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Balancing the Goals of Free Trade with Workers' Rights in a Hemispheric Economy

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COMMENT

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I. INTRODUCTION

The primary focus of the United States-Latin America agenda for the remainder of the 1990's and beyond is the creation of a hemispheric free trade agreement, a Free Trade Area of the Americas (FTAA).¹ It is estimated that a hemispheric trade

1. In December 1994, thirty-four heads of state, representing the United States, Canada and the countries of Latin America and the Caribbean, met in Miami at the Summit of the Americas and agreed to establish a free trade zone in the western hemisphere by the year 2005. Melissa Ann Miller, *Will the Circle Be Unbroken? Chile's Accession to the NAFTA and the Fast-Track Debate*, 31 VAL. U. L. REV. 153, 173 (1996).

alliance will create the world's largest market, encompassing more than 850 million people with over \$13 trillion in purchasing power.² Such a major initiative raises many difficult issues, one of which is whether a hemispheric free trade agreement should include provisions regarding workers' rights, and if so, in what form?

This Comment ultimately concludes that workers' rights should be included in the FTAA for two primary reasons. First, because workers' rights would help to address the disparity of wealth in Latin American countries, and, as a result, would promote political stability in the region which, in turn, will stimulate investment, economic growth and free trade. Second, the domestic political climate will likely require that some form of workers' rights be included in the FTAA to garner support for passage of a hemispheric free trade agreement.

While there are advantages to including workers' rights in the FTAA, the major disadvantage is that doing so may be burdensome and costly. There is an inherent tension between the goals of free trade, global market efficiency and competition on the one hand and workers' rights and social welfare on the other. To address this tension, this Comment also presents a series of puzzles which must be considered in meeting the challenge of promoting workers' rights without inhibiting growth by placing unrealistic burdens on free trade.

Part II of this Comment shows that workers' rights provisions in the FTAA may actually stimulate investment, economic growth and free trade by redistributing wealth in Latin American countries, thereby promoting political stability in the region. Part III examines the domestic political division in the United States regarding the viability of workers' rights provisions as part of the FTAA and shows that some form of workers' rights will be necessary to garner the requisite Democratic support in Congress for passage of any new free trade agreement. Part IV presents a series of puzzles which must be addressed in meeting the challenge of promoting workers' rights without placing unrealistic burdens on free trade. Finally, this

These negotiations were continued at the second Summit of the Americas held April, 1998, in Santiago, Chile. Craig Torres, *U.S. Aims to Reassert Influence Over Latin Trade*, WALL ST. J., Apr. 14, 1998, at A17, available in 1998 WL-WSJ 3490015.

2. Carol Stump, *Free Trade Area of the Americas (FTAA)*, 4 D.C.L. J. INT'L L. & PRAC. 155 (1995).

Comment examines the possibility of a broader application of two models of existing free trade agreements which include workers' rights provisions and suggests a balanced approach for the future.

II. STIMULATING INVESTMENT, GROWTH AND TRADE THROUGH WORKERS' RIGHTS PROVISIONS

Including workers' rights provisions in the FTAA may actually stimulate investment, economic growth and free trade by redistributing wealth in Latin American countries, thereby promoting political stability in the region.

A. *The Cyclical Political Instability in Latin America and its Detrimental Effect on Economic Growth and Free Trade*

Latin American countries, in general, have been characterized by a pattern of political instability.³ This pattern can be described, albeit somewhat simplistically, as follows⁴: chronic economic underdevelopment results in an increasingly marginalized and alienated population and promotes a concentration of wealth in the hands of a small elite.⁵ In turn, this elite supports and promotes repressive political regimes and governmental policies in an effort to maintain its position in society.⁶ As a result, there is a lack of popular support for the regimes and policies in place.⁷ This lack of popular support leads to the organization of a political opposition which works to oust

3. Jorge Nef, *Political Trends in Latin America: A Structural and Historical Analysis*, in *LATIN AMERICA: ITS PROBLEMS AND ITS PROMISE*, 191, 192-93 (Jan Knippers Black ed., 1984).

4. *Id.* This pattern is a model which describes the experience of many, but certainly not all, Latin American countries. While generalizations can be made, there is a high variation among Latin American societies and no single set of outcomes can be expected. See generally Gilbert W. Merkx, *Social Structure and Social Change in Twentieth-Century Latin America*, in *LATIN AMERICA: ITS PROBLEMS AND ITS PROMISE*, 148-61 (Jan Knippers Black ed., 1984) (describing and categorizing differences in the social structure in Latin American countries).

5. Nef, *supra* note 3, at 192-93. The term "elite" describes those who exert social, economic, and political control and make the major decisions affecting the economics and politics of their nations. E. BRADFORD BURNS, *LATIN AMERICA: A CONCISE INTERPRETIVE HISTORY* 130 (5th ed. 1990).

6. Nef, *supra* note 3, at 192-93.

7. *Id.*

the regime, resulting in political instability.⁸ In sum, the political instability which has characterized Latin American countries can be attributed to chronic underdevelopment⁹ and a huge disparity of wealth¹⁰ which breed continued social conflict and opposition to the political regimes in place.

This political instability has a detrimental effect on economic growth and free trade because it creates increased risks resulting in uncertainty among potential foreign investors and higher costs of doing business, thereby discouraging investment and inhibiting growth.¹¹ Typically, investors shy away from politically unstable countries because frequent governmental turn-over increases the likelihood of short-sighted and inefficient policy changes and discretionary state intervention resulting in uncertain property rights, unstable rules and unpredictable regulations.¹² This absence of stable, clearly enforced property rights reduces predictability, increases the costs of doing business and discourages investment.¹³ The result: unstable

8. *Id.* at 200-01.

9. *Id.* at 192. This under-development has been attributed to the fact that Latin American countries, after World War II, attempted to compete with industrialized nations by "plunging directly into heavy industry, even when they lacked the essential raw materials to do so successfully." DONALD MARQUAND DOZER, *LATIN AMERICA: AN INTERPRETIVE HISTORY* 588-89 (1979). This attempt to industrialize too rapidly resulted in persistent economic instability characterized by high inflation, a high rate of unemployment and a heavy debt burden. *Id.* at 585.

