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Sustainable Development in the Negotiation of the FTAA

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Sustainable Development in the Negotiation of the FTAA

Marie-Claire Cordonier Segger

Abstract

First, I will briefly explain what is meant by hemispheric sustainable development law. Then, I will discuss the current progress of the FTAA from a sustainable development law perspective. To illustrate the links between trade liberalization, social and environmental law and policy in the Americas, I will briefly highlight potential social and environmental impacts and opportunities in several important areas of negotiations: services, intellectual property rights, competition law, government procurement and investment. (The directions of agricultural liberalization, market access and subsidies are also crucial to sustainable development, but are too extensive to discuss here). Then, I will consider the institutional questions from a sustainable development perspective, especially the potential directions for FTAA chapters on environmental and social issues, focusing especially on mechanisms for cooperation and dispute resolution. I will only briefly comment on institutional mechanisms for civil society participation, as these issues have been canvassed elsewhere, and are also addressed in this volume. Finally, since a large part of social and environmental issues are not directly linked to trade and investment, I will briefly discuss the development of other, parallel forums for hemispheric cooperation on the environmental and social challenges of the western hemisphere, and consider whether these forums are strong enough to address overlapping agendas, as well as the mechanisms for coordination between these forums and the trade liberalization treaty process.

SUSTAINABLE DEVELOPMENT IN THE NEGOTIATION OF THE FTAA

*Marie-Claire Cordonier Segger**

“We support . . . the FTAA . . . which will most effectively foster economic growth, the reduction of poverty, development, and integration through trade liberalization, contributing to the achievement of the broad Summit objectives.”¹

“Our goal is to achieve sustainable development throughout the Hemisphere.”²

INTRODUCTION

Governments of the Western Hemisphere plan to conclude a Free Trade Area of the Americas (“FTAA”) accord by 2005. If negotiations are successful, this FTAA will become the world’s largest trading group, covering over 850 million people and nearly a third of the world’s economic output. It is an important initiative, and could present either a barrier or a significant opportunity for sustainable development in the Americas.³

The Americas region shares more than just a commitment to integration through trade liberalization — it shares serious common social and environmental development challenges.⁴ According to the United Nations Economic Commission for Latin America and the Caribbean (“U.N. ECLAC”), 44% (220 million people) of the inhabitants of Latin America and the Caribbean live in poverty and 20% live in extreme poverty. The World Bank attests that the richest 10% earn 48% of the region’s

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1. Special Summit of the Americas: Declaration of Principles, Monterrey, Mex., Jan. 13, 2004, *available at* <http://www.state.gov/p/wha/rls/fs/28148.htm>.

2. Third Summit of the Americas: Declaration of Principles, Quebec City, Can., Apr. 22, 2001, *available at* http://www.ftaa-alca.org/Summits/Quebec/declara_e.asp [hereinafter Third Summit: Declaration of Principles].

3. *See generally* TOWARD FREE TRADE IN THE AMERICAS (Jose Manuel Salazar-Xirinachs & Maryse Robert eds., 2001) [hereinafter TOWARD FREE TRADE].

4. ORG. AM. STATES, ADVANCING IN THE AMERICAS: PROGRESS AND CHALLENGES: SUMMIT REPORT 2001-2003 (2004).

income, while the poorest 10% earn only 1.6%. The International Labour Organization (“ILO”) reports that fifty-seven million people in Latin America and the Caribbean are unemployed or underemployed, with eighty million informal workers in the Americas.

These economic challenges are coupled with serious environmental problems. According to the United Nations Environment Programme (“U.N. EP”), forests and other critical ecosystems continue to degrade at an unprecedented rate, and arable land and freshwater supplies are diminishing while vulnerability to natural disaster is increasing. Unsustainable urban development and natural resource extraction practices are affecting the health and quality of life of millions in the Western Hemisphere.

The FTAA is part of a broader initiative for closer cooperation in the Americas aiming to address such challenges. This initiative crystallized at the Miami Summit of the Americas in 1994 (“Miami Summit”). Democracy, trade liberalization, and sustainable development were adopted as the main thrusts of hemispheric integration, as reflected in the Miami Declaration of Principles.⁵

Sustainable development has economic, social, and environmental components. Countries increasingly perceive these as complementary international objectives rather than as unrelated or opposing disciplines. They appear both in binding “hard law” treaties and international judgments of the region and in the persuasive authority of “soft law” declarations and State practices. In the Miami Summit, the heads of State acknowledged that “social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly.”⁶ A special hemispheric summit took place in Bolivia in 1996 as a follow-up to the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.⁷ The Santa

5. First Summit of the Americas: Declaration of Principles, Miami, Florida, Dec. 11, 1994, *reprinted in* 34 I.L.M. 810 (1995) [hereinafter First Summit: Declaration of Principles].

6. *Id.*

7. See generally MARIE-CLAIRE CORDONIER SEGGER ET AL., INT’L INST. SUSTAINABLE DEV. & U.N. ENV’T PROGRAMME, ECOLOGICAL RULES AND SUSTAINABILITY IN THE AMERICAS (2002), available at http://www.iisd.org/pdf/2002/trade_ersa_en.pdf (last visited Jan. 31, 2004).

Cruz de la Sierra Special Summit of the Americas in 1996 established a blueprint for sustainable development.⁸ Leaders recognized the role that trade liberalization can play in promoting growth, seeking to do it in a way that also strengthens hemispheric social development and environmental cooperation. The Santa Cruz Declaration stated that “[d]evelopment strategies need to include sustainability as an essential requirement for the balanced, interdependent, and integral attainment of economic, social, and environmental goals.”⁹

The commitment to sustainable development in the Americas, at least in the declarations that give policy guidance to the hemispheric integration process, remains an overarching priority. The Quebec City Summit Declaration states clearly that, for heads of State, the “goal is to achieve sustainable development throughout the Hemisphere.”¹⁰

The Quebec City Summit also recognized the need for equilibrium between the economic, social, and environmental elements of the hemispheric integration process. Governments committed “to strengthen environmental protection and sustainable use of natural resources with a view to ensuring a balance among economic development, social development and the protection of the environment, as these are interdependent and mutually reinforcing.”¹¹ In the accompanying Plan of Action, they also committed to “[c]onsult and coordinate domestically and regionally, as appropriate, with the aim of ensuring that economic, social and environmental policies are *mutually supportive* and contribute to sustainable development, building on existing initiatives undertaken by relevant regional and international organizations.”¹²

After preliminary meetings of trade ministers, negotiations for new hemispheric trade rules were launched in the Santiago Summit of the Americas in 1998.¹³ The instrument launching

8. Summit Conference on Sustainable Development: Declaration of Principles, Santa Cruz de la Sierra, Bol., Dec. 8, 1996, *available at* <http://www.oas.org/EN/PROG/BOLIVIA/summit.hun> [hereinafter Santa Cruz Summit].

9. *Id.* art. 2.

10. Third Summit: Declaration of Principles, *supra* note 2.

11. *Id.*

12. *Id.*, Plan of Action at para. 9 (emphasis added).

13. To date, a progression of trade ministerial meetings have taken place beginning in Denver, Colorado in 1995. Further events were held in Cartagena, Colom. (1996), Belo Horizonte, Braz. (1997), San Jose, Costa Rica (1998), Toronto, Can.

these negotiations committed to “take into account the broad social and economic agenda contained in the Miami Declaration of Principles and Plan of Action with a view to raising living standards, to improving the working conditions of all people in the Americas and protecting the environment.”¹⁴ All subsequent policy direction given by Ministers to the negotiators has contained similar hortatory language. Indeed, the 2003 Miami FTAA 8th Ministerial Declaration:

reiterate[s] that the negotiation of the FTAA will continue to take into account the broad social and economic agenda contained in the Miami, Santiago, and Quebec City Declarations and Plans of Action with a view to contributing to raising living standards, increasing employment, improving the working conditions of all people in the Americas, strengthening social dialogue and social protection, improving the levels of health and education, and better protecting the environment.¹⁵

One deed has already made a significant impact in this regard. In an unprecedented move, ministers at the Buenos Aires trade ministerial released the draft text of the FTAA to the public, revealing the direction of the negotiations and opening the debate to civil society’s commentary and advice. In Quito in 2002 and Miami in 2003, ministers released the second and third drafts of the FTAA texts, permitting comparative analysis which might demonstrate areas where progress had been made and generate further recommendations.

Critics of the FTAA warn that as it is currently conceived, the agreement may have significant negative impacts on social and environmental sustainability.¹⁶ How can it be ensured that

(1999), Buenos Aires, Arg. (2001), Quito, Ecuador (2002), and, most recently, Miami, Florida (2003). For more information, see Free Trade Area of the Americas, FTAA Trade Ministerial Meetings, at http://www.ftaa-alca.org/Minis_e.asp.

14. Free Trade Area of the Americas: Fourth Trade Ministerial Meeting, Joint Declaration of Ministers, San José, Costa Rica, Mar. 19, 1998, at para. 4, available at http://www.ftaa-alca.org/ministerials/SanJose/SanJose_e.asp [hereinafter Joint Declaration of San José].

15. Free Trade Area of the Americas: Eighth Trade Ministerial Meeting, Declaration of Ministers, Miami, Florida, Nov. 20, 2003, available at http://www.ftaa-alca.org/Ministerials/Miami/declaration_e.asp.

16. See, e.g., HEMISPHERIC SOC. ALLIANCE, THE FTAA EXPOSED: A CITIZENS’ CRITIQUE OF THE NOVEMBER 2002 DRAFT OF THE FREE TRADE AREA OF THE AMERICAS (2003), available at <http://www.tradeobservatory.org/library/>. See also CITIZENS TRADE CAMPAIGN, COMMENTS OF THE CITIZENS TRADE CAMPAIGN TO THE COMMITTEE OF GOVERNMENT

economic policies such as the FTAA can best contribute to sustainable development? Could the FTAA accord be drafted to foster, rather than frustrate, sustainable development? If so, which substantive chapters of the FTAA, and which institutional arrangements, might best achieve this objective?

One of the premises of this Article is that for sustainable development to be achieved, economic, social, and environmental laws and policies can and should be “mutually supportive” in the Americas. For sustainable development, it is important to ensure that these three sets of law and policy are not working at cross purposes. There is a need to ensure that hemispheric trade and investment, human rights, and environmental cooperation processes can be, if not integrated, at least coherent.¹⁷ This can be done in two ways. First, it is important to find ways to ensure that the FTAA itself, as a legally binding keystone of closer economic cooperation in the Americas, will not frustrate social and environmental goals. In other words, the FTAA should clearly support sustainable development in the Americas in its institutions and its substantive provisions. It can contain provisions which link its economic deliverables to social and environmental results, and which ensure that in the interest of economic growth, it does not sacrifice environmental and social priorities. Second, it is also important for the legitimacy of the Summit process that one track of negotiations (such as trade and investment) not be perceived to be too far ahead of the others. In other words, it should be possible to demonstrate that environmental and social cooperation aspects of the Summit of the Americas process are also achieving substantive progress.

This Article will focus mainly on the first question. First, I will briefly explain what is meant by hemispheric sustainable development law. Then, I will discuss the current progress of the FTAA from a sustainable development law perspective. To illustrate the links between trade liberalization, social and environ-

REPRESENTATIVES ON THE PARTICIPATION OF CIVIL SOCIETY IN THE FREE TRADE AREA OF THE AMERICAS (2003), available at <http://www.citizenstrade.org/ftaa.php>.

17. For a survey of economic, environmental, and social challenges in the Americas, and recommendations for ways to address them, see generally MARIE-CLAIRE CORDONIER SEGGER ET AL., *INT’L INST. SUSTAINABLE DEV., TRADE RULES AND SUSTAINABILITY IN THE AMERICAS* (1999) [hereinafter CORDONIER SEGGER ET AL., *TRADE RULES*]; CORDONIER SEGGER ET AL., *supra* note 7; MARIE-CLAIRE CORDONIER SEGGER ET AL., *INT’L INST. SUSTAINABLE DEV. & ORG. AM. STATES, SOCIAL RULES AND SUSTAINABILITY IN THE AMERICAS* (2004) [hereinafter CORDONIER SEGGER ET AL., *SOCIAL RULES*].

mental law and policy in the Americas, I will briefly highlight potential social and environmental impacts and opportunities in several important areas of negotiations: services, intellectual property rights, competition law, government procurement and investment. (The directions of agricultural liberalization, market access and subsidies are also crucial to sustainable development, but are too extensive to discuss here). Then, I will consider the institutional questions from a sustainable development perspective, especially the potential directions for FTAA chapters on environmental and social issues, focusing especially on mechanisms for cooperation and dispute resolution. I will only briefly comment on institutional mechanisms for civil society participation, as these issues have been canvassed elsewhere,¹⁸ and are also addressed in this volume. Finally, since a large part of social and environmental issues are not directly linked to trade and investment, I will briefly discuss the development of other, parallel forums for hemispheric cooperation on the environmental and social challenges of the western hemisphere, and consider whether these forums are strong enough to address overlapping agendas, as well as the mechanisms for coordination between these forums and the trade liberalization treaty process.

I. HEMISPHERIC SUSTAINABLE DEVELOPMENT LAW

In 2002, at the Johannesburg World Summit for Sustainable Development (“WSSD”), world leaders assumed “a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection — at the local, national, regional and global levels.”¹⁹ Specifically, in the 2002 WSSD “Johannesburg Plan of Imple-

18. See generally Marie-Claire Cordonier Segger & Jorge Cabrera, *Green Smoke Signals: Public Participation in Americas Trade and Environment Regimes*, in HEMISPHERIC CIVIL SOCIETY (forthcoming 2004). See also M. Rivas, *ALCA y Participacion de la Sociedad Civil*, in *ALCA Y MEDIO AMBIENTE: IDEAS DESDE AMERICA LATINA* (Hernan Blanco et al. eds., 2003); Marie-Claire Cordonier Segger et al., *A New Mechanism for Hemispheric Cooperation on Environmental Sustainability and Trade*, 27 COLUM. J. ENVTL. L. 613 (2002); CORDONIER SEGGER ET AL., *SOCIAL RULES*, *supra* note 17; Eric Dannenmaier, *Trade, Democracy, and the FTAA: Public Access to the Process of Constructing a Free Trade Area of the Americas*, 27 FORDHAM INT’L L. J. ____.

19. *Report of the World Summit on Sustainable Development*, U.N. Dep’t Econ. & Social Affairs, Division Sustainable Dev., at para. 5, U.N. Doc. A/CONF.199/20 (2002), revised by U.N. Doc. A/CONF.199/20/Corr. 1 (2003).

mentation,” over 140 countries agreed to “continue to enhance the mutual supportiveness of trade, environment and development with a view to achieving sustainable development”²⁰ International law — its treaties, principles, and institutions — is an essential part of this agenda. The need to develop international law on sustainable development was identified in 1992 in Chapter 38 of the Agenda 21.²¹ Governments committed to the “further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns.”²² Governments also recognized the “need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of the developing countries”²³

What is sustainable development law? It is the body of legal principles, treaties, and instruments which govern the area of intersection between social, economic, and environmental law.²⁴ At a minimum, coherence between these fields should be encouraged for sustainable development. Many national laws and judgments have fully acknowledged a connection between environmental protection, economic development, and human rights.²⁵ Such linkages, however, are also particularly important

20. *Id.* at para. 97.

21. *Report of the United Nations Conference on Environment and Development*, U.N. Department of Economic and Social Affairs, Agenda Item 21, at ch. 38, U.N. Doc. A/CONF.151/26 (Vol. III) (1992).

22. *Id.*

23. *Id.* at ch. 39.

24. See Marie-Claire Cordonier Segger, *Significant Developments in Sustainable Development Law and Governance: A Proposal*, in NATURAL RESOURCES FORUM (forthcoming 2004). Sustainable development law is further defined in MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES AND PROSPECTS* (forthcoming 2004). On the process of development of international law in this manner, see Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L. L. 19 (2000). See also Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 207, 214-15 (Michael Byers ed., 2001).

25. See, e.g., Charan Lal Sadhu v. Union of India (1990) S.C.R. 1480 (India); Koolwal v. Rajasthan A.I.R. 1998, Raj. 2 (India) (addressing environmental pollution as an issue affecting the human right to life). See also Leatch v. Nat'l Parks & Wildlife Serv. & Shoalhaven City Council, 81 LGERA 270 (1993) (Austl.); Vellore Citizens Welfare Forum v. Union of India (1996) 5 S.C.R. 647 (India); Balankulama v. The Sec'y, Ministry

at international levels, where normal over-arching governance mechanisms that should serve to ensure legal coherence (such as high courts and parliaments) are still comparatively weak or non-existent. Though the role of international law in sustainable development is still being defined,²⁶ much progress has been made in recent decades. Indeed, recent scholarship has identified a growing corpus of legal principles, treaties, and instruments that integrate international environmental, social, and economic law.²⁷

Perhaps more explanation is helpful at this point. Sustainable development as a concept has been vague in the past.²⁸ This was perhaps deliberate to ensure that it could be relevant in different local and global contexts, for many diverse cultures and regions. But it is my view that this vagueness has almost outlived its usefulness, particularly on the international level. Where consensus exists, defined by treaty, custom or other means, international principles, treaties, and organizations have emerged to govern sustainable development cooperation between countries.

of Indus. Dev., 7(2) SAER, June 2000 (Supreme Court, Sri Lanka); *Minors Oposa v. Sec'y of the Dep't of Env't and Natural Res.*, 33 I.L.M. 173 (1994) (Phil.).

26. For a careful legal examination of the status of sustainable development in international law, see Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES* 19 (Alan Boyle & David Freestone eds., 1999). See also Philippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 53 (Winfried Lang ed., 1999); *SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE* (Konrad Ginther et al. eds., 1995); M. McGoldrick, *Sustainable Development: The Challenge to International Law*, *REV. EUR. CMTY. INT'L ENVTL. L.* 3 (1994); Philippe Sands, *International Law in the Field of Sustainable Development*, 65 *BRIT. Y.B. INT'L L.* 303 (1994).

27. On the process of development of international law in this manner, see Brunnee & Toope, *supra* note 24. See also Lowe, *supra* note 24, at 214-15.

28. One of the most compelling explanations for the early lack of clarity was presented by Christopher D. Stone in *Deciphering Sustainable Development*, 69 *CHI.-KENT L. REV.* 977 (1994).

[T]he term "sustainable development" is not merely vague — a masker of failed consensus — the way key terms in the U.S. Constitution are vague and require case by case elaboration. "Sustainable development" functions to gloss over not only failed consensus, but a latent collision course. The chasm is less a failure of language . . . than a poignant tussle between, roughly, Rich and Poor. The indigenous native who extinguishes a species for food is not trapped in orthodox semantics of conventional prematerialist homo economus' cost-benefit analysis. He is trapped in hunger (just as we, the rich, are so often trapped in moral blindness). There is no reason to suppose that killing off a species pains him less than it does us.

Id. at 978-79.

One proposal has particular coherence in this regard. Perhaps sustainable development is not simply a *principle* of international law itself. Rather, it has been argued convincingly that sustainable development is a normative concept operating in the interstices between primary norms when they overlap or conflict, such as the right to development, or the duty to protect the environment — an “interstitial norm.”²⁹ Once they have been articulated, such interstitial norms operate as modifying norms, bearing upon the primary norms that surround them. They also have a broader significance as reconciling concepts, exercising great influence on the system of international law and governance in these areas.³⁰ If this is so, it is likely this modifying norm is articulated in order to point negotiations, legal instruments, and especially, dispute resolution regimes towards a consistent, coherent approach that balances economic and social development, and environmental protection. The legal rules and principles that are influenced in such a way by the interstitial norm of sustainable development can, in effect, make up the body of what is now becoming known as “sustainable development law.”

Is there a conflict between a description of sustainable development as an “interstitial norm,” a meta-principle that operates at the interstices between social, economic, and environmental norms of international law, and sustainable development as an area of law? I do not believe there is. Rather, it is a question of the stage of development of the regimes. Principle 4 of the 1992 Rio Declaration states that in “order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”³¹ Nevertheless, not all economic or social law requires environmental expertise, or vice versa.³² Sus-

29. See Lowe, *supra* note 24, at 214-15.

30. See *id.*

31. *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Principle 4, at U.N. Doc. A/CONF.151/6 (1992), revised by U.N. Doc. A/CONF.151/6/Rev.1, (1992). See also *Stockholm Declaration on the Human Environment*, U.N. Conference on the Human Env't, at Principle 13 (1972).

32. The important insight is that international sustainable development law is not about the environment alone. It is not another “softer” word for international environmental law, and does not simply refer to environmental law for developing countries, either. While international environmental law is extremely important and must be strengthened, international sustainable development law directly addresses the key concept of “needs, in particular the essential needs of the world’s poor, to whom overwhelming priority should be given.” See WORLD COMM'N ENV'T DEV., OUR COMMON

tainable development requires coherence between social, economic, and environmental law at the international level, not further confusion and complexity. Only certain instruments in each regime take into account the objectives or link with the others in practice. At the area of intersection between these laws, where this interstitial norm is used most often, and is most necessary, a corpus of sustainable development law now exists. Sustainable development is both the concept used to mediate at the interstices of the three fields of law and their respective norms, and a general term for the law that has developed in this area of overlap.

International legal principles related to sustainable development have been defined. A myriad of legal instruments have been developed to carry them forward. Recently, based on prior work by the U.N. Commission for Sustainable Development and other bodies,³³ the International Law Association Committee on

FUTURE (1987). As such, international environmental treaties are not the only locus where international sustainable development law must be practiced. Indeed, not all aspects of international environmental law are also international sustainable development law. For example, animal rights, the conservation of "charismatic mega-fauna," and trans-boundary environmental disputes do not necessarily address sustainable development problems. See generally SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW, *supra* note 26.

33. See *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development*, U.N. Div. Sustainable Dev. for Comm'n on Sustainable Dev., 4th Sess., (1996), available at <http://www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm>; INT'L L. ASS'N, THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW (Subrata Chowdhury et al. eds., 1992); SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE, *supra* note 26; INT'L L. ASS'N, INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE (Friedl Weiss et al. eds., 1997); *Position Papers on International Environmental Law Aimed at Sustainable Development*, U.N. EP (1997); *Position Papers on International Environmental Law Aimed at Sustainable Development*, U.N. EP (Montevideo Programmes II and III 2000); *Earth Charter* (2000); R. D. MUNRO & J. G. LAMMERS, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (1986); *Rio Declaration*, *supra* note 31; *Declaration on International Economic Co-operation, in particular the Revitalization of Economic Growth and Development of the Developing Countries*, U.N. GAOR, 18th Special Sess. Int'l Econ. Cooperation, S-18/3 (1990); *Report of the World Conference on Human Rights*, U.N., U.N. Doc. A/CONF.157/24 (1993); *Report of the International Conference on Population and Development*, U.N., U.N. Doc. A/CONF.171/13 (1994); *Report of the Fourth World Conference on Women*, U.N., U.N. Doc. A/CONF.177/20 (1995), revised by U.N. Doc. A/CONF.177/20/Rev.1 (1996); *Report of the World Summit for Social Development*, U.N. Dep't Econ. & Soc. Affairs, U.N. Doc. A/CONF.166/9 (1995); *Agenda for Development*, U.N. Secretary General (1995), available at http://www.un.org/Docs/SG/ag_index.htm. Environmental law experts have made efforts to clarify these principles. See e.g., WORLD CONSERVATION UNION & INT'L COUNCIL ENVTL. L., DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT (2d ed. 2000).

the Legal Aspects of Sustainable Development has elaborated a set of "Principles of International Law for Sustainable Development."³⁴ These are becoming part of the general body of international law.

Much remains to be done, however. International law is not only about principles. It is also about regimes for cooperation — deliberately woven, financed, and monitored by governments. And in Johannesburg, world leaders emphasized the need to facilitate the implementation of Agenda 21 and the outcomes of the WSSD "through the regional commissions and other regional and sub-regional institutions and bodies."³⁵

Trade and investment can be powerful engines for regional economic growth and development. According to estimates from the U.N. ECLAC, if current trends continue, the Western Hemisphere will be the world's largest market with more than 850 million consumers buying U.S.\$13 trillion in goods and services.³⁶ It has a combined gross domestic product ("GDP") of U.S.\$9 trillion, representing 34.7% of the world's GDP per capita and 29.6% of its market, though it has only 13.1% of the world's population. The economy of Latin America and the Caribbean grew by 1.5% in 2003, and is expected to grow by 3.5% in 2004. In 1996, total trade among the potential members of the FTAA was over U.S.\$2.4 trillion, which is over 22% of world trade.

