

LINKING LABOUR, THE ENVIRONMENT, AND HUMAN RIGHTS TO THE FTAA

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I. INTRODUCTION

IN 1994, AT THE SUMMIT of the Americas, the Heads of State of 34 democracies confirmed their effort to unite the economies of the Western Hemisphere through a single free trade arrangement. The negotiation process for the proposed “Free Trade Area of the Americas” (FTAA) began in March of 1998 and represents the most ambitious undertaking for free trade liberalization since the 1994 Uruguay Round.¹ The “Plan of Action,” which details the various objectives of the negotiations, indicates that the FTAA is to encompass more than just economic integration. Leaders have committed to secure worker’s rights, enhance sustainable development, and further define and develop comprehensive policies aimed at promoting and protecting fundamental human rights. Exactly what route will be followed to achieve this objective is uncertain.

There are a number of paths that leaders can follow in their attempt to effectively link labour, environmental, and human rights protection with the over-arching goal of hemispheric free trade. Similar efforts to make this linkage have been pursued in the North American Free Trade Agreement (NAFTA), the European Union (EU), the Organization of American States (OAS), the World Trade Organization (WTO), and other international arrangements. This paper examines the strengths, weaknesses, and overall appropriateness of such models for the emerging FTAA and suggests new alternatives yet to be tested.

II. LABOUR

WITH LARGE SCALE ECONOMIC INTEGRATION on the horizon, the need to address accompanying labour policy is crucial. The reasoning is not difficult to comprehend. From a purely humanitarian perspective, it is desirable to assemble a core labour package which all citizens in the

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¹ “FTAA Overview,” online: FTAA Official Website <<http://www.ftaa-alca.org/VIEW-e.asp>>.

hemisphere can expect their respective governments to follow. Furthermore, if the situation is left unchecked there is the real risk of investment and employment loss to those states with cheap labour and minimal standards, otherwise known as “social dumping.” Governments embarking on such elaborate trade deals must strive to implement measures to prevent the worst aspects of free trade from becoming a reality. The question therefore is not whether such a package should be implemented, but how to achieve an acceptable agreement with the most meaningful results.

Is there an appropriate model that is already in place or is it time to develop a new approach? Prior to the 1994 Summit of the Americas, a group of leading hemispheric experts from academia, bilateral and multilateral agencies, business and labour organizations, and non-governmental organizations who came together to develop policy considerations, recommended the creation of a structure for progressive integration through “existing international legislation.”² The NAFTA stands out as an obvious model to be given close attention. The NAFTA is the only one of the five regional arrangements in the hemisphere that addresses labour issues directly, making it a useful starting point for discussion.

A. NAFTA and the NAALC

NAFTA’s “side deal” on labour, the North American Agreement on Labor Cooperation (NAALC),³ came into force in 1994. The NAALC “seeks to promote fundamental labour standards,⁴ compliance with labour laws, and the enforcement of those laws in each country.”⁵

Although the signatories are committed to improving their respective labour conditions and to a general cooperative effort towards the agreement’s

² Policy Proposals on Shared Prosperity in the Hemisphere: Trade, Investment, and Economic Development, Proceedings of a Pre-Summit of the Americas Workshop 1 (Buenos Aires) (Oct. 2-4, 1994); J. F. Perez-Lopez “The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects” (1995) 10 Conn. J. Int’l L. 427 at 461.

³ *North American Agreement on Labor Cooperation* 8 September 1993, 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC].

⁴ The fundamental labour principles are freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibition of forced labour, labour protections for children and young persons, minimum employment standards, elimination of employment discrimination, equal pay for men and women; prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers, *Ibid.* at Article 49.

⁵ “Study on the Operation and Effects of the NAFTA,” online: Organization of American States – Trade Unit <http://www.sice.oas.org/forum/p_sector/govt/nafta_repe/chap3_1.stm>.

goals, the NAALC does not issue mandates. The agreement recognizes the sovereignty of each member state and confirms the primacy of their own domestic labour law.⁶ The NAALC in no way requires the harmonization of laws but rather sets out guiding principles that the parties are committed to promote.⁷ The principles essentially impose a moral obligation on each state to improve the substance and overall enforcement of its domestic labour laws. Each party, however, maintains the power to formulate and enforce its own labour laws. It is only the effectiveness of enforcement that can be reviewed.

The agreement contains a trilateral Committee for Labor Cooperation comprising a ministerial council and a secretariat. The council is the governing body of the commission which is made up of a cabinet-level labour official from each country.⁸ The secretariat provides administrative support to the council and is staffed by professionals from all three NAFTA countries.⁹ The NAALC also requires each party to establish a National Administrative Office (NAO) which serves as a point of contact between the committee and the three national governments.¹⁰

The NAO's are effectively a forum for inter-governmental consultations which includes consultations at the ministerial level, considerations of specific labour issues, and at times, dispute settlement once cooperative attempts have been exhausted. Cooperation is clearly the focus of the process. The NAO's have a broad jurisdiction to investigate all allegations relating to "labour law" which, as noted above, is given a wide definition by the agreement.¹¹ The ultimate decision whether to initially accept a submission, however, is completely within the discretion of each individual NAO.¹²

If the dispute is not resolved through the ministerial consultations, a government may, in certain cases, call for the establishment of an Evaluation Committee of Experts (ECE).¹³ An ECE is an independent body which analyzes each party's labour standards or enforcement practices in those situations where practices are both trade related and covered by the labour law of the governments concerned.¹⁴ If the parties are unable to resolve the

⁶ B. S. Murphy "NAFTA's North American Agreement on Labor Cooperation: The Present and the Future" (1995) 10 Conn. J. Int'l L. 403 at 409.

⁷ *Ibid.*

⁸ *Supra* note 3 at Article 9(1).

⁹ *Supra* note 5.

¹⁰ *Supra* note 3, at Article 16(1).

¹¹ *Supra* note 5.

¹² *Supra* note 3 at Article 16(3).

¹³ *Ibid.* at Article 23(1).

¹⁴ *Ibid.* at Article 24.

matter after an ECE evaluation, and if the matter involves certain specified labour standards,¹⁵ a government may invoke the agreement's dispute settlement procedures to determine whether another government failed to enforce those standards.¹⁶ In such a case, an arbitral panel may review the matter¹⁷ and issue a report containing its findings, its determinations as to whether there has been a persistent failure to enforce the law effectively, and recommendations for resolution of the dispute. If the disputing parties cannot themselves agree on an appropriate remedy to the problem, the arbitral panel may evaluate an "action plan" proposed by the party complained of and decide to either implement it, set out an action plan of its own, or recommend monetary enforcement against the offending party.¹⁸ Failure to pay the assessment may lead to suspension of NAFTA trade benefits, with certain limitations.¹⁹

There is an argument to be made in favour of a voluntary agreement such as the NAALC whereby each member state is ultimately left with the individual responsibility of enforcing its own domestic legislation. Firstly, it is difficult to argue that such an arrangement impinges on the sovereignty of any nation as no party is "legally obliged" to assume a responsibility it feels it cannot fulfill. Secondly, in the attempt to create a progressive agreement, an NAALC-like approach offers developing countries the comfort of not being burdened with obligations that are unrealistic and difficult to achieve. In short, the NAALC is attractive in the sense that it sets out uniform objectives while allowing each state flexibility to improve their respective labour laws at their own pace. Although strict measures of enforcement are only a remote possibility, an agreement that readily imposes trade sanctions is arguably counter-productive. There are several developing countries in the hemisphere that need assistance, not punishment, and swift trade sanctions could easily destroy a fragile economy. Harsh sanctions would also fail to rectify a series of concerns that are important for workers, such as job security and child labour.²⁰

Although the NAALC is open to the criticism that it lacks effective enforcement power,²¹ one should not be quick to downplay the effect that

¹⁵ Occupational safety and health, child labour, or minimum wage standards. *Ibid.* at annex 39.