10. Nef, *supra* note 3, at 192-93. This disparity in wealth is evident in the following statistics: on the average the wealthiest 20% of the population in Latin America earns twenty times more than the poorest 20%. Alan C. Swan, *NAFTA and the Juridification of Economic Relations in the Western Hemisphere*, in 15 *PERSPECTIVES OF AIR LAW, SPACE LAW, AND INTERNATIONAL BUSINESS LAW FOR THE NEXT CENTURY* 217, 230 n.36 (Karl-Heinz Bockstiegel ed., 1995). In comparison, in the United States, the wealthiest 20% of the population earns nine times more than the poorest 20%; in Asia the ratio is 10:1; in Ecuador 40:1; in Brazil 33:1; in Uruguay 10:1; and, in Chile 11:1. *Id.* This disparity of wealth in Latin America has only worsened with time. For example, in Brazil in 1960, 17.7% of national income was earned by the poorest 50% of the population, while 39.7% went to the richest 10%. BURNS, *supra* note 5, at 342. By 1980, only 14.6% of income was earned by the poorest 50% while 47.7% went to the richest 10%. *Id.* Similarly, in Mexico in 1950 7.8% of income was earned by the poorest 20% of the population while 38.6% went to the top 10%. *Id.* And, by 1975 only 1.9% of the nation's income was earned by the poorest 20% while 43.5% went to the top 10%. *Id.* And, despite recent sustained economic growth, "[L]atin America harbors more poor people than ever before, and the gap between rich and poor yawns wider." Tim Johnson, *Latin poverty worsens amid growth, official says*, *MIAMI HERALD*, Mar. 17, 1998, at 7B.

11. SILVIO BORNER ET AL., *POLITICAL CREDIBILITY AND ECONOMIC DEVELOPMENT* 44-45 (1995); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *WESTERN HEMISPHERE ECONOMIC INTEGRATION* 79 (1994).

12. BORNER, *supra* note 11, at 44-45.

13. HUFBAUER, *supra* note 11, at 79.

Latin American regimes "necessarily have a disruptive effect upon foreign business and investment."¹⁴ Political stability, therefore, is a prerequisite for investment and economic growth. And, without investment and economic growth, successful free trade is unlikely. "In sum, the readiness of a country to engage in Western Hemisphere free trade talks will depend importantly on the degree to which it has developed a stable and pluralistic political regime."¹⁵

B. Workers' Rights Provisions as a Tool to Promote Political Stability in Latin America by Improving the Conditions of the Working Class

Because the persistent disparity of wealth among Latin American populations is at the heart of the region's political instability, it is imperative that this disparity of wealth be addressed if the nations of the Western Hemisphere hope to stimulate economic growth by creating a successful free trade agreement. If this disparity of wealth is not addressed, any economic benefits that a new hemispheric trade agreement may generate are likely to be distributed "very unevenly among different social classes," thereby serving to "exacerbate the already tragic mal-distribution of wealth between various classes of Latin society."¹⁶ Under this scenario, the political instability in Latin America would continue and economic growth and hemispheric free trade would be hindered.

One way to address the disparity of wealth in Latin American countries is to use a hemispheric free trade agreement as a tool to encourage Latin American countries to adopt and enforce workers' rights provisions such as the freedom of association and the right to organize and bargain collectively. Such provisions would help to expand the role of unions and may help to promote political stability in the region by expanding the middle class.¹⁷

As one commentator suggests, "enhancing the role of unions as intermediary institutions...may help spread the political and

14. DOZER, *supra* note 9, at 558.

15. HUFBAUER & SCHOTT, *supra* note 11, at 79.

16. Swan, *supra* note 10, at 230.

17. Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE L. 70-72 (1986).

economic benefits of development across a broader range of [the] population."¹⁸ As a result, unions may help to reduce the disparity of wealth, expand the middle class and diminish the social conflict which breeds political instability.

Unions have the ability to promote political development by organizing workers to become a significant pressure group for positive social change.¹⁹ Once organized, unions have the ability to negotiate with employers to improve workers' rights, to collect and disseminate information to workers and raise worker morale, and to add legitimacy to the political process by increasing popular participation.²⁰ Improved legitimacy, created by increasing popular support for political regimes and addressing the social conflicts which breed opposition, would help to stabilize the politics of Latin America. As one commentator states, "governments should promote unions, peasant federations, and neighborhood associations; such organizations build civil society, deepen democracy, and give the dispossessed a stake in the system."²¹

However, unions may not be the answer. While unions may help to promote political stability, they may actually hinder economic growth by "raising wages at the expense of investment and by promoting workplace rules that lower productivity."²² In fact, some see unions as exclusionist organizations which help only their members, not the truly poor.²³ One example of a powerful union that has failed to improve the lives of its workers is the major union in Mexico, the Partido Revolucionario Institucional (PRI).²⁴ Despite the fact that the PRI has been in power for over sixty years, Mexican wage earners have not reaped the rewards of a powerful union.²⁵ "Indeed, many observers assert that the function of the PRI labor machine is to

18. *Id.* at 62.

19. *Id.* at 72.

20. *Id.* at 71.

21. Rafael X. Zahralddin-Aravena, *Chile and Singapore: The Individual and the Collective, A Comparison*, 12 EMORY INT'L L. REV. 739, 754 n.51 (1998) (quoting Tina Rosenberg, *Latin America and Liberalism: Democratic Illusions and Realities*, CURRENT, Mar. 1993, at 40.).

22. Charnovitz, *supra* note 17, at 70.

23. *Id.*

24. Frederick Englehart, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation*, 29 CASE W. RES. J. INT'L. L. 321, 325-27 (1997).

25. *Id.* at 326.

maintain its power; any salutary effect on wage earners is coincidental.²⁶ Thus, the disadvantages of unions must be considered in formulating a balanced approach to meet the challenge of promoting workers' rights without inhibiting growth by placing unrealistic burdens on free trade.

III. *REALPOLITIK*: THE INCLUSION OF WORKERS' RIGHTS PROVISIONS MAY BE NECESSARY TO GARNER THE DEMOCRATIC CONGRESSIONAL SUPPORT REQUIRED FOR PASSAGE OF THE FTAA

In addition to the view that workers' rights provisions in the FTAA would help to promote political stability in Latin America, another, perhaps more concrete, reason to include such provisions is *realpolitik*. In the U.S. domestic political arena, there is evidence which shows that workers' rights provisions must be included in an FTAA agreement to garner the requisite Congressional support for passage.

The United States is deeply divided as to whether future free trade agreements with Latin American countries should include workers' rights provisions.²⁷ More often than not Republicans are opposed to inclusion while Democrats are in favor of it.²⁸ Two examples of this domestic division are the heated debate which surrounded the passage of the North American Free Trade Agreement (NAFTA)²⁹ and the failure of Congress to grant fast-track negotiating authority to President Clinton.

While the two parties have been divided on the issue of workers' rights, it is evident by examining the outcome of these two debates that some form of workers' rights provisions will be necessary to garner the requisite Democratic support in Congress for passage of any FTAA agreement.