Trade rules can have deep structuring impacts on a country's or a region's economic development. Debate over the positive or negative impacts of trade-induced economic growth on

34. The principles are: (1) the duty of States to ensure sustainable use of natural resources; (2) equity and the eradication of poverty; (3) common but differentiated obligations; (4) precautionary approach to human health, natural resources, and ecosystems; (5) public participation and access to information and justice; (6) good governance; and (7) integration and interrelationship, particularly in relation to human rights and social, economic, and environmental objectives. These proposed principles, taken together, provide considerable guidance for jurists seeking ways to balance conflicting or overlapping social, environmental and economic obligations. See *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 INT'L ENVTL. AGREEMENTS: POLITICS, LAW AND ECON. 211 (2002). See also Nico Schrijver & Friedl Weiss, *Editorial*, *id.* at 105; INT'L L. ASS'N, REPORT OF THE EXPERT GROUP ON IDENTIFICATION OF PRINCIPLES OF INTERNATIONAL LAW FOR SUSTAINABLE DEVELOPMENT (1995); INT'L L. ASS'N, REPORT OF THE SIXTY-SECOND CONFERENCE 1-11, 409-87 (1987).

35. *Report of the World Summit on Sustainable Development*, *supra* note 19, at para. 158.

36. See *Equity, Development and Citizenship*, U.N. Economic Commission for Latin America and the Caribbean, 28th Sess., U.N. Doc. LC/G.2071 (2000).

the environment and society is still ongoing.³⁷ Sectoral studies have shown that trade-induced growth can lead to increased depletion of natural resources, increased levels of pollution and related public health problems, and loss of habitat and species.³⁸ Human rights and social development advocates are also concerned that trade rules may erode hard won social programs and human rights laws, without bringing clear benefits to the most vulnerable or poverty stricken communities.³⁹ On the other hand, trade holds the promise of increased prosperity and constitutes a powerful tool that can contribute significantly to sustainable development, especially through international cooperation.⁴⁰ There is a need to identify legal and policy options consistent with both trade liberalization and sustainability. The use of incentives and economic instruments to promote sustainable development, along with a strong environmental and social cooperation agenda, could do much to assure a higher quality of life, health, employment, and environmental protection in the Americas.

Regional economic agreements can integrate social and environmental concerns in different ways. Parties to such accords can establish parallel treaties on social and environmental cooperation; this is often done in simple free trade agreements. Examples will be provided below. They can also establish regional integration frameworks to provide links between separate economic, environmental, and social cooperation instruments and institutions, either through regular reporting relations among parallel actors or through an overall coordinating body. These will be explored below. Another approach, which has recently evolved, is that of including chapters on environmental and social issues in the body of the trade agreement, with access to

37. See, e.g., CENTRE INT'L SUSTAINABLE DEV. LAW, REPORT ON THE AMERICAS TRADE AND SUSTAINABLE DEVELOPMENT FORUM (forthcoming 2004) [hereinafter REPORT ON THE AMERICAS].

38. See BEYOND THE BARRICADES: AN AMERICAS SUSTAINABILITY AGENDA AND THE FTAA, INT'L INST. SUSTAINABLE DEV. (Marie-Claire Cordonier Segger & Maria Lechner Reynal eds., forthcoming 2004) [hereinafter BEYOND THE BARRICADES]. See also ALCA Y MEDIO AMBIENTE, *supra* note 18; TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: LATIN AMERICAN AND CARIBBEAN PERSPECTIVES, U.N. ENV'T PROGRAMME (Enrique Leff & Mindahi Basúda eds., 2001).

39. See, e.g., JOSEPH E. BRENNER ET AL., CTR. POLICY ANALYSIS TRADE & HEALTH, THE FTAA: HEALTH HAZARD FOR THE AMERICAS? (2003).

40. See generally TOWARD FREE TRADE, *supra* note 3.

equivalent dispute settlement provisions.⁴¹ These will also be explored further below in the context of potential models for the FTAA.

To become instruments of sustainable development law, regional trade, and investment, treaties and regimes can and should take social or environmental priorities into account, whether it is through parallel or integrated provisions. This policy coordination does not, of course, replace other regional instruments that provide frameworks for specialized cooperation to address particular social and environmental challenges. Indeed, existing international principles, treaties, and institutions in all fields — social, economic, and environmental law — should be taken into account when developing regional sustainable development proposals in the FTAA to avoid duplication. But governments of the Americas are coming under increasing pressure to address sustainable development issues, specifically during their negotiations of trade law.

As a result, a significant opportunity has emerged for sustainable development in the context of the FTAA treaty regime itself. This can be accomplished through two principal strategies. First, the parties can ensure that new institutional mechanisms are set in place to pursue proactive environmental and social cooperation agendas as they relate to hemispheric integration. Second, parties to an eventual FTAA can consider the sustainable development implications of each aspect of the substantive trade negotiations agenda, and ensure that potential impacts are minimized or mitigated while potential opportunities for “triple-wins” (on economic, environmental, and social results) are maximized. This Article will address each in turn.

II. *SUSTAINABLE DEVELOPMENT IN THE FTAA*

As mentioned above, governments have reaffirmed, in the FTAA context, “the broad social and economic agenda contained in the Miami, Santiago, and Quebec City Declarations and Plans of Action with a view to contributing to raising living

41. See generally CORDONIER SEGGER ET AL., *SOCIAL RULES*, *supra* note 17. See also ADOLFO CIUDAD REYNAUD, *INT’L LABOR ORG., LABOUR STANDARDS AND THE INTEGRATION PROCESS IN THE AMERICAS* (2001); DANIEL MARTINEZ ET AL., *INT’L LABOUR ORG., LAS DIMENSIONES LABORALES DE LA INTEGRACION ECONOMICA EN AMERICA LATINA Y EL CARIBE: WORKING PAPER No. 8* (1995).

standards, increasing employment, improving the working conditions of all people in the Americas, improving the levels of health and education and better protecting the environment.”⁴² At their Seventh Meeting in Quito, Ecuador in 2002, trade ministers reiterated that one of their general objectives “[was] to strive to make trade liberalization and environmental policies in the Americas mutually supportive, taking into account work undertaken by the World Trade Organization (“WTO”) and other international organizations, and to promote sustainable development in the Hemisphere.”⁴³ They also recognized “the importance of strengthening throughout the Hemisphere, national actions and cooperation in order to ensure that the benefits of trade liberalization, the protection of the environment, and human health are mutually supportive.”⁴⁴

FTAA negotiations have faced challenges, however, in addressing contentious environmental and social policy aspects of the trade rules. This situation has much to do with fears, mostly in Latin America, that environmental or social provisions in the FTAA will be used by Canada and the United States to justify protectionist measures. Also, it is feared that higher environmental or labor standards and regulations will undermine the competitiveness of Latin American and Caribbean businesses. Finally, there is a fear of unilateral U.S. human rights or environment-related trade sanctions (as experienced by Mexico and other countries in the General Agreement on Tariffs and Trade (“GATT”)/WTO system in the 1990s). This remains a powerful psychological hurdle to be removed if the FTAA is to address sustainable development issues.

These fears must be overcome if progress in this area is to be achieved. First, parties to the FTAA must provide guarantees that social or environmental provisions will not be used to disguise protectionism, while at the same time not permitting public interest measures to become vulnerable within the FTAA. Second, in instances where competitiveness concerns can be demonstrated through quantitative studies, larger economies may have to “trade” market access and other benefits for recog-

42. Free Trade Area of the Americas: Seventh Trade Ministerial Meeting, Declaration of Ministers, Quito, Ecuador, Nov. 1, 2002, at ¶ 2, available at http://www.ftaa-alca.org/Ministerials/Quito/Quito_e.asp.

43. *Id.* at para. 7.

44. *Id.* at para. 8.

dition of standards. In the long term, better environmental and social conditions should benefit everyone in the Western Hemisphere, especially the economies where poverty is most degrading and persistent. Hemispheric financial mechanisms may also be needed to improve standards so that already disadvantaged economies do not find themselves further marginalized by new social or environmental trade restrictions. Moreover, reliable, *mutually supportive* hemispheric trade, human rights, and environmental rules (and a strong dispute settlement mechanism) are the very instruments that can best control unilateral impositions.

The next section briefly reviews existing experiences in the Americas, especially at the sub-regional levels, in order to identify new environmental and social law and policy options for trade and sustainable development agenda.⁴⁵ Such provisions can support trade liberalization, social development, and environmental protection.

A. *A Review of Existing Approaches*

The FTAA is not being negotiated in a legal vacuum. The current hemispheric process can be viewed from different perspectives. Traditional international relations theory divides the Western Hemisphere into sharply defined areas of North and Latin America (with an addition of "the Caribbean" in *voce sotto*). Academic and economic debates sometimes appear to perceive the FTAA as another form of North American Free Trade Agreement ("NAFTA") accession,⁴⁶ or focus overmuch on costs and benefits of liberalization in the FTAA as opposed to the WTO (as though one had to choose between the regional and global co-

45. For further elaboration of this analysis, see *BEYOND THE BARRICADES*, *supra* note 38. See also *TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: LATIN AMERICAN AND CARIBBEAN PERSPECTIVES*, *supra* note 38; *ALCA Y MEDIO AMBIENTE*, *supra* note 18; *REPORT ON THE AMERICAS*, *supra* note 37.

46. Ana Maria de Aguinis, *Can MERCOSUR Accede to NAFTA? A Legal Perspective*, 10 *CONN. J. INT'L L.* 597, 609 (1995). See also *GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE* (Carolyn L. Deere & Daniel C. Esty eds., 2002) [hereinafter *GREENING THE AMERICAS*]; Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: A Work in Progress*, 14 *NW. J. INT'L L. & BUS.* 493, 513-14 (1994); Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 *VA. J. INT'L L.* 539 (1995); Sidney Weintraub, *The NAFTA and Developing Countries, in NAFTA AS A MODEL OF DEVELOPMENT: THE BENEFITS AND COSTS OF MERGING HIGH AND LOW WAGE AREAS* 68, 77, 81-83 (Richard S. Belous & Jonathan Lemco eds., 1995).

operation).⁴⁷

In practice, however, the FTAA is being deliberately⁴⁸ built upon advances achieved in *five* sub-regional trade agreements: the Southern Common Market (“MERCOSUR”), the Andean Community (“CAN”), the Caribbean Community (“CARICOM”), the Central American Common Market (“MCCA”), and the NAFTA.⁴⁹ Each of these sub-regional arrangements addresses the links between social, environmental, and economic law and policy differently.⁵⁰

The economies of the Americas are also connected by a complex web of standards, rules, schedules, and responsibilities, including WTO membership, the ongoing process of liberalization under the Latin American Integration Agreement (“LAIA”),⁵¹ and hundreds of evolving trade and investment ac-

47. See, e.g., Carlos A. Paranhos, *Regional and Inter-Regional Trade and Environment Issues in Latin America*, in *TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: VIEWS FROM SUB-SAHARAN AFRICA AND LATIN AMERICA* (Peider Konz et al. eds., 2000). As pointed out in a recent WTO study on regionalism and the world trading system, the GATT rules on customs unions and free-trade areas reflect the desire to provide for such agreements while at the same time ensuring their compatibility with the multilateral trading system and the trade interests of third countries. See WORLD TRADE ORG., *REGIONALISM AND THE WORLD TRADING SYSTEM* (1995); WORLD TRADE ORG., *DECISION ON DIFFERENTIAL AND MORE FAVOURABLE TREATMENT, RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES* (1979). Other provisions that apply to non-reciprocal unilateral preferential schemes in favor of developing countries and to agreements among developing countries are to be found in Part IV of GATT and in the 1979 enabling clause.

48. See Joint Declaration of San José, *supra* note 14, at para. 2 (noting “the widening and deepening of existing subregional and bilateral arrangements free trade agreements”).

49. Chief among the active regional trade agreements include Agreement on Andean Subregional Integration, May 26, 1969, in *BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW* 597 (Stephen Zamora & Ronald A. Brand eds., 1990) (consisting of Colom., Venez., Bol., Ecuador and Peru); Treaty Establishing the Caribbean Market, July 4, 1973, *in id.* at 647 (consisting of the English speaking countries of the Caribbean); Annex to the Treaty Establishing the Caribbean Market, July 4, 1973, *in id.* at 660; General Treaty on Central American Economic Integration, Dec. 13, 1960, *in id.* at 529 (consisting of El Sal., Hond., Nicar., Costa Rica and Guat.); Treaty Establishing A Common Market, Mar. 26, 1991, 30 I.L.M. 1041 (consisting of Arg., Braz., Para., and Uru.); North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 107 Stat. 2057, 32 I.L.M. 605 [hereinafter NAFTA]; Treaty on Free Trade between the Republic of Columbia, the Republic of Venezuela, and the United Mexican States, June 13, 1994, available at http://www.sice.oas.org/Trade/G3_E/G3E_TOC.asp.

50. See generally CORDONIER SEGGER ET AL., *TRADE RULES*, *supra* note 17. See also Marie-Claire Cordonier Segger & Nicola Borregaard, *Sustainability and Hemispheric Integration: A Review of Existing Approaches*, in *GREENING THE AMERICAS* 307, *supra* note 46.

51. In 1960, the Treaty of Montevideo also established the Latin American Free

cords.⁵² Several of the newer bi-lateral agreements also offer interesting models for ways that future free trade accords may address social and environmental issues.⁵³

As such, existing sub-regional and bi-lateral models provide a useful starting point for analysis of potential trade provisions for the Americas.⁵⁴ They present diverse and often innovative policy solutions, which have been designed for the conditions and problems of the region. Each mechanism was negotiated by the Americas' governments, and represents a set of expectations, as well as a significant body of experience and policy experimentation which might provide a model for a potential regional cooperation mechanism.

As is explored in the following section, NAFTA contains various innovative provisions related to sustainable development, and in parallel, also includes the North American Agreement for Environmental Cooperation ("NAAEC")⁵⁵ and the North Ameri-

Trade Association (with the unfortunate acronym of "LAFTA," in English), a free trade area with a mandate to cut tariffs among its members on a limited list of products, while each member maintained its own barriers toward non-LAFTA countries. After twenty years, LAFTA was re-cast as the Latin American Integration Association. Intra-LAIA exports have grown, in relation to total exports, from 11.9% in 1991 to 17% in 1995. The LAIA integration process is ongoing and by 2005 trade among LAIA members will be mostly under preferential terms. See Daniel M. Ferrere, *New Trends in Latin American Foreign Trade: The LAIS and Its Work*, 19 INT'L LAW. 933 (Summer 1985).

52. Discussions have also been held between Chile and CARICOM, Chile and CACM, CACM and MERCOSUR, CAN and MERCOSUR, Venezuela and MERCOSUR, Mexico and MERCOSUR, Mexico and the northern triangle countries in Central American, Mexico and Nicaragua, Mexico and CACM as a whole, Mexico and Peru, and Mexico and Ecuador. Trinidad and Tobago expressed interest in joining NAFTA, and Chile and Mexico explored the potential for a "NAFTA-plus" agreement.

53. See generally CORDONIER SEGGER, *SOCIAL RULES*, *supra* note 17. See also BEYOND THE BARRICADES, *supra* note 38; TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: LATIN AMERICAN AND CARIBBEAN PERSPECTIVES, *supra* note 38.

54. A brief survey of these agreements may also clarify the state of existing environmental and social mandates in the Americas, limiting potential for overlap and duplication in suggested areas for hemispheric cooperation. After all, the FTAA should try to avoid launching new initiatives in areas that are already being effectively addressed on a sub-regional level. Nevertheless, it must be noted that the existence of a cooperation instrument on paper, particularly in the Americas, does not necessarily mean that a problem is being addressed in practice. Further research and institutional capacity assessment is needed to identify resources, coordination, and capacity-building needs required to ensure that these instruments can effectively fulfill their mandates.

55. North American Agreement on Environmental Cooperation, Sept. 9, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 (1993) [hereinafter NAAEC]. For commentary on this aspect and its relation to the FTAA, see GREENING THE AMERICAS, *supra* note 46.

can Agreement on Labor Cooperation (“NAALC”).⁵⁶ Building on a similar model, there are environmental side agreements to the more recent Canada-Chile Free Trade Agreement (“Canada-Chile FTA”)⁵⁷ and the Canada-Costa Rica Free Trade Agreement (“Canada-Costa Rica FTA”).⁵⁸ There are also labor side agreements in the Canada-Chile FTA⁵⁹ and in the Canada-Costa Rica FTA,⁶⁰ the latter referring to specific obligations in the 1998 ILO Declaration on Fundamental Principles and Rights at Work (“ILO Declaration on Fundamental Principles”).⁶¹

As will also be explored below, MERCOSUR, CAN, and the MCCA have taken a more structured, institutional approach to both environmental cooperation⁶² and socio-laboral cooperation.⁶³ In these sub-regions, though trade and investment law

56. North American Agreement on Labor Cooperation, Sept. 13, 1993, Can.-Mex.-U.S. [hereinafter NAALC], available at <http://www.naalc.org>. See also COMM’N LABOR COOPERATION, COMPARATIVE GUIDE TO LABOR AND EMPLOYMENT LAWS IN NORTH AMERICA: LABOR RELATIONS LAW IN NORTH AMERICA (2000); Kevin Banks, *Civil Society and the North American Agreement on Labor Cooperation*, in LINKING TRADE, ENVIRONMENT AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES 195 (John J. Kirton & Virginia W. Maclaren eds., 2002).

57. Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile, Dec. 5, 1996, 36 I.L.M. 1079 [hereinafter Canada-Chile FTA]. The environmental side agreement is the Agreement on Environmental Cooperation between the Governments of Canada and the Republic of Chile, Feb. 6, 1997, 36 I.L.M. 1196 [hereinafter Canada-Chile AEC].

58. Free Trade Agreement between the Government of Canada and the Government of the Republic of Costa Rica, Apr. 23, 2001 [hereinafter Canada-Costa Rica FTA], available at <http://www.sice.oas.org/Trade/cancr/English/cancrin.asp>. The environmental side agreement is the Agreement on Environmental Cooperation between the Government of Canada and the Government of the Republic of Costa Rica, Apr. 23, 2001 [hereinafter Canada-Costa Rica AEC], available at <http://www.sice.oas.org/Trade/cancr/English/enve.asp>.

59. See Agreement on Labour Cooperation between the Governments of Canada and the Republic of Chile, Feb. 6, 1997, 36 I.L.M. 1216 [hereinafter Canada-Chile LCA]. For a recent review of this Agreement, see Ministerial Council Report on the Three-Year Review of the Canada-Chile Agreement on Labour Cooperation (2002), available at <http://labor.hrdc-drhc.gc.ca>.

60. See Agreement on Labour Cooperation between the Government of Canada and the Government of the Republic of Costa Rica, Apr. 23, 2001 [hereinafter Canada-Costa Rica, LCA], available at <http://www.sice.oas.org/Trade/cancr/English/labore.asp>.

61. ILO Declaration on Fundamental Principles and Rights at Work, 86th Sess., June 1998 [hereinafter ILO Declaration on Fundamental Principles], available at http://echo.ilo.org/pls/declaris/DECLARATIONWEB.INDEXPAGE?var_language=en.

62. See Cordonier Segger & Borregaard, *supra* note 50, at 307-26. See also CORDONIER SEGGER ET AL., *supra* note 7.

63. See generally CORDONIER SEGGER ET AL., SOCIAL RULES, *supra* note 17. See also REYNAUD, *supra* note 41; MARTINEZ ET AL., *supra* note 41.

provisions can take sustainable development issues into account, most sub-regional social and environmental issues are directly addressed by particular cooperation mechanisms established as part of the overall integration project. For example, the MERCOSUR Socio-Laboral Commission is part of the general MERCOSUR regional integration system,⁶⁴ and CAN's Committee of Andean Environmental Authorities is part of the general process of CAN cooperation.⁶⁵ CARICOM, due in part to its global links, is slightly different. Most Caribbean environmental and social cooperation takes place in the context of global programs for regional seas or environmental management, though their activities extend to the whole community and have a place in its structure.

Finally, the new U.S.-Chile Free Trade Agreement ("U.S.-Chile FTA") contains chapters on both environment and labor issues.⁶⁶ This model specifically references concrete commitments that will be delivered as part of the agreement, though it also does not prevent further environmental and social cooperation outside the context of the trade treaty.

In the next section, I will briefly review the cooperation programs and institutions that each of the previously mentioned regimes has established to address social and environmental issues within the context of their economic integration and free trade projects.

1. The MERCOSUR

a. MERCOSUR Environmental Cooperation Regimes

In the MERCOSUR, meetings between the environmental ministers of the four parties (Uruguay, Paraguay, Argentina and Brazil) have laid a foundation for environmental cooperation.⁶⁷ The need for closer sub-regional environmental cooperation was

64. See Oscar Ermida Uriarte, *La Ciudadanía Laboral en el MERCOSUR*, XLI *DERECHO LABORAL* No. 190 (1998).

65. Statement of the Andean Environmental Authorities, July 3, 2001, at <http://www.comunidadandina.org/ingles/document/Quito3-7-01.htm>.

66. Office of the United States Trade Representative, Free Trade with Chile: Summary of the U.S.-Chile Free Trade Agreement, available at http://www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile_summary.pdf (last visited Feb. 15, 2004).

67. See PEDRO TARAK, BASES PARA LA ARMONIZACIÓN DE EXIGENCIAS AMBIENTALES EN EL MERCOSUR — EL MEDIO AMBIENTE EN EL MERCOSUR 18 (1995). See also INTER-AM. DEV. BANK, BACKGROUND STUDIES REPORT ATN/II-5109-96, ENVIRONMENTAL MAN-

recognized early on in the MERCOSUR process. The Preamble to the Treaty of Asuncion⁶⁸ acknowledges that the integration of national markets and the resulting creation of a common market have to be achieved by the preservation of the environment via the most effective use of the resources available.⁶⁹ The Treaty at Asuncion refers to the need to coordinate macroeconomic and sectoral policies of the parties in order to determine the appropriate areas of competence and harmonize their legislation in the relevant areas in order to strengthen the integration process.⁷⁰ Indeed, the MERCOSUR has generated a series of norms harmonizing qualitative characteristics, including the sanitary and phyto-sanitary qualities of particular products (such as food additives, containers in direct contact with food, labelling, insecticide, and fungicide residues in agricultural products). In terms of coordination of sectoral policies, a series of MERCOSUR norms, such as the Agreement on the Transport of Dangerous Goods and Sanctions Regime, the Sanitary and Phyto-Sanitary Agreement, and Basic Directives on Environmental Policy, have also been promulgated.⁷¹

In addition, the MERCOSUR has also developed a special trajectory of environmental cooperation. The 1992 Canela Declaration created an informal working group, the Reunion Especializada en Medio Ambiente ("REMA"), to study environmental laws, standards, and practices in the four countries. This forum evolved into the creation of a "Sub-Grupo No. 6" on the environment, one of the recognized technical working bodies of the MERCOSUR. This group examines issues such as environment and competitiveness, non-tariff barriers to trade, and common systems of environmental information. It provides mechanisms for direct participation by civil organizations and technical experts, in particular through informal consultations held before every meeting of Sub-Grupo No. 6. The group negoti-

AGEMENT IN THE SOUTHERN CONE: A STUDY OF THE LEGAL AND INSTITUTIONAL FRAMEWORK (1996).

68. Southern Common Market (MERCOSUR) Agreement, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041 [hereinafter Treaty of Asuncion].

69. *Id.* at pmb1.

70. *Id.* art. 1.

71. See generally Daniel E. Ryan, *MERCOSUR and the Environment*, in TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: VIEWS FROM SUB-SAHARAN AFRICA AND LATIN AMERICA, *supra* note 47.

ated a draft MERCOSUR Environmental Protocol,⁷² and in 2001, approved the MERCOSUR Framework Agreement on the Environment.⁷³ This agreement, upon ratification by Member States, will be added as a decision of the *Consejo del Mercado Común* [Common Market Council] to the Treaty of Asuncion.