¹⁶ The matter must be trade related and subject to coverage by the labour laws of both parties.

¹⁷ *Ibid.* at Article 25(2).

¹⁸ *Ibid.* at Article 39(4), Annex 39.

¹⁹ *Ibid.* at Article 41, Annex 41B.

²⁰ E. Cappuyns, "Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship" (1998) 36 Colum. J. Transnat'l. L. 659 at 670.

²¹ Under NAALC, sanctions may only be imposed by an arbitral Panel where "there has been a persistent pattern of failure" by the party to enforce its laws in three areas: "occupational safety and health, child labour, or minimum wage technical

“moral persuasion” can have. The way it is drafted, the agreement should encourage self-enforcement, as no party will want to have its labour disputes aired publicly. There is some evidence that this public process is beginning to have a positive effect. Mexico provides a good illustration. Between 1993 and 1996, Mexico’s Secretariat of Labor and Social Welfare (STPS) reports increased funding for enforcement of labour laws by almost 250 percent.²² In addition, STPS “implemented revised occupational safety and health regulations in 1997 for the first time covering workers in certain sectors and requiring additional protections on the part of employers.”²³ Some multinational corporations also appear to have made compliance with Mexican law a higher priority in order to avoid being linked with a complaint under the agreement.²⁴ At the very least, the NAALC provides a forum where industrial relations parties are obliged to explain their actions in light of the principles to which they have committed themselves.²⁵

Despite the absence of a well-structured adversarial system with access to an international oversight body, the accord does offer a means by which serious concerns can be examined. The public nature of the proceedings themselves plays an important role in encouraging further investigation, and although not mandated by the agreement, NAO proceedings can lead to further ministerial consultations and possibly an ECE evaluation. This process should not be viewed as an insignificant step towards addressing “persistent patterns” of failure to enforce domestic labour laws. While the approach appears more diplomatic than judicial, it does serve the purpose of having matters examined when local redress falls short.²⁶

Having identified the attractive qualities of the NAALC, is it really the most desirable structure for the future? The agreement, as discussed, requires only that mutually recognized labour laws are subject to review under the “persistent pattern of failure to enforce” standard of review.²⁷ There are obvious concerns with maintaining this unharmonized approach, the most notable of which is that the enforcement system is not the most effective deterrent to party behaviour inconsistent with either national laws or general principles of workers’ rights. Even if the respective parties

labour standards.” *NAALC*, *supra*, note 3 at Article 29(1).

²² *Supra* note 5.

²³ *Ibid.*

²⁴ D. Delgado, “NAOs Deterring Would-Be Violators of Labor Laws, Mexican Official Says” *Daily Lab. Rep.* (25 October 1995) A14–A15.

²⁵ J. Adams and P. Singh “Early Experience with NAFTA’s Labor Side Accord” (1997) 18 *Comp. Lab. L.J.* 161 at 176.

²⁶ C. L. Jackson, “Social Policy Harmonization and Worker Rights in the European Union: A Model for North America?” (1995) 21 *N.C. J. Int’l L. & Com. Reg.* 1 at 56.

²⁷ *Supra* note 3, at Article 28.

establish adequate labour protection, there is no mechanism to lock these standards into the agreement. Ultimately, individual state governments remain free to change their labour policies as they see fit.

Currently, only the EU has enforcement provisions for its common labour standards. Under the EU system, the European Commission issues directives which impose a binding obligation on the member states to enact national legislation.²⁸ A member state or the commission may bring an action before the European Court of Justice (ECJ) alleging a failure to fulfil their obligations.²⁹ Furthermore, the doctrine of “direct effect” affords individuals in the union the opportunity to “complain before a national court that a member state has deprived that individual of rights that would be recognized under a particular community law.”³⁰

It is unlikely that the FTAA will be able to accomplish the same level of integration as the EU. The EU’s institutions and its capacity to effectively govern at a supranational level took form incrementally over four decades and it was only relatively recently that laws in the area of social policy came into effect.³¹ It would take an enormous attempt to re-create the institutional framework of the EU in a western hemispheric organization. With additional framework comes additional confusion, expense and drain on resources. It is also highly improbable that member states in the FTAA would be immediately willing to cede to the same doctrine of supremacy that is paramount in the EU. The Treaty of Rome, for example, which created the EU, has effectively come to be treated as a constitutional document as several decisions of the ECJ have deemed EU laws to be superior to the laws of member states.³² Those working towards the FTAA simply cannot expect this type of unity to be a realistic goal for the near future. While the EU process is instructive, the immediate focus should be more narrowly guided towards either further utilizing or improving what framework is already in place.

If the NAALC is chosen as the model to accompany hemispheric-wide economic integration, what can be done to make it more attractive? The first step should be to make the process more accessible to all of the parties of the agreement. In the EU, if a party brings a complaint before a national court

²⁸ *Treaty Establishing the European Economic Community* 23 November 1957, 298 U.N.T.S. 11 (entered into force 1Jan. 1, 1958) at Article 194.

²⁹ *Ibid.* at Article 169 & Article 170.

³⁰ Jackson, *supra* note 26 at 9.

³¹ It was not until 1989 that a detailed “Community Charter of Fundamental Social Rights of Workers” was completed. Together with the “Social Protocol and Agreement” to the Maastricht Treaty on European Union in 1992, an “Action Programme” was finally designed to implement the Charter. See L. Compa, “Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA” (1995) 10 *Conn. J. Int’l L.* 337 at 339–340.

³² Jackson, *supra* note 26 at 19.

and that matter eventually reaches the member state's highest court, that party has the legal right to be heard at the international level. The NAALC, conversely, does not contemplate domestic enforcement of community standards nor does it have a supreme authority to which parties have guaranteed access. While the NAALC cannot be expected to handle the same level of work as the EU, there does appear to be room for improvement. As a start, parties should be encouraged to further utilize the existing framework and not to be overly reluctant to allow more immediate access to the advanced investigation procedures that the NAALC has to offer. For example, despite any formal requirement in the NAALC,³³ it has been the practice in the United States to delay any post-NAO ministerial consultation until a "failure finding" has officially been declared at the local level.³⁴ Whether the NAALC model is adopted or not, it is evident that promoting active involvement of the oversight body at an earlier stage will be critical in the effort to establish an efficient and timely vehicle for redress. A process with too many hurdles is doomed for failure.

Above all other criticisms, the agreement is most open to attack for failing to establish any real uniformity between the member states. Aside from the fact that it only mandates the implementation of local laws and policies, interpretation of regional objectives remains a matter of local discretion.³⁵ Unlike the EU, for example, which has been very explicit in its regulation of workplace health and safety, the NAALC has failed to set clear procedural safeguards.³⁶ The result of this lack of clarity is that the type of worker protection in one country may or may not be the same as another depending on the interpretation and implementation of the respective legislation.

One approach to remedying the potential for unevenness is for the FTAA to be more explicit in defining its standards. The very real potential for political gridlock over such issues, however, may prove to be overwhelming. With each new state comes a different set of priorities and a distinct outlook on social policy generally. The pragmatic solution may be for leaders to shift the discussions in a different direction altogether.

B. Labour Standards and the WTO

1. Overview

The WTO which was established in Geneva, Switzerland on 1 January 1995, is the legal and institutional foundation of the multilateral trading

³³ *Supra* note 3 at Article 22.

³⁴ Jackson, *supra* note 26 at 49.

³⁵ *Ibid.* at 47.