26. *Id.*

27. Swan, *supra* note 10, at 219.

28. Miller, *supra* note 1, at 178.

29. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA]. The NAFTA is an international free trade agreement between the United States, Canada and Mexico. *Id.*

A. *The NAFTA Debate*

One example which supports the view that some form of workers' rights provisions must be included to achieve passage of an FTAA agreement is the domestic debate which surrounded the passage of the NAFTA. The NAFTA was vociferously opposed by well-organized interest groups in the United States who were concerned about the potential consequences of the agreement and demanded special protections.³⁰ The major concern of domestic labor interests was that free trade with Mexico would depress U.S. wages and encourage corporations to relocate to Mexico.³¹ In an effort to protect U.S. jobs, labor groups proposed a charter which would set minimum standards for the treatment of workers and unions in Mexico and perhaps set a minimum wage closer to that of the United States.³² Influential Congressional leaders responded to the concerns of labor interests and advocated for the inclusion of workers' rights provisions as part of NAFTA.³³

The original NAFTA agreement, negotiated by the Republican Bush administration, did not include workers' rights provisions.³⁴ However, due to labor's persistent lobbying efforts, the advocacy of members of Congress and the fact that the United States' newly-elected, Democratic President, Bill Clinton, refused to sign NAFTA until it included a supplemental labor agreement, the North American Agreement on Labor

30. THE PREMISE AND THE PROMISE: FREE TRADE IN THE AMERICAS 171 (Sylvia Saborio ed., 1992).

31. Miller, *supra* note 1, at 171-72. Whether or not this concern was warranted is difficult to determine because there is no conclusive data on NAFTA-related job losses and gains in the U.S. David A. Gantz, *The United States and the Expansion of Western Hemispheric Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. L. 381, 393 (1997). In general, since the passage of NAFTA in 1994, the U.S. unemployment rate has steadily dropped from 6.1% in 1994 to 5.6% in 1995, and from 5.4% in 1996 to a low of 4.9% reported in the second quarter of 1997. 1998 WORLD ALMANAC 144. And the average earnings of production workers in the U.S. has steadily increased from \$11.12 in 1994 to \$11.43 in 1995 and to \$11.81 in 1996. *Id.* at 149.

32. Miller, *supra* note 1, at 172.

33. *Two Key Lawmakers Request 'Action Plan' from President Bush on Mexico Trade Talks*, 8 Int'l Trade Rep. (BNA) 377 (Mar. 13, 1991).

34. Manuel Fuentes Muniz, *The NAFTA Labor Side Accord in Mexico and its Repercussions for Workers*, 10 CONN. J. INT'L L. 379, 390 (1995).

Cooperation (NAALC)³⁵ was signed.³⁶ Thus, it is evident that the NAALC was created in response to Democratic pressure to address domestic labor concerns. It is also evident that, "[w]ithout the inclusion of the NAALC, NAFTA would not have passed...."³⁷ The NAFTA/NAALC debate provides evidence that some form of workers' rights provisions in the future FTAA will be necessary to garner the requisite support in Congress for passage of any new free trade agreement.

B. *The Fast-Track Debate*

A second example of the view that workers' rights provisions are necessary to garner Democratic support for passage of an FTAA agreement, is the Congressional debate surrounding fast-track authority.³⁸ In November, 1997 Congress considered and decided against granting fast track authority to President Clinton to enable him to negotiate Chile's accession to the NAFTA.³⁹ Clinton has introduced numerous fast track measures

35. North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 [hereinafter NAALC]. Some of the objectives of the NAALC are to: improve working conditions and living standards in each Party's territory; promote agreed-upon labor principles; encourage cooperation to promote innovation and increased productivity and quality; encourage the exchange of information; pursue cooperative labor-related activities on the basis of mutual benefit; and, promote compliance with, and effective enforcement by each Party, of its labor law. *Id.* art. 1, 32 I.L.M. at 1503.

36. Laura Okin Pomeroy, *The Labor Side Agreement Under the NAFTA: Analysis of its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated with Developing Countries*, 29 GEO. WASH. J. INT'L L. & ECON. 769, 772 (1996).

37. Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 423 (1995).

38. Fast track authority is "the means through which Congress authorizes the President unilaterally to negotiate international trade agreements for a limited period of time." Miller, *supra* note 1, at 154. While fast track authority allows the President to negotiate agreements, there are some limits on the President's authority. *Id.* For example, the President is required to "keep Congress updated on the progress of the negotiations, seek congressional input and submit the final agreement to Congress for approval." *Id.* Once a proposed agreement is submitted, Congress can then either approve or reject it without amendment. *Id.*

39. John M. Broder and Lizette Alvarez, *President and Party Sound Like Couple in Need of Therapy*, N.Y. TIMES, Nov. 15, 1997, at A1. It is likely that the NAFTA will serve as a model and perhaps even a mechanism for implementation of an FTAA agreement. HUFBAUER & SCHOTT, *supra* note 11, at 134. NAFTA includes accession provisions through which other nations could join the agreement. Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT'L L. 301, 303 (1995). The NAALC also allows for accession. NAALC, *supra* note 35, art. 53, 32 I.L.M. at 1514.

to Congress.⁴⁰ These measures have ranged from including broad and extensive provisions regarding labor to more limited and explicit provisions, all of which have been met with Congressional opposition from both sides of the aisle.⁴¹ Republicans, voicing many of the arguments discussed in Part IV *infra*, refuse to "extend fast track authority to Clinton as long as provisions regarding labor are part of the negotiation process."⁴² Democrats, answering the concerns of constituents fearful of losing their jobs, insist that such provisions be included.⁴³ These views have resulted in a political stalemate which bodes badly for passage of fast track authority any time soon.⁴⁴

This political stalemate is evident in the most recent Congressional debate regarding fast track authority. In mid-November 1997, Clinton's most recent bill seeking fast track authority died without ever coming to a vote.⁴⁵ According to House Minority Whip Bonior, the President's bill was rejected by Democrats because it "did not reflect the genuine and legitimate concerns of a majority of the House."⁴⁶ In fact, "among the 80% of the House's 205 Democrats who bolted from the President on the trade issue, many cited constituent concerns about job losses from free trade and fear that expanded trade means exploitation of workers...in developing countries."⁴⁷ Further, at the close of the House debate on fast track, House Minority Leader, Richard Gephardt, indicated that he would introduce a new fast track measure that would require other nations to enforce labor standards or suffer sanctions.⁴⁸

As a result of Clinton's failure to obtain fast-track authority, there is a loss of confidence in U.S. leadership on trade among Latin American leaders.⁴⁹ In the absence of fast-track authority,

40. Housman, *supra* note 39, at 311-13.

41. *Id.*

42. Miller, *supra* note 1, at 178.

43. *Id.*

44. *On Hill Members of Both Parties Hit Clinton over Demise*, CONGRESS DAILY, Nov. 10, 1997, available in 1997 WL 11443933 [hereinafter *On Hill*].

45. Broder & Alvarez, *supra* note 39, at A1. As of the publication of this article, a revised fast-track measure has been introduced to Congress. Don Bohning, *Fast-track trade bill is back on track in Congress*, MIAMI HERALD, Sept. 24, 1998, at 10A. However, sources say that it has minimal chances of success if it comes up for a vote. *Id.*

46. *On Hill*, *supra* note 44.