The 2001 MERCOSUR Framework Agreement on the Environment⁷⁴ ("Framework Agreement") is a comprehensive sustainable development law treaty, establishing a shared objective of "sustainable development and environmental protection through the development of economic, social and environmental dimensions, contributing to a better quality of environment and life for the people."⁷⁵ It contains several interesting provisions. The text of the Framework Agreement provides for upward harmonization of environmental management systems and increased cooperation on shared ecosystems, in addition to mechanisms for social participation and the protection of health. Public participation is an expressly pursued objective, and specific actions aimed at civil society participation will likely be agreed upon in further protocols. In the Framework Agreement, governments commit to the promotion of effective civil society participation in addressing environmental issues.⁷⁶ Specific new provisions also offer a promise to implement this commitment. The actors named to implement the accord include Member States along with appropriate national and civil society organizations' participation.⁷⁷ The goals are "to increase information exchanges concerning environmental laws, regulations, procedures, policies and practice, including their social, cultural, economic, and health aspects, particularly those which might affect trade or competitiveness."⁷⁸ The transparency system sets mechanisms in place, which, while bureaucratic in char-

72. Protocolo Adicional al Tratado de Asuncion Sobre Medio Ambiente (2001).

73. Acuerdo Marco sobre Medio Ambiente del MERCOSUR, June 22, 2001, Arg.-Braz.-Para.-Uru. Upon ratification by Member States, it will be annexed to the Treaty of Asuncion, *supra* note 68.

74. MERCOSUR Framework Agreement on the Environment, [2001], Arg.-Braz.-Para.-Uru. [hereinafter MERCOSUR Framework Agreement].

75. See Acuerdo Marco sobre Medio Ambiente del MERCOSUR, *supra* note 73, art. 4 (stating objective is "desarrollo sustentable y la protección del medio ambiente, mediante la articulación de las dimensiones económicas, sociales y ambientales, contribuyendo a una mejor calidad del ambiente y de la vida de la población").

76. MERCOSUR Framework Agreement, *supra* note 74, at ch. 1, art. 3.

77. *Id.* at ch. 3, art. 6.

78. *Id.* at ch. 3, art. 6(a).

acter, can be successful if they are properly implemented. The Framework Agreement commits Member States to cooperate on the development of instruments for environmental management, including quality standards, environmental impact assessment methods, environmental monitoring and costs, environmental information systems, and certification processes.⁷⁹ The Framework Agreement includes provisions for the settlement of disputes, by reference to the existing MERCOSUR dispute settlement process, and other general mechanisms for implementation of the Framework Agreement.⁸⁰

An Annex to the Framework Agreement also provides a structure for future development of protocols in three priority areas.⁸¹ First, it lays out the possibility of a protocol in the area of sustainable management of natural resources, such as protected areas, biological diversity, biosafety, wildlife management, forests, and hydrological resources. Second, it addresses quality of life and environmental management issues, such as hazardous waste management, urban planning, renewable energy, and improvement of soil, atmosphere, and air quality. Finally, it addresses environmental policy cooperation, such as environmental impact assessment, economic instruments, environmental information exchange, and environmental awareness programs.

Three elements of this arrangement deserve particular attention. First, it is interesting to note that the Framework Agreement was established due to consideration of environmental issues from within the structures of the MERCOSUR Customs Union. In this instance, it appears that the international economic negotiations took environmental priorities into account, stimulating environmental cooperation as part of the general sub-regional economic integration process. Nevertheless, true progress was not made on a significant substantive environmental cooperation agenda until specific negotiations were undertaken outside the economic cooperation context. Second, the model chosen is that of a traditional multilateral environmental agreement: a framework of general cooperation is established, and then space is created for further protocols on specific areas of cooperation to be identified by the parties. Even the issues

79. *Id.* at ch. 3.

80. *Id.* at ch. 4, arts. 8-11.

81. *See id.* at ann.

chosen by the parties in the sub-region are highly general, leaving scope for further adaptation and specific commitments to cooperation. Third, there are clear provisions for civil society participation and broad sustainable development goals in the Framework Agreement; hence all the protocols. This presents significant opportunities for integrated, inclusive agendas. If the Framework Agreement enters into force and can be effectively implemented, it presents a worthy model for broad cooperation on a scale up to now unknown among sub-regional environmental agreements.

Although the regime has much work to do to ensure that the promise of the Framework Agreement is realized, important aspects are present. Indeed, civil society actors first expressed cautious optimism about this linkage at a sub-regional level.⁸² Nevertheless, concern has been generated by the fact that the Framework Agreement has not yet been ratified.

b. MERCOSUR Social Development Cooperation Regimes

The Treaty of Asuncion makes no express mention of social and labor matters, though its Preamble sets out a generic objective of accelerating development processes with social justice. Nevertheless, the MERCOSUR Labor Ministers 1991 Declaration of Montevideo responded by highlighting the need to address labor aspects of MERCOSUR and improve working conditions, proposing creation of a working sub-group on labor issues and considering the possibility of a Social Charter for MERCOSUR.⁸³ The MERCOSUR Economic and Social Consultative Forum ("FCES") was established by the Protocol of Ouro Preto⁸⁴ and given a role to guarantee participation of different sectors.⁸⁵

Member State governments created a working sub-group to take up matters dealing with labor relations, employment, and

82. See Maria Lechner, *The MERCOSUR Framework Agreement on the Environment*, 15 BRIDGES J. TRADE AND SUSTAINABLE DEV. (2001).

83. See Alberto Jose Robles, *Balance y perspectivas de los organismos sociolaborales del MERCOSUR*, 8 REVISTA PISTAS (2002). See also COORDINACIÓN DE ASUNTOS INTERNACIONALES DEL MINISTERIO DE TRABAJO, EMPLEO Y SEGURIDAD SOCIAL, *EL FUTURO DEL MERCOSUR* (2002).

84. Southern Common Market (MERCOSUL): Protocol of Ouro Preto, Dec. 17, 1994, Arg.-Braz.-Para.-Uru., art. 1.

85. With nine representatives per country (thirty-six in total), the FCES advises the Common Market Council (the Consejo Mercado Común, or "CMC"). See OAS, SICE Database on FTAA Issues, at <http://www.sice.oas.org/DEFAULT.asp>.

social security,⁸⁶ with eight committees to study various topics. The eight committees handle individual work relationships, collective work relationships, employment and labor migration, vocational training, workers' health and safety, social security, labor costs in land and ocean transport, and the ILO Conventions, respectively. Sub-Group No. 10 and its committees, as in the ILO, are formed with tripartite representation from government, labor, and employers, and have held a number of meetings, some of which included representatives from civil society.⁸⁷ Sub-Group No. 10 drafted the MERCOSUR Multilateral Convention on Social Security, and in 1998, the Socio-Laboral Declaration of MERCOSUR.

This declaration led to the creation, in 1999, of a tripartite Socio-Labor Commission with a regular calendar of meetings and a mandate to make consensus recommendations on social issues for adoption by the Common Market Group.⁸⁸ The Socio-Labor Commission has established a Labor Market Observatory (Observatorio del Mercado de Trabajo) of the MERCOSUR and has successfully led a CMC Resolution on Professional Qualifications. Recently, the Technical Group on Social Development in the MERCOSUR, Chile, and Bolivia developed a Statistical System of Social Indicators (Sistema Estadístico de Indicadores Sociales).⁸⁹ MERCOSUR Ministers of Labour also meet to address regional issues and provide high-level political guidance for the regime.

As part of the MERCOSUR social agenda, Working Sub-Group No. 11 deals with health issues, and regular meetings take place between MERCOSUR Health Ministers. There is also a Specialized Meeting on Women's Issues, with a strategic plan and program of work for the sub-region.

As such, on the social side of the MERCOSUR agenda,

86. This began as Working Sub-Group No. 11, later becoming Working Sub-Group No. 10, through the provisions of the Consejo Mercado Común Decision No. 20/95.

87. See Uriarte, *supra* note 64.

88. The Socio-Laboral Commission has considerable discretion and means to accomplish its mandate. It delivers reports of its governments to the parties, makes observations, conducts reviews, and responds to questions on the application of the Socio-Laboral Declaration. It also receives complaints of non-compliance with the Declaration, and even can develop proposals to modify the Declaration, as the Declaration itself provides opportunities for bi-annual updates and review.

89. See generally Grupo Técnico de la Reunión de Ministros y Autoridades de Desarrollo Social del MERCOSUR, Bolivia y Chile (Mar. 21-22, 2002).

much cooperative progress has been possible, though most initiatives are too new for an evaluation of their concrete results. Both trade-related and non-trade-related issues are being addressed, and social development programs have also recently been developed between the Member States. In spite of recent economic turbulence in the sub-region, these institutions have continued to develop and appear to be undertaking a series of ambitious common social programs within the overall framework of the MERCOSUR integration project.

2. The Andes

a. The Andean Environmental Cooperation Regimes

Environmental matters have been a fixed part of the Andean integration agenda since 1982, when the Andean Commission recognized the importance of regional cooperation in agriculture, food security, and general environmental policy and research.⁹⁰ Then, in 1996, when the Trujillo Protocol⁹¹ launched a reinvigorated Andean integration system, environmental and sustainable development issues became part of the agenda. Working from a newly invigorated foundation, the Andean Commission agreed on a Common Regime on Access to Genetic Resources. This decision empowers national authorities and indigenous and local communities, as custodians of traditional knowledge and resources, to grant prior informed consent to potential users in exchange for equitable returns.⁹²

In 1998, the Andean Commission created an Andean Committee of Environmental Authorities ("CAAAM")⁹³ to facilitate the sub-regional environmental cooperation agenda. CAAAM's

90. See E. F. Pardo, *La Política Ambiental en el Grupo Andino*, in *MEDIO AMBIENTE Y RELACIONES INTERNACIONALES* 179-89 (Ernesto Guhl & Juan Tokatlian eds., 1992).

91. Eighth Andean Presidential Council: Protocol of Trujillo, Mar. 10, 1996, Bol.-Colom.-Ecuador-Peru-Venez.

92. For a full text of this Decision, see Andean Community, Decision 391: Common Regime on Access to Genetic Resources (1996), available at <http://www.comunidadandina.org/ingles/treaties/dec/d391e.htm>. According to the 1992 Convention on Biological Diversity, access to resources is subject to the prior informed consent of the provider of such resources. This means that any company or individual seeking access to genetic resources must first seek and receive the consent of the custodian of these resources, before procuring any genetic resources from the provider's jurisdiction. Access, therefore, must be granted on mutually agreed-upon terms, as defined by the seeker and provider.

93. See Andean Community, Decision 435 (1998), available at <http://www.comunidadandina.org/normativa/dec/d435.htm>.

goal is to advise the General Secretariat of the Andean Community ("ANCOM") on environmental matters and implement, monitor, and enforce ANCOM's environmental decisions.⁹⁴ For example, in 1998, the Inter-American Development Bank ("IDB") and the ANCOM agreed to create a Regional Biodiversity Strategy for the countries of the Andean Tropics, which has provided a framework for joint bio-safety measures in the community.⁹⁵ CAAAM appears to have greatly increased involvement and cooperation between Andean environment ministers, and is attempting to proceed with an integrated agenda similar to that agreed upon in the Santa Cruz Summit on Sustainable Development.⁹⁶ In their 1999 Cartagena Summit, ANCOM ministers also made a commitment to develop, as part of a broader social agenda, a CAN Sustainable Development Strategy.

General tools of the CAN may also serve to address sub-regional environmental problems. For example, international disputes, including those concerning the sub-regional environment or other claims, can be settled in the Andean Court of Justice ("Court").⁹⁷ The Court has jurisdiction over all disputes involving CAN norms, including disputes brought by Member States or CAN institutions and, in appropriate cases, even disputes brought by private parties.⁹⁸ As such, the Court has, in principle, significant supra-national authority. The Court produces judgments, and Member States found by the Court to be in non-compliance with CAN norms must take all necessary measures to come into compliance. National courts are required to refer questions of CAN law to the Court after exhausting local appeals

94. For further explanation of the activities of the CAAAM and the Environmental Action Plan, see <http://www.comunidadandina.org>.

95. *See Comercio y Medio Ambiente en los Acuerdos Regionales*, 2:1 PUNTOS: ENTRE EL COMERCIO Y EL DESARROLLO SOSTENIBLE 1 (June-Aug. 1999).

96. Santa Cruz Summit, *supra* note 8.

97. *See* Agreement on Andean Subregional Integration, *supra* note 49, at ch. II, sec. E, art. 23. *See also* Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, 18 I.L.M. 1203, at ch. III (1979), [hereinafter Court of Justice Treaty] (resolving, in principle, a major gap in the earlier legislative process of the 1969 Cartagena Agreement). A Protocol modifying the Court of Justice Treaty was later added.

98. Court of Justice Treaty, *supra* note 97, arts. 1, 17-33. These norms include the 1979 Cartagena Agreement, *supra* note 97, its protocols and instruments, the Treaty itself, the decisions of the Commission, and the Resolutions of the Board. Actions which can be brought concerning these norms include actions for nullification of acts of CAN institutions, actions for non-compliance on the part of a Member State, and requests by national courts for advisory opinions.

to their rulings, and the interpretations of the Court must be adopted by the referring judge. While the Court's effectiveness was, until recently, affected by a general lack of political cooperation and coordination among CAN Member States,⁹⁹ it now appears to be gaining credibility and recognition in the region as a viable place for dispute resolution.

This broad regional dispute resolution structure, as well as the new Consejo Andino de Autoridades Ambientales ("CAAA") and the Andean Social Policy Forum, could offer ideas for future hemispheric cooperation mechanisms. While the issues addressed by the CAAA have links to trade concerns, they are often treated as environmental cooperation issues and, effectively, addressed as such. For example, provisions of the Andean biodiversity strategy relate to sharing of benefits of genetic resources. These may affect trade liberalization commitments on the protection of intellectual property rights ("IPRs"). Nevertheless, IPR issues are addressed as part of the CAAA agenda. The CAAA's progressive agenda on new policy questions, though requiring high degrees of ecosystem and scientific knowledge, suggests that Andean countries are gaining capacity through the new institutional cooperation mechanism and workplans.

b. Andean Social Development Cooperation Regimes

In 1995, the Andean Declaration on Social Development reaffirmed the right of all people of the region to education, the fruits of science and technology, culture, and health.¹⁰⁰ While hortatory in nature, the Declaration focused on social, economic, and cultural rights. It highlighted the pressing need to adopt specific measures for incorporating disadvantaged social groups into the economic, social, civic, cultural, and political life. The Declaration called for new strategies to promote employment and committed itself to eradicate all forms of social

99. Most credibility gaps came from international critique of a strongly "regionalist" investment regime adopted by the ANCOM. See Scott Horton, *Peru and ANCOM: A Study in the Disintegration of a Common Market*, 17 *TEX. INT'L L. J.* 39, 43-44 (1982). For a more recent discussion, see Eduardo A. Wiesner, *ANCOM: A New Attitude Toward Foreign Investment?*, 24 *U. MIAMI INTER-AM. L. REV.* 435, 436-37 (1993) (arguing that foreign direct investment in CAN Member States has been impeded by the continuing vitality of the Calvo Doctrine).

100. See Seventh Andean Presidential Council: Act of Quito, Sept. 5, 1995, Bol.-Colom.-Ecuador-Peru-Venez., at Declaration on Social Development.

discrimination. Equitable income distribution was stressed as a basic aim of social development.

Four years later, the 1999 Act of Cartagena Social Agenda focused on creating jobs and guaranteeing improvements in education, health, and social housing.¹⁰¹ It provides for a CAN migration policy and a guarantee of migrant workers rights, an educational, cultural, and science and technology policy aimed at safeguarding and promoting the Andean identity and an Andean strategy on sustainable development. In particular, Education Ministers were given the task of developing programs to harmonize Andean educational systems and secure mutual recognition of professional licenses, certificates, and degrees. The Education Ministers were also responsible for taking measures to strengthen the Andean cultural identity, promote integration values, and prioritize educational policies in border areas. Ministers of Culture undertook a program to coordinate cultural policies, executing a multicultural project known as the "Andean Route" to promote the sub-region's traditions, history, and common legacy. Assistance was provided to implement health programs within the framework of the Hipólito Unanue Convention, on issues such as building healthy frontiers, strengthening epidemiological surveillance systems, sub-regional coordination for emergency and disaster measures, harmonization of medicinal products and good manufacturing practices, bi- and multi-lateral health agreements, and establishing telemedical and health promotion programs for Aymara communities in Bolivia, Peru, and Chile.

Emphasis was placed on the need to reinforce the participation of business people and workers in the integration process, and the General Secretariat was instructed to increase their support for Business and Labor Advisory Councils. Labor Ministers were instructed to take measures to move ahead with the coordination of policies on job promotion, labor studies and training, job health and safety, social security, and labor migration, and to prepare a Draft Protocol Amending the Simón Rodríguez Convention.¹⁰² In 2000, the Act of Lima created the Andean Advi-

101. Eleventh Andean Presidential Council: Act of Cartagena, May 27, 1999, Bol.-Colom.-Ecuador-Venez.-Peru, available at http://www.comunidadandina.org/ingles/document/act_n1.htm.

102. See Final Declaration of the Meeting of Ministers of Labor of the Andean Community and Action Plan Approved at the Conclusion of the Meeting of Ministers of

sory Council of Labor Ministers.¹⁰³ CAN Ministers of Labor coordinate efforts in five areas of social and labor integration: job promotion, job training, health and safety on the job, social security, and labor migration.

In the Act of Carabobo of June 2001, the Ministers responsible for executing social welfare, health, labor, education, and housing policies were entrusted with drawing up a Comprehensive Social Development Plan to confront the pressing problems of poverty, social exclusion, and inequality in the sub-region.¹⁰⁴ An Andean Forum on Social and Economic Development was organized. As part of the effort to build up the Andean Statistical Information System, access to harmonized and periodical data on social development and the informal sector were emphasized. In the Declaration of Machu Picchu,¹⁰⁵ a Working Committee on Indigenous Peoples Rights was established, with the participation of indigenous peoples' organizations, human rights organizations, civil society, and representatives of the Member States. Strong support was to be given to all efforts aimed at promoting and protecting the basic rights and freedoms of the indigenous peoples, and to promote the Organization of American States ("OAS") Declaration on the Rights of Indigenous Peoples.¹⁰⁶

Other Andean social cooperation instruments are also being developed. An Andean Labor Observatory has been proposed to collect statistical data and information about labor provisions and employment programs. A proposal is being drafted with the assistance of the Iberian-American Social Security Organization ("OISS") to amend the Andean Social Security Instrument¹⁰⁷ and the Regulations for the Andean Social Security In-

Labor of the Andean Community—Declaration of Cartagena de Indias, May 23, 1999, available at http://www.comunidadandina.org/ingles/document/Act_n9.htm.

103. Act of Lima, Twelfth Andean Presidential Council, Lima, Peru, June 10, 2000, available at http://www.sice.oas.org/Trade/Junac/XIIacta_e.asp.

104. Act of Carabobo, Thirteenth Andean Presidential Council, Valencia, Venez., June 23-24, 2001, available at <http://www.comunidadandina.org/ingles/document/valencia24-6-01.htm>.

105. Declaration of Machu Picchu on Democracy, the Rights of Indigenous Peoples, and the Fight Against Poverty, Lima-Machu Picchu, Peru, July 28-29, 2001 [hereinafter Declaration of Machu Picchu], available at <http://www.dialoguebetweennations.com/OASdeclaration/english/MachuPicchu.htm>.

106. *See id.*

107. Andean Community, Decision 113, Feb. 14-17, 1977.

strument.¹⁰⁸ National legislation on labor migration has been reviewed with the assistance of the International Organization for Migration and a proposal is being drawn up to amend Andean Labor Migration Instrument.¹⁰⁹

A new, but vigorous, program of social cooperation appears to be developing in the Andean sub-region. These initiatives, coordinated by the Andean integration process, focus on addressing key priorities for sub-regional cooperation. Where the social issues touch on trade, solutions appear to be found within the context of labor, health, or other social issues, though it is unclear how these different processes will relate to each other as they develop.

3. Central America

a. Central American Environment and Sustainable Development Cooperation Regimes

The environment became a significant international issue in Central America in 1989, following the signature of the Central American Convention for the Protection of the Environment ("CPC"),¹¹⁰ and the subsequent creation of the Central American Commission for the Environment and Development ("CCAD") among Environment Ministers from seven countries of Central America.¹¹¹

The establishment of the Central American Integration System (Tegucigalpa Protocol) in 1991 has led to the relatively rapid negotiation and adoption of multiple regional environmental agreements, covering, among other areas, biodiversity and protected areas, hazardous-waste movement, forest conservation, and climate change.

At the U.N. Conference on Environment and Development in 1992, the CCAD coordinated the development of a joint position — Agenda 2000 — for the region. Two tangible results of this cooperation should be highlighted. First, the CCAD supported the creation of a Central American Inter-Parliamentary

108. Andean Community, Decision 148, Sept. 3-7, 1979.

109. Andean Community, Decision 116, Feb. 14-17, 1977.

110. Central American Commission for the Environment and Development (1979).

111. For more details about the Central American Commission on Environment and Development and ALIDES, see <http://www.sice.oas.org/tradee.asp>.

Commission on the Environment, which led to a regional Forests Convention that is now being implemented by the Central American Forest Council. The CCAD created a regional forestry unit to work on a Tropical Forestry Action Program, which led to the adoption of common guidelines for forestry concessions.¹¹² Second, a Mesoamerican Biological Corridor has been developed. This network of protected areas aims to serve as an effective biological link between North and South America.¹¹³

The Alliance for Sustainable Development ("ALIDES") was created in 1994, generating a conceptual and operational framework for sub-regional and national goals and strategies. ALIDES is a comprehensive sub-regional initiative that addresses political, moral, economic, social, and environmental issues that might otherwise have fallen to trade negotiators to resolve. National Councils on Sustainable Development in each country support the implementation of the ALIDES goals. ALIDES was seen as a potential foundation from which to strengthen environmental protection and other development priorities. It was a starting point for the 1994 Convenio CentroAmérica-U.S. ("CONCAUSA"), a partnership for sustainable development that provided funding to the region for a list of concrete commitments including environmental measures such as the conservation of biodiversity, development of renewable energy, environmental legislation standards, and environmentally friendly industrial processes.

112. Guidelines include commitments to establishing a forestry policy based on zoning of permanent forestry, adoption of a contractual system for the long-term use of forests, and even-handed application of laws regulating forestry activities to national and foreign concessionaires.

113. The concept of a Mesoamerican Biological Corridor is espoused in the Central American Convention for the Conservation of Biodiversity and the Protection of Priority Natural Areas (June 5, 1992). The six countries' commit:

to create, associated to the Central American Commission for Environment and Development, CCAD, the Central American Council for Protected Areas, with personnel and institutions related to the World Commission on Protected Areas, CNPPA, and financed by the Regional Fund for Environment and Development, as the main entity charged with coordinating regional efforts towards harmonizing policies related to and for the development of the Regional Protected Area System as an effective Mesoamerican biological corridor.

Id. art. 21.

At their regular meeting during the 19th Central American Summit in 1997, the region's presidents approved the Central American Council on Protected Areas' proposal for implementation of a Mesoamerican Biological Corridor Program.

These priorities and a comprehensive regional strategic environmental program are being carried out by the CCAD and its partners.¹¹⁴ The Plan Puebla Panama also brings new energy to sustainable development for broader Mesoamerican cooperation with several south Mexican states on infrastructure, natural resource management, and development.

As such, in terms of policy innovations which might provide lessons for a hemispheric regime, it is clear that Central Americans have comprehensive strategic action plans and a reasonably robust institution for environmental cooperation — the CCAD — that seeks to address environmental and developmental challenges for the region in an integrated fashion. While the economic integration process itself has not been very successful to date, the CCAD can arguably serve both to coordinate environmental (and developmental) cooperation as a platform for sub-regional capacity building initiatives, and to attract development and environmental cooperation financing to the sub-region.

b. Central American Social Cooperation Regimes

The Central American Integration System (“SICA”) has economic, social, and sustainable development streams and is supported by institutions such as the Central American Court of Justice as well as a general administrative secretariat.¹¹⁵

The social stream (“SISCA”) includes one principal treaty, the Central American Social Integration Treaty (Tratado de la Integración Social Centroamericana).¹¹⁶ The treaty commits governments to progressive social integration for sustainable de-

114. CCAD’s success stems partly from its transparent and participatory decision-making process: civil society organizations, representatives of indigenous peoples, and businesses all participate in CCAD’s quarterly meetings and other sponsored events. Additionally, as only a small number of member countries with clear common interests are involved, progress on sensitive issues is possible.