³⁶ *Ibid.*

system. The WTO is easily the most universally accepted trade agreement with 134 members as of February 1999.³⁷ Developing countries in the WTO, supported by some developed countries like the UK and Australia, however, have been reluctant to include core labour policies in the text of the agreement. They argue that by including these issues in the WTO the rich countries would gain an unfair advantage over the South by dictating their domestic policies and using the threat of trade penalties to ensure compliance. Ultimately, the WTO was left with little choice but to abandon the effort to address global labour policy, stating instead that the International Labor Organization (ILO) is the most appropriate body to handle the issue. There is some indication, however, that the subject may be revived at a future date in the WTO. As French Trade Minister Yves Galland told the press following the first Ministerial Conference in Singapore, “The major debate of labour standards is here to stay in the WTO. It will never go away.”³⁸

2. Linking the FTAA and the ILO

Is the ILO really the most appropriate forum through which labour concerns should be addressed? Seemingly, the Americas are in a position to effectively put this proposition to the test.

Conceivably, greater utilization of the ILO by the FTAA will shed light on the potential for meaningful results. One of the virtues of regional organizations generally is that they can provide ideas and experimentation that can eventually be incorporated into larger multilateral agreements. The question of tying labour standards to trade deals is clearly one such topic with room for development. Indeed, a fresh approach by the FTAA may not only prove beneficial to those within the hemisphere, but may be highly instructive to those seeking a more clearly defined labour policy at the global level. Greater participation between the FTAA and the ILO would also be entirely consistent with stated hemispheric objectives. As early as 1994, heads of state and governments in the western hemisphere committed to secure the observance and promotion of worker rights, as defined by “appropriate international conventions.”³⁹ The ILO, which has seen over 182 of its conventions adopted to date with 174 countries as members, is an obvious forum through which this objective might be achieved.⁴⁰

³⁷ “Internet Service of the World Trade Organization,” online: World Trade Organization <<http://www.wto.org>>.

³⁸ M. Khor, “The WTO and the Battle Over Labor Standards,” online: Global Policy Forum <<http://www.globalpolicy.org/soecon/labor.wtolabor.htm>>.

³⁹ *Supra* note 2.

⁴⁰ “Internet Service of the International Labor Organization; Information Leaflet,” online: International Labour Organization <<http://www.ilo.org/public/english/235press/leaflet/page5.htm>>.

The ILO is attractive in the sense that it has a strong tripartite structure with a long history. Groups of workers and employers participate actively with government delegates in all of the bodies of the ILO, which include the governing body, the International Labor Conference (ILC), technical committees, and expert group meetings, thereby ensuring that all groups are adequately represented.⁴¹ The ILO presents a real sense of continuity with almost 80 years of experience in addressing labour concerns with the underlying notion that fair labour conditions are a critical component to maintaining social peace. More recently, the focus has been human rights issues in the employment context, particularly “discrimination in employment, equality for women workers, forced labor, child labor and freedom of association as well as other concerns relating to stimulating employment opportunities.”⁴²

Most important for the work of the ILO are the International Labor Conventions which are adopted by the ILC.⁴³ These conventions, however, are not directly binding on all members of the ILO. Only those countries which choose to ratify them are bound.⁴⁴ A possibility for the FTAA would be to require all countries to adopt certain ILO conventions as a condition precedent to full membership. While there would be no requirement for each FTAA member state to harmonize all domestic labour legislation, each party would effectively commit itself to a minimum level of binding obligations. Precisely which conventions would ultimately be chosen is an obvious point for negotiation. The ILO itself has recently studied the question of what might constitute a package of minimum labour standards to which all states should adhere.⁴⁵ For the immediate future, however, emphasis might well be placed on the seven “key” ILO conventions, which are currently highlighted by the organization.⁴⁶

If the FTAA were to officially incorporate these ILO conventions into the text of its agreement, how would these standards be monitored? One possibility would simply be to employ one of the supervisory systems from an

⁴¹ “International Labor Organization Bureau of Statistics,” online: International Labour Organization
<<http://www.ilo.org/public/english/comp/civil/standards/ilodcr.htm>>.

⁴² J. M. Vogelson, “American Bar Association Section of International Law and Practice Report the House of Delegates” (1996) 30 *Int'l Law* 653 at 655.

⁴³ *Supra* note 40.

⁴⁴ *Ibid.*

⁴⁵ Vogelson, *supra* note 42 at 661.

⁴⁶ Subject matter of these conventions includes: forced labour, freedom of association and protection of the right to organize, collective bargaining, equal remuneration, abolition of forced labour, protection against employment discrimination and minimum age requirements. *Supra* note 39.

existing regional arrangement such as the NAALC or the Common Market of the South (MERCOSUR).⁴⁷ Attempts to push too hard for one regional arrangement over the other, however, may create unnecessary delay and a possible stalemate. One must be cognizant of the fact that U.S. ambition over the subject of western integration generally is viewed by many in developing economies as “an attempt by the U.S. government to impose its demands throughout the hemisphere.”⁴⁸ Perhaps the more appropriate course of action would be for the FTAA to refer its labour disputes to the ILO supervisory system altogether. In addition to the advanced institutional framework that it has to offer, the ILO carries the advantage of being an independent international body that does not stem from any one dominant power. Indeed, this element of impartiality could be a key factor in making the labour agreement a reality.

The ILO is open to the criticism that its supervisory system lacks any real “teeth” to ensure compliance with its conventions. Similar to the NAALC, the ILO has no real sanctioning power. Rather, it relies solely on “the power of persistent persuasion and the mobilization of shame against governments that fail to live up to the obligations they have voluntarily undertaken.”⁴⁹ While success under this model still hinges on the individual commitment of the member states, it appears to be the most realistic approach for the near future. As the American Bar Association succinctly notes, “it does what can be done in an international system that would not tolerate a global sheriff with real power to punish sovereign governments for their failure to live up to accepted labor standards.”⁵⁰ In spite of its limitations, the ILO, through its use of independent and tripartite bodies, has been able to achieve positive results. The ILO Committee of Experts reports that:

over the last 30 years, there have been more than 2,000 cases in which national legislation or practice was changed to meet the requirements of a ratified convention following comments by one or more of the ILO supervisory bodies.⁵¹

While not a perfect system, the ILO route to achieving social harmony on the labour front may well be the answer. Hemispheric arrangements such as NAALC and MERCOSUR may be useful but are too new to provide any firm guidance for the future. The ILO, conversely, has a history that spans back to the 1919 Treaty of Versailles, and through the decades, has developed a

⁴⁷ *Treaty of Asuncion* 26 March 1991, 30 I.L.M. 1041 at 1044.

⁴⁸ “Preparatory to the Western Hemisphere Workers’ Conference Against NAFTA and Privatizations” (26-27 July 1997), online: [igc internet <http://www.igc.org/workers/brasil.htm>](http://www.igc.org/workers/brasil.htm).

⁴⁹ Vogelson, *supra* note 42, at 660.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

substantial body of case law with numerous precedents that could serve as an effective point of reference for the FTAA by providing a consistent and predictable application of standards.⁵² The Americas have the option of simply referring all of their labour disputes to the existing structure or, alternatively, could choose to set up their own branch of the ILO supervisory system within the hemisphere. The latter option might be useful in the sense that it would bring the entire hemisphere directly under the umbrella of the ILO while still allowing FTAA member states to actively participate in the administration of the process.

Once the FTAA decides which standards it will incorporate into the agreement, consideration must be given to the extent that enforcement will be available. In addition to the ILO supervisory body, the FTAA has the option of introducing domestic enforcement through a system of “internal adoption.” This approach would be similar to the doctrine of “direct effect” that is present in the EU, with the exception that there would lack a supreme community authority such as the ECJ. Currently, internal adoption is not explicitly mandated by the constitution of the ILO. It merely states that once a party has communicated formal ratification of the convention, it must take such action as “may be necessary” to make effective the provisions of such convention.⁵³ Perhaps the time is right to incorporate a more definitive approach. Under the FTAA, all member states could be required to pass accompanying domestic legislation to give the ILO conventions effect. Therefore, any complaints relating to the non-compliance of labour standards could be directly raised at the local level. Of course, if a complaint was not adequately addressed at this level, there would still be the opportunity for supranational review. While critics may continue to argue that swift trade sanctions are the only feasible way to ensure compliance, opening the door to domestic enforcement would, at the very least, be a positive step towards further commitment and accountability.

