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Labour Rights in the FTAA

Abstract

[Excerpt] Without an overall trade agreement containing stronger labour rights linkage than that of the NAALC model, advocates will have no central forum or mechanism for dealing with workers' rights in the Americas. This paper suggests that labour rights advocates can and should shape a new viable social dimension in hemispheric trade and demand its inclusion in the FTAA.

The emphasis of this paper is on a viable, not a definitive or triumphant, solution. Workers and their advocates do not triumph in the current conjuncture of economic and political forces. They do not will their way to victory with the sharpness of their criticism or the strength of their denunciations; they hold their losses and make small gains where possible. Workers' advocates must coldly calculate what can be done with the reality they are dealt, hoping the outcomes will advance the longer-term struggle for social justice.

Keywords

Free Trade Agreement of the Americas, FTAA, labor rights, labor movement, globalization

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Labour rights in the FTAA

LANCE COMPA

Introduction: rejection or engagement?

Negotiations on the Free Trade Agreement of the Americas (FTAA) bring advocates of a strong social dimension in hemispheric economic integration to a fork in the road: a path of rejection and a path of engagement. On the rejection path, critics point to flaws and failings in existing trade-labour linkages in the Americas. Ten years after the adoption of the North American Free Trade Agreement (NAFTA) and its labour side agreement, the three member countries of the North American Agreement on Labour Cooperation (NAALC), demonstrate job and wage stagnation, growing inequality in labour markets, and continuing violations of workers' rights.¹

Similarly, more than a decade after the creation of the Common Market of the Southern Cone (Mercosur) and five years after its Social-Labour Declaration, workers in Brazil, Argentina, Paraguay and Uruguay face wrenching problems of job and wage losses and social inequality. So do workers of the Caribbean Community (CARICOM), in spite of the far-reaching Declaration of Labour and Industrial Relations Principles (1993) and the Charter of Civil Society (1994).² In sum, the social provisions of trade pacts have failed to protect human rights, workers' rights and labour standards.

The flaws and failings of these labour instruments lead to one conclusion: an effective workers' rights regime in the FTAA is an impossible goal, and seeking one is a lost cause. In addition, promoting a social dimension in the FTAA, like the NAALC and other regional trade-labour instruments, is aiding and abetting abuses by transnational companies and investors. It gives political cover to weak-kneed legislators who can vote in favour of the FTAA claiming that they support workers' rights when in fact the trade-labour link is "toothless" (the favorite epithet of critics).

Instead, advocates must turn all their energies to torpedoing any agreement. For activists who adopt this view, it means convincing their governments to reject a hemispheric trade pact or, where elections are imminent, supporting and electing legislators and presidents who will repudiate FTAA talks.

This paper advocates for the advancement of the engagement path. Not from any rose-coloured view of existing labour rights-trade links whose flaws and failings are manifest. Rather, from a short-term analysis that parliaments and presidents in the Americas are unlikely to renounce a hemispheric trade agreement, and from a longer-term view that workers can benefit from expanding trade and investment linked to human rights and labour rights protection.

NAFTA countries show no inclination to abandon the FTAA. Hopes of anti-FTAA activists that the election of Luis Inacio da Silva as Brazil's president would crash hemispheric trade negotiations have faded. Lula had earlier characterized FTAA proposals as a US plan for economic "annexation" of Latin America, but upon taking office he declared he would bargain hard for an agreement beneficial to Brazil and the other Mercosur countries.³

If labour rights advocates refuse to promote a workers' rights chapter in the FTAA, they could end up with an FTAA with no labour provision at all. And, if they succeed in killing the FTAA, they can celebrate for one night and wake up the next morning to find that not much has changed. The United States and Canada, the developed country engines of the hemispheric economy, will continue to seek bilateral trade agreements with countries eager for expanded access to North American markets and more investment in their economies.

Hemispheric trade and investment with insufficient regard for workers' rights will continue with or without an FTAA. Multinational companies and banks might have to account for slightly higher risk premiums in making production and investment decisions without FTAA guarantees, but they will not walk away from profitable deals. Many countries in Latin America and the Caribbean will jump at the chance for a competitive edge vis-à-vis other developing countries through bilateral deals with the United States and Canada. Mexico and Chile have done so, and Costa Rica with Canada. Since access to US and Canadian markets is the main goal of other countries in the hemisphere, the NAALC and its variations will likely be the sole model for a workers' rights clause, as it was in the Canada-Chile, Canada-Costa Rica, and United States - Chile agreements.