115. See Central American Integration System, at <http://www.sgsica.org>. See also LUIS G. SOLÍS & PATRICIA SOLANO, CENTRAL AMERICA: THE DIFFICULT ROAD TOWARDS INTEGRATION AND THE ROLE OF CANADA, available at http://www.focal.ca/images/pdf/central_america.pdf (last visited Feb. 15, 2004); SISTEMA DE LA INTEGRACION CENTROAMERICANO, SECRETARÍA TÉCNICA DE LA INTEGRACIÓN SOCIAL, VISIÓN ESTRATÉGICA DEL DESARROLLO Y LA INTEGRACIÓN SOCIAL DE CENTROAMÉRICA PARA EL AÑO 2020 Y ESTRATEGIAS Y LÍNEAS DE ACCIÓN AL 2010 (2000), available at http://www.sgsica.org/sisca/docs_sisca/Vision.pdf (last visited Feb. 15, 2004).

116. Central American Social Integration Treaty, Mar. 30, 1995, Belize-Costa Rica-El Sal.-Guat.-Hond.-Nicar.-Pan.

velopment,¹¹⁷ cooperation in providing basic services to all Central Americans to overcome poverty,¹¹⁸ and establishes a social sub-system of SICA.¹¹⁹ The treaty recognizes social development as a universal human right — the human being at the center of sustainable social development. It also commits to end social exclusion.¹²⁰ Among other sub-regional activities, the treaty commits governments to identify and cooperate on social development issues, gradually harmonize social policies, and dedicate resources to end the structural causes of poverty, focusing on the most disadvantaged groups first. The treaty also promotes local government and community action.¹²¹

As part of the Central American Social Sub-System, the treaty establishes several committees and positions. The Social Consultative Committee advises the MCCA. The treaty also created a Consejo de la Integración Social [Council on Social Integration], a Consejo de Ministros del Area Social [Council of Social Ministers], and a Secretaría de la Integración Social [Secretariat of Social Integration]. The treaty recognizes groups to provide technical support: the Instituto de Nutrición de Centroamérica y Panamá, the Banco Centroamericano de Integración Económica and the Instituto Centroamericano de Administración Pública as technical support.¹²² In addition, the treaty leaves open the door for other members.¹²³ The remainder of the treaty lays out the institutional structure, ratification procedures, and other aspects of the treaty.¹²⁴

A Social Integration Council consisting of relevant high level representatives and a Secretariat for Central American Social Integration (“SGSICA”) is based in Panama City. These bodies coordinate the Strategic Plan for Development and Social Integration 2020. The SGSICA appears to play a role in obtaining funds for regional social sustainable development projects related to education, health, and infrastructure development, such

117. *Id.* art. 1.

118. *Id.* art. 2.

119. *Id.* art. 3.

120. *Id.* art. 6.

121. *Id.* art. 8.

122. *Id.* art. 9.

123. *Id.* art. 10.

124. *See id.* arts. 11-23.

as a Social Vulnerability Reduction Program.¹²⁵

As part of the economic stream, there is a Regional System of Labor Information, which has an internet-accessible database. In addition, the Programa Regional de Modernizacion del Mercado Laboral is a sub-regional IDB-U.S. AID-SIECA initiative to promote Central American compliance with core labor standards and ILO Conventions, raise awareness, and provide information. These economic integration programs and initiatives are considered fundamental to the broader Central American strategy for development.¹²⁶

4. CARICOM

CARICOM's mission is to "provide dynamic leadership and service, in partnership with Community institutions and Groups, toward the attainment of a viable, internationally competitive and sustainable Community, with improved quality of life for all."¹²⁷ As such, the overall goal of this sub-regional integration project includes sustainable development and quality of life for all citizens.¹²⁸

a. CARICOM Environmental Cooperation Regimes

Caribbean environmental cooperation crystallized in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region,¹²⁹ as part of the U.N. EP's Regional Seas Programme. The Cartagena Convention was adopted in 1983 and put into effect in 1986. It is one of the major legal instruments for the development of laws under the U.N. EP's Caribbean Environment Programme.¹³⁰ This

125. See INCAE & HARVARD INST. INT'L DEV., *CENTROAMÉRICA EN EL SIGLO XXI: UNA AGENDA PARA LA COMPETITIVIDAD Y EL DESARROLLO SOSTENIBLE* 1-23 (1999).

126. R. Najera, *Orígenes, Evolución y Perspectivas de la Integración Centroamericana*, in *LA INTEGRACION COMO INSTRUMENTO DE DESARROLLO: SUS PERSPECTIVAS Y DESAFIOS PARA CENTROAMERICANA*, PANORAMA CENTROAMERICANO 66 (1997).

127. See *CARICOM Mission Statement*, available at <http://www.caricom.org./mission-statement.htm>.

128. See Jose Zaragoza, *The Future of the Caribbean Economy* (Mar. 2002), available at <http://www.focal.ca/images/pdf/caribbean.pdf>.

129. Cartagena Convention, Mar. 24, 1983, Barb.-Colom.-Fr.-Gren.-Guat.-Hond.-Jam.-Mex.-Neth.-Nicar.-Pan.-St. Lucia-U.K.-U.S.-Venez.-Eur. Econ. Comm. (E.U.).

130. See Marian Miller, *Protecting the Marine Environment of the Wider Caribbean Region: the Challenge of Institution Building*, in *GREEN GLOBE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT* 37-45 (Helge O. Bergesen & Georg Parmann eds., 1996).

global initiative encourages nations to cooperate under a framework "Regional Sea Convention" with subsequent affiliated protocols on specific areas of the marine environment. The Cartagena Convention led to the Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region,¹³¹ the Specially Protected Areas and Wildlife Protocol,¹³² and the Land-Based Sources of Marine Pollution Protocol.¹³³

A Caribbean Environment Programme ("CEP") was created in 1986 and is facilitated by the Caribbean Regional Coordinating Unit, located in Kingston, Jamaica. The Unit serves as Secretariat to the CEP and has a coordinating rather than implementing role. The Secretariat's objectives are as follows: provide assistance to all countries in the region, strengthen national and sub-regional institutions, coordinate international assistance, and stimulate technical cooperation among countries. The Caribbean Environmental Health Institute ("CEHI") also has a well-developed capacity in environment and health programming, coordinating several excellent initiatives funded by the Global Environmental Facility. CEHI also participates in the Health and Environment Ministers of the Americas process.

The Caribbean has traditionally kept its common market negotiations separate from environmental legal frameworks. Nevertheless, it will address environmental issues if they arise within the framework of economic cooperation. This is due in part to the Caribbean's membership in many global arrangements, and because the region's environmental programs are often externally stimulated and financed. Should there be no agreement on links between trade and the environment within the thirty-four countries of the Americas, this Caribbean model could be chosen instead.

A parallel, completely unconnected, environmental regime already exists in Latin America and the Caribbean, facilitated by

131. Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region, Mar. 24, 1983, Barb.-Colom.-Fr.-Gren.-Guat.-Hond.-Jam.-Mex.-Neth.-Nicar.-Pan.-St. Lucia-U.K.-U.S.-Venez.

132. Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Jan. 18, 1990, Ant. & Barb.-Colom.-Cuba-Fr.-Guat.-Jam.-Mex.-Neth.-Pan.-St. Lucia-St. Vincent-Trin. & Tobago-U.K.-U.S.-Venez.

133. Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Oct. 6, 1999, Colom.-Costa Rica-Dom. Rep.-Fr.-Neth.-U.S.

the U.N. EP Regional Office for Latin America and the Caribbean. If the Caribbean model were chosen, the U.N. EP Forum of Environment Ministers of Latin America and the Caribbean¹³⁴ could serve as coordinator or secretariat to several binding hemispheric environmental accords agreed on by the Americas environment ministers. This could be achieved simply by including Canada and the U.S. in its deliberations. Indeed, such independent cooperation could be undertaken without prejudice to any environmental provisions in the FTAA or other agreements. Depending on the scope of relevant mandates, another possibility is strengthening the OAS Environment and Sustainable Development Unit to ensure its ability to address adequately issues of coherence, coordination, and mutual supportiveness.¹³⁵

b. CARICOM Social Cooperation Instruments

The main CARICOM institution to address social issues in the sub-region is the Council for Human and Social Development (“COHSOD”), which is separate from the CARICOM trade liberalization structures. COHSOD structures its work within a two-year cycle during which four Ordinary Meetings are convened. An Inter-Sessional Committee, comprised of the incumbent and rising Chairman, is responsible for organizing the COHSOD between sessions. Assisted by a Committee of Officials from CARICOM Member States, CARICOM’s Secretariat is recognized as the Secretariat of the COHSOD.¹³⁶ COHSOD coordinates cooperation on regional social programs such as the “Caribbean Cooperation in Health Initiative Phase II, Human Resource Requirements, Strategic Inter-Sectoral Alliances with Gender and Development, Youth and Drug Demand Reduction, as well as Regional Strategic Plans for HIV/AIDS prevention and control.”¹³⁷

CARICOM has a number of social cooperation programs.

134. See United Nations Env’t Programme, Forum of Ministers of the Environment of Latin America and the Caribbean (2003), available at <http://www.pnuma.org/foroalc/esp/engforum.htm>.

135. See generally Org. Am. States, Environment and Sustainable Development Unit, at <http://www.oas.org/usde>.

136. See CARICOM, COHSOD V: Investing in Human Resource Development with Equity, at <http://www.caricom.org/archives/cohsod/cohsodv.htm>. See also Rules of Procedure for the Council for Human and Social Development, at <http://www.caricom.org/archives/rules-cohsod.htm>.

137. CARIBBEAN COMMUNITY SECRETARIAT, COHSOD UPDATE 1 (June 2002), availa-

“CARICOM Member States, with the assistance of UNAIDS, have been holding ‘en bloc’ negotiations with pharmaceutical companies to gain access to cheap antiretroviral drugs.”¹³⁸ CARICOM Ministers of Education meet regularly to coordinate the utilization of sub-regional research and planning. In addition, there are Ministries of Youth Affairs and National Youth Councils that cooperate to attract funding for sub-regional efforts. CARICOM also includes a significant civil society component that hosts forums and encounters for the sub-region, operating under a Civil Society Charter of CARICOM.

The CARICOM Declaration of Labor and Industrial Relations Principles¹³⁹ sets out the general labor policy, consistent with international labor standards and other international instruments to which the sub-region aspires. In addition, the Declaration includes principles on labor policy, industrial relations, labor relations, collective bargaining, equality of opportunity, remuneration, right to work, termination of employment, industrial action, occupational health and safety, social security, dispute settlement, employment policy, discrimination, CARICOM, and labor administration.¹⁴⁰ Pursuant to the Cooperation Agreement between the ILO and the Caribbean Community and its subsequent Amendments, the ILO and CARICOM agreed to cooperate with each other on matters arising in the spheres of labor, social policy, and related matters of mutual interest. A later modified Agreement sought to focus on policy development, institution and capacity building, and other matters.¹⁴¹

Finally, as part of this extensive sub-regional system of social cooperation instruments, there remains CARICOM’s Agreement on Social Security.¹⁴² It is an extremely interesting instrument that addresses the need for freedom from discrimination, as well as the need for protecting the rights of the most vulnerable.

ble at http://www.caricom.org/archives/cohsod/cohsodupdate-jun_02.pdf (last visited Mar. 7, 2004).

138. *Id.* at 4.

139. See CARICOM, Declaration of Labour and Industrial Relations Principles, available at <http://www.caricom.org/archives/labourprinciples.htm>.

140. See generally *id.*

141. See Amendment of the 1982 Cooperation Agreement between the International Labour Organization and the Caribbean Community, available at <http://www.caricom.org/archives/agreement-ilo-caricom-amendment.htm>.

142. See CARICOM Agreement on Social Security (1996), available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/carisoc.htm>.

The Agreement established harmonization of the social security legislation of CARICOM's Member States with equality of treatment with respect to invalidity pensions, disablement pensions, old age or retirement pensions, survivors' pensions, and death benefits in the form of pensions.¹⁴³ It also establishes mutual recognition of contribution periods for voluntary insurance and bars reduction, modification, suspension, and forfeiture of benefits due to residence in any Member State party to the treaty.¹⁴⁴ The Agreement's provisions lay out social security rules for persons employed in transnational companies operating in the region,¹⁴⁵ itinerant persons,¹⁴⁶ and persons employed in international transport or on ships,¹⁴⁷ and other circumstances, including exclusions from these provisions. It also contains provisions governing social security benefits for invalidity, old age, retirement, survivors, and disablement pensions, as well as death benefits, for all parties.¹⁴⁸ The Agreement lays out a common set of rules for determining invalidity, investigations and medical examinations, duties of examination institutions and medical supervision, payment of claims, settlement of disputes, and other matters.¹⁴⁹ It also established a sub-regional Committee of Heads of the Social Security Schemes for CARICOM,¹⁵⁰ which is administered by the CARICOM Secretariat.

CARICOM also is far ahead in its formal mechanisms for civil society participation. First, in 1997, a Civil Society Charter was ratified recognizing the need for participation by a wide range of actors. This Charter is now being revisited by CARICOM to strengthen existing mechanisms of consultation between government and civil society. Furthermore, new mechanisms will be identified and a commitment to ongoing collaboration at national and regional levels will be sought.

A range of issues deemed critical to the future development of CARICOM will be debated at the CARICOM Forum. Some of the proposed issues relate to reform of the region's educational

143. *Id.* art. 2.

144. *Id.* arts. 3-4.

145. *Id.* art. 7.

146. *Id.* art. 8.

147. *Id.* arts. 9-10.

148. *Id.* arts. 16-24.

149. *Id.* arts. 33-51.

150. *Id.* arts. 25-26.

systems and their relationship to employment, productivity, and technology acquisition. Other issues include recapturing or retaining migrating skills, promoting domestic savings through instruments at regional and national levels, and focusing on the Caribbean as a “zone of peace.” While those issues relate to trade and economic integration issues, they are addressed in a holistic way, as social challenges, and are proposed as elements of a “New Model of Economic Development” for the Caribbean.

5. North America

NAFTA¹⁵¹ is an independent treaty linked with two other independent treaties: NAAEC¹⁵² and the NAALC.¹⁵³ Those three parallel accords and institutions neither report to a central organizing body nor are institutional linkages between the three mediated in any formal fashion — beyond bridges between various officials within the countries themselves. It is not automatic that the institutions are “mutually supportive” of each other, or that they will develop in such a way in the future.

a. North American Environmental Regime

The NAAEC has been well-documented in scholarly literature. Several excellent studies survey its nature, development, and take note of its potential as a model for environmental cooperation in the Americas.¹⁵⁴ NAAEC’s objectives are assigned to the Commission for Environmental Cooperation (“CEC”), which is served by a secretariat in Montreal, Canada, and governed by the Tripartite Council of Environment Ministers that works to promote environmental cooperation among the three countries.¹⁵⁵ It may consider and develop recommendations on envi-

151. See NAFTA, *supra* note 49.

152. See NAAEC, *supra* note 55. For commentary on this aspect and its relation to the FTAA, see GREENING THE AMERICAS, *supra* note 46.

153. See NAALC Secretariat, at <http://www.naalc.org/english/secretariat.shtml>. See also COMPARATIVE GUIDE, *supra* note 56; Banks, *supra* note 56.

154. This accord makes environmental integrity a priority, recognizing as objectives the need to “foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations” as well as to “increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna.” NAAEC, *supra* note 55, art. 1(a), (c). See also Armand de Mestral, *The NAFTA Commission on Environmental Cooperation — Voice for the North American Environment?*, in ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS 63 (Alexandre Kiss et al. eds., 2003).

155. Specifically, the Council will promote a cooperative work plan based on prior-

ronmental issues, including: scientific research and technology, eco-labelling, pollution prevention techniques and strategies, and public awareness of the environment.¹⁵⁶ If a persistent pattern of non-enforcement of environmental laws is identified, an appeals process also exists.¹⁵⁷

The CEC, as an institution, has become the primary regional voice in North America for the promotion of environmental integrity. With guidance from its Joint Public Advisory Committee, it has established programs to link environment, economy, and trade issues in North America, promote the conservation of biodiversity in the region, address pollutants, promote health, and strengthen environmental law and policy. It does so by compiling legal environmental measures in the sub-region, and reviewing existing mechanisms for compliance.¹⁵⁸

The NAAEC is a particularly good model for a regional environmental agreement. It has implemented various innovative mechanisms with some success, founded on a firm mandate. The Preamble of the Agreement recognizes the importance of civil society's participation in the conservation, protection, and improvement of the environment. The Agreement further establishes a series of provisions related to public access to information at all levels.¹⁵⁹ Also contemplated in the NAAEC is the possibility of generating a factual record, even if solicited by civil society groups.¹⁶⁰ It also grants highly controversial access to jus-

ity areas, including: establishing limits for specific air and marine pollutants, environmental assessments of projects with transboundary implications, and reciprocal court access for damage or injury resulting from transboundary pollution.

156. See NAAEC, *supra* note 55, art. 10:2.

157. See GUSTAVO ALANIS-ORTEGA, *THE NAAEC ARTICLE 14 AND 15 FACTUAL SUBMISSION PROCESS* (2001). See also GREENING THE AMERICAS, *supra* note 46.

158. See COMM'N ENVTL. COOPERATION, *VOLUNTARY MEASURES TO ENSURE ENVIRONMENTAL COMPLIANCE: A REVIEW AND ANALYSIS OF NORTH AMERICAN INITIATIVES* (1998). See also *Environmental Management Systems and Compliance: Report to the Council of the Commission for Environmental Cooperation on Results and Recommendations Pursuant to Council Resolution 97-05*, in *NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY* (Marc Paquin ed., Fall 1998).

159. According to article 2 of the NAAEC, the parties should periodically produce reports about the state of the environment, which must be made public and administrative and legal procedures are contemplated to guarantee access. See NAAEC, *supra* note 55, art. 2. Similar provisions are in place regarding public participation. One of these mechanisms mandates that the Council hold public meetings in all its ordinary sessions and consult with non-governmental organizations, including independent experts, in the decision making process. See *id.* art. 9.

160. See *id.* arts. 14-15. See also ALANIS-ORTEGA, *supra* note 157.

tice for investors.¹⁶¹ A program for bio-regional mapping of the sub-region has proved useful in providing a common vision and base of knowledge for further cooperation.¹⁶² Elements of the NAAEC, and certainly the CEC itself, demonstrate the usefulness of a credible institution as part of any regional regime seeking to harmonize environment and trade objectives.

b. North American Labor Cooperation

The North American focus on social development cooperation is very narrow, including only one instrument on labor issues: the NAALC. The NAALC carries forward the commitment of the Preamble to NAFTA to “improve working conditions and living standards” in all Parties; “protect, enhance and enforce basic workers’ rights;” strengthen cooperation on labor issues among governments and citizens; ensure that the Parties will work to protect high labor standards; and ensure that each Party retains the ability to set its own labor standards.¹⁶³

The NAALC lists eleven labor principles which the countries are committed to encourage: (1) freedom of association and the right to organize; (2) the right to collective bargaining; (3) the right to strike; (4) prohibition of forced labor; (5) labor protection for children and young persons; (6) minimum employment standards; (7) elimination of employment discrimination; (8) equal pay for women and men; (9) prevention of occupational injuries and illnesses; (10) compensation in such cases; and (11) protection of migrant workers.¹⁶⁴

The NAALC establishes a Commission for Labor Cooperation¹⁶⁵ composed of a Ministerial Council¹⁶⁶ and a Secretariat.¹⁶⁷ The Commission is assisted by a National Administrative Office (“NAO”) in each country.¹⁶⁸ The Council, comprising cabinet-level representatives from each country, directs implementation

161. See NAAEC, *supra* note 55, at ch. 11. See also Howard Mann & Monica Araya, *An Investment Regime for the Americas: Challenges and Opportunities for Environmental Sustainability*, in *GREENING THE AMERICAS* 63, *supra* note 46.

162. For more details about the North American Commission for Environment Cooperation, see <http://www.cec.org>.

163. See NAFTA, *supra* note 49, at pmbl.

164. NAALC, *supra* note 56, at ann. 1.

165. *Id.* art. 8.

166. *Id.* art. 9.

167. *Id.* art. 12.

168. *Id.* art. 15.

of the Agreement. The Secretariat, overseen by the Council and located in Dallas, Texas, prepares regular background reports, conducts studies, and supports all working groups or committees, as well as arbitral panels set up by the Council.¹⁶⁹

The NAOs in each country compile and transmit information¹⁷⁰ to the Secretariat and receive and register public communications on a full range of issues including matters relating to the enforcement of labor laws. In addition, the NAOs respond to public requests for information and issues relating to the enforcement of labor laws. The Secretariat, in cooperation with the NAOs, analyzes labor laws, regulations, and administrative procedures, as well as employment rates, wages, labor productivity, and human resource development. It also facilitates cooperative activities on a wide range of labor issues. Government-to-government cooperative consultations are held at several stages in order to seek constructive solutions to problems concerning the effective enforcement of labor laws.

Ministers consult only after factual consultations at the officials' level (NAOs), and they are committed to make every effort to find mutually satisfactory resolutions to problems.¹⁷¹ Ministers may launch a comparative evaluation by independent experts of enforcement patterns related to occupational safety and health and other technical labor standards on trade-related matters.¹⁷² The report is made public and used as part of the consultation process.¹⁷³

If the Council¹⁷⁴ is unable to resolve a trade-related labor dispute concerning the enforcement of occupational safety and health, child labor, or minimum wage laws, it may, by a two-thirds vote, convene an arbitral panel.¹⁷⁵ The panel will investigate and make public its findings.¹⁷⁶ A compliance mechanism is activated if an arbitral panel finds that a country consistently fails

169. See NAALC Secretariat, at <http://www.naalc.org>. See also COMPARATIVE GUIDE, *supra* note 56.

170. NAALC, *supra* note 56, art. 21.

171. *Id.* art. 22.

172. *Id.* art. 23.

173. *Id.* art. 26. See also Banks, *supra* note 56.

174. NAALC, *supra* note 56, art. 27.

175. *Id.* arts. 28-29.

176. *Id.* art. 37.

to effectively enforce its labor laws.¹⁷⁷ If a country fails to correct the problem,¹⁷⁸ the panel may impose a fine of no more than U.S.\$20 million for the first year.¹⁷⁹ If the problem persists, future fines are limited to .007 % of total trilateral trade of goods. If a fine were imposed on Canada, it would be enforceable by domestic courts. In the case of the U.S. and Mexico, failure to pay the fine would result in suspension of NAFTA benefits, including the imposition of a duty based on the amount of the fine.¹⁸⁰ The NAALC entered into force on the same day as the NAFTA¹⁸¹ and provides for the accession¹⁸² of any country or group of countries to the agreement. A country may withdraw from the NAALC on six months written notice.¹⁸³

6. New Bi-lateral Instruments

A number of other instruments also deserve special attention in the search for innovative models for social cooperation in the Americas. Though several are very recent, they are worthy of considerable analysis and study as they develop.

a. Integrated Environmental Plan for the Mexican-U.S. Border Area

A technical assistance program was established between Mexican authorities and the U.S. Environmental Protection Agency, under the framework of NAFTA. Through annual Congressional allocations, the Border Environmental Cooperation Commission ("BECC") funds projects under an Integrated Border Environmental Plan.¹⁸⁴ The Plan channels transfers of resources and establishes a joint action agenda of collaborative projects with strong social and environmental components to improve health, working conditions, and polluted areas on the border with *maquiladora* factories.¹⁸⁵ Such a financial mecha-

177. For a summary of disputes to date under the NAALC, see Human Rights Watch, at <http://www.hrw.org/reports/2001/nafta/nafta0401-05.htm>.

