have also endorsed the petition and campaign. The main goal of this campaign is to change trade rules which are currently “rigged” to favor rich countries, expand market access to developing countries, allow developing countries certain levels of protectionism in certain sectors, lessen the period of patent protections currently articulate through the TRIPS agreement, roll-back the WTO’s control over investment and competition, and limit the General Agreement on Trade in Services (GATS) agenda so that it has greater benefits for developing countries in the areas of financial services and utilities (Watkins 2002b).

This campaign lays an excellent critique of the hypocrisy of the current trade system; while the United States and the European Union call for free trade and increased access to markets they maintain national policies that do the opposite. Watkins compares these actions to a statement made by Alice during her adventures in Wonderland, “I give myself very good advice, but I very seldom follow it” (Watkins 2002a). This statement is based on the fact that while the US and European Union encourage other countries to lower their barriers to trade they maintain agricultural subsidies for agribusiness in the US and Europe and they maintain tariffs that are higher for the poorest of countries.

Watkins further explains this inconsistency saying:

Northern governments constantly preach the virtues of open markets whilst practicing protectionism. ... On a conservative estimate, developing countries are currently losing about \$100bn a year annually as a direct consequence of

protectionism in Northern markets. The average tariff facing an export from a developing country entering an industrialized country market is about four times higher than the average barrier facing industrialized countries. Viewed from the South, the global market place looks like a hurdle race with a difference: namely, the weakest athletes face the biggest hurdles. (Watkins 2002a)

While these tariffs apply mostly to garment and textiles, the United States and European Union have also continued to subsidize agriculture in their own countries despite agreeing to liberalize agriculture in the Uruguay Round of the WTO. These subsidized agricultural products are exported to developing countries, making it impossible for small farmers in the developing world to compete in the market. For example after NAFTA came into effect, American subsidized corn was exported to Mexico at a price substantially lower than what small farmers in Mexico paid to produce the same thing. As a result Mexican corn farmers were no longer able to compete in the market. Agriculture and goods production are the areas of trade that developing countries can most directly contribute to given the current levels of education and infrastructure in most developing countries. However, increasingly the most developed countries are maintaining protectionist policies in these sectors while pushing for liberalization of things like investment, procurement, and competition that will only benefit wealthy countries. Inclusion of these new issues is changing the face of global trade. No longer is it trade goods across markets, but it is trade in opportunities in one world market.

Consumer Codes of Conduct: “Fair Trade”

“Fair Trade” regulatory mechanisms are heavily promoted by Oxfam and other activist organizations in the global North as a way consumers can help level the playing field of global trade and promote better prices. “Fair Trade” denotes a certification process by which certain commodities are sold into the market at a fixed rate rather than a fluctuating market rate. While fair trade certification can apply to many products, like

sugar, crafts, bananas, and honey, coffee is the most well-known and available fair trade product on the market. Fair trade coffee is an important product to consider because coffee is the second most internationally traded commodity next to oil (Camp 2005: 13). Coffee is also a product produced by many small-scale indigenous farmers in Latin America and is one of the products that links indigenous people to the global trade network.

The fair trade movement is relatively new, but the coffee industry has been around for years. In a manner similar other export crops, coffee growing has increased poverty in indigenous areas by replacing traditional cultural practices and sustenance. In an interview with Cultural Survival, an NGO based in Boston, Jamie Hernandez Balderas who is a marketing directing with a coffee cooperative in Oaxaca, Mexico explained this history saying, “For the past 80 years, coffee has provided income to farmers in this regions. At the same time, it has displaced traditional agricultural practices which had always supported family and the community, which were an integral part of the culture” (Cycon 2005: 26).

Fair trade does not aim to address this impact of coffee growing, rather it attempts to help farmers get a better price for their *ceresa*, the fruit containing coffee beans, so that they have more money to meet their needs. Two international certification organizations have developed the principal guidelines for Fair Trade coffee, the Fair-trade Labeling Organization (FLO) and the Fair Trade Federation (FTF). The FLO certifies fair trade cooperatives whose trade practices are then monitored by TransFair. The FTF has operation guidelines for its members, but does not initiate any monitoring. Rather the FTF requires the coffee cooperatives it certifies to sign a pledge to follow the guidelines

established by FTF. The basic principles of the FTF and the FLO include working with cooperatives rather than conventional middlemen, a.k.a. *coyotes*, establishing direct relationships between cerasa buyers and producers, and paying at minimum a set fair trade price per-pound of coffee. The FTF and FLO also require buyers to provide partial pre-financing and technical and financial training if the cooperative request these services.

Fair trade pricing allows coffee growers to sell their coffee at a stable price that is less impacted by daily market changes than the commodity market price. The world market price for coffee, the commodity price (C price), is set daily by the New York Board of Trade based on the speculative decisions of commodity brokers in New York and London. The C price can then be changed depending on the quality of coffee in certain countries. As a result of these pricing systems coffee prices fluctuate greatly (Cycon 2005: 27). In 2003 the C price of coffee sunk to the lowest it had been in 100 years when adjusted for inflation and was only 54 cents a pound. Just six years earlier coffee had sold at \$3.15 a pound. The sharp decrease in coffee prices became known as the coffee crisis, and has been linked to a decrease in the demand for coffee and an increase in countries growing coffee (Frontline 2002).

In response to these huge price fluctuations and the financial crisis that resulted for coffee farmers, concerned business owners in the global north started the fair trade system. Fair trade certification require fair trade coffee roasters and companies to pay a set base price for coffee so that farmers working with certified cooperatives are guaranteed \$1.21 per pound of coffee after the beans have been processed, roasted and retailed. Included in this pricing system is a required payment of a five-cent-per-pound

social premium payable to the cooperative that sold the beans. Cooperatives can use this money for whatever the co-op members decide. With this money cooperatives have been able to provide low interest loans to help farmers finance their cereza crops through cooperative run credit unions. In some cases cooperative have also been able to contribute to local schools and infrastructure projects such as road building and garbage collecting. The fair trade system has allowed coffee growers to chose between selling their cereza through a cooperative at the fair trade price or to the coyotes on the street who buy cereza based on the commodity market price. While this system has undoubtedly improved the lives of many cereza growers, many continue to struggle to survive support their families (Camp 2005).

Despite the positive impact cooperatives have had on communities, the current commodity price and fair trade price for coffee are simply not enough for cereza growers to sustain themselves. While the fair trade price provides stability in pricing, it is only a floor price. Like the C price, the fair trade price does not take into account the actual cost of production, community needs or reasonable profits for cereza growers. The C price is based on whatever the New York and London commodity traders says it should be, while fair trade pricing is based on what the FTF and FLO feel it should be in relation to the C price (Cycon 2005).