C. Further Possibilities

With FTAA talks still in an early stage, it is unclear how far state representatives will be willing to go in order to achieve a core package of minimum labour standards. It is conceivable that western leaders will recognize the importance of drawing attention to the ILO conventions, for example, but will not be ready to officially “lock” them into the agreement. Individual state sovereignty may simply be too sensitive an issue at this point to expect such a commitment. If this is the case, there are other less

⁵² *Ibid.* at 662.

⁵³ *ILO Constitution* at Article 19, online: International Labour Organization <<http://www.ilo.org/public/english/about/iloconst.htm>>.

“sweeping” measures that should not be ignored.

One such alternative would be to adopt a “social labelling” system. Under this proposal, all member states who accept the obligations of the conventions and subject themselves to international monitoring would be entitled to “label... all goods produced in its territory as a trademark of good working standards.”⁵⁴ In addition, the FTAA could further develop the ILO practice of providing technical assistance to countries that lack the means or expertise to bring meaningful improvement.⁵⁵ Other possibilities include issuing regular FTAA progress reports on the status of labour protection and the establishment of a non-binding universal charter⁵⁶ which, at the very least, could serve as a statement of positive intention and be a general blueprint for further community activity.

Another alternative would be to authorize or require FTAA parties to impose trade sanctions, such as tariffs or import bans, in response to breaches of the labour norms that are embodied in the FTAA. It seems improbable that there would be a consensus among states in the Americas to introduce into a regional free trade agreement provisions that would expose a state to more trade barriers than already exist under the WTO system. Even without a provision for trade sanctions, it will not be easy to achieve a consensus in favour of accepting, as part of the FTAA, norms in the area of labour, the environment, human rights or the elimination of government corruption. Quite apart from trade sanctions, states would sustain a price for breaching legal commitments they accept under the FTAA. They would undermine the credibility of other legal commitments they have made or may wish to undertake. They would expose themselves to criticism from within their boundaries and the wider community. The embarrassment factor is amplified if there are regular mechanisms, administered by international bodies, for investigating and publicizing breaches.

Regardless of the theoretical desirability for not attaching trade sanctions to breaches of labour and other social standards, it seems that any such attachment would have to be left to the second stage of developing the FTAA system. The incremental approach seems the only mechanism with any real hope of acceptance. First, states would solemnly accept legal obligations in areas such as labour, and sustain criticism if they failed to live up to their obligations. As states became more familiar with norms, and more adept at complying with them, they may be more prepared to accept that breaches by

⁵⁴ This proposal was part of a three stage plan recommended by ILO Director-General Michel Hansenne who has been working towards the further imposition of its standards. Cappuyns, *supra* note 20 at 683.

⁵⁵ ILO programs provide assistance on vocational training, occupational safety and health, drafting of labour legislation, labour inspection, employment programs and workers education.

⁵⁶ This concept was proposed by a Commission for MERCOSUR in 1993, but ultimately was not adopted. Perez-Lopez, *supra* note 2 at 468.

themselves or others can result in penalties. It may, of course, turn out that legal obligation coupled with criticism is actually in itself enough to achieve a satisfactory level of compliance throughout the FTAA area and the issue of sanctions may become moot.

If there are to be trade sanctions for breaches of labour standards under the FTAA, certain general principles should apply. First, sanctions should only result when an impartial body designated by the FTAA finds that there has been a breach. There should be no unilateral determinations in this respect. Second, the decision to impose sanctions should only be determined by an impartial body or as the result of a multilateral decision by states. Unilateral decisions are too likely to be distorted by economic or political opportunism, or at least to be perceived as such by those who are inconvenienced by the decision. Third, sanctions should be imposed jointly, not unilaterally. If many states react to a breach of a labour standard by imposing a tariff, the economic effect of the sanction will be greater, and more likely to influence the target state. The imposition of a trade sanction can be economically painful to the party imposing it as well as to the party that sustains it. If all states in the region impose sanctions, the size of the sanction can be relatively modest from the point of view of each imposing state, yet still be painful and influential to the target state. In a regional agreement like the FTAA, of course, there may be no way to prevent third parties from partially or wholly undermining the practical impact of sanctions that are imposed only by parties in the region. Fourth, when the breach of a labour standard involves a grave breach of basic moral principles, the proper response may be an outright embargo on the import of products from the area, as opposed to a tariff on them. Goods produced from the labour of small children, for example, should be regarded as the product of a practice so evil that it should be forthrightly stigmatized. The message should not be sent that such a practice is merely an unfair trade practice, which the offending state can make right by paying a financial penalty. Fifth, before sanctions are imposed in a particular case, some impartial body or expert should be authorized to investigate whether the sanctions are likely to do more practical good than harm. The practical impact of imposing trade sanctions on some goods may be to harm workers who are the object of concern and do nothing to harm either an unjust government or exploitative employers.

III. THE ENVIRONMENT

IT IS CRITICAL THAT FTAA NEGOTIATORS also consider the effects that large-scale market deregulation can have on the environment. In the U.S., environmental groups have attempted to bring the crux of this concern to the attention of government officials. Their general sentiment has been that a

free trade agreement such as the FTAA will cause greater “downward pressure on environmental standards in the U.S. and elsewhere as industry seeks new subsidies to boost its competitiveness in global markets.”⁵⁷ The Western Ancient Forests Campaign cites, as an example of downward pressure, the Salvage Logging Rider of the 1995 Recissions Act, in which it was said that the “U.S. Congress suspended many environmental laws to facilitate increased exploitation of U.S. National Forests.”⁵⁸ This downward pressure on standards could be particularly damaging to the environment in many of the developing nations whose economies are heavily concentrated on trade in natural resources. In addition to these ecological concerns, there is the obvious fear that the removal of economic barriers will lead to the inevitable exodus of capital to the nations with the lowest environmental laws and enforcement. Unless trade and investment are disciplined in the FTAA, it is difficult to see how these problems can be averted.

A. The Global Effort: The Work of the WTO

1. Progress of the Organization

The ILO, as discussed, offers an attractive, well established, and widely accepted globalized framework which the FTAA can utilize for labour concerns. Unfortunately there is no single parallel organization at the international level through which environmental issues can be adequately addressed. The WTO has recently made attempts at progress but, as will be discussed, efforts have yielded little in the way of actual results.

It was not until the 1990's that the linkage between trade and the environment was given close global attention. Environmentalists became concerned during the Uruguay Round trade negotiations, fearing that “greater trade might degrade the environment.”⁵⁹ At the other end of the spectrum, business groups were worried that greater environmental protection might hinder commercial growth.⁶⁰ Consequently, in 1995, the WTO established a Committee on Trade and the Environment (CTE) to address the various concerns.⁶¹

Unlike the enhanced functions of the ILO, it was not the intention of the WTO for the CTE to “become an environmental agency, nor that it should get involved in reviewing national environmental priorities, setting environmental standards or developing global policies on the environment.”⁶² It has been the

⁵⁷ “International Agreements: Santiago People’s Summit Addresses Labor, Environment, Economic Issues” (1998)15 ITR 708.

⁵⁸ *Ibid.*

⁵⁹ S. Charnovitz, “Critical Guide to the WTO’s Report on Trade and Environment” (1997)14 Ariz. J. Int’l L. & Comp. L. 341.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² “Trade and Environment in the WTO,” online: World Trade Organization

position of the WTO that these activities should continue to be the responsibility of “national governments and of other intergovernmental organizations better suited to the task.”⁶³ The CTE, therefore, can be described as a forum for global discussion on trade and the environment rather than an institution from which parties can expect definitive standards to be derived.