178. NAALC, *supra* note 56, arts. 38-39.

179. *Id.* art. 39:5.2.

180. *Id.* art. 41.

181. *Id.* art. 51.

182. *Id.* art. 53.

183. *Id.* art. 54.

184. Integrated Environmental Plan for the Mexican-U.S. Border Area (1992-1994), Feb. 1992, Mex.-Envtl. Protection Agency (U.S.).

185. See MARY KELLY ET AL., THE BORDER ENVIRONMENTAL COOPERATION COMMIS-

nism, armed with adequate resources, could do much to address environmental and even social aspects of the Americas integration process. Specifically, it could address cooperative research, capacity-building efforts, and specific problems through sustainable development projects in desperately poor and polluted areas with strong, export-oriented economies.

b. Canada-Chile Agreement on Environmental Cooperation

The Canada-Chile AEC¹⁸⁶ bears special mention. The Canada-Chile AEC provides a framework for bilateral cooperation on environmental issues, committing the Parties to effectively enforce their environmental laws and work cooperatively to protect and to enhance the environment and promote sustainable development.¹⁸⁷ Modeled on the NAAEC, the Canada-Chile AEC provides for a commission for environmental cooperation, the provision of environmental information, and a joint public advisory council process.¹⁸⁸ The Canada-Chile AEC obliges Parties to consider limiting specific pollutants and prohibiting the export of domestically prohibited substances. It also obliges Parties to notify each other of domestic limits or restrictions, and to ensure transparency through publication and access to justice, including procedural guarantees. The Canada-Chile AEC contains provisions for private access to remedies, establishes national secretariats to implement its mandates, and recognizes all prior commitments under other environmental accords. Its annexes, which phase in the application of the Agreement to Chilean environmental law, led to a comprehensive and valuable revision of environmental law in Chile.¹⁸⁹

SION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBank): ACHIEVING THEIR ENVIRONMENTAL MANDATE (2001). See also MARK SPALDING, PROMISING POTENTIAL FOR THE US-MEXICO BORDER AND FOR THE FUTURE: AN ASSESSMENT OF THE BECC/NADBank INSTITUTIONS (1997); Craig Kovarik, NAFTA and Environmental Conditions on the United States-Mexico Border, 2 KAN. J. L. & PUB. POL'Y 61 (1993); DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 376-78 (1994).

186. Canada-Chile AEC, *supra* note 57.

187. Interview with A. Bowcott, Manager of Environment Canada, International Relations, Canada's chief negotiator for the Canada-Chile, Canada-Costa Rica, and Canada-Central America environmental side agreements, in Quebec, Can. (Jan.-Apr., 2003) (notes on file with the author) [hereinafter Bowcott Interview].

188. See generally WILLIAM DURBIN, A COMPARISON OF THE ENVIRONMENTAL PROVISIONS OF THE NAFTA, THE CANADA-CHILE TRADE AGREEMENT AND THE MEXICAN-EUROPEAN COMMUNITY TRADE AGREEMENT (2000).

189. See generally Canada-Chile AEC, *supra* note 57.

c. Canada-Chile Labor Cooperation Agreement

In 1997, the Canada-Chile Labor Cooperation Agreement¹⁹⁰ ("Canada-Chile LAC") became effective. Similar to the NAALC's role as a complement to NAFTA, the Canada-Chile LAC supplements the Canada-Chile FTA.¹⁹¹ It does so by seeking to improve working conditions and living standards in both countries and by protecting, enhancing, and enforcing basic workers' rights. Under this Agreement, Canada and Chile commit to effectively enforce their own labor legislation and cooperate on labor matters. They also agree to the following eleven labor principles: (1) freedom of association; (2) the right to bargain collectively; (3) the right to strike; (4) prohibition of forced labor; (5) labor protection for children and young persons; (6) minimum employment standards; (7) elimination of employment discrimination; (8) equal pay for men and women; (9) prevention of occupational injuries and illnesses; (10) compensation in case of occupational injuries or illnesses; and (11) protection of migrant workers.¹⁹²

In addition, the Parties undertake the following six obligations under the Agreement:

- High Levels of Labor Protection: each Party shall ensure that its laws and regulations provide for high labor standards, and shall strive to improve those standards;
- Government Enforcement Action: each Party shall promote compliance with and effectively enforce its labor law through appropriate government actions;
- Private Action: each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial (where appropriate), judicial, or labor tribunals for enforcement of the Party's law;
- Procedural Guarantees: each Party shall ensure that its

190. Canada-Chile LCA, *supra* note 59.

191. The Canada-Chile FTA has several goals. These include: creating an expanded and secure market for the goods and services produced in the Parties' territories, enhancing the competitiveness of Canadian and Chilean firms in global markets, creating new employment opportunities and improving working conditions and living standards in the Parties' respective territories, and protecting, enhancing, and enforcing basic workers' rights. See generally Canada-Chile FTA, *supra* note 57.

192. See First Annual Report Canada-Chile Agreement on Labour Cooperation (July 1997-June 1998), available at <http://labor-travail.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/backen.htm#background>.

proceedings for the enforcement of its labor law are fair, equitable, and transparent;

- Publication: each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application are made available; and
- Public Information and Awareness: each Party shall promote public awareness of its labor law.¹⁹³

A Commission for Labour Cooperation (“CLC”) was created to implement the Agreement. The Agreement has two main components: a Cooperative Work Program and a process for handling issues of concern between the two countries. If differences arise, the Agreement provides for cooperative consultations, independent evaluations, and ultimately, a dispute resolution process. An assessed contribution, which goes into a fund to improve matters, may be levied on the party losing a dispute. The CLC consists of a bi-national Ministerial Council that is supported by a National Secretariat in each country.

The Ministers, or their designees, meet annually to review progress and approve the work plan, which the National Secretariats are responsible for implementing. The Canadian Secretariat resides within the Labour Branch of Human Resources Development Canada. The Chilean Secretariat resides within the structure of the Ministry of Labor and Social Security. Each national Secretariat is responsible for planning and organizing participation in cooperative activities, responding to public requests for information, compiling and transmitting information to its counterpart, preparing reports and studies and providing support to any working groups or committees organized by the Council, and receiving and reviewing public communications on a range of labor issues, including concerns relating to the enforcement of labor laws in the other country.¹⁹⁴

d. Canada-Costa Rica Environmental and Labor Cooperation Agreements

In 2002, Canada and Costa Rica signed environmental and labor cooperation agreements, similar to those Canada signed

193. *See id.*

194. *See* Ministerial Council Report on the Three-Year Review of the Canada-Chile Agreement on Labour Cooperation (December 2002), available at http://labor-travail.hrdc-drhc.gc.ca/psait_spila/aicdt_ialc/2003_2004/report_english.htm.

with Chile. The Canada-Costa Rica AEC¹⁹⁵ and the Canada-Costa Rica LCA¹⁹⁶ were signed in Quito, Ecuador at the FTAA Ministers of the Americas Meeting.

The Canada-Costa Rica AEC focuses on environmental information exchange and capacity-building in the area of environmental enforcement and monitoring.¹⁹⁷ This agreement contains similar provisions to the Canada-Chile AEC, but has a stronger focus on access to environmental information and capacity-building for environmental policymakers and lawmakers. The Canada-Costa Rica AEC recognizes the relevance of transparency and public participation in the development of environmental laws and policies,¹⁹⁸ and one objective is the promotion of public participation in the process of developing environmental laws.¹⁹⁹ Other provisions of the accord also deal with public participation and access to justice for violations of environmental laws. These provisions include: the right of citizens to request that authorities investigate potential violations of environmental laws,²⁰⁰ the development of cooperation programs which may involve the public and experts,²⁰¹ the right of any citizen or non-governmental organization ("NGO") to request information from any party on the effective implementation of environmental law in its territory and the duty to respond to this request, including public access to summaries of the question and response,²⁰² the appointment of focal points for communication between any party and the public on matters related to the implementation of the Agreement,²⁰³ and the development of mechanisms to inform the public of activities carried out under the agreement and to involve the public, where appropriate, in such activities.²⁰⁴

While the Canada-Costa Rica LCA is structured similarly to the NAALC and Canada-Chile LCA, there are differences. Ad-

195. Canada-Costa Rica AEC, *supra* note 58.

196. Canada-Costa Rica LCA, *supra* note 60.

197. See Eduardo Gitli & Carlos Murillo, *A Latin American Agenda for a Trade and Environment Link in the FTAA*, in *GREENING THE AMERICAS*, *supra* note 46.

198. See Canada-Costa Rica AEC, *supra* note 58, at pmb1.

199. *Id.* art. 1(d).

200. *Id.* art. 5.

201. *Id.* art. 8.

202. *Id.* art. 9.

203. *Id.* art. 10.

204. *Id.* art. 11.

ministratively, the Canada-Costa Rica LCA is much simpler, and does not include provisions for national secretariats, evaluation committees of experts, or panel rosters. Because of these differences, it may have more direct relevance and be a more inclusive model for smaller economies in the Americas that have less administrative capacity.

In terms of scope, both models cover the same eleven principles and rights.²⁰⁵ The Canada-Costa Rica LCA obligations in Annex 1, however, directly relate to the ILO Declaration on Fundamental Principles²⁰⁶ that came into effect after the Canada-Chile LCA. Another difference is in the area of consultations, where review procedures apply to all of Annex 1. Ministerial Consultations are covered by the Review section and must relate to obligations in Annex 1.²⁰⁷ In the Canada-Chile LCA, dispute resolution applies to only three areas of enforcement: occupational safety and health, child labor, or minimum wage technical labor standards.²⁰⁸ General Consultations are a separate article under Cooperative Consultations and Evaluations and can occur regarding matters that concern the "interpretation and application of the Agreement . . . on any matter that may affect its operation," including concerns about the application of labor law.²⁰⁹

The Canada-Costa Rica LCA, regarding arbitral panels, does not provide for monetary fines. If a failure is not remedied, the other party may take "reasonable and appropriate measures, exclusive of fines or any measure affecting trade" to encourage remedies.²¹⁰ This may be interpreted to include enhanced technical assistance, but the Agreement is silent on the matter.²¹¹ Finally, in the area of cooperative activities, the developmental component of the Canada-Costa Rica LCA appears stronger than in the Canada-Chile LCA.

205. See *supra* note 192 and accompanying text.

206. ILO Declaration on Fundamental Principles, *supra* note 61.

207. See Canada-Costa Rica LCA, *supra* note 60, art. 14; *contra* Canada-Chile LCA, *supra* note 59 (consultations are not an institutional provision but can cover any matter related to the Agreement).

208. Canada-Chile LCA, *supra* note 59, art. 25.

209. *Id.* art. 18.

210. Canada-Costa Rica LCA, *supra* note 60, art. 23(5).

211. Communication with Dale Whiteside, Deputy Director, Strategic Trade Policy, Department of Foreign Affairs and International Trade, Government of Canada, (June 26, 2003) (notes on file with author).

e. U.S.-Chile Free Trade Agreement

The Free Trade Agreement between the U.S. and Chile (“U.S.-Chile FTA”) presents a different model.²¹² As with other recent U.S. trade agreements, this accord includes environmental and social provisions, not as side agreements but rather within the text of the agreement itself.

The U.S.-Chile FTA established the Environmental Affairs Council.²¹³ “This council shall ensure a process for promoting public participation in its work and shall seek opportunities for the public to participate in the development and implementation of environmental activities.”²¹⁴ Both parties must consider public communications on environmental matters, make available to the other party and its public all the communications it receives, and review them in accordance with its domestic procedures.²¹⁵ In addition, each party may convene or consult existing advisory committees, comprised of members of its public (business representatives and NGOs), to advise on implementation of the environmental initiatives.²¹⁶ Access to conciliation and dispute settlement procedures is provided under procedural matters.²¹⁷ While these innovations are certainly of interest to the environmental community, it remains to be seen whether similar initiatives can be agreed on by the thirty-four countries of the Americas. If they can, a side agreement providing for capacity building and other arrangements also may be included, otherwise, such concerns could be addressed in an “Environmental Chapter.”

Labor obligations are part of the core text of the U.S.-Chile FTA.²¹⁸ Both parties reaffirm their obligations as members of the ILO, and commit to strive to ensure that their domestic laws provide for labor standards consistent with internationally recognized principles.²¹⁹ The U.S.-Chile FTA makes clear that it is in-

212. Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, June 6, 2003 [hereinafter U.S.-Chile FTA], available at http://www.sice.oas.org/Trade/chiusa_e/chiusa_ind_e.asp.

213. *See id.* art. 19.3.

214. *Id.* art. 19.3:2-3.

215. *Id.* art. 19.4:1.

216. *Id.* art. 19.4:3.

217. *Id.* art. 19.8.

218. *Id.* art. 18.

219. *Id.* art. 18.1.

appropriate to weaken or reduce domestic labor protections to encourage trade or investment.²²⁰ The Agreement also requires that parties effectively enforce their own domestic labor laws, and this obligation is enforceable through the Agreement's dispute settlement procedures, including the establishment of a twelve-member "Labor Roster" to serve on panels.²²¹ Procedural guarantees in the Agreement seek to ensure that workers and employers will have fair, equitable, and transparent access to labor tribunals and courts.²²² A cooperative mechanism is provided specifically to promote respect for the principles embodied in the ILO Declaration on Fundamental Principles, and in compliance with the ILO's Worst Forms of Child Labour Convention (No. 182).²²³ Cooperative activities may include discussions of legislation, practice, and implementation of the core elements of the ILO Declaration on Fundamental Principles as systems for the administration and enforcement of labor laws.

All core obligations of the Agreement, including labor and environmental provisions, are subject to the Agreement's dispute settlement provisions. Dispute panel procedures set high standards of transparency with open public hearings, public release of legal submissions by parties, a special roster of labor or environmental experts for disputes in these areas, and rights for interested third parties to submit views.²²⁴ The emphasis is on promoting compliance through consultation, joint action plans, and trade-enhancing remedies. An innovative enforcement mechanism includes monetary penalties to enforce commercial, labor, and environmental obligations of the trade agreement.²²⁵

f. General Observations

The Canada-Costa Rica FTA, with its parallel accords on environment and labor, and the U.S.-Chile FTA with its labor and environmental chapters, are the most recent agreements of this nature in the Americas. They probably present the best models

220. *Id.* art. 18.2:2.

221. *Id.* art. 18.7.

222. *Id.* art. 18.3.

223. Worst Forms of Child Labour Convention (No. 182), Int'l Labour Org., June 1999 [hereinafter ILO Child Labour Convention], available at <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=en>.

224. U.S.-Chile FTA, *supra* note 212, art. 22.11.

225. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 66.

— to date — to ensure social, economic, and environmental “mutual supportiveness” through parallel accords or chapters of the FTAA.

Based on the survey of sub-regional and bi-lateral agreements provided above, three general observations can be made. First, most economic integration regimes in the Americas either contain provisions on environmental and social issues, provide space for parallel environmental and social cooperation institutions which address trade-related issues, or both. Such cooperation is not considered abnormal in the *modus operandi* of accord negotiation or implementation, though little work has been done to examine the mechanisms by which these parallel provisions can link or ensure coherence and “mutual supportiveness” in law and policy-making. Second, environmental and social cooperation regimes in most sub-regions are recent developments — over the past decade in several cases — and are becoming more prevalent in the Americas. Most provide for some kind of environmental or social cooperation institution, a council or commission, with provisions for public participation and review or monitoring of implementation of domestic environmental and labor laws. Third, environmental and social cooperation mechanisms across the Americas still face criticism for being too weak, costly, uncoordinated, under-funded, and unable to live up to expectations. When civil society access is assured, cases are brought forward, but governments tend not to trigger disputes on these “non-enforcement” issues themselves, even when legal avenues are provided to allow for these challenges. There remains much work to be done to define these agendas, let alone to link them with new ones.

B. Proposals for Environmental and Social Cooperation in the FTAA

The survey of social and environmental provisions in the Americas sub-regional and bi-lateral economic integration processes, FTAs, and existing institutional mechanisms for cooperation, raises several questions. Most of the sub-regional processes have recently set in place international legal structures for environmental or social cooperation. If such accords lead to deeper integration between the economies of the Americas, can institutionalized structures for environmental and social policy coordination also become more integrated, leading towards

hemispheric sustainable development law? Is it possible that, eventually, trust and cooperation will evolve to the harmonization, mutual recognition, and financing of health, labor, and environmental standards and instruments?²²⁶ Or will such provisions always be added as “afterthought” rather than part of the agenda-setting process itself? If so, what kind of hemispheric institutions are needed, what should be their mandates, and how could they be financed and implemented?

1. General Provisions

Before addressing these questions in greater detail, it must be noted that general sustainable development provisions can also achieve much for the FTAA. For example, hemispheric commitment to social development, poverty eradication, environmental protection, and sustainable development can be specifically mentioned in the preamble to the FTAA. In addition, the preamble should recognize the need for mutual supportiveness between economic, social, and environmental policies. Sustainable economic development, as an overarching objective of trade policy in the Americas, can also be mentioned in the objectives or purpose of the accord, committing the FTAA to consistency with other environmental and human rights treaty obligations. Such provisions could give guidance to dispute settlement processes and other occasions of treaty interpretation. The need for reinforced environmental and social cooperation systems in the Americas, in the context of increasing economic integration, could also be recognized in the Preamble, and mechanisms for linkage between such cooperative systems could be later recognized in the provisions on institutional arrangements.²²⁷ Such

226. Additional sources of financing for sustainable development initiatives are very much needed across the Americas. See A. BARCENA ET AL., FINANCING FOR SUSTAINABLE DEVELOPMENT IN LATIN AMERICA AND THE CARIBBEAN: FROM MONTERREY TO JOHANNESBURG (2002). Other sub-regional or hemispheric cooperation could include harmonization or mutual recognition of other mechanisms to implement social or environmental laws, such as impact assessment procedures or judgments of labor tribunals. See CORDONIER SEGGER ET AL., *supra* note 7; CORDONIER SEGGER ET AL., SOCIAL RULES, *supra* note 17.

227. It could contain a clear commitment to implement such a cooperative program and to develop systematic institutional cooperation mechanisms between trade, social, and environmental instruments. See, e.g., Marie-Claire Cordonier Segger, *Ecosystems, Trade and Sustainability in the Americas: Sustainable Development Opportunities in the FTAA and Americas Summits Agenda*, in TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: LATIN AMERICAN AND CARIBBEAN PERSPECTIVES, *supra* note 38.

recognition, coupled with mechanisms to ensure policy coherence, could work to prevent isolated, disconnected decision-making between different fields of law and policy and ensure “mutual supportiveness.”

The FTAA dispute settlement procedures could place the burden of proof in favor of maintaining human rights, health, environment, and other public policy legislation that, allegedly, restricted trade. In other words, a claimant could be required to establish a very robust *prima facie* case against a social or environmental law before it could be challenged. In addition, exceptions could be made broader, and policy-makers should not be required to demonstrate, beyond a reasonable level, that their social or environmental laws are “necessary.” The FTAA could also include, if necessary, institutional provisions allowing dispute settlement bodies to gain access to environmental, health, and human rights expertise from academia, hemispheric organizations, other specialist groups, or civil society. For legitimacy and transparency, it could also include provisions to ensure that civil society and citizens can gain access to deliberations and proceedings. Where necessary, such provisions could provide the conditions for dispute resolution processes to reach balanced results that take economic, social, and environmental considerations into account where necessary.

As mentioned above, the FTAA could also include, either as parallel agreements or as chapters, cooperation mechanisms for social development and environmental law. Such agreements probably would recognize the sovereign rights of States to establish their own levels of protection for health, safety, labor, and the environment. Nevertheless, economic growth spurred by trade liberalization, even wisely done, consumes natural resources and results in pollution and social dislocation, i.e., it has environmental and social costs. The FTAA should also deliver benefits. As hemispheric trade and economic integration proceed, both, systematic enforcement of environmental and human rights laws and hemispheric environmental and social programming, will become increasingly necessary to prevent competitive forces from pressuring regulators to lower standards or neglect enforcement of environmental and social laws and to ensure that the FTAA delivers sustainable benefits. Binding new agreements on these issues can fulfil several important tasks. Furthermore, I propose that such accords should be backed by

adequately financed new mechanisms for ongoing sustainable development cooperation that will achieve concrete results.

2. An Americas Environmental Cooperation Mechanism?

The Americas is a contiguous geographic area with common migratory species and linked ecosystems. It shares many natural, cultural, and historical characteristics, from interdependent chains of mountains, coasts, and forests to common languages, indigenous peoples, colonial history, and modernization.²²⁸ The region would benefit from a coherent environmental cooperation agenda to increase resources for environmental management and ensure better implementation of international and domestic environmental commitments.

A new environmental cooperation mechanism is needed to improve environmental protection as a foundation for sustainable development in the Western Hemisphere.²²⁹ This Article recommends that some form of an Americas "Framework Agreement on the Environment" should be negotiated in the context of the FTAA. A cooperative agenda on the environment could be addressed through an environmental chapter of the FTAA that recognizes sustainable development as a goal, through a parallel environmental agreement to the FTAA or through a combination of both.²³⁰

I recommend that the agreement, whatever form it takes, provide for the development of an environmental cooperation mechanism, one which includes a strong institutional component. This could consist of a hemispheric environmental commission, governed by a council selected from a bi-annual Americas environment ministers forum or network of sub-regional environmental cooperation bodies. It should, perhaps in annexes, lay out an agenda for future cooperation (and financing) of specific environmental initiatives.

This begs two questions. First, what would an environmental cooperation agenda in the FTAA do? And second, why is a

228. See generally CORDONIER SEGGER ET AL., *supra* note 7.

229. It could undertake an Americas environmental cooperation, and also address hemispheric linkages between the environment and health, trade, and human rights issues.

230. For further ideas on form and substance for Americas environmental cooperation, see CORDONIER SEGGER ET AL., *supra* note 7. See also GREENING THE AMERICAS, *supra* note 46.

framework agreement, supported by a commission selected by a hemispheric environment ministers forum or sub-regional environmental authorities, recommended?

An Americas environmental cooperation agenda, either within the FTAA or parallel to it could fulfil several key tasks. It could contain specific provisions to support more systematic development and enforcement of environmental standards and regulations by all parties, not simply on a national level, but also for sub-regional and regional compliance with international accords.²³¹ This could be done through provisions on comparative analysis, capacity building, exchange of best practices, and policy linkages. It could also be accomplished through streamlined procedures for challenges of non-enforcement, which would permit greater accountability and settlement of any disputes. To be effective, such a non-enforcement challenge process should be open to civil society, as governments do not traditionally initiate disputes on environmental matters. In the interest of good governance, any discretion for enforcement of environmental laws granted by such a process should be very limited.²³² And if non-enforcement can be shown to be caused, in good faith, by a lack of resources, a hemispheric financing mechanism would be needed to help remedy these situations. Furthermore, such a mechanism should cover both commitments to enforce environmental law and also commitments not to lower standards to attract investment or achieve competitiveness gains. Rather than trade sanctions, however, such a mechanism could provide for assessed contribution mechanisms designed to improve environmental protection.²³³ Such a preventive measure would essentially exist for damage control — to limit any “race to the bottom” that might be linked to the FTAA.

But a positive Americas environmental cooperation agenda is also desirable, and possible in the context of the FTAA. Such an agenda could involve various commitments. First, it could in-

231. See generally CORDONIER SEGGER ET AL., *supra* note 7.

232. While voluntary environmental projects or programs may be implemented by governments on a discretionary basis, environmental laws, especially those which ensure compliance with internationally agreed treaties, are binding legal obligations established, through a democratic process, to protect national (and often regional or global) public interests. As such, any decisions not to enforce the law must carry a burden to be clearly and demonstrably reasonable, with the burden of proof on the party accused on non-enforcement.

233. This is done in the Canada-Costa Rica AEC, *supra* note 58.

clude a commitment to jointly compile and analyze aggregated, empirical data on environmental conditions in the Western Hemisphere, and share this information through reports and publications. Such data is, presently, extremely difficult to obtain, and would be invaluable for researchers and scientists, as well as for citizens and policy-makers, encouraging higher levels of focused cooperation on these issues across the Americas.