Fair trade has also failed to close the large disconnect that exists between cereza growers and the production of the final product that is sold as coffee. While many farmers understand fair trade to mean a better price for their cereza than they would get on the street from a coyote, they do not understand the fair trade certification process. In most cases they also do not know understand the process and marketing that turn their

ceresa into profitable coffee. Without knowledge of these processes, coffee cooperatives cannot negotiate more sustainable prices with buyers. As far as a year in advance of the crop being ready, out of fear of not having a market, some cooperatives have locked themselves into contracts at the fair trade price, only to have the C price increase to over the fair trade price. When this has happened many farmers sell their cerasa to coyotes to get the higher price, leaving the cooperative with barely enough coffee to fulfill the contract. While fair trade certifiers recommend that cooperatives not lock themselves into contracts until they are ready to sell their product, the reasons behind this policy are not explained to cooperative members. In a study of one cooperative in Guatemala, the FLO visited the cooperative once a year for its annual certification and TransFair USA and fair trade buyers visited several times throughout the year, offering several trainings for improving organic coffee growing techniques. Not once did any of the organizations offer training in business management, negotiation, or understanding the market. Understanding the way business and markets work is essential to being able to get the most out of the fair trade system. Without these skills cooperatives cannot negotiate the coffee market to achieve the best outcome for their members. The failure of fair trade certifiers to require business skills trainings as part of their certification process is most likely a result of the charity approach that began the project (Camp 2005).

By guaranteeing a base price for farmers, fair trade has definitely helped small coffee growers survive during periods of market lows. It has also helped support cooperative enterprises that have in turn improved communities where coffee growers live. Buying fair trade is better than buying traditionally marketed coffee. Fair trade has not, however, challenged the power structures that allow coffee prices to be based on the

speculations of commodity brokers trying to protect bottom lines, rather than the actual costs of production farmers must pay to produce a crop. Rather than questioning who has benefited from excluding coffee growers in pricing coffee, fair trade legitimizes pricing practices that exclude the voices of coffee growers. Without challenging these pricing structures, fair trade will never meet the goal of turning small-scale export crops into sustainable livelihoods. As Dean Cycon, the founder of a fair trade coffee roasting company called Dean's Beans, explains, "Fair trade, as currently structured and administered, will never be more than a band-aid, for it supports rather than challenges the dynamics of colonial trade that underlie the world coffee market" (Cycon 2005: 27).

Corporate Codes of Conduct

This fact combined with public pressure against abusive environmental and labor practices leads to a second approach for solving the human rights violations associated with trade. The essential argument is to privatize human rights regulations by encouraging corporate codes of conduct that establish business standards that are mindful of human rights and avenues for holding corporate actors accountable for ensuring these business standards are met in worldwide operations. On July 26, 2000 the United Nations launched the *United Nations Global Compact*, which "offers an opportunity for UN bodies, corporations, unions and non-governmental organizations with a variety of interests to come together and reinforce ongoing efforts around the world to promote greater corporate accountability" in the areas of "human rights, labor and the environment."¹ Several U.S. based human rights organizations, like Amnesty International, Human Rights First, and Human Rights Watch support these approaches to protecting human rights associated with the expansion of trade; however, they express some concern about the need to promote transparency and enforcement of the codes

businesses adopt. To do this, these organizations propose that new forms of international law must be created to hold businesses accountable for human rights abuses, especially in areas like labor, and the human right to a healthy environment, without seeking to understand why existing laws in these areas have failed to hold these entities accountable for decades.

Corporate Codes in Practice

In theory the United Declaration on Human Rights (UDHR) and other international human rights agreements, like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), set principles for every individual and every facet of society, including businesses and corporations, to strive to follow. While the ICCPR and the ICESCR are only legally binding on state parties, two decades before these laws existed the Nuremberg court established the basis for holding non-state actors, including corporations and individuals, accountable for violations of international law by stating “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced” (Bolivar 1998: n 102, 103).

Through the Nuremberg principles state parities can hold private entities accountable for violations of international human rights law. However, in order to have laws regulating private entities, like businesses that expand their markets, manufacturing and investment bases through international trade agreements, domestic law implementing human rights standards must be enacted. Several nations have passed these types of laws; however, in light of international trade, businesses are not hampered by borders and can easily move operations to countries with fewer legal restrictions. Despite the fact over

1500 corporate partners have signed onto the UN's Global Compact (Kell 2004),² several human rights organizations are concerned because there has not been "tangible evidence of progress arising from the Global Compact" (Letter 2003). Many of the original mandates of the compact, like requiring yearly reports of member's efforts to implement the principles of the compact, had been abandoned by 2003 because few companies were complying with the compact agreements.

As a result of the Compact's failure to lead to action, on April 7, 2003 the senior directors of Oxfam International, Amnesty International, Human Rights First, and Human Rights Watch sent a joint letter to the Deputy Secretary-General of the UN, Ms. Louise Fréchette, expressing their disappointment with the Compact and laying out concrete steps the organizations would like to see implemented by the UN to ensure compliance with the compact. This letter also stated that continued organizational support of the compact was dependant on evidence of progress towards company compliance with the compact goals (Letter 2003). After a series of exchanges over a year period, in June of 2004 Human Rights First sent UN Secretary-General Kofi A. Annan a letter expressing concerns similar to the ones expressed in April of 2003. John Ruggie, Special Advisor to the Secretary-General, and Georg Kell, Executive Head of the Global Compact, responded to the letter saying that:

The Global Compact is neither a regulatory mechanism nor a seal of approval for the performance of those participating in it with more than 1,500 corporate participants, and continued increases foreseen, we simply cannot evaluate individual participants' performance. From the Global Compact's inception, we have been very explicit about this. Instead, an important element of our model is to encourage participants to communicate their progress to their stakeholders - who are much better equipped than our small Global Compact Office located at UN Headquarters to know whether the 1,500 participants are doing what they say they are doing. (Kell 2004)

Human Rights First responded to this letter explaining:

We have never viewed the Global Compact as a regulatory body or as providing a seal of approval. In fact, what concerns us, and prompted our earlier letter, is that some companies are promoting their participation in the Global Compact as implicitly suggesting an indication of good conduct resulting in such approval. We continue to be concerned that these companies are using their participation in the Global Compact primarily as a marketing tool, despite the fact that they have made no discernible commitment to comply with the Global Compact principles. (Posner 2004b)

Human Rights Watch and Amnesty International have not expressly shared this concern; however, their business and human rights campaigns have shifted focus to include working with business leaders to implement corporate protection of human rights, and with the UN to implement an international legal framework for regulating corporate compliance with human rights norms. None of these campaigns have taken a stand on the expansion of neo-liberal trade, but they have expressed concern about the links between corporate activity and grave human rights abuse, like extra judicial killings of labor activists by corporate supported and state controlled security forces. Amnesty International has expressly stated concern over the privatization of goods necessary for life. Yet the structure of the campaigns seems to support the theory that the expansion of the market can be linked to human rights norms for the mutual benefit of both.