While the WTO has little to offer in the way of setting or identifying uniform environmental standards, it has reached a number of conclusions and recommendations which deserve attention. A central topic for discussion has been the relationship between International Environmental Agreements (IEA’s) and WTO rules. It was initially emphasized in the Uruguay Round Decision on Trade and Environment that:

there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.⁶⁴

As is now the concern for the WTO, the FTAA should take caution in creating environmental policies which directly conflict with these agreements. Avoiding conflict will not only be important to maintain the legitimacy of these agreements, but will also serve an important political purpose.⁶⁵ An FTAA that is compatible with important IEA’s will be essential in the effort to ease environmentalists’ concerns over the impact that the trade system will have on environmental protection.

There are a number of issues which the CTE touches on in its report but, unfortunately, it does not seem to provide any firm guidance on future activity. The only conclusion on the topic of general environmental policies and the trading system was that “further work is needed.”⁶⁶ Similarly, on the issues of environmental taxes, packaging and recycling, no definitive course of action was adopted.⁶⁷

The CTE did specifically address the concept of environmental labelling or

<<http://www.wto.org/wto/environ/environ1.htm>>.

⁶³ *Ibid.*

⁶⁴ Charnovitz, *supra* note 60 at 343.

⁶⁵ *Ibid.*

⁶⁶ “World Trade Organization, Report (1996) of the Committee on Trade and Environment” (7 November 1996, online: World Trade Organization <<http://www.wto.org>> at 181 [hereinafter CTE report].

⁶⁷ *Ibid.* at 182–183.

“eco-labelling,” a practice that might be well suited for the FTAA.⁶⁸ Generally, the report concludes that eco-labels “can be effective instruments of environmental policy to encourage the development of an environmentally-conscious consumer public.”⁶⁹ The report recommends that “increased transparency can help deal with trade concerns regarding eco-labelling schemes/programmes while it can also help to meet environmental objectives by providing accurate and comprehensive information to consumers.”⁷⁰

The CTE report, however, has been criticized for its failure to address the “need to assure that eco-labelling criteria reflect the latest technological developments,” which could, in effect, create an “incentive against adopting new production processes.”⁷¹ If the FTAA does incorporate this practice, further work will be needed to ensure that eco-labels do not effectively freeze the continued implementation of improved production techniques.

Among the most important items on the CTE agenda was the general effect of increased market access on the environment, particularly in developing countries. The report takes the firm position that greater market access opportunities will be instrumental in assisting developing countries to obtain the resources they need to implement adequate environmental policies.⁷² It was emphasized that “trade liberalization including the elimination of trade restrictions and distortions can yield developmental and environmental benefits by facilitating a more efficient allocation and use of resources.”⁷³ While the CTE report did not outline specific environmental policies to be implemented, it does provide FTAA negotiators with the important global recognition of the ability to upgrade environmental management through income generated from trade.

2. Existing WTO Rules on Trade and the Environment

While significantly less developed than under the NAFTA or the EU, there are a set of trade-environment rules in the WTO which deserve brief consideration. The first dimension of the GATT/WTO rules relate to domestic health, safety, and environmental protection. The general rule under the GATT, the Uruguay Round Agreement on the Application of Sanitary and

⁶⁸ *Ibid.* at 186. A recent example of the impact of eco-labelling on consumer awareness is the case of tuna products labelled as “Dolphin Safe.” See K. Kittichaisaree, “Using Trade Sanctions and Subsidies to Achieve Environmental Objectives in the Pacific Rim” (1993) 4 *Colo. J. Int’l Envtl. L. & Pol’y* 296 at 315. With the use of such labelling, it was found that the tuna cans with the label were likely to sell better than those without the label. *Ibid.*

⁶⁹ *Supra* note 67 at 183.

⁷⁰ *Ibid.* at 184-185.

⁷¹ Charnovitz, *supra* note 60 at 360.

⁷² *Supra* note 67 at 197.

⁷³ *Ibid.*

Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT) is that each country can maintain regulations necessary to protect life and health, conserve exhaustible natural resources and may independently determine the level of risk it deems appropriate to manifest in its product standards.⁷⁴ In general, each country is entitled to prohibit the importation of goods that do not meet those standards.⁷⁵

These environmental rules are qualified in the WTO rules to ensure that they are not used as a vehicle for protectionism. For example, the rules must not be “more trade restrictive than necessary” to achieve the chosen level of environmental protection.⁷⁶ The rules must also be subject to national treatment disciplines,⁷⁷ and must not “arbitrarily or unjustifiably discriminate” against imports.⁷⁸ Furthermore, SPS measures must be consistent with international standards, guidelines or recommendations or must not be maintained “without sufficient scientific evidence” of a relationship to be avoided.⁷⁹

The GATT/WTO approach is open to the criticism that it will likely have little effect on environmental protection within developing countries with low standards. Nevertheless, there does appear to be some potential for upward harmonization under this model. Firstly, the SPS Agreement regards conformity to international standards as GATT-consistent, creating an incentive for poor countries that cannot afford testing simply to default and choose the international standard, which is generally more stringent than current developing country standards.⁸⁰ Moreover, the right of wealthier countries to ban imports that do not conform to their relatively stringent standards could create market pressures on developing countries to produce products for export that meet those higher standards.

⁷⁴ *Agreement on the Application of Sanitary and Phytosanitary Measures* 15 April 1994 at Article 2, 5; *Agreement Establishing the World Trade Organization* 15 April 1994 at 69 Annex 1A, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh; *Agreement on Technical Barriers to Trade* 15 April 1994, preamble, *Ibid.* at 17 [hereinafter TBT Agreement]; *General Agreement on Tariffs and Trade* 30 October 1947 at Article XX(b), (g), TIAS No. 1700, 55 UNTS 187 [hereinafter GATT]. See also “GATT Dispute Panel, Thailand–Restrictions on Importation and Internal Taxes on Cigarettes” 7 November 1990, GATT, B.I.S.D. (37th Supp.) at 200.

⁷⁵ R. H. Steinberg “Trade Environment Negotiations in the EU, NAFTA, and the WTO: Regional Trajectories of Rule Development” (1997) 91 *Am. J. Int’l L.* 231 at 237.

⁷⁶ *Supra* note 75 at Article 2.2; *TBT Agreement, supra*, note 75 at Article 2.2.

⁷⁷ *Supra* note 75 at Article 2.3; *TBT Agreement, supra*, note 75 at Article 2.1.

⁷⁸ *Supra* note 75 at Article 2.3; *TBT Agreement, supra*, note 75 at Preamble.

⁷⁹ *Supra* note 75 at Article 2.2.

⁸⁰ Steinberg, *supra* note 76 at 238.

While the attractiveness of these trade-environment policies for future trade areas remains open to debate, the shortcomings of the WTO dispute settlement procedure are clear. The process does include adjudication of trade-environment disputes, but resolution of these disputes only considers the “trade friendliness of the environmental laws – not whether a party’s actions or laws are appropriately green.”⁸¹ Furthermore, only officials of the WTO member governments and members of the WTO secretariat may attend the hearing and receive most documents relating to the dispute.⁸² Institutionalized monitoring is also very limited. Such monitoring only considers the “trade friendliness of national environmental measures,” not the “environmental friendliness of national measures.”⁸³ Seemingly, a more thorough and publicly accessible process would be desirable for the FTAA.

Obviously there are some positive aspects of the WTO approach that should be given special attention by FTAA negotiators. As a whole, however, the WTO does not appear to be the most appropriate forum through which the FTAA should channel its core trade-environment concerns. The global trade-environment rules are limited in scope and the institutional framework clearly needs review. While the WTO rules and the CTE Report should in no way be ignored, perhaps the Americas would be better served if leaders were to follow a regional model, namely the NAFTA, where deeper integration has resulted in a more defined focus.

B. NAFTA and the Environment

1. Overview

Much of the interest in developing an FTAA stems from the desire to create an effective building block towards further global consensus. With respect to the environment, it is true that many concerns can be characterized as principally local or regional. Nevertheless, it is the approach to addressing the trade-environment problem, not necessarily the subject matter, that is particularly important for further progress at the global level. Unfortunately, the WTO, in its current state, is not yet ready to handle this enormous responsibility. At the very least, a NAFTA-based model under the emerging FTAA could serve as a useful supplement to addressing important trade and environment problems.