Second, it could provide a forum for countries of the Americas to jointly develop cooperative initiatives. These could include cooperative sustainable development-related capacity building programs and sustainability impact assessment of the FTAA, along with other concrete (and financed) initiatives that would take place on national, regional, and sub-regional levels. Voluntary initiatives also could be included.²³⁴

Third, it could provide a forum for discussions on systems for mutual recognition or, where appropriate, harmonized environmental product and service standards and certification systems. Indeed, in certain sectors, parties could use the mechanism to commit to measurable upward harmonization of environmental and social standards over time, and provide incentives or financial resources to support such programs.²³⁵ A mechanism for the recognition of business codes of social and environmental conduct (with appropriate incentive systems)

234. Such mechanisms might include civil society, academic, and government partnerships or guidelines for environmental performance. They also might include information- and expertise-sharing on environmental protection, environmental auditing and reporting, methods for improving efficiency of resource use or reducing environmental impacts, environmental monitoring, and collection of baseline data. Finally, they may include natural resource protection mechanisms such as financial incentives, incentives for the exchange or trade of environment-related permits or credits, and public recognition of environmental performers.

235. For example, a ten to fifteen year agenda could be established to create common standards and certification bodies in key sectors where civil society and industry associations were prepared to work together. As tariff levels have dropped, non-tariff or technical barriers to trade have become relatively more important for developing-country market access. Experience suggests that, without certain basic institutional infrastructure, developing countries cannot benefit from the provisions in trade agreements. Developing countries' experiences implementing environmental health, safety standards, and technical regulations demonstrate that these are no different from other product quality requirements. Both are required for market access and both are developed and implemented within a complex institutional and legal framework. See TOM ROTHERHAM, INT'L INST. SUSTAINABLE DEV., IMPLEMENTING ENVIRONMENTAL, HEALTH AND SAFETY (EH&S) STANDARDS, AND TECHNICAL REGULATIONS: THE DEVELOPING COUNTRY EXPERIENCE (2003).

could also be established by the FTAA to complement efforts made by the private sector.

Fourth, it could facilitate increased public participation regarding the FTAA's environmental aspects, in particular, and a cooperative environmental agenda for the Americas, in general. The need, nature, and scope of a permanent mechanism for public participation in the FTAA have been discussed elsewhere,²³⁶ and are also addressed in this volume.

Fifth, it could provide for a commitment to enhance the mutual supportiveness of environment, trade, and human rights accords to which all FTAA members are also parties. In this instance, it should also suggest ways of resolving overlaps between the FTAA and other treaties to which some, but not all, FTAA members are parties. Such an environmental cooperation mechanism could save considerable time and resources by ensuring greater coherence between accords, and even by providing, where common agendas exist, regional negotiating mechanisms in multilateral environmental agreements.²³⁷

The second question, regarding the institutional structure of such a cooperation mechanism, is also worthy of greater examination. A framework agreement mechanism would build on the model presented by the MERCOSUR Framework Agreement on the Environment,²³⁸ and by the Caribbean Regional Seas Treaty, both with action-oriented "protocols." This structure has been successfully used in many other environmental agreements, as it provides a legal way to adapt to changing scientific and technological knowledge and environmental conditions. The agreement can lay out the intention to cooperatively address shared hemispheric environmental management challenges, adding value to the existing regimes. But these challenges may change over time. A "framework agreement" allows further "protocols" or annexes to be added later, laying out specific initiatives with targets and timetables.²³⁹ These initiatives

236. See generally Cordonier Segger & Cabrera, *supra* note 18. See also Rivas, *supra* note 18; Cordonier Segger et al., *A New Mechanism*, *supra* note 18; CORDONIER SEGGER ET AL., *SOCIAL RULES*, *supra* note 17.

237. Such joint positions could be followed up by cooperative implementation, monitoring, and reporting, which include hemispheric clearinghouses, experts' networks, technology transfer, and financing mechanisms.

238. MERCOSUR Framework Agreement, *supra* note 74.

239. The initiatives defined in the Quebec City Summit Plan of Action and in meetings of environment ministers provide a good starting point for an Americas envi-

will coordinate cooperation to solve common hemispheric or sub-regional environmental issues, including those related to trade, health, or human rights.²⁴⁰

To be effective, however, a strong implementing institution, sensitive to the needs of the diverse sizes of economies and distinct ecological zones of the Americas must accompany the accord. A hemispheric environmental commission, for example, would provide necessary institutional support and continuity. This institution would require a small secretariat and office to support its activities,²⁴¹ a clear program of activities with financing, and a structure that ensures effective cooperation and feedback. For instance, existing national and sub-regional environmental instruments and environmental authorities are becoming increasingly effective and capable. A new hemispheric institution would require a mandate to work with these authorities in a structured manner. Similar to the Commission of Andean Environmental Authorities, the North American Commission on Environmental Cooperation ("NACEC") and the Canada-Chile Environmental Cooperation Commission ("CCECA"), such a commission can be governed by an environment ministers council. These ministers could be elected from a plenary of the Environment Ministers of the Americas, or selected by the environmental authorities of existing sub-regional environmental cooperation mechanisms. Thirty-four ministers, one from each of the countries in the Americas, would be too large and too costly to provide a functional governing body for an environmental treaty because geographical distances are great and frequent meetings might be required. But a council of Environment Ministers of the Americas could be composed of one minister from each sub-region with rotating seats. These

ronmental cooperation agenda and have resonance with the declarations of prior regional forums. Their priorities are defined by sub-regional environmental entities, as well as by existing global gaps in environmental law and policy.

240. A program for new environmental cooperation in the Americas could address key Americas environmental priorities such as sustainable forest products and forest nature tourism, reduction and elimination of unsustainable subsidies, land-based sources of marine pollution and coastal ecosystems, a hemispheric environment and health program, a hemispheric environment and trade program, and a hemispheric program for migratory species and their habitat. See MARIE-CLAIRE CORDONIER SEGGER, *OUR AMERICAS ENVIRONMENT: A PROPOSAL FOR REGIONAL ENVIRONMENTAL GOVERNANCE* (2003).

241. It could work in a "virtual way," but should be independent and based in the same city as the FTAA Secretariat.

could be selected by a bi-annual plenary meeting, which could act as a hemispheric environmental cooperation mechanism, or in existing sub-regional environmental cooperation bodies.²⁴² Such a hemispheric environmental commission would need to hold periodic, substance-based meetings with whatever coordination mechanism emerges from the FTAA negotiations. In cooperation with appropriate advisory groups and an ongoing Western Hemispheric civil trade society and sustainable development forum, both could jointly attend to the task of issue identification, gathering and responding to input, and analysis.²⁴³

The process by which an FTAA environmental cooperation mechanism is developed will be crucial for its success. Negotiations should be launched through a series of high-level political and expert environmental policy dialogues, which could take place in the context of the Americas Summits agenda.²⁴⁴ Negotiators will also need to identify ways to address environment and

242. The existing U.N. EP Environment Ministers Forum for Latin America and the Caribbean involves thirty-three countries of the Americas (including Cuba, which is part of the geographical and environmental territory of the region), and might provide a base for such a forum, working in cooperation with the five sub-regional environmental cooperation authorities. These five authorities include the North American Commission for Environmental Cooperation, the MERCOSUR Sub-Grupo No. 6, the Commission of Andean Environmental Authorities, the Central American Environment and Development Commission, and the appropriate Caribbean environmental program.

243. See GREENING THE AMERICAS, *supra* note 46. See also Cordonier Segger, *supra* note 227, in TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: LATIN AMERICAN AND CARIBBEAN PERSPECTIVES, *supra* note 38; CORDONIER SEGGER ET AL., TRADE RULES, *supra* note 17; Nicolas Lucas, Some Issues for Consideration on Participation, Paper Presented at The FTAA and the Environment: What Can We Learn from the NAFTA Model? (April 2002).

244. The negotiations should be based on the following considerations. First, negotiations for a hemispheric environmental cooperation mechanism should be conducted in an open, transparent, and accountable way, with careful preparation and full participation of all countries of the hemisphere from the start. It is essential to avoid last minute negotiations, which could alienate key actors and countries, as happened in the NAAEC. Mechanisms will be needed to ensure coherence on global environmental policy while negotiations are proceeding, otherwise, a lack of consensus on global matters, such as the Kyoto Protocol, could derail regional goals and progress. Second, the negotiations should be coordinated by an ad-hoc Secretariat, formed by credible regional partners such as the U.N. EP Forum of Ministers of the Environment of Latin America and the Caribbean, OAS, and the World Conservation Union ("IUCN"). This could begin the process of building an institution to facilitate the work of a hemispheric environmental commission. Third, negotiations should be based on and informed by concrete data concerning real trade-related environmental and health problems, for example, provided by the results of hemispheric or sub-regional environmental reviews or sustainability impact assessments of the various parts of the trade accord.

trade linkages, where these issues overlap.²⁴⁵

The issue of financing deserves special emphasis. For negotiations to be successful, they must start with a clear commitment of new and additional resources to finance the result. Serious attention must be given to the establishment of mechanisms for new and additional resources to properly finance the agenda in a realistic, cost-effective manner which the parties to the accord control to themselves in a just and equitable way. A new environmental cooperation mechanism in the Americas should not burden already over-extended environmental ministries, particularly in smaller economies.²⁴⁶ The NACEC, with binding contributions from each member government of CAD\$3 million per year, has a budget of CAD\$9 million annually to address environmental cooperation in North America.²⁴⁷ A realistic estimate of the costs involved in administering environmental cooperation for the Western Hemisphere, involving governments with very diverse resources, must take into account the needs of each sub-region. A comprehensive study of this issue, with budgets and comparative analysis of other international environmental institutions, would be very valuable. At a minimum, it can be estimated that a serious provision for hemispheric environmental cooperation, at U.S.\$9 million annually per sub-region, would cost U.S.\$45 million. This amount seems quite reasonable compared to the sums committed for the FTAA Hemispheric Cooperation Program, to build trade technical assistance. In the interest of stability and consistency, such funds may need to be dedicated from government budgets, with all governments making an assessed contribution on a scale and taking into account both the common and the distinct responsibilities of the parties involved. Further project funds would also be necessary and

245. This agenda could incorporate such issues as a gradual process of mutual recognition or harmonization, where appropriate, of Americas-wide environmental standards and certification procedures (potentially on natural resources such as mining or forestry), and the promotion of trade or technology transfer in environmental goods and services. It could also examine ways to promote more environmentally beneficial investment policies, eliminate unsustainable subsidies, and settle eventual hemispheric trade and environment disputes.

246. See Bowcott interview, *supra* note 187.

247. While each of the three member governments has significant environmental budgets of their own, so that the NACEC can build on their work and resources, North America is also an extremely extensive area, environmentally.

could be raised in innovative ways.²⁴⁸

3. Social Cooperation Mechanisms for the FTAA?

While the NAFTA model only focuses on labor rights, there is not just one FTAA social cooperation agenda. Focusing exclusively on labor might be particularly inappropriate in the hemispheric context, where so few workers are unionized or even part of a formal labor market. Rather, there are several key social priorities that can be considered within or outside the context of the FTAA. This proposal will focus on four interrelated social development concerns for the Americas: labor, poverty (especially among the most vulnerable peoples), human rights, and health.

Labor issues are high on the hemispheric agenda. The Quebec City Summit of the Americas Plan of Action recognized that employment is the most direct link between economic activity and the improvement of the standard of living of citizens. It recognized that true prosperity can be achieved only if it includes protecting and respecting basic rights of workers as well as promoting equal employment opportunities and improving working conditions for people in all countries in the region, with special attention to the most vulnerable groups.²⁴⁹

The governments of many developing countries fear and resist links between trade and labor standards. This is not to avoid the improvement of labor standards, on the contrary, most are parties to the ILO Conventions and have agreed to related Declarations. Rather, there is a fear that badly-drafted measures could limit access to new markets, or even worse, privilege competitors in countries that do not have to comply with such social

248. One expert body to consult is the Inter-Agency Technical Committee of the Forum of Ministers of the Environment of Latin American and the Caribbean. Special funds, modeled on the ALIDES Central American Fund for Environment and Development project, can also be created to support regional environmental priorities.

249. These groups include those in the informal sector, people belonging to ethnic and religious minorities and other vulnerable persons including women, youth, indigenous migrant workers, persons with disabilities, and persons with HIV/AIDS. The Quebec City Summit also noted the importance of investing in human resource development, promoting employment security consistent with economic growth, and of developing mechanisms to assist workers with periods of unemployment. It also noted the need to strengthen cooperation and social dialogue on labor matters among workers, their organizations, employers, and governments.

or labor standards. Any labor-related provisions in the FTAA²⁵⁰ should contain a commitment not to make conditional otherwise agreed market access gains, nor to create additional “hoops” or protectionist “red tape” for the producers of developing countries.

A positive, cooperative hemispheric socio-laboral agenda is also possible, and indeed, highly desirable. Unlike for the environment, an institutional cooperation labor mechanism already exists in the Americas. As such, the meetings of the Inter-American Conference of Labor Ministers can define and lead a cooperative agenda.²⁵¹ This Conference provides for tripartite (government, employers, and labor unions) participation and has been meeting for a number of years. Nevertheless, such an agenda should be backed by a commitment to deliverable goals, measurable outcomes, specific monitoring, and participation provisions. In the context of the FTAA, direct trade-related labor and social cooperation measures also are useful.

Such measures should be capable of addressing trade related social issues which extend beyond labor concerns. For example, a hemispheric Commission on Socio-Labor Cooperation could be set up, modeled on the existing MERCOSUR Socio-Laboral Commission. This commission could address pressing labor issues in the FTAA and also work on further social issues as appropriate.

In the FTAA, similar to the Canada-Costa Rica and the U.S.-Chile FTAs, it should be possible to confirm a commitment to adopt and implement the ILO Declaration on Fundamental Principles. Where they do not already exist, national offices can be established to facilitate this work and ensure greater public

250. One innovative proposal is that the FTAA could permit, or even support, preferential treatment for certain LAC *products* based on their compliance with core ILO standards or other multilaterally agreed upon and monitored measures. The distribution of trade preferences through a Generalized System of Preferences (“GSP”) regime based on *product* compliance with core ILO labor standards (rather than *country* compliance with such standards) could provide a more effective tool for linking trade benefits with socially desirable economic behavior. See generally CORDONIER SEGGER, SOCIAL RULES, *supra* note 17.

251. The Quebec City Plan of Action reaffirmed the work of the Inter-American Conference of Ministers of Labor by adopting its Plan of Action in 1998 asking Labor Ministers to collaborate to identify areas where further work needed to be done, in coordination with the OAS, the ILO, the U.N. ECLAC, as well as the IDB and the World Bank.

participation, similar to those which exist under the North American Agreement for Labor Cooperation.²⁵² The FTAA's cooperative labor agenda can include actions to strengthen fundamental labor rights and their effective application, eliminate the worst forms of child labor,²⁵³ improve labor administration, labor inspectorates and inspection systems, strengthen labor justice, and improve labor-management relations and working conditions (such as hours of work, minimum wages, and occupational safety and health). Further cooperation might also include work to support the development and implementation of more effective labor market policies, collaboration with employers and labor organizations to develop and generate aggregated and comparative data and information on labor conditions and markets, hosting tripartite consultations, dialogues, and establishing dispute resolution strategies. These dispute resolution strategies might include a mechanism similar to the one outlined above for environmental laws, as this could be applicable to the enforcement of labor law and respect for labor standards. Other issues of importance might include those addressed by the Andean Advisory Council of Labor Ministers, such as job promotion, job training, social security, and labor migration.

The regional trade-related social development agenda is broader than simply labor. In accordance with the 2003 Summit of the Americas Declaration of Nuevo Leon, the FTAA could explicitly recognize the importance of the promotion and observance of economic, social, and cultural rights. It also can explicitly link with and support the efforts of existing OAS poverty eradication instruments.²⁵⁴ The agenda of a socio-laboral com-

252. The experience of the NAALC to date demonstrates that linking the enforcement of labor standards to trade relations can have a positive impact on the protection of labor standards both domestically and internationally. This is so even without the actual use of the trade measures available under such an agreement. Civil society groups have used the NAALC complaints procedure as part of their broader efforts to bring about positive social policy changes.

253. The 2001 Summit of the Americas Plan of Action called for hemispheric ratification and implementation of the ILO Child Labour Convention, *supra* note 223, and identified the need for national laws, regulations and policies to come into conformity with this Convention.

254. Indeed, according to the 2003 Summit of the Americas Declaration, the OAS mechanisms to fight poverty, such as the Inter-American Council for Integral Development, the Inter-American Committee on Social Development, and the Inter-American Program to Combat Poverty and Discrimination, desperately require strengthening. It

mission, perhaps with links to other related instruments, can address trade-related aspects of important priorities, such as social security, human rights, and health. These provisions would reinforce a commitment to the rights and basic needs of the most vulnerable in the Western Hemisphere such as women,²⁵⁵ migrants,²⁵⁶ and indigenous peoples.²⁵⁷

Through a show of commitment or explicit recognition in its provisions, the FTAA has the potential to make progress in the area of trade-related social issues beyond labor, such as social security, human rights, and health. While a detailed consideration of these options is beyond the scope of this Article, a few points can be made.

should also take into account the recommendations of the 2003 High-Level Meeting on Poverty, Equity, and Social Inclusion, held in Isla de Margarita, Venezuela, to strengthen the hemispheric social agenda.

255. The 2003 Summit of the Americas Declaration of Nuevo Leon reiterated that the empowerment of women, their full and equal participation in the development of our societies, and their equal opportunities to exercise leadership are fundamental for the reduction of poverty, as well as the promotion of economic and social prosperity, and for people-centered sustainable development. Specific proposals were made in the 2001 Quebec City Summit of the Americas, especially involving the strengthening of the OAS Inter-American Commission of Women.

256. Respect for the rights of migrant workers, who are often made more vulnerable by abrupt international economic changes, is important. Close cooperation is needed between countries of origin, transit, and destination in order to ensure protection of the human rights of migrants. Further actions can help to implement the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This Convention enlarges the protection of fundamental human rights to all migrant workers, including undocumented workers, and establishes additional rights for migrant workers and their families in more stable situations. A new hemispheric instrument, linked to the FTAA and the commitments in the Protocol of San Salvador, and containing complaints procedures similar to those offered in the NAALC, might help to protect the rights of migrant workers in this way. Such an accord could be modeled on the regional instruments in CARICOM, CAN, and MERCOSUR, or could be achieved by giving hemispheric scope to the Regional Conference on Migration (Puebla Process) or the South American Conference on Migration (Lima Process). Commitments were made in 1998 at the Santiago Summit Concerning the Protection of Human Rights of Migrants, and also in the 2001 Quebec City Summit of the Americas. Governments will establish an inter-American program within the OAS for the promotion and protection of the human rights of migrants, including workers and their families.

257. In the context of the broader Summit of the Americas process, sustained progress is needed on the development and implementation of the ORG. AM. STATES, INTER-AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS POPULATIONS (2001), available at www.oas.org. Furthermore, a permanent Indigenous Peoples Forum, modeled on the Declaration of Machu Picchu, *supra* note 105, can be established to undertake implementation activities and monitor progress in this area. A cooperation mechanism and a strengthened OAS program in this area could support it.

First, in the broader Summits of the Americas, the work of the Pan American Health Organization (“PAHO”) has been recognized, and the need to implement the Shared Agenda for Health in the Americas²⁵⁸ signed by PAHO, the IDB, and the World Bank has been highlighted. Many action initiatives, especially those to combat HIV/AIDS and its consequences, have been announced, and more work is possible.²⁵⁹ More can be done specifically within the framework of hemispheric trade liberalization, especially if the FTAA includes liberalization of health services. In order to ensure that these programs support hemispheric health cooperation efforts, parties may consider including a brief statement on trade-related health cooperation in the FTAA treaty, or negotiating a hemispheric agreement on principles of health cooperation.²⁶⁰

Second, more also can be done to ensure that the most vulnerable populations gain non-discriminatory access to social security, particularly if hemispheric integration deepens and movement becomes more common. Governments also could eventually consider negotiating a Hemispheric Agreement on Social Security Benefits (modeled on the Caribbean and MERCOSUR Social Security treaties).

258. Shared Agenda for Health in the Americas, June 22, 2000, available at <http://www.paho.org/English/DEC/sharedagenda.htm>.

259. For example, a hemispheric equity-oriented health sector review and reform process can be launched, to ensure essential public health functions for all and improve quality of care. Hemispheric systems can also be set in place to promote use of common indicators for assessing effectiveness, equity and efficiency of health systems, accompanied by reliable funding. Regional cooperation initiatives could be established for standards of practice, accreditation and licensing procedures, codes of ethics, and education and training programs for health personnel. A hemispheric program could be launched on alternative health practices and medicinal products, to share experience and knowledge with other countries in the Americas. For example, smoking is still a serious threat to health throughout the Americas. Hemispheric programs can be strengthened to promote ratification and implementation of the Framework Convention on Tobacco Control and to reduce the consumption of tobacco products, especially as they affect children and adolescents. See generally CORDONIER SEGGER ET AL., *SOCIAL RULES*, *supra* note 17.

260. Such a statement could be negotiated by the joint Health and Environment Ministers of the Americas (“HEMA”) process, and link the FTAA process with the goals of the Health and Environment Charter discussed above. It would serve to clarify the social benefits of the FTAA in the area of health care, to provide cooperative agreements or other measures to ensure that national investments in the training of health professionals are not lost, and ensure that any liberalization commitments made in relation to the provision of health services are done in a framework which takes into account the special nature of these social policies.

Third, as agreed in the Quebec City Summit of the Americas, governments must significantly increase political and legal commitment to the mandate of the Inter-American Human Rights System. As mentioned above, the Preamble and objectives of the FTAA recognize that trade agreements are being negotiated within the context and framework of existing regional²⁶¹ and global human rights doctrines, and ensure that trade measures will contribute to the progressive realization of human rights, including social, economic and cultural rights.

4. Sustainable Development in the FTAA

While increased trade may lead to increased wealth, it is not clear that the FTAA will actually reduce poverty, and even less clear that it will lead to a more equitable distribution of wealth. It is also not clear how increased trade and investment might affect the environments of the Americas. Will the social costs of the FTAA be borne by some, while the benefits all go to others, as some claim? How does trade liberalization affect equity (measured by such indexes as the Gini Coefficient) within regions and countries? In order to advance the FTAA agenda, there is a need to address the concerns of smaller economies and the public about the potential environmental and social impacts of trade liberalization. This is difficult to do without accurate, independent information, analysis, and awareness. There is a need for credible, impartial impact assessments of ongoing trade liberalization negotiations (on hemispheric, sub-regional, or national levels). A process to conduct comprehensive, participatory sus-

261. Indeed, within the broader context of the Summit of the Americas, it has been noted that the Inter-American human rights institutions need to be strengthened and granted increased financial support, and that improved mechanisms are needed to facilitate access to justice. In this context, many have called for concrete measures to strengthen and improve the inter-American human rights system, in particular the functioning of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (IACHR). These efforts must focus on the universalization of the inter-American human rights system, and especially on increasing adherence to its founding instruments, such as the Protocol of San Salvador. It is also important to enforce compliance with the decisions of the Inter-American Court, follow up on the recommendations of the IACHR, facilitate access to this protection mechanism, and substantially increase resources to maintain ongoing operations. In addition, both the Court and the IACHR should become permanent mechanisms. See generally CORDONIER SEGGER, *SOCIAL RULES*, *supra* note 17. See also Ctr. Human Rights & Env't, Access to Justice Program, at <http://www.cedha.org.ar/>.

tainability reviews of the proposed FTAA could be helpful to address this need.

Various governments and inter-governmental agencies have recently begun to seek ways to prevent or mitigate the adverse impacts of new trade rules²⁶² through the use of national and regional assessments.²⁶³ Such studies present one way of identifying sequencing options, flanking measures and even provisions which could effectively transform the FTAA into an instrument of sustainable development law.²⁶⁴ These assessments, and the decision-making processes that are informed by them, should be participatory and capable of generating action plans, mitigation strategies, and appropriate flanking measures with measurable benchmarks that can be monitored. Taking into account the economic impacts of deteriorating social conditions, they can be used to identify useful parallel measures for trade policy, support the development of sequencing options to mitigate or lower any adverse social or environmental effects, and strengthen the sustainable development benefits of liberalization. They also can generate comparative data with which to identify and eliminate

262. While there is no clear relationship between rates of economic growth and rates of environmental degradation, the "environmental Kuznet's curve" (where environmental protection improves as economies improve) has been discredited. Methodologies are becoming increasingly refined, including ways of studying effects by economic sectors (agriculture, services), environmental media (air quality, water, biodiversity) or qualitative sustainability bench marking (such as using the Winnipeg Principles). See *Reference Manual for the Integrated Assessment of Trade-Related Policies*, U.N. Env't Programme (2001), available at www.unep.ch/etu/etp/acts/manpols/refmania_final.pdf (last visited Mar. 14, 2004).