Amnesty International's "Human Rights are Everybody's Business" campaign directly reflects this theory. This campaign encourages companies to adopt and uphold human rights standards when operating abroad, especially when making security arrangements (AI 2002). Part of this campaign included a partnership with the International Business Leaders Forum (IBLF) to create a report called "Business & Human Rights: A Geography of Corporate Risk" which maps out places where human rights abuses have been reported in relation to where transnational corporations have ongoing operations. The report in no way links the human rights abuses with the business

practices; it puts the blame on the fact that “transnational corporations operate in countries with repressive administrations where the rule of law is weak, the independence of the judiciary is questionable, and where arbitrary arrest, detention, torture and extra-judicial executions occur” (IBLF 2002). The report continues to link the violations of labor rights, freedom of assembly and association, and the destruction of ethnic or cultural identity with the actions or inactions of bad governments, but does not address when corporate money is used to support these actions. Nor does the report address when these actions benefit the corporation’s bottom line. The report’s primary concern is the risks businesses face when operating in areas where human rights abuses have been reported; it does not question the benefits received by businesses that chose to set up operation in countries with lax human rights standards.

The IBLF wrote a second report called “Human Rights: It is Your Business – the case for Corporate Involvement,” which gives a more in depth analysis of why human rights should concern businesses. Eight principle reasons for why human rights matter to business emerge from the report, which states:

By acting on human rights, companies can:

1. Safeguard reputation and brand image.
2. Gain competitive advantage.
3. Improve recruitment, retention and staff loyalty.
4. Foster greater productivity.
5. Secure and maintain a license to operate.
6. Reduce cost burdens.
7. Ensure active stakeholder engagement.
8. Meet investor expectations. (IBLF 2005)

None of the included reasons for promoting human rights indicate a need to respect international human rights law or the need to promote equality and respect among people. The bottom line is clearly the motive. Human rights organizations recognize this motive, and use it as a bargaining chip to convince corporations to protect human rights. For example, Amnesty International USA has called on individuals who own stock in Chevron and Dow Chemical and consumers who use their products to write the board of directors and shareholders and ask them to compensate the communities that have been harmed by their activities. Amnesty International and Human Rights Watch also emphasizes the need for governments to ensure that legal processes exist for holding corporations like Chevron and Dow Chemical responsible for the human rights violations that have resulted from their activities (AIUSA 2005).

Rules and Regulations—Top Down Approaches to Maintaining Hegemony

Each of the above approaches has had some positive results. Campaigns to include mechanisms for addressing environmental harms in trade agreements have debunked the myth that increased trade has had no impact on the environment. Campaigns for corporate responsibility have resulted in public awareness of corporate labor practices and have forced a handful of corporations to change these practices. Fair trade has stabilized the prices some farmers get for their products and has empowered cooperatives to improve their communities. All of these campaigns have increased the discourse around the negative impact of trade and have brought public attention to these issues. They have also shown that people do not act solely because of market pressure, but also because of moral convictions and the desire to uphold the principles of human rights. Despite these positive impacts, these approaches to establishing human rights maintain hegemony by failing to question several of its outcomes and by failing to question the

rise of liberal ideas of human rights with the spread of neo-liberal capitalism. They do this by failing to consider several important historical questions.

First, they do not call into question why existing international human rights laws and national laws have not been successful in holding multinational corporations accountable for human rights abuses. Second, they do not look at the role of development institutions like the IMF and World Bank in using human rights discourse to support neo-liberal reforms, although they do question the debt poor countries bear as a result of these institutions. Third, they rarely question the link between governmental security forces that may receive financial support from corporations but have been trained at military bases in the United States, like the Western Hemispheric Institution for Security Cooperation, formerly known as the School of the Americas (SOA) and how they have help secure markets and expand neo-liberal policies. Finally these approaches do not question a definition of development that equates the ability to consume market goods and property ownership with human rights. The failure to include these questions in campaign strategies has weakened the ability of these campaigns to meaningfully address the negative impacts of trade.

By pushing for legal and regulatory modes of protecting human rights, these campaigns “provide controllable outlets for social dissent at the same times that they reinscribe the relations of power and logics of rule that generate it” (Speed 2005:33). In other words while publicly speaking out against and exposing the negative side of trade through marketing and legislative campaigns aimed at the current legal and economic systems, these campaigns call on the same power structures that created the problems to fix problems.

Rather than calling on the power structures that created the current legal and economic systems to fix the negative impacts of trade, counter globalization movements challenge the power on which these systems rely. Some of the campaigns above have started using counter globalization tactics, particularly the Oxfam Make Trade Fair campaign, but still focus their energies on asking the powerful to change policy on behalf of the poor. At the 2005 WTO Ministerial Meeting in Hong Kong, Oxfam helped coordinate massive protests of peasant farmers and students. Oxfam also presented their Big Noise petition to the U.S. and U.K. trade representatives in a very public ceremony that explained the principles behind the campaign. The trade representatives had no choice but to acknowledge the petition. Large campaigns like this show trade representatives from all countries that a large number of people are paying attention to their decisions and help legitimize the decision of trade representatives from developing countries to stick together and push for better agreements for their countries.

While the alliances between developing countries stay unified and strong at large WTO meetings where all countries sit together and massive protests occur outside, these alliance have been broken after the meetings are over and the protestors and representatives return home and realize that their decisions at the WTO meeting can be challenged by the desire for development aid and military support. This has been especially true in the aftermath of the collapse of the 2003 WTO meetings. While thousands of people protested in the streets of Cancun, WTO delegates from 22 countries (the G-22) joined forces to resist the demands of the United States and the meetings collapsed. After the collapse of the WTO meeting the United States began approaching individual members of the G-22 by threatening to revoke earlier agreed to trade

preferences for Caribbean island nations, demanding privatization of energy in Costa Rica as a condition for continued negotiation, and tying trade agreements to military support in places like Columbia (Greider 2003: 12).

While corporate responsibility and fair trade campaigns approaches are important to encouraging corporate actors and consumers to change business and buying practices that are impacting human rights, they do not challenge the underlying power structures that enable these abuses to happen in the first place. “These theorists understand the relationship between the globalization of human rights and that of neo-liberalism to be fundamentally agonistic; a process in which neo-liberal policies, being antithetical to human rights, create conditions of increasing oppression, and civil society increasingly turns to human rights discourse and doctrine to defend itself” (Speed 2005: 31).

The next chapter will explore a fourth approach to change, counter hegemonic globalization movements, and show that the power to challenge the negative impacts of trade lies not in the economy or laws, but in the people who legitimize the economy and the laws and refuse to legitimize them any longer.