Most modern trade agreements are principally focused on trade liberalization. The NAFTA is attractive in the sense that it explicitly links this

⁸¹ Under the existing WTO rules, environmental laws are only constrained to the extent that they are inappropriately trade restrictive, not by any quota for a specified level of environmental protection. *Ibid.* at 239.

⁸² *Ibid.* at 240.

⁸³ *Ibid.*

goal with the over-lapping objective of environmental protection.⁸⁴ This position is reflected in NAFTA's preamble which specifically provides that the agreement is intended to:

contribute to the harmonious development and expansion of world trade ... ; ...promote sustainable development...; [and] strengthen the development and enforcement of environmental laws and regulations.⁸⁵

Although the preamble does not have any binding effect on the parties, the basic premise is important, namely that free trade should enhance sustainable development.⁸⁶

The NAFTA does contain binding provisions regarding investment flight, which could be vitally important for regions as economically diverse as North and South America. Article 1114.2 of NAFTA recognizes that it is "inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures."⁸⁷ Accordingly, if one party believes that another has waived or derogated from "such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment..." the party may request official consultations with the Party whose actions are in question.⁸⁸ This consultation process, which aims to avoid the waiver or derogation from environmental protection, is a significant step in the right direction.

A further aspect of the NAFTA, which the FTAA could utilize or further develop, is the inter-relationship between IEA's and trade rules. Throughout the discussion on trade and the environment much emphasis has been placed on the "preference for multilateral solutions to multilateral environmental problems."⁸⁹ NAFTA Article 104 builds on this notion by listing three multilateral agreements⁹⁰ and two bilateral agreements⁹¹ for

⁸⁴ See R. Houseman "Reconciling Trade and the Environment: Lessons From the North American Free Trade Agreement" online: United Nations Development Program

<gopher://gopher.undp.org:70111/ungophers/unep/publications/monographs/mon_03>.

⁸⁵ *North American Free Trade Agreement Between the Government of the United States, the Government of Canada and the Government of the United Mexican States* 17 December 1992, 32 I.L.M. 289; (1993) 32 I.L.M. 605.

⁸⁶ Houseman, *supra* note 85.

⁸⁷ *Supra* note 86 at Article 1114.2.

⁸⁸ *Ibid.* at Article 1114.2.

⁸⁹ Houseman, *supra* note 85.

⁹⁰ *Supra* note 86 at Article 104, Annex 104. The multilateral agreements are: (1) *The*

protection. The agreement also provides that in the event of an inconsistency between the NAFTA and the trade provisions of the listed IEA's, the obligations of a party under the IEA:

shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of [the NAFTA].⁹²

Currently, under the NAFTA accession clause, incoming parties are not required to accede to the listed IEA's.⁹³ If the IEA's are to maintain their legitimacy in the FTAA, there must be a level of binding obligation on member states to respect them. Essentially, parties who wish to join the FTAA should be required to commit to the provisions of these carefully selected agreements.⁹⁴ Seemingly, as the NAFTA provisions illustrate, there is the recognition from at least three important nations that certain IEA's must be shown respect.

A hemispheric effort to pursue this notion further would also be compatible with the larger WTO framework. A 1994 GATT panel decision indicated that unilaterally imposed import restrictions cannot be justified solely because they were made or obtained in an environmentally unsound manner outside the jurisdiction of the importing country.⁹⁵ Under this authority it can be argued that to comply with trade restrictions required by many IEA's⁹⁶ would be to violate the WTO Agreements.⁹⁷ By pre-determining

Montreal Protocol on Substances that Deplete the Ozone Layer 16 September 1987 (entered into force 1 January 1989) S. Treaty Doc. No 100-10, 26 I.L.M. 1541; (2) *The Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal* 22 March 1989, U.N. Doc. EP/16.80/3, 28 I.L.M. 649; and (3) *The Convention on International Trade in Endangered Species of Wild Flora and Fauna* 3 March 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

⁹¹ *Supra* note 86 at Article 104, Annex 104. The listed bilateral agreements are: *Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area* 14 August 1983, T.I.A.S. No. 10,827; *Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste* 26 October 1986, T.I.A.S. No. 1109.

⁹² *Supra* note 86 at Article 104.1, 32 I.L.M. at 297-298.

⁹³ Houseman, *supra* note 85 at 83.

⁹⁴ This could be done by passing appropriate domestic legislation that would reflect the provisions of these agreements.

⁹⁵ "GATT Dispute Panel Report United States-Restrictions on Imports of Tuna" (1994) 33 ILM 839.

⁹⁶ One example is *The Convention on International Trade in Endangered Species of Wild Flora and Fauna* 3 March 1973, 27 UST 1087, 993 UNTS 243, which permits the

a number of IEA's to which *all* FTAA member states must commit, hemispheric leaders can avoid the unevenness currently hindering WTO progress.

2. The NAAEC

The concerns of today's environmental groups over the negative effects of free trade echo those that were voiced in the early 1990's with the inception of NAFTA. Interest groups viewed the Bush administration's vision of the NAFTA as a pure trade and investment vehicle. This stress eventually resulted in the NAFTA text, which would address "basic elements of environmental protection,"⁹⁸ some of which have been discussed. Following President Clinton's election in 1992, the North American Agreement on Environmental Cooperation (the NAAEC)⁹⁹ was included with the agreement. This "side deal" on the environment commits the NAFTA parties to a number of obligations and institutions intended to advance the trade-environment debate. Its stated goals include the promotion of sustainable development, support for the environmental objectives of the NAFTA, and the promotion of transparency and public participation in the development and enhancement of environmental protections.¹⁰⁰ Although it is yet to be determined whether this approach will survive the test of time, the NAAEC appears to be a promising step forward. The following discussion will attempt to briefly highlight some of the significant components of the accord from which the FTAA can draw.

A notable advantage of the NAAEC over the WTO is the commitment of the parties to provide citizens access to judicial and administrative procedures for the enforcement of environmental laws.¹⁰¹ While citizens do not have standing to take legal action in domestic courts, the accord ensures that citizens will have the right to petition their governments to enforce these laws at the national level.¹⁰² The NAAEC even goes a step further by requiring parties to provide citizens, who have suffered real damages because of an

parties to recommend a prohibition on imports of products that contain parts from endangered species. Also see Steinberg, *supra* note 76 at 239.

⁹⁷ Steinberg, *supra* note 76 at 239.

⁹⁸ F. M. Abbott "Foundation-Building for Western Hemispheric Integration" (1996-1997) *Nw. J. Int'l L. & Bus.* 900 at 924.

⁹⁹ *North American Agreement on Environmental Cooperation* 17 December 1993, U.S.-Can-Mex., pt. V, (1993) 32 *ILM* 1480.

¹⁰⁰ *Ibid.* at Article 1.

¹⁰¹ *Ibid.* at Article 5-6.

¹⁰² Hosseman, *supra* note 85 at 83.

environmental harm, the right to sue the responsible party.¹⁰³ Creating a forum through which citizens in the hemisphere feel they are active participants will be a key factor in the effort to sell the FTAA as something more than purely a vehicle for trade and investment. An NAAEC-like approach would be a useful first step.

The NAAEC also provides for a continent wide institution, which is directed at ensuring the effective enforcement of national laws. The Commission for Environmental Cooperation (CEC) is competent to oversee inter-governmental dispute proceedings concerning allegations of persistent failure to enforce environmental laws.¹⁰⁴ The NAAEC secretariat also has the authority to examine the conduct of NAFTA parties with respect to environmental enforcement matters at the request of private parties, and to produce "factual records" on the findings. In addition, the commission contains an educational function by conducting detailed studies of important environmental issues.¹⁰⁵ Although leaders in the NAFTA countries have not gone so far as to establish community wide environmental standards, they have certainly provided for a system which enables the discussion to be advanced.