263. Countries first called for national environmental reviews in 1996. See WTO, *Environmental review of trade agreements at the national level — Submission by the United States*, WT/CTE/W/37 (July 23, 1996). Discussions continued and intensified in 2000 before the WTO Committee on Trade and Environment where countries described their respective efforts towards sustainable development. See WTO, *Eco-labeling programmes: Information provided by Canada, Chile, the Czech Republic, European Communities, Norway and U.S. to the CTE and the TBT Committee*, WT/CTE/M/23-G/TBT/W/23 (Apr. 5, 2000). The WTO Secretariat provided a background paper for the discussions, WTO document WT/CTE/171. For Canada's approach to environmental assessment, see Dep't Foreign Affairs & Int'l Trade, *Framework for Conducting Environmental Assessments of Trade Negotiations* (2001), available at <http://www.dfait-maeci.gc.ca/tna-nac/Environment-.asp>. For the U.S., see Exec. Order No. 13,141, 64 Fed. Reg. 63,169 (Nov. 18, 1999). See also Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements, 65 Fed. Reg. 79,442 (Dec. 19, 2000).

264. A comprehensive proposal for sustainability impact assessment in the context of the FTAA is provided in Hernan Blanco, *Evaluacion de la Sustentabilidad de los Acuerdos Comerciales y su Aplicacion en el Contexto Americano Latino y del ALCA*, in *ALCA Y MEDIO AMBIENTE*, *supra* note 18.

perverse social or environmental subsidies and identify key areas where clean technology and working conditions provide the most efficient industrial gains.

Regional environmental impact assessments have thus far been conducted under the auspices of the North American Symposium for the Assessment of Trade and Environment Policies.²⁶⁵ There have also been studies of the Chilean mining sector conducted by the Center for Environmental Investigation and Planning ("CIPMA") for the U.N. EP, and a recent study conducted by the U.N. ECLAC of the environmental impact of changes in the export structures of Argentina, Bolivia, Brazil, Chile, Jamaica, Mexico, and Peru.²⁶⁶ Some governments have committed to performing national assessments in the context of global trade negotiations,²⁶⁷ and have even undertaken assessments of the FTAA itself.²⁶⁸ Though not all studies currently integrate a strong social dimension into their approach, it is becoming increasingly acceptable to do so. Hence, the emergence of the so-called "sustainability impact assessments," which con-

265. Models for sectoral reviews include the above-mentioned processes conducted by the North American Commission for Environmental Cooperation, which focused on corn in Mexico, cattle in the United States and Canada, and electricity in North America. For more details, see COMISION PARA LA COOPERACION AMBIENTAL, *EVALUACIÓN DE LOS EFECTOS AMBIENTALES DEL TRATADO DE LIBRE COMERCIO DE AMÉRICA DEL NORTE: MARCO DE TRABAJO ANALÍTICO (FASE II) Y ESTUDIOS TEMÁTICOS* (1999). See also Kevin P. Gallagher, *The Environmental Review of the FTAA: Examining the U.S. Approach*, TRADE, EQUITY, AND DEVELOPMENT SERIES, Aug. 2003, at 1; FRANK ACKERMAN ET AL., *GLOBAL DEV. & ENV'T INST., FREE TRADE, CORN, AND THE ENVIRONMENT: ENVIRONMENTAL IMPACTS OF U.S.-MEXICO CORN TRADE UNDER NAFTA* (2003); KEVIN P. GALLAGHER & HERNAN BLANCO, *SUSTAINABILITY ASSESSMENTS: TOOLS FOR EFFECTIVE TRADE POLICY IN THE HEMISPHERE* (2003).

266. Marianne Schaper, *Environmental Impact of Changes in the Export Structure in Latin America and the Caribbean*, in TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: VIEWS FROM SUB-SAHARAN AFRICA AND LATIN AMERICA, *supra* note 47.

267. These include the NAFTA, NAFTA retrospective and Uruguay Round retrospective studies, which were announced in Declarations committing to environmental reviews of WTO agreements from the United States: WTO, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/304 (Aug. 6, 1999); European Union: WTO, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/194 (June 1, 1999); and Canada: WTO, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/358 (Oct. 12, 1999).

268. On May 5, 2003, the Government of Canada released its Initial Environmental Assessment of the Free Trade Area of the Americas (FTAA) Negotiations. The first of three reports prepared for the Strategic Environmental Assessment, Canada hopes it will help negotiators better integrate environmental considerations into the negotiating process. See Canada, *Initial Strategic Environmental Assessment Report of the Free Trade Area of the Americas Negotiations*, May 5, 2003, available at <http://www.dfait-maeci.gc.ca/tna-nac/IYT/ea0422-en.asp#ES>.

sider both social and environmental effects of the new trade rules.²⁶⁹

Sustainability impact assessments might prove particularly useful in the Americas in considering the potential impact of trade reform on indigenous communities and other vulnerable populations. Assessment techniques have already been developed by the Organization for Economic Cooperation and Development ("OECD") as well as members of the European Union.²⁷⁰ A series of assessments also could be conducted for the FTAA in collaboration with the OAS and other inter-American institutions. Carried out *ex-ante* (prior to the conclusion of the agreement) at the hemispheric level, such assessments might subsequently be used to develop a consistent methodology for application by sub-regional environmental and social institutions across the Americas, one which would focus on both the potential physical, environmental, or social impact of the FTAA, as well as any expected legal or regulatory ramifications.

Hemispheric studies might be implemented, not only by well-established, trade-oriented institutions, such as the IDB, the U.N. ECLAC and the OAS (which have already provided in-depth analysis of the region's trade structures prior to the launch of the FTAA), but also by the smaller economy nations of Latin America and the Caribbean through their sub-regional institutions. Civil organizations should act as partners in all aspects of the sustainability reviews.

A comprehensive hemispheric sustainability assessment of the FTAA could also prove very useful for negotiators and policy-makers.²⁷¹ Based on recent literature and ongoing academic debates, the next section of this Article will, based on recent literature and academic debates, briefly illustrate some of the most important sustainability aspects of the FTAA negotiations.

Launched at the San José Ministerial Meeting in 1998, formal FTAA negotiations led to the drafting of the San José mandate, which delineated nine separate negotiations groups: (1) Market Access; (2) Investment; (3) Services; (4) Government

269. See Blanco, *supra* note 264.

270. For more information on the assessment techniques developed by the E.U., see COLIN KIRKPATRICK ET AL., WTO NEW ROUND: SUSTAINABILITY IMPACT ASSESSMENT STUDY: PHASE ONE REPORT (1999); COLIN KIRKPATRICK ET AL., WTO NEW ROUND: SUSTAINABILITY IMPACT ASSESSMENT STUDY: PHASE TWO REPORT (1999).

271. See generally CORDONIER SEGGER ET AL., TRADE RULES, *supra* note 17.

Procurement; (5) Dispute Settlement; (6) Agriculture; (7) Intellectual Property Rights; (8) Subsidies, Antidumping, and Countervailing Duties; and (9) Competition Policy, each supervised by a trade negotiation committee. Special committees were also created to monitor smaller economies, electronic commerce, and civil society, the last of which adheres to a formal consultation process through which trade-related social and environmental issues can be discussed.²⁷²

The following section will focus, in order to illustrate the sustainable development aspects of the FTAA negotiations, on Subsidies, Intellectual Property Rights, Government Procurement, and Competition Policy. It will also briefly mention various social and environmental features of FTAA Market Access and Services negotiations. Although Investment and Agriculture negotiations are extremely important for sustainable development, I do not deal with them here as they are already well-documented in the literature and will no doubt be addressed by other authors in this volume.

a. Subsidies

The FTAA negotiations on subsidies present an opportunity to develop a common agenda between trade, social development, and environment communities within the Americas. Indeed, negotiations on subsidies elimination and phase-out can present an important opportunity for sustainable development.²⁷³ All three oppose “perverse subsidies” as being harmful to social development priorities (such as workers’ livelihoods), the environment, and the economy.²⁷⁴ From a sustainable devel-

272. In Buenos Aires in June 1998, the first meeting of the trade negotiations committee was extended an extra day to set up a transitory instrument which would receive civil society views on the FTAA. The committee was to receive commentary and present the range of views to trade ministers and civil society groups were to present their views to the committee “mailbox” in writing. See MARCELA VALENTE, *CIVIL SOCIETY FIGHTING HARD FOR INCLUSION IN FTAA* (1998). This mechanism has now evolved into an instrument with a mandate to hold meetings to consider civil society views on every aspect of FTAA issues, and to facilitate transparency in the FTAA process. In 2003, an “Americas Trade and Sustainable Development Forum” was convened in Miami, based on prior events in Quebec City (The Hemispheric Trade and Sustainability Symposium) and Quito (The Civil Society Trade and Environment Workshops), and recognized by the assembled ministers. See REPORT ON THE AMERICAS, *supra* note 37.

273. U.N. ENV’T PROGRAMME, *ENVIRONMENT AND TRADE — A HANDBOOK* (2002) [hereinafter *ENVIRONMENT AND TRADE — A HANDBOOK*].

274. See *id.* at 49. On a global level, perverse subsidies have been valued at

opment perspective, these subsidies distort prices and artificially lower the costs of doing business in an unsustainable way.²⁷⁵ “Distorted prices consequently reduce one of the main potential gains from trade — increased efficiency”²⁷⁶ — although the mechanism by which this occurs involves some of the most complex areas of trade policy and is therefore outside the scope of this Article.²⁷⁷ In any event, FTAA agreements to restrict or disallow perverse subsidies would prove highly beneficial for sustainable development.²⁷⁸

Several economic sectors within the Americas and globally remain both highly subsidized and exceedingly important to sustainable development, particularly in the areas of agriculture, forestry, energy, transportation, and fisheries.²⁷⁹ Experience shows that even the most well-meaning subsidies may prove to be perverse, either due to a lack of transparency in the institutional arrangements governing their use and distribution or inevitable

U.S.\$500 billion to U.S.\$1.5 trillion a year, and can result in considerable environmental damage, social injustice, and economic inefficiency. *See id.*

275. *See id.* A subsidy is any measure that keeps prices for consumers below the market level, keeps prices for producers above the market level, or reduces costs for consumers and producers by giving direct or indirect support. *See* NORMAN MYERS & JENNIFER KENT, *PERVERSE SUBSIDIES: HOW TAX DOLLARS CAN UNDERCUT THE ENVIRONMENT AND THE ECONOMY* (2001). *See also* ANATHA DURAIAPPAN, *TRADE-RELATED SUBSIDIES — BRIDGING THE NORTH-SOUTH DIVIDE* (2003).

276. *See* ENVIRONMENT AND TRADE — A HANDBOOK, *supra* note 273, at 50.

277. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH & LEE L. REV. 1227 (1992). *See also* JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO* 433 (2000).

278. Agriculture, forestry, energy production and transportation are all hard on the environment and require significant public investment, while most of the environmental damage and social costs they entail are not built into the market price of the goods they produce. *See* ENVIRONMENT AND TRADE — A HANDBOOK, *supra* note 273, at 49. Progress on subsidies, particularly in the area of agriculture, has been slow under the FTAA. *See* U.S., Brazil Play Brinkmanship in FTAA Talks, REUTERS NEWS SERVICE, Oct. 21, 2003. This is not surprising, however, since developed and developing countries have very strong feelings of ownership over their domestic subsidies regimes and have serious objections when they are challenged or investigated.

279. *See* ENVIRONMENT AND TRADE — A HANDBOOK, *supra* note 273, at 49. “Subsidies in the fisheries sector, for example, include low-interest loans to fishermen, fuel tax exemptions, and outright grants to purchase gear, boats, and other infrastructure. These measures lower the cost of fishing and lead to overexploitation of the resource” *Id.* The subsequent collapse of a fishery affects livelihoods and can lead to increases in poverty. *See* CAROLYN DEERE, WORLD CONSERVATION UNION, *NET GAINS: LINKING FISHERIES MANAGEMENT, INTERNATIONAL TRADE, AND SUSTAINABLE DEVELOPMENT* (2000). *See also* GARETH PORTER, U.N. ENV’T PROGRAMME, *FISHERIES SUBSIDIES AND OVERFISHING: TOWARDS A STRUCTURED DISCUSSION* (2000), available at www.unep.ch/etu/etp/acts/manpols/fishery.htm. Similar concerns exist in other sectors as well.

second-order effects created by distortions in related markets. Subsidies for pollution and excessively centralized sectors and technologies, for instance, have unwittingly diminished incentives to develop more sustainable alternatives.²⁸⁰ Parties to the FTAA now have an opportunity to conduct studies identifying sectors in which these perverse subsidies have the highest impact on the environment and poverty. While the ultimate goal is to target such subsidies for restriction, reduction, and gradual elimination, intermediate measures may now be enacted to ensure transparency concerning their use.²⁸¹

Not all subsidies are perverse, however. A subsidy which compensates for previously unpaid environmental or social benefits might prove beneficial to sustainable development.²⁸² Similar subsidies might allow various industries to employ disabled or disadvantaged individuals while providing employment training to traditionally marginalized groups. If environmental and social costs are taken into account, such subsidies actually move prices closer to their true level. Parties to the FTAA should recognize, therefore, that in certain instances, it would be against the public interest to impose a duty on, or implement countervailing measures against, certain subsidies. An exception to the agreement on Subsidies, Anti-Dumping and Countervailing Duties, for example, might follow the WTO model in permitting subsidies which provide up to 20% of the costs of a one-time expenditure. The FTAA could also provide mechanisms, either within “public interest exceptions” or the “sustainable development box” to sanction subsidies which, for example, help firms

280. For example, “[t]he U.S.\$145 billion a year given in subsidies to the fossil fuel and nuclear energy sectors worldwide diverts physical, financial and intellectual capital from research and development for alternatives like solar energy”, which might also employ more people. See ENVIRONMENT AND TRADE — A HANDBOOK, *supra* note 273, at 50. See also ANDRE DE MOOR & PETER CALAMAI, *SUBSIDIZING UNSUSTAINABLE DEVELOPMENT: UNDERMINING THE EARTH WITH PUBLIC FUNDS* (1998).

281. Countries use the Producer Subsidy Equivalent (“PSE”), the Consumer Subsidy Equivalent (“CSE”), and the Aggregate Measure of Support (“AMS”) to document the level of subsidies provided to particular sectors. However, because these indicators do not clearly demonstrate whether particular subsidies are perverse — or trade-distorting — “terms-of-trade” might serve as a better measure. See DURAIAPPAN, *supra* note 275.

282. For example, many governments subsidize the development and dissemination of solar technologies as alternatives to fossil fuels, since it could lower emissions of greenhouse gases and generate investment opportunities for small and medium sized enterprises.

adhere to social and environmental regulations and encourage the distribution of environmentally sound and socially desirable products, practices, or technologies. In this respect, hemispheric cooperation would greatly facilitate the creation of new subsidies to benefit the environment and social development without unduly distorting trade.

Even perverse subsidies deserve careful consideration for their complete dismantlement because they very well may cause short-term hardship to those least able to absorb the shock.²⁸³ Such considerations suggest that intermediary measures should invariably accompany subsidy removal.

It remains to be seen, however, whether the FTAA will be able to play a major role in dismantling perverse subsidies. Further research, concrete proposals, even investigations under mechanisms contemplated by the FTAA, will all be necessary to identify ways in which the FTAA can help reduce such subsidies while designing appropriate “environmental and social windows” for their implementation. And since every perverse subsidy supports a host of beneficiaries with a vested interest in preserving the status quo, achieving hemispheric consensus on such changes will not be an easy task.

b. Intellectual Property Rights

Intellectual property rights agreements usually set out the type of protection that different innovations should receive, while holding all parties to the same minimum standard of protection.²⁸⁴ The FTAA provisions for intellectual property rights (“IPRs”) are likely to be *positively proscriptive*: while other trade rules typically describe what countries should not do, they would explain what countries *should* do.

Several important sustainable development issues have been

283. Cutting fossil fuel subsidies in cold climates, for example, may hurt the poor who depend on such subsidies to heat their homes. Cutting fisheries subsidies may mean an initial loss of needed revenue for ports and fishing communities with no other sources of income. See DURALAPPAH, *supra* note 275.

284. For example, books must be protected by copyrights, industrial processes must be covered by patents. IPRs are patents, copyrights, or other means of protecting an innovator’s exclusive ability to control the use of their innovation for a specified period, during which the intellectual property rights holder will usually try to market and sell the idea, seeking to recoup their investment in research and development. See ENVIRONMENT AND TRADE — A HANDBOOK, *supra* note 273.

raised in debates concerning IPRs.²⁸⁵ First, there are concerns over how such measures might affect innovation, and if applied strictly to essential medicines, how they might raise costs and lower access for the most underprivileged segments of developing countries. Second, there are concerns over how the stronger protection of IPRs might affect ongoing efforts to conserve biodiversity. Finally, questions remain about whether (and how) collective rights to traditional knowledge, particularly that of indigenous peoples within the Americas, could be protected within a strong IPR regime.

From a sustainable development perspective, IPRs balance the welfare of innovators, whose efforts deserve compensation, against the welfare of society at large, which would benefit by having unlimited access to the innovation. It is important to properly weigh the competing interests: IPRs should serve the mutual advantage of producers and users of technological knowledge by fostering social and economic welfare and providing a balance of rights and obligations. Although innovations, whether in energy efficiency, new medication, or improved agricultural varieties, lie at the heart of sustainable development, they do little good unless widely disseminated.²⁸⁶

How would strong IPRs, such as those included in the FTAA, affect that balance? For one thing, they might help ensure that additional innovations take place,²⁸⁷ while facilitating the dissemination of new and beneficial technologies.²⁸⁸ Yet increased protection of IPRs in the FTAA might also engender a number of undesirable effects. If too strong, they would upset the balance in favor of the innovator,²⁸⁹ thereby impeding the

285. See, e.g., Jorge Medaglia Cabrera & J. P. Sanchez Hernandez, *La Confluencia de los Derechos de Propiedad Intelectual y el Ambiente en Torno al Tema de la Integración Comercial en America*, in *ALCA Y MEDIO AMBIENTE*, *supra* note 18.

286. See *ENVIRONMENT AND TRADE — A HANDBOOK*, *supra* note 273.

287. Without the guarantee of such protection, it seems unlikely that companies could afford to invest significant amounts to develop new software or new drugs, since they could be immediately copied by others and distributed at minimal costs. Intellectual property tends to require extremely high costs of development, but low costs of reproduction once developed. See *id.*

288. Technology transfer is usually a commercial venture, and advocates of strong IPRs suggest that innovators will be more comfortable in countries that are obliged to enforce strong protection of intellectual property rights. The obligation assures that innovations will not be freely pirated and increases the willingness of firms to disseminate their technologies in countries that adopt them.

289. Critics argue that long-term protection, such as twenty years for patents and

distribution of new technologies. Improperly applied, they might also stifle innovation itself. Finally, strong IPR protections have the potential to work against sustainable development objectives by making goods, such as pharmaceuticals, more costly and less accessible to the poor.²⁹⁰

Such effects run contrary to hemispheric policy, which aside from promoting research, prevention, and education, calls for increased resources toward access to care and treatment, especially for high risk populations. In the Quebec City Summit of the Americas Plan of Action, heads of State committed to increase national access to treatment for HIV/AIDS-related illnesses. They placed a high priority on provisions providing for affordable drugs, as well as reliable distribution and delivery systems. If modeled on recent global agreements,²⁹¹ the question remains whether more affordable anti-retrovirals and other drugs for HIV/AIDS treatment could be secured through hemispheric — or a series of sub-regional — dialogues with the pharmaceutical industry. Recognizing the potentially adverse effects of excessively strong IPRs, an exception could be drafted under the FTAA which would release parties from their obligations to grant patents for those products or processes deemed necessary to protect public health and provide access to medicine, safeguard animal and plant life, or prevent serious prejudice to the environment. Based on existing WTO provisions, such an exception would need to be carefully drafted so as to allow sufficient flexibility for policy-makers while providing adequate protection for IPRs.

other intellectual property rights, excessively reward the intellectual property rights holders while punishing the public by keeping the protected good too expensive for too long. See, e.g., Michael Rowson & Meri Koivusalo, *Who Will Inherit the Earth?*, 41 HEALTH MATTERS (Summer 2000). See also MARTIN KHOR, INTELLECTUAL PROPERTY, BIODIVERSITY AND SUSTAINABLE DEVELOPMENT: RESOLVING DIFFICULT ISSUES (2003).

290. Several developing countries would be required to dismantle domestic industries based on the cheap reproduction of foreign-patented drugs, forcing prices up dramatically. Since patents in certain countries protect only the process used to make a product, not the product itself, it is legally possible to make the same drug in a slightly different way without paying royalties. Strong IPRs demand, however, *product* patents as well as *process* patents, which would put an end to this kind of production and prove counter-productive to sustainable development. See K. Balasubramaniam, *Access to Medicines and Public Policy Safeguards under TRIPS*, in TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY (Christophe Bellmann et al. eds., 2004) [hereinafter TRADING IN KNOWLEDGE].

291. Rosine Jourdain, *Intellectual property rights and public health in the Revised Bangui Agreement*, in TRADING IN KNOWLEDGE, *supra* note 290.

The protection of traditional knowledge is another important issue of sustainable development that arises in the relationship between IPRs and biodiversity conservation. The Convention on Biological Diversity (“CBD”)²⁹² requires parties to cooperate to ensure that patents and other IPRs “are supportive of and do not run counter to”²⁹³ its objectives, implicitly recognizing the potential for conflict. The CBD emphasises the need, especially in developing nations, to ensure that local and indigenous communities retain control over and share in the benefits from their own biodiversity-related traditional knowledge and “informal innovations.”²⁹⁴ This kind of knowledge and innovation has immense and growing value.²⁹⁵ Genetic resources provide the foundation for a range of new products and technological applications in biotechnology, agriculture, medicine, and other areas. Knowledge developed and held in traditional knowledge systems of indigenous and local communities can provide clues to genetic resources or biochemicals that can be used for pharmaceuticals, herbal medicines, and other products. It can also provide new genetic material for plant breeders, allowing them to confer desired traits such as pest and drought resistance to crops. The FTAA can include a new mechanism for access to biological and genetic resources and to the traditional knowledge, innovations, and practices of indigenous, African-American, and local communities, ensuring that these rights are conditioned on the prior informed consent of the Parties and

292. Convention on Biological Diversity, June 5, 1992, available at <http://www.biodiv.org/convention/articles.asp> (last visited Mar. 2, 2004).

293. *Id.* art. 16.5.

294. Jorge Medaglia Cabrera, *Synergy or Conflict Between Intellectual Property Rights, Access to Genetic Resources and the Protection of Traditional Knowledge: Lessons Learned from Costa Rica's Biodiversity Law*, in BEYOND THE BARRICADES, *supra* note 38.

295. An example of traditional knowledge is the oral history held by an indigenous community of the herbs and plants that have medicinal properties. This information has great value to pharmaceutical researchers searching for new drugs. Informal innovation is innovation that is carried out by the actual user of the product or system. For example, farmers have traditionally created innovative new plant varieties by saving seeds from previous crops, selecting and planting, generation after generation, those that perform best under their local conditions. See ENVIRONMENT AND TRADE — A HANDBOOK, *supra* note 273. See also Grethel Aguilar, *Acceso a los Recursos Genéticos y el Conocimiento Tradicional de los Pueblos Indígenas* in TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: LATIN AMERICAN AND CARIBBEAN PERSPECTIVES, *supra* note 38; Anna Maria Hernández Salgar, *Traditional Knowledge and the Biotrade: the Colombian Experience*, in TRADING IN KNOWLEDGE, *supra* note 290; Ghate Utkarsh, *Documentation of Traditional Knowledge: People's Biodiversity Registers*, in TRADING IN KNOWLEDGE, *supra* note 290.

the communities that provide it. Such a mechanism can guarantee compensation for access to traditional knowledge, and a fair and equitable distribution of the benefits derived from biodiversity and genetic resources. Also desirable is a commitment to take political, legal, and administrative measures necessary to ensure benefits are shared, and to respect the right of other FTAA members and communities to these resources.