Notes

¹ The UN Global Compact website explains the basis for the Global Compact and the Ten Principles it supports:

“The Global Compact's ten principles in the areas of human rights, labor, the environment and anti-corruption enjoy universal consensus and are derived from:

- The Universal Declaration of Human Rights
- The International Labor Organization's Declaration on Fundamental Principles and Rights at Work
- The Rio Declaration on Environment and Development
- The United Nations Convention Against Corruption

‘The Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labor standards, the environment, and anti-corruption:

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- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
 - Principle 2: make sure that they are not complicit in human rights abuses.
 - Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
 - Principle 4: the elimination of all forms of forced and compulsory labor;
 - Principle 5: the effective abolition of child labor; and
 - Principle 6: the elimination of discrimination in respect of employment and occupation.
 - Principle 7: Businesses should support a precautionary approach to environmental challenges;
 - Principle 8: undertake initiatives to promote greater environmental responsibility; and
 - Principle 9: encourage the development and diffusion of environmentally friendly technologies
 - Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.”
- (<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>)

CHAPTER 5 REBELLION

The Zapatista Movement: Challenging Hegemonic Globalization by Living Alternatives

The history of neo-liberal trade in Mexico involves several bilateral trade and investment agreements and several billion dollars of foreign development debt. Between 1981 and 1997 Mexico's debt doubled to 165 billion dollars, approximately 51% of the gross national product. During this same period, Mexico paid nearly 140 billion dollars in interest, which was twice the amount of foreign debt that existed in 1981 (CIEPAC 1998). Despite the large amount of money Mexico had obtained for development, the southern state of Chiapas, which has a large indigenous population, remained isolated and plagued by poverty and lack of health care and educational opportunities. This poverty and isolation remained even though the region provided 46% of Mexico's electrical energy, 21% of its oil, 16% of its natural gas, 40% of the coffee, and was a top area for producing maize, bananas, and cacao (CIEPAC 1998).

This isolation had been a result of 500 years of oppression during which indigenous groups lost control of historic lands and had been forced in and out of various forms of slavery. Rebellions were common among the indigenous communities throughout the history of the Chiapas region. A victory of one of the many rebellions was Article 27 of Mexico's constitution that came into effect after the 1917 revolution. This provision set aside 49% of all land for community use, guaranteeing at least some degree of autonomy over food production for indigenous and campesino populations. Through this article by

1992 half of all farmland in Mexico was held ejidos, land titles that were held by the community in perpetuity (MSN 2005).

In 1992, however, in preparation for the full implementation of NAFTA then President Carlos Salinas Gortari modified Article 27 at the request of the United States. The modification, which was passed by the Congress of the Union, declared that no more land was available for ejido titles and privatized all existing ejidos. To facilitate this process the “Certification Program for Ejidal Rights” was established to help with the delivery of ownership titles of ejidos to private investors. At the same time these land reforms took place, militarization of rural areas increased to help “secure” lands for ownership and investment. At least eighteen of the high-level officers who would assist in securing the southern region of Mexico were trained at the School of the Americas in Fort Benning, GA (Kinane 2002).

During this period of privatization and the build up to the implementation of NAFTA, indigenous people across Chiapas secretly trained themselves in “politics and weapons” (EZLN 2005). Over a ten-year period what began as a few indigenous people talking and listening to other people in their area about the problems they experienced, grew into a politically trained army of thousands. This army existed in silence for years and hoping that traditional political processes would change their situation, but with the constitutional reforms of Article 27 and the promises of foreign investment opportunities in NAFTA, the Zapatista Army of National Liberation (EZLN) said “*Ya Basta!*” (Enough!) This is the history that ignited the radical action of the autonomous zones of Zapatista Rebellion (EZLN 2005).

The Zapatista Rebellion

On the morning of January 1, 1994 the world awoke to two historic pieces of news: 1) the North American Free Trade Agreement went into effect, creating new investment opportunities in Mexico, and 2) thousands of armed indigenous rebels, known as the Zapatista Army of National Liberation (EZLN), had taken control of the southern state of Chiapas, Mexico including nearly 500 ranches and major population centers, in a direct rebellion to the implementation of NAFTA (MSN 2005).

On this day Subcomandante Marcos, EZLN's military commander and spokesperson, made the following statement shedding light on why the group started what the New York Times called the first post-modern revolution: "Today the North American Free Trade Agreement begins, which is nothing more than a death sentence to the Indigenous ethnicities of Mexico, which are perfectly dispensable in the modernization program of Salinas de Gortari" (Pelaez).

The Zapatistas responded directly to NAFTA because it was the culmination of a series of policy changes that allowed foreign investors and corporations to buy land in Chiapas that had been held and farmed communally for centuries, challenging the ability of the large indigenous populations in the area to continue living on their traditional lands. This takeover would have a disproportionate impact on the indigenous communities from which the Zapatistas came and on the ecologically sensitive tropical forests in which they lived (Gedicks 2001: 18). The rebels were also concerned that NAFTA would solidify the removal of social and economic rights of the poor by putting all resources in the hands of a few private entities. This concern is best expressed in the "Declaration of War" released by EZLN on December 31, 1993, which stated:

To the People of Mexico:

We, the men and women, full and free, are conscious that the war that we have declared is our last resort, but also a just one. The dictators have been waging an undeclared genocidal war against our people for many years. Therefore we ask for your participation, your decision to support this plan that struggles for work, land, housing, food, health care, education, independence, freedom, democracy, justice and peace. We declare that we will not stop fighting until the basic demands of our people have been met by forming a government of our country that is free and democratic. (EZLN 1993)

Other statements released to the media explained:

Necessity brought us together, and we said "Enough!" We no longer have the time or the will to wait for others to solve our problems. We have organized ourselves and we have decided to demand what is ours, taking up arms in the same way that the finest children of the Mexican people have done throughout our history.

We have entered into combat against the Federal Army and other repressive forces: there are millions of us Mexicans willing to live for our country or die for freedom in this war. This war is necessary for all the poor, exploited and miserable people of Mexico, and we will not stop until we achieve our goals. (EZLN 1993)

The Mexican Military responded harshly to the Zapatista uprising and started general attacks and bombings on most indigenous groups in the region, whether or not they were Zapatistas. The people of the state of Chiapas who had not been involved in the revolt publicly protested for an end to the war and a resolution through negotiations. In response EZLN laid down their weapons and entered into negotiations with the Mexican government. The armed uprising only lasted 12 days; however, the effect of the uprising has been deep and long lasting. In 1995, Chase Manhattan Bank confirmed the threat a strong showing of indigenous power has on investors when it released the following statement:

While Chiapas, in our opinion, does not pose a fundamental threat to Mexican political stability, it is perceived to be so by many in the investment community. The government will need to eliminate the Zapatistas to demonstrate their effective control of the national territory and security policy. (Gedicks 2001: 18 n124)

Despite this call to action and continuing attempts by the Mexican government to “eliminate the Zapatistas,” control of the rebel territories still remains in the hands of

Zapatista communities. The strength of the movement lies in the carefully crafted way the rebels garnished international support to legitimize their revolution and in the successful strategies the Zapatista communities have employed to “exercise” civil, political, social and economic rights by promoting development, education, law and democracy on their own terms.