47. Broder & Alvarez, *supra* note 39, at A8.

48. *On Hill*, *supra* note 44.

49. Torres, *supra* note 1, at A17.

there has been "an acceleration toward subregional trade agreements, which exclude the United States."⁵⁰ Leaders at the most recent Summit of the Americas agreed that "without fast-track, the plan to establish a free trade area throughout the region by 2005 is in jeopardy."⁵¹ It is evident that Congress must come to some compromise regarding workers' rights if the United States hopes to lead the way to a hemispheric free trade agreement.

The previous debate surrounding NAFTA and the most recent domestic debate surrounding fast track authority make it apparent that to gain the Democratic support required for passage of any future FTAA, the agreement must include some form of workers' rights provisions.

IV. PUZZLES WHICH MUST BE ADDRESSED IN MEETING THE CHALLENGE OF PROMOTING WORKERS' RIGHTS WITHOUT INHIBITING GROWTH BY PLACING UNREALISTIC BURDENS ON FREE TRADE

Opponents of including workers' rights provisions in the FTAA put forth many arguments to support their position. Some of the major arguments against workers' rights provisions include: (1) improvements in social welfare will automatically follow economic growth and can only occur if costs are kept low to attract foreign investment;⁵² (2) forcing nations to adopt workers' rights provisions infringes on the sovereignty of those nations;⁵³ (3) trade law is not an appropriate forum for social legislation;⁵⁴ and, (4) including workers' rights provisions in the FTAA will unnecessarily slow down the trade liberalization process.⁵⁵ These arguments are explored below.

50. *Id.*

51. Bill Nichols, *Americas Plan Duty Free Zone*, USA TODAY, Apr. 20, 1998, at A1, available in 1998 WL 5722066.

52. Benjamin N. Davis, *The Effects of Worker Rights Protections in United States Trade Laws: A Case Study of El Salvador*, 10 AM. U. J. INT'L L. & POLY 1167, 1177 (1995).

53. *Id.* at 1178.

54. Stump, *supra* note 2, at 159; Housman, *supra* note 39, at 315.

55. Housman, *supra* note 39, at 319.

A. *Will Improvements in Social Welfare Automatically Follow Economic Growth?*

Opponents of including workers' rights provisions in free trade agreements claim that growth in developing countries and improvements in social welfare will automatically follow foreign investment and can occur only if costs of production are kept low to attract that investment.⁵⁶ Addressing this viewpoint requires examining the roles of two players in Latin American economics: elite populations and multinational corporations (MNCs) as well as examining growth experiences of two Latin American countries: Chile and Mexico.

1. The Role of Elite Populations

As discussed in Part II *supra*, Latin American economies have been plagued by a pattern of chronic underdevelopment resulting in a marginalized population and a concentration of wealth in the hands of a small elite.⁵⁷ In turn, the elite population is able to manipulate the market by promoting policies that help it to maintain its position in society,⁵⁸ such as denying basic rights to the workforce.⁵⁹ This market manipulation by the elite artificially holds down living standards and restricts the benefits of trade to a narrow few.⁶⁰

The potential misuse of the legal system by the elite results in "economic stagnation and political polarization."⁶¹ Consequently, the existence and power of the elite in Latin America hinders economic growth and social improvements.

56. Davis, *supra* note 52, at 1177.

57. Nef, *supra* note 3, at 192-93.

58. *Id.*

59. Louise D. Williams, *Trade, Labor Law and Development: Opportunities and Challenges for Mexican Labor Arising From the North American Free Trade Agreement*, 22 BROOK. J. INT'L L. 361, 386-87 (1996).

60. *Id.*

61. Zahralddin-Aravena, *supra* note 21, at 753.

2. The Role of MNCs

MNCs are businesses which are headquartered in one country and operate across national boundaries.⁶² International in nature, MNCs may benefit the most from hemispheric free trade because they "are uniquely situated to...take advantage of the opportunities available due to the liberalization of free international trade."⁶³ Hemispheric free trade would allow MNCs to move their manufacturing operations to nations where the business conditions are the most favorable (i.e. politically stable nations with the cheapest labor and the most permissive health, safety, and environmental standards) where they can assemble their products as cheaply as possible, then ship the products to consumers in other nations without having to pay trade-prohibiting tariffs.⁶⁴

MNCs are widely criticized as exploitative in that they incite a "race-to-the-bottom"⁶⁵ situation whereby the workers of developing nations are exploited by MNCs' threats to move their operations unless unions are suppressed.⁶⁶ According to one U.S. Representative, "[w]hat we see is a handful of giant global firms, many with assets larger than nation states, who hold no national allegiance and gravitate to the lowest common denominator...."⁶⁷

These criticisms ignore the benefits of MNCs. MNCs are imperative to economic growth in Latin America. First and foremost, MNCs provide jobs, thereby increasing income levels.⁶⁸ And, because MNCs are primarily focused on profit and continuously strive for efficiency, they provide a counter-force to internal class structures in Latin America.⁶⁹ Thus, the positive effects of MNCs on economic growth may provide support for the

62. Karen Vossler Champion, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181, 183 n.6 (1996).

63. *Id.* at 192.

64. Williams, *supra* note 59, at 375.

65. The term race-to-the-bottom refers to "the pursuit of capital to areas with lower regulatory standards, as well as to the incentive for all countries to adjust their regulatory environment to a scale that is attractive to foreign companies." *Id.* at 365.

66. Charnovitz, *supra* note 17, at 72.

67. 143 CONG. REC. E2338-01 (daily ed. Nov. 12, 1997) (statement of Rep. Kaptur).

68. Interview with Alan C. Swan, Professor, University of Miami School of Law, in Coral Gables, Fla. (June 27, 1998) [hereinafter Swan Interview].

69. *Id.*

contention that improvements in social welfare follow such growth.

Yet, the MNC focus on profits without regard for workers' rights begs the question: how much profit is enough? Critics of MNCs say that MNCs exploit workers for the sake of profit and efficiency.⁷⁰ On the other hand, supporters respond that MNCs bring opportunities and wealth to developing countries.⁷¹ Addressing this debate requires examining the moral and ethical obligations of MNCs when operating in developing countries, an examination which is beyond the scope of this Comment. However, consistent with the theme of this Comment, a balanced approach may provide the answer. Indeed, a growing number of MNCs have answered their critics by voluntarily subscribing to global human rights codes of conduct and policies.⁷²

3. The Experience of Chile: Free Market Reform

The free market reform experience of Chile provides evidence that social improvements may automatically follow economic growth. Chile can be described as a model Latin American economy. It is the most prosperous country in Latin America, boasting an economic growth rate of eight percent per year since 1990 and a rating as a safe investment by Standard & Poor's.⁷³

Chile achieved its economic growth as a result of various factors: a free market economic strategy;⁷⁴ a rich democratic history;⁷⁵ geography;⁷⁶ and, a reasonable distribution of

70. Martin Davies, *Just Don't Do It: Ethics and International Trade*, 21 MELB. U. L. REV. 601, 603 (1997).

71. *Id.*

72. Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1972 (1996). MNCs which have adopted such codes include Levi Strauss, Sears, J.C. Penney, Wal-Mart, Phillips-Van Heusen, The Gap, Nike, Reebok, Timberland and Starbucks. *Id.* at 1973.