Informal innovation and traditional knowledge should also receive some form of equal treatment under FTAA provisions on IPRs. The FTAA need not over-emphasize patents and other intellectual property rights defined under conventional IPR regimes, because these are held predominantly by inventors and corporations in the formal research sectors of developed countries. Instead, new hemispheric mechanisms could be provided to grant communities control over their knowledge, cultural artifacts, and innovations, for example, under provisions for "traditional and folk culture of indigenous peoples and communities, African-American, and local communities," in a way that ensures permission is sought and benefits are shared. Possible models for such provisions can be found in the Central American and Andean IPR regimes.²⁹⁶ Such provisions could help deliver the kinds of incentives recognized by the CBD as essential in helping preserve cultural and biological diversity.²⁹⁷ Local communities will have greater incentive to help preserve this diversity if they derive some income from it.

The FTAA also need not require national intellectual property rights regimes to be identical. Diverse countries can be permitted the right to adopt higher standards than the FTAA requires, and they can address concerns related to the CBD by imposing certain requirements on the process of applying for intellectual property rights protection, such as certification of origin.²⁹⁸ Parties to the FTAA can also create mechanisms within

296. See Manuel Ruiz, *The Andean Community Regimes on Access to Genetic Resources, Intellectual Property and Indigenous Peoples' Knowledge*, in *TRADING IN KNOWLEDGE*, *supra* note 290; Jorge Cabrera Medaglia, *The Central American Regional Protocol on Access to Genetic and Biochemical Resources*, in *TRADING IN KNOWLEDGE*, *supra* note 290.

297. See generally David Vivas Normand, *The Role of Intellectual Property Rights in the Implementation of Access and Benefit-Sharing Arrangements*, in *TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: LATIN AMERICAN AND CARIBBEAN PERSPECTIVES*, *supra* note 38.

298. See David Vivas Eugui, *Requiring the Disclosure of the Origin of Genetic Resources*

intellectual property rights law to achieve specific objectives, such as benefit sharing.

c. Government Procurement

Government procurement refers to government purchases of goods and services, from paper supplies to hospital equipment to tanks. Government expenditures typically make up a large portion of GDP (10% to 25% in OECD countries) and what governments decide to buy or not buy can have an enormous influence on the economy, social development (particularly on economically disadvantaged groups and those who face discrimination), and environmental objectives. This fact has led many governments to institute programs to make their procurement more sustainable, making it a force for social or environmental protection.

Most such schemes involve either a price preference for goods or services that meet certain criteria,²⁹⁹ or a specification of the product's attributes.³⁰⁰ Because they are administratively straightforward, these measures can make a real difference, and because they portray the government favorably in the public eye, such schemes, undoubtedly, will be increasingly popular. Nevertheless, programs aimed at more sustainable government procurement may have trade implications. Purchasing requirements may be based on process and production method ("PPM") standards, which are not usually permitted in a trade agreement.³⁰¹ This is often for good reason — the PPM criteria set in one country may be irrelevant in another. And specifications, intentionally or unintentionally, may be set up in ways that

and Traditional Knowledge: The Current Debate and Possible Legal Alternatives, in *TRADING IN KNOWLEDGE*, *supra* note 290.

299. For example, recycled paper can be up to 10% more costly but companies will still buy it, or a certain company will be granted pre-award preference, in spite of slightly higher costs, because they employ racially discriminated minorities or women.

300. For example, all government fleet automobiles must have a certain fuel efficiency, or a provision which ensures that all forestry or hospital equipment must meet a certain health and safety standard.

301. For example, governments may give preference to goods that release low levels of carbon into the atmosphere. Alternatively, governments may require a domestic-level social justice or environmental certification to save purchasing officers the trouble of verification and auditing. See *ENVIRONMENT AND TRADE — A HANDBOOK*, *supra* note 273, at 41-49. See also J. CHRISTOPHER MCCRUDDEON, *BUYING SOCIAL JUSTICE* (forthcoming 2004).

favor domestic producers.³⁰²

The FTAA government procurement agreement should cover only the need for further transparency and may be plurilateral. A plurilateral agreement would not require countries to automatically subscribe by being parties to the FTAA. Government procurement under the FTAA should focus on requiring governments to tender bids for their purchases transparently and fairly. It should not prohibit discrimination among like products, but rather might focus specifically on discrimination between foreign and domestic suppliers. It may, for example, demand that any requirements should not be prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. Such a requirement would require careful drafting to ensure that it does not conflict with other cooperative efforts to build capacity and set in place green or social justice related procurement policies. The FTAA might require special provisions to ensure that limits on technical specifications in contracts do not preclude a government from preparing, adopting, or applying technical specifications to promote the conservation of natural resources. The FTAA could mandate, in other areas, that technical specifications should be based on international standards where these exist, or otherwise on national technical regulations, recognized national standards, or building codes. This presents a potential triple-win situation for the FTAA and sustainable development, if a significant effort can also be launched to develop, implement, and monitor such standards on a hemispheric level and the FTAA implementation can be delayed until such standards are firmly in place. It should also be made clear that the environmental management system ISO 14001 would be permitted under such a regime, and, arguably, so would most national eco-labeling and fair trade programs. Transparency requirements should not threaten social and environmental linkages between pre- and post-award procurement contracts, but rather standardize such provisions across the Americas in a cooperative way. Because of their special nature, social services would need to be

302. For example, if a government requires that all the paper it buys is certified by a domestic eco-label, or that all construction companies employ a certain percentage of racially discriminated-against minorities, it enters the grey area between voluntary standards and mandatory technical regulations. See ENVIRONMENT AND TRADE — A HANDBOOK, *supra* note 273, at 41-49.

exempt from the FTAA.³⁰³ Finally, exceptions might need to be provided for procurement measures which protect public morals, order or safety, human, animal or plant life, or health, as well as goods or services of handicapped persons, philanthropic institutions, or prison labor. These exceptions are similar to those found in the WTO. Such exceptions do not need to be strictly interpreted, due to the difficulty of regulators to prove that a procurement measure aimed at a public purpose, is “necessary” to achieve that purpose. These thoughts only begin to suggest an agenda for a “sustainable procurement law” in the FTAA. Further research, analysis, and capacity building in this area are needed to develop a positive agenda.

Civil society groups at the Americas Trade and Sustainable Development Forum emphasized the value of transparency provisions in government procurements to limit corruption in government contracting processes. These commentators identify procurement legislation, practices, and supportive institutional and civic mechanisms as the most important priorities in the effort to curb corruption, though there is also a need to encourage the private sector to apply anti-bribery policies, enforce internal controls, and provide training throughout their organizations. They argue that transparency requirements in the FTAA Procurement Chapter should have the broadest application at all governmental levels and to all goods and services.³⁰⁴

d. Competition Law and Policy

The FTAA can only benefit the Americas if effective competition law and policy mechanisms are in place. Competition law and policy provide a way to prevent the capture of liberalization gains by monopolists or companies with market dominance.³⁰⁵

303. Social services include government services or functions, such as implementation of laws, social readaptation, unemployment pension or insurance services, or services related to social security, social welfare, public education, public instruction, health care and protection, and childcare.

304. Such transparency may include: adequate notice of opportunities, objective technical specifications and evaluation criteria, access to information at all stages, public opening of bids, publication of awards, professional standards and training, impartial challenge procedures, criminalization of the offer, acceptance, or solicitation of bribes during the procurement process, and sanctions for non-compliance by officials and bidders. See REPORT ON THE AMERICAS TRADE AND SUSTAINABLE DEVELOPMENT FORUM, *supra* note 37.

305. See Frederic Jenny, *Globalization, Competition and Trade Policy: Convergence, Di-*

Efficient, effective regulatory frameworks include competition laws to control certain types of economic behavior. They prohibit direct or indirect selling arrangements (vertical agreements) and broad cooperation in cartels (horizontal agreements), to the benefit of all consumers.³⁰⁶ Not all restrictions to trade or other agreements lead to inefficiency, market dominance, or less distribution of economic gains. But those players overstepping the bounds of good behavior need to be controlled or fined, and governmental measures must be applied to ensure this happens fairly.³⁰⁷

In this light, it makes sense to argue for hemispheric competition disciplines in the FTAA. Some seek to reduce and limit the role of competition law to economic purposes only, arguing that other public objectives (like health and safety) should be pursued through other laws.³⁰⁸ Other countries have included non-economic public policy goals in their competition laws.³⁰⁹ This Article recommends that FTAA provisions on competition law should take social and environmental priorities into account, rather than focusing purely on the economic priorities and imperatives. Given the lack of central hemispheric institutions with a mandate and jurisdiction to balance competing social, economic, and environmental priorities, competition treaties themselves must contain balancing mechanisms. Countries may need to use competition law to support sustainable development objectives.

National competition laws are a relatively recent phenomenon, though now more than 100 countries have such laws.³¹⁰ Many competition laws were adopted in the 1990s, and these all contain provisions on mergers, horizontal and vertical restraints, as well as the abuse of dominant positions.³¹¹ Nevertheless,

vergence and Cooperation, in *INTERNATIONAL AND COMPARATIVE COMPETITION LAW AND POLICIES* 31, 33 (Yang-Ching Chao et al. eds., 2001).

306. *See id.*

307. *See generally* ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* (2002).

308. *See id.*

309. WTO, Working Group on the Interaction between Trade and Competition Policy, Overview of Members' National Competition Legislation — Note by The Secretariat, WT/WGTCP/W/128/Rev.2, (July 4, 2001), at app. 3 (counting the EU and its members separately since all EU Member States have competition laws) [hereinafter Trade and Competition Policy].

310. *See* GAVIL ET AL., *supra* note 307, at 4.

311. *See* Trade and Competition Policy, *supra* note 309.

many countries in the Americas do not yet have fully functioning, efficient, and transparent competition authorities. And it is only in the last ten years that international competition laws have begun to develop.³¹² Indeed, NAFTA's section entitled "Competition Policy, Monopolies and State Enterprises," contains very basic competition principles, recognizing the value of competition law and the duty to cooperate in the enforcement of competition policy.³¹³ Other, more sophisticated models have also developed.

Improved competition rules could, in theory, support sustainable development goals *per se*. For example, small producers of energy or agricultural products often have problems entering a monopolistic market, but their survival is important from a social and environmental point of view, especially in terms of encouraging innovation in these sectors.

Building on the limited substantive work that has been done on these issues in the area of trade and investment negotiations,³¹⁴ I identify three additional ways to integrate the concept of sustainable development into FTAA discussions on competition law and policy.

First, certain sustainable development goals might merit the development of substantive hemispheric competition rules. For example, the FTAA could provide space for jurisdictions whose competition laws have expressly recognized the goal of consumer protection.³¹⁵ For example, in Jamaica, consumer protection can trigger an action against a company or serve as a justification for a legal dominant position. The institutional identity

312. See generally ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC CO-OPERATION? (Simon J. Evenett et al. eds., 2000).

313. NAFTA, *supra* note 49, art. 1501.

314. See ESTY, *supra* note 185.

315. See, e.g., Jamaican Fair Competition Act — Act 9 of 1993, available at <http://www.jftc.com/TheFCA/theact/Theact.htm>. For example, the competition law of Jamaica is expressly aimed at consumer protection and its competition authority is equally responsible for consumer protection. See sec. 20, para. 1(e) (stating "the limitation of production of goods or services to the prejudice of consumers" in their definition of abuse of a dominant [market] position). South Africa's Competition Act No. 89 of 1998 (BSRSA 1998), at para. 2 concerns the opposite case:

[a]n enterprise shall not be treated as abusing a dominant position (a) if it is shown that (i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and (ii) consumers were allowed a fair share of the resulting benefit.

Id.

between competition and consumer protection authority reinforces this effect. Measures permitting such provisions in the FTAA would permit inclusion of public interests into the competition analysis. But such laws should be used only for very important policy goals, as they are not necessarily a very efficient way to accomplish the desired end and may even reduce other intended socio-economic benefits of the FTAA disciplines. Another such mechanism is for the FTAA to include provisions permitting competition tribunals or commissions to examine a transaction's impact on public interest.³¹⁶ The application of such public interest evaluation provisions occurs in two ways. A merger that would be otherwise contrary to competition rules can be justified under the public interest evaluation. However, and in addition, a competitive merger that would be positive for competition reasons can nonetheless be prohibited on public interest grounds.

A second and more common method is through the provision of express exceptions or exemptions from competition rules where these rules might limit the abilities of countries to use social and environmental measures. The Canada-Costa Rica FTA provides one example.³¹⁷ This Agreement contains an innovative provision on exceptions,³¹⁸ which permits both parties

316. Such a provision would recognize that when determining whether a merger can or cannot be justified on public interest grounds, competition commissions and tribunals must consider the effect that the merger will have on a particular industrial sector or region, employment, the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive, and the ability of national industries to compete in international markets.

317. The agreement applies to "anticompetitive agreements, anticompetitive concerted practices or anticompetitive arrangements by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce." Canada-Costa Rica FTA, *supra* note 58, art. XI .2:3(a). It includes a commitment to the principles of transparency (adopted or modified measures to proscribe anti-competitive activities should be published or publicly available), non-discrimination (the measures taken to proscribe anti-competitive activities should be applied on a non-discriminatory basis), and procedural fairness (judicial and quasi-judicial proceedings should be fair and equitable and there should be an appeal or review process to any final decision) with regard to competition law. *See generally id.*

318. The Agreement applies to all practices mentioned:

unless such activities are excluded, directly or indirectly, from the coverage of a Party's own laws or authorized in accordance with those laws. All such exclusions and authorizations shall be transparent and should be periodically assessed by each Party to determine whether they are necessary to achieve their overriding policy objectives.

to set and maintain their own exceptions, as long as they are transparent about it. Unlike NAFTA, there is no need to amend an annex if the country decides to exclude a new sector or industry from the application of competition laws.

A third way is to negotiate enhanced application of competition rules, where fair competition can benefit sustainable development, small- and medium-sized enterprises, and other ecologically favorable effects. More research, however, is required to fully understand the implications of competition law on sustainable development law. Two examples illustrate this point. First, smaller economies often need to integrate public interest considerations into their competition laws.³¹⁹ Economic actors, including large companies, are likely to change their behavior quickly, in order to accommodate new competition parameters. Because of this, competition law can be a powerful tool, but generally, only very important issues should be included in competition considerations. In smaller economies, however, where resources for economic incentives are finite, the need for public support places issues of public interest within the competition analysis. The explicit inclusion of public interest considerations has the potential to rebuild or refocus an economy to an extent that few positive incentives could achieve so effectively.

Second, the relationship between competition law and environmental law is not straightforward. There are several areas where strong enforcement of competition law can have a positive effect on environmental goals. For example, in the area of energy supply, access to a secure localized market can be very positive for the development of renewable energies.³²⁰ Competi-

Id. art. XI .2:3.

319. Public interest considerations are:

not evidence of a fatally compromised competition regime. In one way or another it is a feature of most regimes and, in those regimes where it is a particularly strong feature, serious consideration of the public interest by the competition authorities is likely to underpin the credibility of fledgling authorities.

Model Law on Competition: Draft Elements and Commentaries for Articles of a Model Law or Laws on Competition, U.N. Conference Trade & Dev. (2002).

320. *See generally* PETER DUNCANSON CAMERON, COMPETITION IN ENERGY MARKETS: LAW AND REGULATION IN THE EUROPEAN UNION (2002); WOLFGANG JAEGER, REGULIERTER WETTBEWERB IN DER ENERGIEWIRTSCHAFT (2002); GEORG HERMES, STAATLICHE INFRASTRUKTURVERANTWORTUNG: RECHTLICHE GRUNDSTRUKTUREN NETZGEBUNDENER TRANSPORT- UND ÜBERTRAGUNGSSYSTEME ZWISCHEN DASEINSVORSORGE UND WETTBEWERBSREGULIERUNG AM BEISPIEL DER LEITUNGSGEBUNDENEN ENERGIEVERSORGUNG IN EUROPA (1998).

tion laws, however, can also limit environmental laws, as has occurred in the area of waste management.³²¹ Growing producer liability regulations, in electronic products for example, also pose difficult questions for the interaction of environmental and competition law.³²² Other problems with competition law could emerge from certain types of labeling requirements as well.³²³ Finally, the application of strict interpretations of competition law to environmental information and communication would raise some considerations.³²⁴ Generally speaking, however, special legal regimes for environmental products or services should take precedence over competition laws. For these, as for other exceptions, economic efficiency can be only one of the relevant considerations.

Under the auspices of the FTAA, countries can also simply provide for enhanced cooperation on competition law. As in the Canada-Costa Rica FTA, each party can commit to inform each other about anti-competitive activities that may affect the other Party.³²⁵ Additionally, the agreement can provide for further cooperation and mutual legal assistance arrangements. Most importantly, the FTAA can provide for technical assistance to develop understanding, analysis, and implementation of more effective competition policy. This technical assistance can deliver development results. The FTAA might provide a useful, practical forum for capacity building and cooperation. Though many Americas competition authorities have recently signed a Memorandum of Understanding as members of a new International Competition Network,³²⁶ concerns have been raised as to

321. LUDGER GEISBERTS & HERBERT POSSER, *GRUNDFRAGEN DES ABFALLRECHTS: ABGRENZUNG VON PRODUKT/ABFALL UND VERWERTUNG/BESEITIGUNG* (2001)

322. On one hand, the voluminous disposal of electronic waste is not good for the environment, but on the other hand, the recycling industry has considerable economic interest in this fraction of the waste stream. Moreover, statutory obligations to enter into agreements with the producing industry can cause competition concerns to arise. See HANS VEDDER, *COMPETITION LAW, ENVIRONMENTAL POLICY AND PRODUCER RESPONSIBILITY – EXPERIENCES IN THE NETHERLANDS FROM A EUROPEAN PERSPECTIVE* (2002).

323. See THOMAS KLINDT, *DIE UMWELTZEICHEN “BLAUER ENGEL” UND “EUROPÄISCHE BLUME” ZWISCHEN PRODUKTBEZOGENEM UMWELTSCHUTZ UND WETTBEWERBSRECHT* 545 (1998).

324. See generally INA ROTH, *UMWELTBEZOGENE UNTERNEHMENSKOMMUNIKATION IM DEUTSCHEN UND EUROPÄISCHEN WETTBEWERBSRECHT* (2000).

325. WTO, Working Group on the Interaction between Trade and Competition Policy, *Joint Communication from Canada and Costa Rica*, WT/WGTCP/W/173 (July 2, 2001), at app. 2.

326. This international network, founded in 2001, seeks to provide antitrust au-

the transparency and accountability of such an informal network, and much of the same technical assistance could also take place in the FTAA.

5. Other Sustainable Development Provisions

Two other aspects of a “sustainable development” agenda for the FTAA should also be highlighted. First, the FTAA has the potential to make constructive, positive steps in providing socially and environmentally sound products with incentives through market access. In the context of the FTAA, one proposal is for parties to consider establishing a mechanism for the recognition of fair trade and eco-certification processes, and supporting such certification with preferential treatment in market access and other incentives. This would provide incentives for increased trade in green goods, especially in the forests and agricultural sectors (organic products, shade-grown coffee), as well as products that provide improved livelihoods for the most poor. Such a mechanism (or mechanisms) can contribute to cost internalization and support international efforts to recognize the value of environmental and social services provided by ecosystems. Second, the FTAA has an opportunity to emphasize liberalization of environmental services, and define environmental services broadly to encompass under-developed areas where more efficient and effective provision of such services would be environmentally beneficial and good for population health.³²⁷ In doing so, the parties to the FTAA can also cooperate to ensure that services are not liberalized until the improved laws and regulations are in place. This “re-regulation” is important, as it ensures that a good standard of service can be obtained or maintained through the liberalization process, and that access to such services will be possible for vulnerable groups. Such emphasis and improvements in the supply of services resulting from liberalizations, could simultaneously benefit trade, the environment, and social communities in the Americas.³²⁸

thorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition issues, especially with regard to enforcement. It tries to improve worldwide cooperation and to enhance convergence through focused dialogue.

327. See R. Arce, *The Services Sector and Multi-lateral Rules: Perspectives for FTAA and the Environment*, in *ALCA Y MEDIO AMBIENTE*, *supra* note 18.

328. See Dale Andrew, *Services Trade Liberalisation: Assessing the Environmental Effects*

III. CONCLUSIONS AND FUTURE DIRECTIONS

In the FTAA negotiations to date, environment and development issues have too often been viewed through the prism of their potential disruptive effects on trade flows or economic relations. Hence, there has not been sufficient scope for analyzing and discussing the fuller set of trade and sustainable development linkages. This shortcoming is critical, not just from a sustainable development perspective but for the trade community as well. To achieve broad-based support for any new trade agreement, it is clear that environmental and social concerns will also have to be addressed in a sensitive, step-by-step hemispheric law and policy discussion. For governments of the Americas to develop a hemispheric trade liberalization agenda that fosters rather than frustrates sustainability objectives, countries with extremely diverse development trajectories and economic conditions must be satisfied. An FTAA trade and sustainable development agenda can take a hemispheric approach to these issues, but must put strong emphasis on Latin American and Caribbean priorities. It must address current fears and concerns and avoid last minute negotiations, which could alienate key players unnecessarily.

At the hemispheric level, social, environmental, and economic regimes, in spite of all that has been stated about sustainable development and "mutually supportive" law and policy over the last two decades, are just beginning to converge. It will take more time for these policies to grow together. Nevertheless, as I have discussed in this Article, innovative and interesting integration experiences have occurred at different levels in the Americas, from the development of social and environmental institutions in each sub-region to the negotiation of side agreements on environment and labor issues which parallel trade agreements, and trade agreements which integrate environmental and labor chapters. Future efforts to lay the foundations for effective integration must build upon the efforts of existing hemispheric, sub-regional, and national institutions in the social, environmental, and economic spheres.

The opportunity, and the challenge, is clear. New trade liberalization instruments can be positive for sustainable develop-

ment if they are balanced with solid environmental and social cooperation mechanisms. In the Americas, such mechanisms are both necessary and possible. Whatever their forms, they must be strong, adequately resourced instruments for hemispheric cooperation toward sustainable development, and they must be woven into the broad, flexible networks of existing sub-regional, regional, and hemispheric institutions and accords — many of which constitute regimes in their own rights. They must link with and influence trade liberalization processes, so that these can better support sustainable development. This could occur by providing impact assessments. A legitimate and sustainable integration process for the Americas will require the inclusion of all actors.

Ensuring that trade and sustainable development aspects of hemispheric cooperation are appropriately integrated is only part of the picture. It is also important to ensure that social and environmental aspects themselves are integrated, wherever there are potential synergies or significant trade-offs, into the FTAA itself in its substantive provisions. In the second part of this Article, I have advanced some tentative thoughts and proposals on ways to do this, but it is my earnest contention that more hemispheric and sub-regional research, assessment, and capacity building are still necessary to identify viable options for a sustainable Americas trade agenda.

Public support for trade liberalization has been hanging in the balance since the Seattle events. In this Article, I have explored potential legal strategies for the FTAA, in the context of the broader Summit of the Americas process, to break the “Seattle Syndrome” of public concern and mistrust relating to new trade agreements. I have argued that social and environmental aspects of trade should be taken into account as part of a coherent and integrated strategy, with the full participation of civil society. By addressing sustainability issues openly and constructively, the FTAA could begin delivering its fruits to more than 850 million citizens. This hemispheric sustainable development early-harvest agenda holds potential to end the zero-sum relationship that is currently developing between growing national public concerns and hemispheric trade liberalization processes. We must indeed, as recognized in Quebec City, ensure a balance between economic development, social justice, and the protection of the environment. It is possible, and indeed necessary, to

ensure that these become interdependent and mutually reinforcing areas of hemispheric sustainable development law and policy.