During the first few days of the revolt, although the Mexican government did not know who the leaders of EZLN were (all leaders continue to wear ski masks in public), EZLN spokespersons conducted carefully structured interviews with foreign and Mexican journalist each day. These interviews carried the Zapatista’s message to the world, leading to protests across Europe and Mexico, calls by human rights organizations to the Mexican government concerning torture and killings of the rebels, and angry opposition to the state’s then Governor, who ended up resigning as a result. Unlike many other peasant uprisings, the Zapatista revolt immediately gained international support, becoming known as the first “online” revolution (Gedicks 2001: 20). In laying down their arms, the Zapatistas clearly stated that they were still fighting the war, that violence was a last resort, and having gained international attention their weapons would be words. This war with words has been tenuous but successful; through it the Zapatistas have created an international network of support composed of indigenous groups from across the globe, students, human rights groups, and even a few governmental officials.

The movement garnished support across political and class lines because it was based not in political discourse, but in realities that people across the globe were experiencing: a growing gap between the rich and poor, a lack of health care, educational opportunities and jobs, and a lack of ability or will on the part of governments to change

anything. This breadth of support was shown when, at the legislature's vote for an interim Chiapas governor, Subcomandante Marcos received one vote, which resulted in a standing ovation for the legislator who cast it (Robberson 1994: A14).

As the strength of the Zapatista movement has increased so has the presence of the military in the region. School of Americas Watch has reported that the number of Mexican soldiers training in counter insurgency, i.e. civilian warfare, at the Western Hemisphere Institute for Security Cooperation (WHISC) has also increased during this time. This military campaign intensified a year after the government agreed to a cease-fire and began negotiating with EZLN to return some autonomy and control to indigenous people. These negotiations continued over a two-year period resulting in the San Andres Accords of 1996, which recognized indigenous rights, including the right to self-determination, but required constitutional changes to become law. (Speed 2005: 38). Despite ongoing peace negotiations in February 1995, a year after EZLN laid down their arms, 70,000 Mexican troops (1/3 of the Mexico's army), invaded Chiapas and began "low intensity warfare" including checkpoints, military invasions, army patrols, and alliances with local paramilitary groups in an effort to disrupt and wear down the resistance (MSN 2005).

To help foster international solidarity and to discover new strategies for their war with words, in January of 1996 EZLN invited social movements from every continent to attend the "First Intercontinental Meeting for Humanity and Against Neoliberalism" in the Lacandona Jungle of Chiapas. On July 27, 1996, to the surprise of most Zapatistas, over 3,000 grassroots activists from 40 countries and every continent gathered throughout five autonomous indigenous communities. In a collection of stories of the counter

globalization movements, called “We Are Everywhere,” one anonymous conference attendee described the gathering:

Berlin squatters sporting green mohawks exchanged tactics with Mayan rebels in ski masks; the mothers of the disappeared of Argentina swapped stories with French strikers; and Iranian exiles listened to Rage Against the Machine. It was a hallucinating mixture of cultures. “Next time we will have to invite the Martians,” Subcomandante Marcos quipped. This was the beginning of the movement as a global entity, a movement that was about to radically redefine the political landscape. Despite the multitude of differences, everyone agreed on a common enemy: neoliberal globalization and the desire, as the initial invite stated: not to conquer the world but simply to make it anew. (Nowhere 2003: 34)

The solidarity created through this conference and the Zapatista led internet campaigns has been essential to the survival of the Zapatista communities in light of ongoing military repression in the region. “Time after time [the Zapatistas] have mobilized their international supporters to put pressure on the Mexican government to negotiate rebel demands. On at least one occasion the Zapatistas thwarted a planned Mexican military offensive with an e-mail alert and information campaign by international supporters.” (Gedicks 2001: 20). However the government has become increasingly violent towards rebel communities. On December 22, 1997, the government launched an offensive attack on the Chiapas community of Acteal, killing forty-five people including elderly men, women and children. In the face of this military persecution, EZLN has maintained its commitment to a war with words. This campaign has continued until the present day even though army-directed paramilitary activity remains a constant threat to the communities of Chiapas and has resulted in the arrest of several members of EZLN and many extra-judicial killings (Farmer 2003:91-110).

Because the government did not comply with the peace accords, the Zapatistas began reaching out to other Mexicans for support. In 1997, they made their first march to Mexico City with a *compañero* and *compañera* from each Zapatista town actually

walking in the march. The Mexican government paid no attention. So in 1999, Zapatistas held town meetings throughout the country discussing their goals with non-indigenous peoples, and through the process learned that many Mexicans supported the demands of the movement. Still the government did not respond (EZLN 2005).

Then in 2001, the Zapatistas held the “March for Indigenous Dignity” and again marched to Mexico City, stopping along the way to speak to peasant groups about their struggle. When they arrived in Mexico City, their supporters filled an entire city square, and President Fox extended an invitation to the leaders to discuss their goals with him. In this invitation Fox said that he wanted to speak to Subcomandante Marcos, and that he would accept him at the Presidential Palace at Marcos’ named date. When interviewed about the invitation from Fox, Marcos stated: “Fox is looking for a photo opportunity, to maintain his grip on the media. But a peace process is not to be constructed by a spectacle, but by serious signals, sitting down at a table and dedicating yourself to real dialogue. We are ready to talk to Fox, if he takes personal responsibility for that dialogue and sees the negotiation with us through to the end” (Mertes 2004: 8-9).

However, Fox did not wish to continue this dialogue. In April of 2001, the Fox administration acted on the San Andres Accords by signing the Law on Indigenous Rights and Cultures (LIRC) into law, which took away indigenous rights that had previously existed “by limiting indigenous jurisdiction, denying indigenous people territory and natural resource rights, and by leaving the definition of indigenous peoples and their rights to the individual state-level governments” (Speed 2005: 39). For the Zapatistas the law meant an end to further dialogue with the state government. It was a

huge blow to the indigenous rights movement that had worked for years to have codified legal rights that would protect the autonomy and traditions of indigenous cultures.

Despite the failure of the Mexican government to implement meaningful law and the continued military presence in the region, during the years the legal rights were being negotiated the Zapatista movement had implemented them through action. Rather than waiting for the government to pass a law protecting their rights, the Zapatistas pursued their autonomy immediately after laying down their arms. In December of 1994, Zapatista communities across Chiapas declared themselves rebel Zapatista autonomous municipalities. These municipalities were organized into five *Aguascalientes* where EZLN could connect with civil society.

The *Aguascalientes* became the centers of Zapatista resistance, combining autonomous self-government with self-created economic and legal systems that promoted development and human rights to benefit the Zapatista communities. This included the formation of educational and health initiatives and regional cooperatives that were governed, funded, and designed by the autonomous self-governing Zapatista communities (MSN 2005). By the time the Fox government passed the LIRC into law the *Aguascalientes* were well established. The failure of the LIRC had been expected and the Zapatistas moved forward without it (Speed 2005: 39). In response to the passage of LIRC one Zapatista leader stated: "Our autonomy doesn't need permission from the government; it already exists. That's why the government no longer wants laws that permit pluricultural society to thrive" (Speed 2005:41).