73. Zahralddin-Aravena, *supra* note 21, at 790-93.

74. *Id.* at 816-817. This economic strategy is referred to as the Chicago Boys reforms for two reasons: the strategy was associated with the philosophy of Milton Friedman of the Chicago School; and, the advisors of General Augusto Pinochet, who implemented the reforms, were trained at the University of Chicago. *Id.* Chile's economic reforms consisted of cutting tariffs, ending price controls and privatization—all of which resulted in an overall increase in gross domestic product and a decrease in unemployment. *Id.* at 818.

75. *Id.* at 794-800. Chile enjoyed 150 years of civilian democratic rule prior to the overthrow of Chilean democracy in 1973. *Id.* at 795.

income⁷⁷—factors which are not shared by its neighbors. Thus, while social improvements followed economic growth in Chile, it does not follow that a similar result will be achieved in other Latin American countries.⁷⁸

4. The Experience of Mexico: The Maquiladoras

Mexico's economic growth experience resulting from the maquiladora program provides further evidence that social improvements may indeed automatically follow economic growth.

The United States-Mexico "maquiladora"⁷⁹ program began in 1965 as a cooperative effort between the United States and Mexico to increase productivity and reduce economic costs for both nations.⁸⁰ While some criticize the program based on stagnating wages⁸¹ and unsafe working conditions⁸², the program

76. *Id.* at 794-95. Chile's geography protected it from Spanish exploitation of its resources, thus it retained the natural resources to "encourage and support a thriving agricultural industry, which supplied export markets . . ." *Id.*

77. Swan Interview, *supra* note 68. Chilean economists "never completely neglected the poor." Zahralddin-Aravena, *supra* note 21, at 825. In fact, President Aylwin's administration instituted a "growth with equity" program which resulted in job growth, an increase in monthly minimum wages and total family income, and reduced unemployment. *Id.* at 826-28.

78. To provide one example, Brazil, the largest country in Latin America has recently experienced an economic crisis. Katherine Ellison, *Brazil's New Crisis Stirs Economic Fear*, MIAMI HERALD, Jan. 14, 1999, at 1A. While Brazil has opened its economy to world trade, "forty percent of the people are poor and one in every four people lives on less than one dollar a day." Eleanor M. Fox, *Globalization and its Challenges for Law and Society*, 29 LOY. U. CHI. L.J. 891, 899 (1998). And, efforts to attract foreign investment have pushed interest rates close to 40% per year. *Id.* If Chile provides an example of the proposition that social reforms automatically follow economic growth, Brazil provides an example of the opposite. Due to its huge disparity of wealth, its high level of government bureaucracy and its high inflation, Brazil will not likely experience the growth and social prosperity of Chile in the near future. Swan Interview, *supra* note 68.

79. Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 726 (1993). The term "maquiladora" refers to assembly plants located primarily along the United States-Mexico border where Mexican workers' either assemble parts provided by U.S. manufacturers to make a completed product or create sub-assemblies to be used in further manufacturing operations. Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?*, 3 KAN. J. L. & PUB. POL'Y 128, 128-29 (1994). Once assembled, the products are shipped back to the United States where they are sold. *Id.* at 128.

80. Durand, *supra* note 79, at 129.

81. Housman & Orbuch, *supra* note 79, at 729.

82. Durand, *supra* note 79 at 131.

is instrumental to Mexico's economic recovery and future growth.⁸³ Maquiladoras have dramatically increased the number of jobs for Mexican workers⁸⁴ and "[t]he maquila industry is one of the most important sources of foreign direct investment in Mexico."⁸⁵ According to one commentator,

Overall, the Mexican economy is strengthened by the expansion of the maquila industry in five ways. First, the maquila industry provides competitive wages and benefits to a section of the population that is typically undercompensated. Second, the industry creates many jobs and employs a large number of workers, which is of particular importance in times of economic crisis when job creation is needed to alleviate social tensions associated with high unemployment. Third, the maquila industry allows for the transfer of knowledge and technology from the parent company to the maquila.... Fourth, the maquila generates hard currencies through taxes charged against the maquila on foreign investment.... Finally, the maquila industry is one of the largest recipients of foreign direct investments (FDI) in Mexico.⁸⁶

Thus, the maquiladoras have resulted in economic growth and social improvements for the workers of Mexico.

Examining the roles of the elite populations and MNCs as well as the experiences of Chile and Mexico does not provide an easy answer to the question of whether social improvements will automatically follow economic growth. Rather, the discussion provides examples of instances where economic growth has and has not led to social improvements and suggests that there may exist factors which will inhibit automatic social improvements in Latin America.

83. David W. Eaton, *Transformation of the Maquiladora Industry: The Driving Force Behind the Creation of a NAFTA Regional Economy*, 14 ARIZ. J. INT'L & COMP. L. 747, 750 (1997).

84. Housman & Orbuch, *supra* note 79 at 729. The number of jobs in maquiladoras has expanded from 100,000 to over 500,000. *Id.*

85. Eaton, *supra* note 83, at 750.

86. *Id.* at 836-37.

B. Does Inclusion of Workers' Rights Provisions in International Free Trade Agreements Offend the Principle of Sovereignty Among Nations?

A second argument put forth by opponents of including workers' rights provisions in the future FTAA is based on the principle of sovereignty.⁸⁷ Opponents argue that forcing Latin American countries to adopt workers' rights provisions invades the sovereignty of those countries.⁸⁸ This argument is not convincing for two primary reasons. First, parties that sign onto international trade agreements are not "forced" to do anything. Rather, the parties involved have a choice as to whether or not to participate, and if they choose to participate, they do so willingly. Second, due to the inherent nature of international trade agreements, the parties to the agreement are often required to give up their sovereign rights. For example, parties to a free trade agreement willingly forfeit the right to erect trade barriers in the form of tariffs.

While international trade agreements have a price, it is a price that governments have accepted in return for the economic benefits created by increasing access to foreign markets.⁸⁹ Additionally, as nations become more and more economically interdependent, the concept of sovereignty must change to allow greater flexibility in reaching international agreements. Because nations make informed decisions to enter international agreements and willingly agree to the provisions included in those agreements, their sovereignty is not violated.

C. Is Global Trade Law an Appropriate Forum for Social Legislation?

Opponents of including workers' rights provisions in the FTAA also argue that workers' rights are social welfare issues and that global trade law is not an appropriate forum for social legislation.⁹⁰ There are two primary arguments against this

87. Davis, *supra* note 52, at 1178.

88. *Id.*

89. Peter Morici, *Implications of a Social Charter for the North American Free Trade Agreement*, in *TIES BEYOND TRADE* 132, 144 (Jonathan Lemco & William B.P. Robson eds., 1993).