Without an overall trade agreement containing stronger labour rights linkage than that of the NAALC model, advocates will have no central forum or mechanism for dealing with workers' rights in the Americas. This paper suggests that labour rights advocates can and should shape a new viable social dimension in hemispheric trade and demand its inclusion in the FTAA.

The emphasis of this paper is on a viable, not a definitive or triumphant, solution. Workers and their advocates do not triumph in the current conjuncture of economic and political forces. They do not will their way to victory with the sharpness of their criticism or the strength of their denunciations; they hold their losses and make small gains where possible. Workers' advocates must coldly calculate what can be done with the reality they are dealt, hoping the outcomes will advance the longer-term struggle for social justice.

Start over or build on what's been done?

Commitment to a workers' rights clause in the FTAA raises another issue. Should labour rights advocates scrap existing rights models in the hemisphere like the NAALC and its progeny (the United States–Chile, Canada–Chile and Canada–Costa Rica labour pacts), the Mercosur's Social-Labour Declaration, or the CARICOM social charter? Jettisoning those models, advocates could demand a totally new worker rights system with international standards to which national laws must conform and an oversight body empowered to levy economic sanctions on violators. This paper argues for an incremental approach integrating positive features of labour rights instruments and mechanisms already in place in the hemisphere.

For some, the European Union (EU) provides an example. Its structure includes a commission, parliament and a council setting Europe-wide labour standards ("directives") by which national laws must abide. It empowers the European Court of Justice to find violations and to order countries to change their laws to come into compliance with EU standards. Indeed, the EU has all the trappings of a "hard law" legal system like that of national systems.⁴

But for all its strengths, the EU is not the best model for the Americas. Countries involved in FTAA talks are not even remotely contemplating EU-style structural integration. Moreover, the EU social dimension is not nearly as strong as its institutional framework suggests. Directives setting European labour standards are few, and they cover less thorny issues such as health and safety, parental leave, and employee "works councils"

entitled to information and consultation, but not to collective bargaining. The EU treaty specifically *excludes* collective bargaining, union organizing and the right to strike from Europe-wide standard setting.⁵ These issues are so embedded in national institutions, histories, cultures and class struggles that no European country is willing to hand them over to supranational rule.

Various European social charters broadly address labour rights and labour standards. In December of 2000, the Charter of Fundamental Rights of the European Union was adopted at a summit meeting in Nice. The Nice charter replaced the 1989 Community Charter of Basic Social Rights. An EU “convention” crafting a new union treaty had proposed incorporating the charter into the EU’s constitutional structure, supposedly making it binding and enforceable, but such a move is still far from complete.⁶

The charter and its forerunners have always been non-binding “side agreements” to the EU treaty. They are important as guiding principles and points of reference for EU institutions, but they do not yield enforceable rights. National authorities and national courts can ignore them. Countries sometimes even ignore orders from the European Court of Justice (ECJ) on cases stemming from violations of Europe-wide directives, which are supposed to be binding and enforceable. For example, for a decade, France ignored an ECJ order to repeal its labour law prohibiting night work by women. The ECJ held that the law discriminated against women, but there is no European police or European marshal to enforce that court order.⁷

Creating a supranational tribunal empowered to overrule national laws and courts risks turning the wrong direction. For example, the ECJ struck down a German state’s affirmative action law favouring women’s movement into public sector supervisory jobs. The court held that this was “reverse discrimination” forbidden by EU equality directives, and ordered Germany to nullify their law.⁸

Even if the EU’s social dimension were a robust one driving labour standards higher and punishing workers’ rights violators (granted that it *is* more advanced than Americas’ models), importing it into a trade pact is impractical. Both large and small countries in this hemisphere are not going to say, “We’re at sea on workers’ rights, we don’t know how to do this, so we’ll borrow the EU model.” They are going to negotiate a homegrown social dimension to hemispheric trade.

Binding, enforceable international labour standards remain an overarching goal for worker rights advocates. However, getting from here to

there in a single bound in an FTAA is not possible, especially when so much economic disparity marks the negotiating parties. Smaller, weaker countries naturally fear that universal standards will be applied to them, but not to bigger economic powers. Moreover, each country has its own political and jurisdictional barriers to supranational labour authority. For example, Canadian provinces already enjoy and jealously guard provincial sovereignty in most labour affairs. They are not interested in surrendering their power to the federal government, let alone to a new international authority.

On the trade union side, activists in other countries look at the condition of workers' rights in the United States and recoil at the prospect of homogenized labour standards tending toward the US model. US trade unionists ought to be equally sceptical about solving their own problems through some kind of international legal legerdemain. Trade-labour instruments are not going to reverse deficiencies in US law – NLRB election rules, striker replacements, contingent workers' lack of protection and others – without action by Congress.⁹ These are problems for US workers to tackle through their own organizing and political action, not by demanding a silver bullet in a trade and labour pact.