Continuing in their steps to autonomy, in 2003 the Zapatistas transferred the *Aguascalientes* into regional administrative seats called *Caracoles*, which initiated the

formal transfer of power from EZLN to the now established and autonomous communities themselves, i.e. from military to civilian authority. Included in this transfer of authority was the establishment of administrative bodies in each Caracoles called the *Juntas de Buen Gobierno* (Good Governance Councils) which formed a means of self-governing for each Caracoles based on the local customs and practices of the area (Speed 2005: 41). The juntas carry out all the functions of government from economic decisions to judicial ones, although they are not recognized by the state. Community assemblies elect members of the juntas for terms of one year, but every week the make-up of the juntas rotates so that members from each community have an opportunity to govern. An equal number of men and women sit on the junta, and no one gets paid for his/her work.

Autonomy is of central importance to the Zapatista communities and is understood as “building a world in which all worlds have a place” (MSN 2005). Decentralized power and respect for customs and traditions are central to the principle of autonomy, as are exercising social and economic rights. The juntas are an exercise in decentralized power and have thus far been successful. They govern under the directive of *mandar obedeciendo* (lead by obeying). This governance is considered separate from the state government, which for years Zapatistas have called *mal gobierno* (bad government). While the state has not recognized the governance of the juntas, the fact that Zapatista communities have successfully operated through them for three years speaks to their political force (Speed 2005: 41).

The autonomous Caracoles do not seek recognition of their juntas from the state. Nor do they want to separate from the state. The Zapatistas see autonomy as an exercise of self-determination. Rather than seeking to have indigenous rights defined and

protected by the state, the Zapatistas seek to practice rights by governing their communities through honesty and transparency based on the desires of the communities and no one else. An often-quoted slogan of Subcomandante Marcos explains this, "We the Zapatistas want to exercise power, not take it." Comandanta Esther also emphasized the importance of exercising power in 2003 at a celebration of the formation of the Caracoles and the birth of the *Juntas de Buen Gobierno* when she said:

The political parties conspired to deny us our rights, because they passed [the law on indigenous rights and culture] . . . Now, we have to exercise our rights ourselves. We don't need anyone's permission, especially that of politicians. . . Forming our own autonomous municipalities, that's what we are doing in practice and we don't ask anyone's permission. (Speed 2005: 41)

While not without great struggle and risk of military attack, the Zapatistas have maintained autonomy over the five Caracoles since the 1994 revolution. A sign that says, "You are entering the area of Zapatistas in Rebellion. Here the People Lead and the Government Obeys," marks the territory of each Caracoles. Through the governance of the juntas, the Zapatistas have been able provide the three pillars of the revolution, education, healthcare, and community development to the people who live in Zapatista controlled territories. The communities have also established justice and political structures and systems for regulating the type of foreign investment in the area to allow only investment that furthers community goals rather than the goals of transnational corporations. These types of investment are used to promote the three pillars of the revolution (Campagna 2005).

For instance, Zapatista communities run international language programs that allow visitors from other countries to learn Spanish and Tzotzil in Zapatista territories. The international students who attend the language schools are charged the equivalent of three days of minimum wage in their home country for a week of classes. These fees fund local

primary schools and teacher training. Before being admitted to the language school international students must be certified by Zapatista solidarity groups in their home country. This funding system incorporates a kind of foreign investment that has resulted in primary schools opening in almost every Zapatista Community (MSN 2005).

The Zapatista healthcare systems also focus on training indigenous healthcare providers in both western and traditional healing to work in each junta's regional health clinic. These health care providers also work in local clinics that provide emergency and preventative care. Chiapas' largest autonomous hospital functions without state or federal assistance. In 2003 this hospital provided health care services ranging from free consultations to surgery for 8,214 patients. The hospital also oversaw eight community based clinics and an indigenous healthcare training program. While these medical services depend on largely donations of medical supplies from Zapatista solidarity groups and operate on very small budgets, they incorporate traditional medicinal healing and have brought standard and reliable healthcare to an area where no public health services previously existed (MSN 2005). They have also revitalized the use of traditional healing methods that had begun to die out (Farmer 2003: 109).

Community economic development opportunities have been created collectively through the cooperative model. Unlike the fair trade cooperatives mentioned in the previous chapter, cooperatives in Chiapas are involved at all levels of the decision making and production processes and work through solidarity networks to market their products rather than through traditional modes of trade. These alternative economic networks have been established through Zapatista solidarity organizations in urban areas and industrialized countries that facilitate alternative economy programs which function

to connect producers directly to consumers. These programs allow goods produced by the collectives to be sold directly to consumers. For example the Mexico Solidarity Network (MSN), which operates one of these programs explains it as follows:

The Mexico Solidarity Network connects Zapatista cooperatives that produce artisan crafts and coffee with interns located throughout the United States. Interns receive training in the principles of alternative economy, and then set up tables displaying cooperative-produced goods in public places. Interns act as the link between producers and consumers, revealing the human face behind production. Interns may accept donations for the cooperative-produced goods, but there are no set prices. The exchange is based on a genuine link between consumers and producers based on knowledge and mutual respect. (MSN 2005)

By linking the producers of the products directly to the consumers, Zapatista collectives have been able to keep the human face of their work present when it sold and garnish prices based on the realities of production rather than the commodity market.

While overseeing the functions of the education, health and community development systems, the juntas also oversee a judicial process whereby parties to conflicts present their cases to the junta. The primary concern for the junta in resolving the conflict is reparations for the victim and the best outcome for the community. While this process is still developing, the outcomes of their decisions have been so promising that non-Zapatistas communities have sought the junta's assistance in resolving conflicts the state government has failed to resolve. In a few rare cases, the state government has even referred cases to the Junta (Campagna 2005).

In March of 2005, the National Lawyers Guild (NLG) was invited to Chiapas by a developing Zapatista legal organization to participate in a knowledge exchange program that would allow both parties to learn from each other. One of the members of the NLG delegation lived in Chiapas for a year shortly after the revolution. Her description of her return explains some of the changes that Zapatista Autonomy has achieved:

Throughout the last eleven years, the landscape of Chiapas has become dotted with autonomous schools, health clinics, cultural centers, a Zapatista-created water system and radio station, sustainable agriculture centers, and other direct services projects that benefit the people. The communities determine which projects to take on, which are then managed through the governing bodies of the Caracoles. (Campagna 2005)

Included in the changes that have occurred in Chiapas is the formation of the *La Red Defensores Comunitarios* (The Network of Community Defenders), the group that invited the NLG to Chiapas. *La Red* is comprised of indigenous people from different Zapatista communities who come together once a month to learn legal skills, share information, and attend workshops on domestic and international law. The principal goal of *La Red* is to move the community one step closer to autonomy by learning how to apply human rights laws to their own autonomous governments and to defend members of their community who are coming under increasing government repression. Currently they are working to prevent the displacement of indigenous communities from the Montes Azules Bio-reserve area of the Lacandona Jungle. The communities in this area are in active resistance, but face displacement as the government seeks to implement the Plan Puebla Panama (PPP), a supposed development project that will place roads, electric grids, hydroelectric facilities, dry canals, and other infrastructure in this mineral and oil rich region of the country. While the Fox administration claims that the PPP will bring development to the poorest area of Mexico, the poor who live in the area were never consulted in the planning of the project. Instead the PPP will provide access for resource extraction to international investors. *La Red* hopes to be able to defend the indigenous groups that have already been forcibly removed from the area and prevent the removal of others before violence escalates (Campagna 2005).