90. Stump, *supra* note 2, at 159.

theory. First, labor issues and trade are interdependent, and workers' rights are sufficiently trade-related to warrant their inclusion in trade agreements because they influence the competitive position of products in the global marketplace.⁹¹ Second, the fact that the United States has enacted numerous laws in the past which have linked workers' rights provisions with trade supports the contention that workers' rights and trade are sufficiently related to warrant the inclusion of workers' rights provisions in trade agreements. The use of international agreements to promote workers' rights is not a new concept. In fact, the United States has used such provisions successfully for over a century.⁹²

The first example of a United States law regulating trade in goods produced abroad under substandard labor conditions occurred in the Tariff Act of 1890, which banned the import of goods manufactured by convict labor.⁹³ And, in 1912, the United States passed legislation which banned the import and export of matches containing the toxic substance of white phosphorous.⁹⁴ Later, in 1955, the United States encouraged Japan to adopt its first minimum wage law for employees during United States-Japan tariff negotiations.⁹⁵

More recently, in 1983, the United States passed the Caribbean Basin Economic Recovery Act which provides trade preferences aimed at improving economic opportunities in the Caribbean Basin region.⁹⁶ Under this Act, the United States determines the eligibility of beneficiary countries based on criteria such as whether workers are afforded "reasonable workplace conditions and enjoy the right to organize and bargain collectively."⁹⁷

91. Housman, *supra* note 39, at 315-16.

92. Charnovitz, *supra* note 17, at 62-67; see generally Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253 (1988)(providing a broad historical overview of U.S. agreements which have linked international trade to labor standards).

93. Perez-Lopez, *supra* note 92, at 254.

94. *Id.*

95. Charnovitz, *supra* note 17, at 65.

96. Perez-Lopez, *supra* note 92, at 259.

97. Charnovitz, *supra* note 17, at 61. The labor standards in this Act led to significant commitments by several countries including Haiti, the Dominican Republic and Honduras. *Id.* at 66. For example, in order to gain trade preference, Haiti announced the "right of unions to form federations and affiliate with international trade union organizations." *Id.*

Similarly, the Generalized System of Preferences (GSP) authorizes the United States to grant duty-free treatment to eligible products which meet certain criteria.⁹⁸ The GSP requires that, to retain their eligibility, countries must take steps to "afford internationally recognized worker rights" including the right of association, the right to organize and bargain collectively, prohibition on use of any form of forced or compulsory labor, minimum age for employment of children and acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety.⁹⁹ The GSP, like the legislation which came before it, has had success in encouraging workers' rights improvements in Latin America.¹⁰⁰

Another example of the positive effect that international trade agreements which include workers' rights provisions can have on improving conditions of the working class in Latin America is the response of Mexico when negotiating with the United States regarding NAFTA. Realizing that NAFTA and the NAALC required improved labor standards, Mexico established a private retirement insurance program, increased funding of public education programs, and took steps to improve workplace safety.¹⁰¹ Mexico's willingness to improve its labor standards to be part of the NAFTA shows that "[i]nclusion of the concepts underlying the Agreement on Labor Cooperation will result in better economic conditions for workers in Latin America and the Caribbean."¹⁰²

This overview of existing trade agreements which include provisions regarding workers' rights clearly shows that the

98. Perez-Lopez, *supra* note 92, at 266.

99. Charnovitz, *supra* note 17, at 61; Perez-Lopez, *supra* note 92, at 270.

100. In 1990, under the provisions of the Generalized System of Preferences (GSP), the American Federation of Labor-Congress of Industrial Organizations filed a petition against El Salvador, alleging that El Salvador was violating the GSP and should lose its trading benefits. Davis, *supra* note 52, at 1200. In response, fearful that they would lose their GSP benefits, El Salvador created a tripartite body, the Economic & Social Forum, which included representation of labor, business and government, and agreed to a process of negotiations. *Id.* at 1201-02. As a result of these negotiations, El Salvador enacted a new labor code in 1994. *Id.* at 1213. While its provisions are substantially weaker than the union's original proposals, the threat to withdraw GSP benefits created a limited opportunity for Salvadoran unions. *Id.* For the first time in El Salvador's history, government and the private sector sat across the table from workers to negotiate the future of Salvadoran industrial relations. *Id.* As a result, "labor emerged as a significant political force in El Salvador." *Id.*

101. Housman & Orbuch, *supra* note 79, at 774-75.

102. Murphy, *supra* note 37, at 426.

United States has successfully used international agreements to promote workers' rights across the globe and has had a positive influence on the improvement of labor standards in developing countries. The United States could have an especially strong influence in promoting workers' rights in Latin American nations which are highly dependent on the United States for their economic growth.¹⁰³ This dependency creates an opportunity for the United States to use its leverage to encourage Latin America to improve its workers' rights conditions and enforcement of labor laws. The United States should take advantage of this opportunity but must do so in a way that will not place unrealistic burdens on free trade.

Taking the above factors into consideration, the question is no longer whether there should be a linkage between workers' rights and trade, but rather how to effectively link the two without placing unrealistic burdens on trade.¹⁰⁴

D. Will Including Workers' Rights Provisions in Future Free Trade Agreements Slow Down Trade Liberalization?

Opponents also argue that including workers' rights provisions in the FTAA is not attractive because it will unnecessarily delay the trade liberalization process.¹⁰⁵ While a delay is possible, and even likely, to the extent that it would allow a more comprehensive examination and consideration of the labor issues involved, such a delay should be welcome. Is it not more desirable to address and debate the social concerns inherent in workers' rights prior to entering into international agreements than to rush into hemispheric free trade without sufficient consideration of the labor issues involved? As one commentator observes, few criticize the objectives of free trade, rather criticism of free trade stems from the "headlong rush to such an end, without accounting for wholly relevant social concerns of the effected populace...."¹⁰⁶

103. The share of Latin American exports going to the United States in 1980 was 30%, and in 1990, 40%. Augusto Varas, *Latin America: Toward a New Reliance on the Market*, in GLOBAL CHANGE, REGIONAL RESPONSE 272, 281 (Barbara Stallings ed., 1995).

104. Frederick M. Abbott, *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 351 (1996).

105. Housman, *supra* note 39, at 319.

106. Housman & Orbuch, *supra* note 79, at 814. However, the effected populace

V. MODELS OF EXISTING FREE TRADE AGREEMENTS WHICH INCLUDE WORKERS' RIGHTS PROVISIONS: THE NAFTA AND THE EUROPEAN UNION AND SUGGESTIONS FOR THE FUTURE

As shown by this Comment, workers' rights provisions should be included in the FTAA to address the disparity of wealth in Latin America, to encourage political stability in the region and to stimulate economic growth and trade. In addition, workers' rights provisions should be included to garner the requisite domestic support for the FTAA. However, the question remains, what form should workers' rights provisions take?