Ideally, the FTAA would best be served by implementing a number of clear environmental standards which each member state would be legally obliged to respect. Unfortunately this is an unrealistic objective for the immediate future. As previously discussed, any attempt to create a supranational authority akin to the structure in the EU would be a futile endeavour. States are simply not ready to cede the same level of sovereignty to legislative institutions designed to enact binding legislation. It is currently the case in the NAFTA, and will likely be the case for the FTAA, that member states will only subject themselves to legislative recommendations. This does not, however, signal the demise of any future progress. In fact, a critical evaluation of the current framework reveals room for improvement.

A primary area of concern should be the oversight body and dispute resolution process of the NAAEC, which is essentially the same as that of the NAALC. Firstly, the FTAA should encourage further public participation in the process. While the provisions of the NAAEC are more far reaching than the GATT, the fact remains that the public is not accorded any role in the actual proceedings. Secondly, the standard for what disputes may be heard is

¹⁰³ *Supra* note 100 at Article 5-6.

¹⁰⁴ *Ibid.* at Article 8, 32 I.L.M. at 1485. Environmental interest groups in the U.S., Mexico and Canada have all actively pursued claims before the CEC. See J. Kirton & J. Soloway "Assessing NAFTA's Environmental Effects: Dimensions of a Framework and the NAFTA Regime" (April 1966) NAFTA Effects Working Paper No. 1.

¹⁰⁵ See F. M. Abbott "From Theory to Practice: The Second Phase of the NAFTA Environmental Regime" in Rudiger Wolfrom, ed., *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Berlin: Springer, 1996) at 451.

too narrow in that it requires a “persistent pattern” of non-enforcement which is defined to exclude anything before the agreement came into force.¹⁰⁶ Thirdly, the entire process of settling the dispute is overly time consuming, bringing into question whether any significant environmental gains will ever result.¹⁰⁷

The most concerning aspect of the NAAEC, however, is the lack of any real movement towards harmonization of national laws respecting the environment. The NAAEC offers little in the way of providing guidance to parties contemplating environmental reform. In fact, each party under the agreement has complete independence to select its own level of environmental protection and its own developmental policies.¹⁰⁸ Unless the FTAA provides a much more detailed set of guidelines on environmental protection, true progress will not be realized. Even under the EU, where integration is much deeper, vague language has resulted in contradictory implementation and enforcement of community laws among the individual member states.¹⁰⁹ If ambiguous guidelines can hinder environmental protection in the EU, surely a non-binding agreement with nothing more than “general obligations” will suffer the same result.¹¹⁰

C. Conclusion

There is no single model that the FTAA can easily incorporate to adequately address the trade-environment dilemma. Instead, leaders will have to decide which of the many components of these models are most appropriate for a free trade agreement in the western hemisphere. This paper has outlined some of the attractive qualities of the different models that are

¹⁰⁶ Howseman, *supra* note 85.

¹⁰⁷ Under Article 14(2)(c), the complainant must first pursue any available “private remedies” even though they might be lengthy and unlikely to resolve the problem. See “An Environmental Perspective on the ‘Effective Enforcement’ Provisions of the North American Agreement on Environmental Cooperation,” online: Vancouver Community Net <<http://www.vcn.bc.ca/wcel/wcelpub/11099.html>>. Furthermore, under Article 14(3)(a) of the agreement, the complaint cannot proceed if there is judicial or administrative proceeding underway. *Ibid.*

¹⁰⁸ *Supra* note 100 at Article 3.

¹⁰⁹ D. Vandermeersch, “The Single European Act and the Environmental Policy of the European Economic Community” (1987) 12 *Eur. L. Rev.* 407 at 424. The EU has consequently experienced significant problems in controlling the transborder movement of pollution. See N. Haigh, *EEC Environmental Policy and Britain* (2nd ed., 1987) at 140-41.

¹¹⁰ E. A. Ellis, “Bordering on Disaster: A New Attempt to Control the Transboundary Effects of Maquiladora Pollution” (1996) 30 *Val. U. L. Rev.* 621 at 686.

currently available. There is no shortage of possibilities. Negotiators may wish to create a stronger link between trade and important IEA's, adopt eco-labels, or even introduce definitive community wide standards such as the SPS or TBT Agreements recognized in the WTO. Moreover, the FTAA could effectively draw from the trade-environmental forum within the NAFTA, which contains important provisions regarding investment flight, IEA's, and dispute settlement. While each of these possibilities are attractive, none are without their shortcomings. FTAA negotiators will have to carefully consider the most appropriate means by which to maximize the potential of each.

IV. HUMAN RIGHTS

AS THE EXPERIENCE IN THE EU ILLUSTRATES, there is a wide recognition that the issues of international trade and fundamental human rights are inextricably linked and must be addressed together. The United States, in its trade practices over the years, has demonstrated an awareness of this fact by linking its trade policy with human rights concerns in other countries. While this awareness is present in the western hemisphere,¹¹¹ there has, nevertheless, been a lack of significant progress. The creation of the FTAA, however, opens a new window of opportunity for the Americas to set a positive example.

A. The European Union

Why is a multilateral agreement the most attractive means by which to attain results? A closer look at regional systems helps illustrate the benefits of adopting such an approach. In their effort to achieve wide scale economic integration, European leaders have committed themselves to establishing not only regional norms but institutions designed to protect fundamental human rights. The Council of Europe ratified its first treaty (the European Convention on Human Rights) in 1953¹¹² and later established the European

¹¹¹ Reported human rights violations in Mexico include disappearances, unlawful arrests, torture, and assassination. Victims of this government abuse include: political party leaders and followers, land reformers and rural human rights activists, labour union organizers, human rights workers, lawyers, and journalists. See J. F. Smith, "NAFTA and Human Rights: A Necessary Linkage" (1994) 27 U.C. Davis L. Rev. 793 at 823.

¹¹² *European Convention for the Protection of Human Rights and Fundamental Freedoms* 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953) (as amended by Protocol No. 3, entered into force 21 September 1970, and Protocol No. 5, entered into force 21 December 1971. The Convention guarantees the right to life, freedom from torture or degrading treatment and punishment, due process of law, freedom from ex post facto punishment, right to family and private life, freedom of thought, and religion, freedom of expression and assembly, right to marry and

Commission and Court of Human Rights. The convention requires that anyone whose rights are violated must be provided with an effective remedy before a national authority.¹¹³ In approximately one-half of the member states, the convention has become part of domestic law thereby creating rights directly enforceable by individuals.¹¹⁴

The European Court of Human Rights has jurisdiction over cases referred to it by the European Commission of Human Rights, as well as member states that have accepted its jurisdiction. The court has become more and more active throughout recent years,¹¹⁵ and although its decisions are not formally binding on member states, its precedents are generally followed.¹¹⁶ Indeed, the European system for protecting human rights has very much become a part of the larger legal framework of the EU. The ECJ has held that the law of the EU now includes the “protection fundamental of human rights,” with implications that member state actions in violation of these rules would be annulled.¹¹⁷ Furthermore, the ECJ has affirmed that these fundamental rights form an “integral” part of law derived from member state constitutional traditions, the European Human Rights Convention, and its protocols.¹¹⁸

It is evident that the EU has developed an impressive framework, through both international treaties and institutions, to ensure that human rights considerations are given the respect they deserve when considering trade policy. FTAA negotiators obviously cannot expect this same level of integration to emerge in the immediate future. A study of the EU system, however, strongly suggests that a multilateral framework is workable for a very expansive and economically diverse region. Much of the success in implementing such a model will depend on the willingness of leaders to commit to enforceable international standards.

B. The OAS

While re-creating the same elaborate system as the EU appears very attractive, it is unrealistic. Instead, the Americas should look at further enhancing the institutional framework that is already in place. The OAS,

found a family.