In June of 2005 the Clandestine Revolutionary Indigenous Committee, the General Command of EZLN released the Sixth Declaration of the Selva Lacandona to the international community. This document gave an update to the international community on the progress of the Zapatista revolution. It explained that in 2003 with the Juntas of Good Governance in place, EZLN shifted its focus from establishing the autonomy of the region to training a new generation of leaders and speaking on behalf of the community. The juntas have helped coordinate collaboration with civil society groups that wish to support the Zapatista project so that their donations and skills could help the areas that have the most needs and respect the goals of the communities. The autonomous rebel Zapatista municipalities, governed by the Juntas, continue to function without government aid, development projects, or corporate investment, and according to a government study the only indigenous areas that have improved in terms of housing, health, education and food security since 1994 are within the autonomous rebel Zapatista municipalities. While this improvement has been remarkable, the report says there is still more that needs to be done (EZLN 2005).

The report continues calling for continued international support of the Zapatista rebellion, and then offers the support of the Zapatista community to other groups resisting neo-liberal globalization and exploitative trade. In offering this support, EZLN calls for continued world-wide resistance against neo-liberal globalization, which seek to “destroy the nations of the world so that only one Nation or country remains, the country of money, of capital” (EZLN 2005) and is based on “exploitation, plunder, contempt and repression of those who refuse” (EZLN 2005).

EZLN explains that only worldwide resistance will end this abuse saying:

But it is not so easy for neo-liberal globalization, because the exploited of each country become discontented, and they will not say well, too bad, instead they rebel. And those who remain and who are in the way resist, and they don't allow themselves to be eliminated. And that is why we, all over the world, those who are being screwed over [are] making resistances, not putting up with it in other words, they rebel, and not just in one country but wherever they abound. And so, as there is a neo-liberal globalization, there is a globalization of rebellion.

And it is not just the workers of the countryside and of the city who appear in this globalization of rebellion, but others also appear who are much persecuted and despised for the same reason, for not letting themselves be dominated, like women, young people, the indigenous, homosexuals, lesbians, transsexual persons, migrants and many other groups who exist all over the world but who we do not see until they shout *ya basta* of being despised, and they raise up, and then we see them, we hear them, and we learn from them.

And we are astonished when we see the stupidity of the neoliberals who want to destroy all humanity with their wars and exploitations, but it also makes us quite happy to see resistances and rebellions appearing everywhere, such as ours, which is a bit small, but here we are. And we see this all over the world, and now our heart learns that we are not alone. (EZLN 2005)

With this passionate recognition of the movements of the world that are practicing rights, claiming their identities, adopting different strategies for action, and creating local solutions to global problems, the Zapatistas extend an invitation to resistance communities of every continent to join together once again for a second Intercontinental Encuentros against Neo-liberalism and for Humanity (MSN 2005).

With this invitation, EZLN has emphasized why human rights advocates must move beyond working within existing systems if they hope to achieve lasting protection of human rights with the expansion of global trade. The Zapatista rebellion demonstrates how important ideologies and imagined communities are to creating spaces where human rights do not simply exist, but can actually be practiced. It has also demonstrated the important role charismatic leaders can play in shaping an ideology and moving it from theory to practice. Just as the plans of U.S. economist Harry Dexter White shaped the Bretton Wood Institutes that in turn shaped a world economy, the personality of

Subcomandante Marcos of EZLN has no doubt shaped the vision of the CHG movements. However, unlike other charismatic leaders his vision exists less in his personality and more in the movement he represents. To this day he has remained publicly anonymous, and his writings and stories are meant to represent the goals of the Zapatista movement and not of himself. His words and dreams have become synonymous with the Zapatista movement, and since he writes on behalf of the movement it is difficult to separate the personality from the ideology and to know which came first. The ideology behind the movement struck a chord with the poor and indigenous communities who have suffered under neo-liberal policy and united indigenous groups from many background into Zapatistas.

It is this ideology that has kept the movement alive and that has allowed human rights to be practiced in the autonomous territories in the face of extreme challenges of continued poverty and military repression. While the progressive Mexican constitution of 1921 had guaranteed the indigenous people and poor people of Mexico “land, health care, and freedom from the peonage that had marked their lives for centuries,” this is exactly what the Zapatistas did not have when they rebelled (Farmer 2003: 110). The belief that they should have those rights and that they would have those rights regardless of what the government did is what has allowed the Zapatistas to practice these rights despite continued state repression, violence, and codified rejection of the rights. The support of communities across the globe who share this same vision has also been essential to this practice of human rights. These communities have helped develop alternative markets for selling Zapatista products and have brought international investment into the area that stays in the community. CHG movements like the Zapatista movement are redefining and

recreating and redefining trade and development based on their understandings of human rights, and in doing so are creating new networks of economy, law, and decision making that position the needs of community over the needs of investors. Through this story human rights are shown not to exist on paper in rules and codes, but in the people who risk practicing them regardless of the consequences of rejecting what has been promised and acting on something new.

CHAPTER 6 CONCLUSION

In each of these examples we see an attempt to ensure a level of human rights protection balanced against the expansion of international trade. While the first three approaches have resulted in some positive changes, they do not challenge the existing power relationship and ideology that have allowed a small group of people and transnational actors to benefit from trade at the expense of marginalized communities. By failing to question the ideological basis that has driven neo-liberal trade and development to have a more protected place in law than human rights, advocates who pursue only rule and regulation based approaches for preventing the abuse of marginalized communities are essentially asking the fox to guard the hen house. These approaches maintain the hegemonic idea that human rights exist in protection rather than practice. Instead of looking to a historical analysis of trade and development that shows how the theories behind these policies were sold to the post World War II world as bargaining chips to allow the United States and United Kingdom to maintain a hegemony that was being challenged by leftists and anti-colonization movements across the global south, human rights advocates often accept these theories of trade and development and believe that the needs of people in the developing world can be protected by incorporating a few more rules into the mix and encouraging current power holder to be more responsible. This is contradictory given that the purpose of neo-liberal trade is to make capital the most influential force in the world and to create a one size fits all world economic system based on the expansion of capitalism and in opposition to other types of economies.

Finally these approaches do not meet the goals of securing human rights for marginalized communities because they seek permission from the powerful for the protection of human rights, instead of recognizing that human rights can exist in the actions of people. Just like actions can violate human rights; human actions can exercise rights as well.

While some development and trade projects have brought higher living standards to certain areas, many marginalized communities in Latin America have experienced negative impacts on their standards of living as a result of these same policies. In most cases these communities were not consulted in the project planning that imposed neo-liberal trade and development. The actions of these groups in light of these negative impacts suggest that alternative visions for trade and development exist that challenge the existing neo-liberal paradigm. Each example represents the antagonism shaping our law and the constant struggle for self-determination and the ability to exercise the rights one has been promised. Through this antagonism, new rights have been created and exercised, new boundaries have been drawn, and new ideas of justice and sovereignty have been written by untraditional lawmakers.