In determining the appropriate form, it is helpful to examine two existing agreements which incorporate workers' rights: the NAFTA/NAALC and the European Union Social Agreement.

A. *The NAFTA/NAALC Model*

One model upon which a future FTAA could be based is the NAFTA/NAALC.¹⁰⁷ The NAALC does not establish international labor standards, but rather obligates each member to enforce their existing domestic labor laws.¹⁰⁸ Specifically, the NAALC creates guiding principles whereby each member agrees to promote the following rights within its own domestic labor laws: freedom of association; the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children; minimum employment standards; elimination of employment discrimination; equal pay for women and men; prevention of and compensation for occupational injuries and illnesses; and, the protection of migrant workers.¹⁰⁹

The enforcement provision of the agreement¹¹⁰ provides for fines of up to \$20 million, but only in three out of the eleven

includes not only workers in developing economies but also U.S. workers, consumers, and manufacturers. Swan Interview, *supra* note 68. The question then becomes, whose concerns should take priority? Must manufacturers and consumers give up some of the benefits of free trade so that workers are better protected? Again, the answer is likely found in a balanced approach.

107. See *supra* text accompanying note 39 regarding NAFTA/NAALC accession provisions.

108. NAALC, art. 2, *supra* note 35, 32 I.L.M. at 1503.

109. *Id.* annex 1, 32 I.L.M. at 1515.

110. *Id.* art. 39 and annex 39, 32 I.L.M. at 1511-12, 1516.

areas listed above.¹¹¹ And, for the monetary sanction to kick in, a "persistent pattern" of failure on the part of a member nation to effectively enforce its occupational safety and health, child labor or minimum wage standards must exist.¹¹² Because monetary sanctions are rarely imposed under the NAALC, trade sanctions are clearly a last resort. In effect, trade sanctions can only be imposed if, after an extended process of encouraging a party to enforce the law in question, that party continues to refuse to enforce the law, refuses to make a plan, refuses to accept assistance aimed at addressing the problem, and fails to pay a fine.¹¹³ The enforcement provisions of the NAALC have been widely criticized as ineffective, highly time consuming and overly bureaucratic in nature.¹¹⁴

The major criticisms of the NAALC side agreement are that its enforcement provisions are too weak¹¹⁵ and that it neglects to

111. *Id.* art. 39, 32 I.L.M. at 1511-12. The three areas covered by the enforcement provisions are: (1) minimum wage violations; (2) child labor laws; and, (3) occupational and safety hazard standards. *Id.* The remaining eight areas are subject only to consultation provisions. *Id.*

112. *Id.*

113. *Id.* art. 41, 32 I.L.M. at 1512-13.

114. Muniz, *supra* note 34, at 393; Champion, *supra* note 62, at 235; Pomeroy, *supra* note 36, at 799; Catherine T. Barbieri, *Women Workers in Transition: The Potential Impact of the NAFTA Labor Side Agreements on Women Workers in Argentina and Chile*, 17 COMP. LAB. L.J. 526, 553 (1996).

115. Barbieri, *supra* note 114, at 553. The effect of the weak enforcement provisions of the NAALC can be seen in the National Administrative Office's (NAO) treatment of the first two complaints brought under it. Pomeroy, *supra* note 36, at 784-785. In these complaints, claims were made against Mexico for its failure to enforce its labor laws after two U.S. corporations, Honeywell, Inc. and General Electric, fired workers that were in the process of unionizing. *Id.* After a public hearing on the matter, the NAO dismissed the complaints because the information available did not show that Mexico had failed to enforce its labor laws. *Id.* at 785. Specifically, the NAO found that, because the workers had accepted severance pay, Mexico was under no duty to investigate whether the terminations were for legitimate cause or in retribution for union organizing. *Id.* at 785-86. More recent claims, however, have resulted in ministerial consultations. See generally Sarah Lowe, Comment, *The First American Case Under the North American Agreement for Labor Cooperation*, 51 U. MIAMI L. REV. 481 (1997). For example, a more recent claim filed against Mexico was brought by workers who were fired by the Sony Corporation, allegedly due to union organizing activity. *Id.* at 494. The U.S. NAO report agreed that the workers were likely terminated due to union organizing. *Id.* As a result, U.S. Labor Secretary Robert Reich requested ministerial consultations under the NAALC. *Id.* The consultations resulted in an agreement which directed Mexico to study union registration and to provide public hearings to the workers. *Id.* In 1994, the first NAALC case was filed against a corporation operating in the United States, La Conexion Familiar, Inc. (LCF), a subsidiary of Sprint. *Id.* at 481, 498. The Telephone Workers of the Republic of Mexico filed an NAALC complaint against LCF when it suddenly closed its plant in San Francisco, California. *Id.* The workers alleged non-compliance with the

enforce the core labor standards that would most directly enable workers to participate in their nation's development, namely freedom of association and collective bargaining.¹¹⁶ While the NAALC of NAFTA has been criticized in many regards, it represents an important first step toward hemispheric cooperation to promote workers' rights and provides a useful model for workers' rights provisions in the FTAA.¹¹⁷

B. The European Union Social Agreement Model

A second model, the Social Agreement of the European Union (EU), goes much further than NAFTA in protecting workers' rights. In fact, the EU has "constructed one of the world's strongest multilateral models to establish and enforce international labor standards"¹¹⁸ and "takes by far the most comprehensive approach to the issue of labor disparities."¹¹⁹ The EU includes provisions which mandate that citizens of each member state abide by certain treaty provisions, and includes incentives for member states to harmonize their labor and employment laws.¹²⁰

While the EU represents an approach far more aggressive than the NAFTA/NAALC, it may not be a realistic model for the FTAA because the resource disparity between the industrialized and developing nations of the Western Hemisphere is much larger than any resource disparities which exist among industrialized European nations.¹²¹ Additionally, the historic situation which brought rise to creation of the European Union is very different from that of the West.¹²²

NAALC and requested that the Mexican NAO investigate the sudden closure. *Id.* at 498, 500. The Mexican NAO accepted the submission, investigated the charge and issued a report which concluded that U.S. workers' rights to organize were likely violated. *Id.* at 501. Further, the report requested ministerial consultations. *Id.* at 502. Ministerial consultations were held, resulting in a pact which requires the U.S. Labor Secretariat to study the effect of sudden plant closings in the U.S., Canada and Mexico and to hold a public forum dedicated to the study. *Id.* at 506-07. While the ministerial consultations held in these more recent cases may heighten awareness of labor infractions, they offer no real relief for injured workers.