¹¹³ *Ibid.* at Article 13.

¹¹⁴ In the other member states implementing legislation is required to assure comparable protection. Smith, *supra* note 112 at 821.

¹¹⁵ *Ibid.* See B. Walsh “The European Court of Human Rights” (1987) 2 Conn. J. Int’l L. 271, 284.

¹¹⁶ T. Buergenthal, *International Human Rights in a Nutshell* (1983) at 111-12.

¹¹⁷ See Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419. (recognizing that community institutions must respect basic human rights).

¹¹⁸ Smith, *supra* note 112 at 822.

which has been designated as the primary implementing body for the FTAA, contains a structure for addressing such human rights concerns. Given the recent show of support at the 1998 Summit of the Americas, the OAS serves as a useful focal point for discussion. The Inter-American Commission on Human Rights (IACHR), which is responsible for implementing and enforcing the OAS regime, derives its power from two primary sources: firstly, the Charter of the OAS¹¹⁹ and the American Declaration of Rights and Duties of Man and secondly, the American Convention on Human Rights.¹²⁰ While the charter and the declaration apply to all OAS members, the convention system is binding only on those states that have ratified it.¹²¹ Under the American Declaration system, the IACHR issues country studies and can hear individual petitions.¹²² Adverse findings in such a case may result in a report to the General Assembly and a non-binding resolution.¹²³ Only petitions brought under the convention, however, may eventually be referred to the Inter-American Court of Human Rights for a binding decision if the state party has accepted the court's jurisdiction.¹²⁴ A state that does not comply with the court's ruling violates the convention.¹²⁵

There appears to be a growing support for this region-based model of protecting human rights. Originally, the concept of regional enforcement was frowned upon by the United Nations due to the perception that "it might detract from the perceived universality of human rights."¹²⁶ Eventually, however, as regional organizations developed, resistance by the United Nations decreased and in 1977, the General Assembly asked states not belonging to regional regimes to consider agreements that would establish them within their respective area.¹²⁷ Indeed, many have come to acknowledge the effect that general homogeneity and geographic proximity can have on promoting greater interdependence and cooperation.¹²⁸ This element of

¹¹⁹ *Charter of the Organization of American States* 30 April 1948, 2 U.S.T.2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 (entered into force 13 December 1951).

¹²⁰ *American Convention of Human Rights* 22 November 1969, OAS T.S. No. 36, at 1, OAS Off. Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1979), 9 I.L.M. 673(1970) (entered into force, 18 July 1978).

¹²¹ Smith, *supra* note 112, at 810.

¹²² M. J. Corbera, "In the Wrong Place, at the Wrong Time: Problems with the Inter-American Court of Human Rights Use of Continuous Jurisdiction" (1993) 25 Vand. J. Transnat'l. L., 946, (1993); *Ibid.*

¹²³ Corbera, *supra* note 123 at 928.

¹²⁴ *Supra* note 121 at Article 62.

¹²⁵ *Ibid.* at Article 68.

¹²⁶ B. H. Weston et al., "Regional Human Rights Regimes: A Comparison and Appraisal" (1987) 20 Vand. J. Transnat'l L. 585 at 588.

¹²⁷ *Ibid.* at 591.

¹²⁸ P. Stirling, "The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization" (1996) 11

cohesion is also conducive to more successful investigations and remedying of violations.¹²⁹ In establishing the OAS institutions to address human rights, the Americas have already taken a significant step. Perhaps the time is right to explicitly mandate regional adherence to some, if not all, of the OAS monitoring system of human rights.

One particular quality of the OAS, which may glean FTAA attention, is the potential for individual involvement. The Inter-American Convention allows petitions containing complaints of violations under the convention by a state party to be lodged by any person, any group of persons, and any non-governmental organizations legally recognized in one or more member states of the OAS.¹³⁰ Investigations are then conducted by the commission, which conducts more on-site investigations than any other similar body in the world. Following the investigations, the commission attempts to achieve friendly settlement between parties. One example of the commission's success was its investigation into the "Argentinean government's arbitrary detention of citizens in the 1980s," which resulted in "subsequent enforcement of the commission's recommendations concerning compensation."¹³¹

C. Further Possibilities

Individual participation in the field of international human rights is clearly not an entirely new concept. An existing regional framework that is capable of success is already in place. However, in order to ensure widespread community compliance with human rights, even stronger measures may be required. FTAA membership could require state ratification of a minimal number of regional human rights conventions or even key UN documents such as the International Covenant on Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights along with their Optional Protocols. Whether or not such a definitive course of action in the Americas is possible is uncertain, particularly in light of the general non-committal attitude of the United States – the region's most powerful player.

In its early stages of development, it is likely unrealistic to expect states to immediately embrace a free trade agreement which includes harsh penalties for non-compliance with international human rights norms. As discussed earlier, imposing swift trade sanctions in response to such

Am. U. J. Int'l L. & Pol'y 1.

¹²⁹ *Ibid.*

¹³⁰ *Supra* note 121 at Article 44.

¹³¹ Stirling, *supra* note 129 at 22–23.

violations is not always the appropriate answer, particularly for fragile developing economies. However, as recognized in the GATT, the threat of economic repercussions for human rights violations does have a place in free trade policy. Whether leaders choose to pursue this option in the early stages or at some later date, the issue deserves brief consideration.

Under the GATT, a party can only withdraw trade concessions when the practice in question could be characterized as a “negative subsidy” that confers an advantage or benefit on producers in the country concerned by reducing the costs of production. The fact that the practice is in violation of an international standard on labour rights, for example, is in and of itself insufficient. One option for the FTAA would be to allow countervailing duties to be imposed on a state, regardless of whether the action amounts to a negative subsidy. This method, however, has been criticized as being a largely arbitrary means of aiding the process of compliance in developing countries, since which practices will be targeted will be a function of the demand for the protection of the importing country, not the significance of the violation.¹³²

An alternative approach could be to allow parties to restrict trade in goods produced in a manner that is inconsistent with carefully defined human rights norms.¹³³ Under Article XX(e) of the GATT, restrictions or prohibitions are permitted on imports of products manufactured with prison labour.¹³⁴ The FTAA could build on this principle by including other “core” human rights or international worker’s rights as defined, for example, by Section 702 of the Third Restatement of Foreign Relations within the Second Geneva Protocol.¹³⁵ Leaders could later expand this list if the members obtained a majority vote. The general limitation on trade restrictions that already exists in the GATT could equally apply to the FTAA, namely that they not be applied in a discriminatory fashion and that they do not constitute a disguised restriction on trade.¹³⁶ In order to guard against arbitrary action, parties could be officially required to consult the appropriate overseeing body prior to imposing restrictions, whether it be the ILO, the Inter-American Court or some other forum designated by the parties.

V. CONCLUSION

THE AMERICAS ARE PRESENTED with an opportunity to break new ground on the necessary step of linking trade to fundamental social issues such as labour, the environment, and human rights. Whether this is achieved through existing international arrangements or even by creating a new

¹³² M. J. Trebilcock & R. Howse, *The Regulation of International Trade* (Routledge, London 1997) at 188-189.

¹³³ *Ibid.*

¹³⁴ *Supra* note 75 at Article XX(e).

¹³⁵ Stirling, *supra* note 129 at 39.

¹³⁶ Trebilcock & Howse, *supra* note 133 at 189.

framework that will be unique to the western hemisphere is still very much open to debate. Efforts in the NAFTA, the OAS, the EU, the WTO, and other institutions show that there is no shortage of possibilities and all can serve as a very important reference for negotiators. What is clear in these negotiations is that there are a number of different parties each with their own predisposition as to which path will be most appropriate. In light of this reality, leaders should keep an open mind to different ideas, and should not be overly reluctant to adopt a fresh line of thinking. Any hope of reaching a meaningful agreement will depend on it.