The hegemonic practices that have driven neo-liberal policies across the world are being stopped and transformed to create alternative visions of globalization, trade, and development by the people who have borne the burden of these practices. Rather than asking permission to have rights recognized or to have their voices included in hegemonic policy, these movements are exercising their rights, creating their own policy making forums, and supporting alternative economies based on the needs of communities rather than on the movement of capital. By supporting the movements that are leading this revolution, human rights advocate can move the goal of protecting human rights

forward while also learning new frameworks of analysis to inform continued work to change hegemonic policy and challenge existing laws that have prevented human rights protections.

Questions arise when considering these examples. Where does the rule of law come into all of this? What is the purpose of government if it claims to be concerned with protecting the environment and people, yet adheres to agreements that make it very difficult to enforce this protection? What is the appropriate response of citizens who are concerned that their government no longer represents human interests, and find themselves facing desperate measures in order to bring attention to their plight?

Traditional notions of democratic governance hold that the law exists to protect the rights of humans, but for marginalized communities, except for a few legal cases where irreversible harm has occurred and people have either been tortured or killed in a manner that cannot be excused with claims of national security interest, history has shown when human rights are challenged by property interest law protects the latter (Hertz 2000). The failures of the law to bring true justice are exemplified by the response of the Zapatista leaders when offered a pardon by the Mexican government for violating the laws of Mexico by instigating the rebellion. On January 18, 1994, the Zapatista leaders responded to the offer of a pardon with the following retort:

“Who must ask for Pardon and who can grant it?”

Why do we have to be pardoned? What are we going to be pardoned for? Of not dying of hunger? Of not being silent in our misery? Of not humbly accepting our historic role of being the despised and the outcast? ... Of having demonstrated to the rest of the country and the entire world that human dignity still lives, even among some of the world's poorest peoples? (Farmers 2003: 15)

The hope that human rights and environmental laws alone can and will protect human rights is increasingly tenuous in light of the fact that they have been shunned by one of

the most powerful countries in the world. The United States of America has been a player in drafting most human rights documents yet it has failed to create legal remedies for enforcing all but a handful of human rights, like torture and extra-judicial killings. Furthermore the United States does not even recognize many of the rights claimed by marginalized communities, such as the right to be free from “nuclear testing, extractions, production and disposal of toxic [and] hazardous wastes,” to have “public policy ... based on mutual respect and justice for all peoples, free from any form of discrimination or bias,” and to “participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation” (Gauna 2003: 22). While overtime more of these rights have been laid out in human rights documents and customary international law has accepted the right to a healthy environment as a fundamental right belonging to all people,¹ these rights have not been upheld by the courts of the United States, the Inter-American Court of Human Rights, or the International Court of Justice.²

Decisions like these leave marginalized communities with little options for getting the protection and relief they desperately need in order to live healthy and productive lives. The more marginalized a group feels and fewer benefits they receive from participating in hegemonic power structures, the more likely it is that they will resort to rebellion, as the Zapatistas did. Internationally supported grassroots movements help dissipate the threat of violent rebellion by creating international communities of support that marginalized communities can work within to support their economic and development goals. Through these rebellions rights will be exercised and alternative economies developed that meet the needs and demands of marginalized communities and

challenge the current hegemony that talks about human rights, but does nothing to guarantee their existence. Through CHG support networks social and economic rights are not only being practiced, but methods for practicing these rights are being transferred and transformed from community to community. By providing legal, academic and material support to these movements, human rights advocates can help move the goals of CHG movements into the mainstream and de-legitimize the activities that they reject, thus dissipating the threat of violence.

The power of this movement of movements to challenge and create a counter-hegemony without violence has been seen in recent changes in the leadership of Latin American States. Leaders like Hugo Chavez in Venezuela are incorporating the discourse of these movements in state sponsored propaganda. For instance, documents produced by the Venezuelan government for the 2006 World Social Forum said, “Another World is Possible,” one of the rallying cries of CHG movements. Chavez also incorporated this language into his speech along with criticism of neo-liberalism and imperialism. At the same time Bolivia elected its first indigenous leader, a man who had been directly involved in CHG movements that successfully stopped the actions of powerful U.S. companies like Bechtel in Bolivia. Several Latin American countries have come together to create a regional trading bloc called MECOSUR to challenge the U.S. proposed FTAA. In a piece of literature produced by the Argentinean government for the World Social Forum it proclaims “Another America is on the March” and shows the pictures of the leaders and the flags of the countries that are full members of MECOSUR. Inside the flyer are pictures of street protests against the FTAA, street art that says “Stop Bush,” and appeals to the democratic and progressive movements to support MECOSUR. It remains

to be seen if this trade agreement will truly present an alternative to neo-liberalism; its supporters claim to be reaching out to NGO's for assistance in formulating the agreement and it seeks to keep investment within the more equal economies of Latin America. However, indigenous groups remain questionable about the true intentions of the agreement. Already the Venezuelan government, a full member of MECOSUR, is making moves to mine the resource rich indigenous lands of Western Venezuela without the consent of the people who have historically lived on the land. Perhaps the fact that state sponsored speech has adopted some counter-hegemonic language speaks to the strength of the movement. It could also speak to the desperate attempt to re-legitimize a challenged hegemonic order. Regardless of the intentions of states leaders, the fact that they feel the movement is important enough to court through propaganda and conferences show its power. Perhaps another world is not only possible, but is already on its way.

Several other research questions came to mind while I wrote this paper. Have marginalized communities in the Global North had success in challenging neo-liberal globalization in the same ways that communities in the global south have been able to? What role has the anti-terrorism movement and the rise of the peace movement played in the counter globalization movements? How have conceptions of human rights been redefined across border as trade agreements have been challenged? How have national borders been redefined through trade? What role do trans-national immigrant communities play in challenging hegemonic globalization? What approaches to human rights protection or practice have been used in Europe and with what impact? I personally would like to conduct a traditional ethnographic study of the trans-national disability

movement that is forming in relation to the counter hegemonic globalization movement.

There are many possibilities for future study in this area.

Notes

¹ See note 1 for a full discussion of the right to a healthy environment.

² For a full discussion of how U.S. Courts have responded to law suits addressing violations of the right to a healthy environment see, *Litigating Environmental Abuses Under the Alien Tort Claims Act: a Practical assessment* by Richard Hertz (Hertz 2000). For a discussion on how international courts have respond to similar claims see, *A Comparison of Protecting the Environmental Interests of Latin American Indigenous Communities from Transnational Corporations Under International Human Rights and Environmental Law* by Maura Mullen de Bolivar (Bolivar 1998) and *Is The Human Right to Environment Recognized Under International Law? It Depends on the Source* by Luis E. Rodriguezx-Rivera (Rodriguezx-Rivera 2001).

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BIOGRAPHICAL SKETCH

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