116. Williams, *supra* note 59, at 366.

117. Champion, *supra* note 62, at 235-36.

118. *Id.*

119. Abbott, *supra* note 104, at 344.

120. Williams, *supra* note 59, at 378.

121. Murphy, *supra* note 37, at 422.

122. Abbott, *supra* note 104, at 901-902 (explaining that interstate violence and the

C. *Suggestions for the Future*

Considering first that the NAFTA/NAALC is criticized for its weak enforcement provisions and its indifferent treatment of core labor standards, and second that the harmonization of the European model is not likely attainable in the Western hemisphere, a solution for the FTAA lies somewhere between the two models.

1. Workers' Rights Provisions in the FTAA Should Continue the NAFTA/NAALC Objective of Allowing Nations to Develop Their Own Standards and Should Create a Floor, Not a Ceiling

First, because the nations of the Western Hemisphere do not share a common set of values, and are in various stages of development, there cannot be one set of standards that would be acceptable to or reachable by every party.¹²³ Therefore, FTAA workers' rights provisions should create a floor beyond which no party can go, rather than attempt to require its parties to meet unattainable standards.¹²⁴ By creating a floor of requisite labor standards, the FTAA will meet the objective of preventing the race-to-the-bottom, discussed in Part IV *supra*, while still improving workers' rights in Latin America.

Furthermore, FTAA labor standards should not be based on the U.S. model. There are many United States practices which, due to economic and cultural differences, would not be acceptable to developing nations.¹²⁵ As one commentator observes, "[i]f the notion of international standards means only that 'Western' standards receive international endorsement, such standards lack persuasiveness and authority. Accordingly, when they are enforced without regard for the economic, political, social, and cultural systems on which they are imposed, international labor standards face probable failure."¹²⁶

pressing need for post-World War II economic rehabilitation, coupled with the postwar threat of the Soviet Union provided incentives to bring European nations together. On the other hand, the incentive bringing nations of the Western Hemisphere together is internal strife and the promise of more rapid economic growth).

123. Charnovitz, *supra* note 17, at 69.

124. *Id.*

125. Williams, *supra* note 59, at 385-86.

126. *Id.* at 386.

2. Workers' Rights Provisions in the FTAA Should Include Strong Enforcement Mechanisms, and Enforcement Should Cover Core Labor Standards

Second, workers' rights provisions in the FTAA should include strong Enforcement Mechanisms which cover core labor standards and include strict monetary sanctions against violators.

Enforcement mechanisms should cover the core labor standards which will most effectively promote political stability and which will most help workers to play a meaningful role in the economic development of their country, namely freedom of association and collective bargaining. As discussed in Part V.A *supra*, the NAFTA/NAALC mandates a monetary penalty only if a country is found to have persistently violated its occupational and safety-hazard laws, child labor laws, or minimum wage standard and does not allow monetary sanctions for the failure to enforce such basic workers' rights as freedom of association and collective bargaining. Stronger enforcement provisions which cover core labor standards would help to rectify the NAFTA/NAALC deficiencies.

In addition, strict monetary sanctions should be implemented. Monetary sanctions against violators would provide an incentive to encourage compliance. As one commentator has observed, "[w]ithout a credible threat to impose trade penalties, 'target' governments will see no need to change their internal policies."¹²⁷ While some argue that sanctions have proved ineffective in altering behavior because the adjustment costs required for compliance will exceed any trade benefit, and because developing nations do not have the resources to comply,¹²⁸ there is evidence to the contrary. For example, as discussed in Part IV *supra*, sanctions have been used effectively as part of the GSP in promoting improved labor standards in developing nations.

An additional consideration regarding sanctions is the availability of technical assistance.¹²⁹ Because the primary objective is to raise labor standards, and not to put up barriers to

127. Charnovitz, *supra* note 17, at 76.

128. Morici, *supra* note 89, at 141-42.

129. Charnovitz, *supra* note 17, at 77.

free trade, whenever monetary sanctions are applied, technical assistance should be offered to help the non-complying party to meet the requisite standards.¹³⁰

3. Workers' Rights Provisions in the FTAA Should Include Independent Monitoring

Third, workers' rights provisions in the FTAA should include reliance on an independent, multilateral organization for monitoring.¹³¹ One organization which may be well-suited for monitoring activity is the World Trade Organization.¹³²

Currently, the NAALC establishes a trilateral Commission for Labor Cooperation¹³³ comprised of a Council,¹³⁴ Secretariat¹³⁵ and a National Administrative Office¹³⁶ (NAO). The NAO is positioned at the federal level of each member country.¹³⁷ The various branches of the Commission collect information on alleged violations and make suggestions for future improvements to a member in violation of the agreement.¹³⁸ Specifically, the NAO receives and investigates complaints that a member country is not enforcing its domestic labor laws.¹³⁹

Because this Commission is politically tied to each party, there is a threat of politics playing a role in the decision-making process. Independent monitoring would have the benefit of removing decisions from the politics of each member party.¹⁴⁰

In sum, workers' rights provisions of the FTAA should be stronger than the NAFTA/NAALC provisions yet less comprehensive than the European Social Agreement. The FTAA provisions should continue the NAFTA/NAALC objective of

130. *Id.* at 76-77.

131. *Id.* at 76.

132. The World Trade Organization, the successor to the General Agreement on Tariffs and Trade, monitors international trade procedures, implements market access measures, and facilitates the settlement of trade disputes between its members. SOUTH AMERICA, CENTRAL AMERICA AND THE CARIBBEAN 736 (6th ed. 1997).

133. NAALC, art. 8, *supra* note 35, 32 I.L.M. at 1504.

134. NAALC, art. 9, *supra* note 35, 32 I.L.M. at 1505.

135. NAALC, art. 12, *supra* note 35, 32 I.L.M. at 1506.

136. NAALC, art. 15, *supra* note 35, 32 I.L.M. at 1507.

137. *Id.*

138. NAALC, arts. 8-15, *supra* note 35, 32 I.L.M. at 1504-07.

139. NAALC, art. 16, *supra* note 35, 32 I.L.M. at 1507.

140. Charnovitz, *supra* note 17, at 76.

allowing nations to develop their own standards and should create a floor, not a ceiling. However, the FTAA provisions should also incorporate stronger enforcement provisions than the NAFTA/NAALC and should incorporate an independent monitoring system.

VI. CONCLUSION

There is an inherent tension between the goals of free trade, global market efficiency and competition on the one hand and workers' rights and social welfare on the other. The debate surrounding the inclusion of workers' rights provisions in international trade agreements has focused on this tension and, in doing so, has overlooked the argument that workers' rights may actually improve economic growth and competition in the Western Hemisphere by addressing the disparity of wealth in Latin American countries, thereby promoting political stability in the region and stimulating investment.

If the leaders of the nations which comprise the Western Hemisphere similarly overlook the view that workers' rights will stimulate investment and promote successful hemispheric free trade, then the FTAA will be in theory, a system to propel the West into the forefront of the world's economy, but in reality, an enormous failure.

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