The embedded national framework of labour rights and labour standards did not take shape casually. In each country, it resulted from national histories replete with anti-colonial wars, civil wars, constitutional crises, domestic regional conflicts and class struggles. Thirty-four countries sitting down to negotiate a social dimension to a hemispheric trade agreement are not going to undo those histories and defer to an untested supranational authority.

Many governments involved in FTAA talks have already committed themselves to addressing workers' rights in trade arrangements. Their specific labour agreements are still evolving, but they are enough to lay a foundation for new movement in FTAA negotiations. Instead of a harsh demand that governments leap into the unknown with a new supranational system, a softer demand to build upon blocks already in place is one that a strong civil society movement can persuade governments to adopt.

Labour rights in existing regional trade agreements

I am not going to recite all of the institutional structures, procedures, case histories and other aspects of labour rights provisions related to various regional trade agreements. However, a brief description of the

main features of the NAALC, the Mercosur Social-Labour Declaration, and the CARICOM Social Charter will set the stage for what follows. This paper aims to explore the prospect of weaving together the “best practices” into a new plan that labour rights advocates can support and that governments can accept.¹⁰

The NAALC

The NAALC sets forth eleven “Labour Principles” that the three signatory countries have committed themselves to promote:

- freedom of association and protection of the right to organize;
- the right to bargain collectively;
- the right to strike;
- forced labour;
- child labour;
- minimum wage, hours of work and other labour standards;
- non-discrimination;
- equal pay for equal work;
- occupational safety and health;
- workers’ compensation; and
- migrant worker protection.

The NAALC signatories have pledged to effectively enforce their national labour laws in these eleven subject areas, and have agreed to be subjected to critical reviews of their performance by the other countries.

With regard to the eleven labour principles, these countries adopted six “obligations” for the effective enforcement of these principles. These obligations include:

- a general duty to provide high labour standards;
- effective enforcement of labour laws;
- access to administrative and judicial fora for workers whose rights are violated;
- due process, transparency, speed, and effective remedies in labour law proceedings;
- public availability of labour laws and regulations, and opportunity for “interested persons” to comment on proposed changes; and
- promoting public awareness of labour law and workers’ rights.

Key to understanding the NAALC is to highlight the two things that it does *not* do. Firstly, it does not set new common standards to which

countries must adjust their laws and regulations. Instead, the NAALC stresses sovereignty in each country's internal labour affairs, recognizing "the right of each Party to establish its own domestic labour standards".

Secondly, the NAALC does not create a supranational tribunal that hears evidence, decides guilt or innocence in labour disputes or orders remedies against violators. This role is left to national authorities applying national law. Nor does it create a supranational judicial review body to hear appeals from decisions of national tribunals and overrule decisions that arguably fail to "enforce" the NAALC. Decisions by the national courts are left undisturbed by the NAALC.

Instead of an international enforcement system, the NAALC countries have created an oversight, review and dispute resolution system designed to hold each other accountable for performance in the eleven defined areas of labour law. Oversight is conducted by a review body of *another* government. Then, depending on the subject area, an evaluation and arbitration is held by an independent, non-governmental committee or panel.

Under this process, trade unionists and their allies file complaints on one or more of the labour principles in a new institutional structure that provides for investigations, public hearings, written reports, government-to-government consultations, independent evaluations, non-binding recommendations and other "soft law" measures common to most international agreements. At each stage of this process, advocates can intervene to press for favourable outcomes.

A National Administrative Office (NAO) in the labour department of each country receives complaints ("public communications" or "submissions" in NAALC parlance) from the public related to any of the eleven labour principles. There are no restrictions on who may file a complaint. In the interest of having the process as open and accessible as possible, the regulations of each NAO set a fairly low threshold of acceptance for review.¹¹

The scope of such reviews is "labour law matters arising in the territory of another Party". This is an unusual but critical feature of the NAALC. Employers, workers, unions and allied NGOs must file their submissions with the NAO in another country, not the country where alleged violations occurred, to commence the review process. The United States and Canada hold public hearings on complaints with transcripts and sworn testimony. The Mexican NAO holds private "informative sessions".

The NAOs issue public reports on the submissions that they have accepted for review. The public report contains a key make-or-break

conclusion: whether or not it recommends ministerial consultations. If no recommendations are made, the matter is closed. If recommendations are provided, the matter moves forward. These ministerial consultations are open-ended efforts to resolve a problem before it enlarges. They have generally led to further hearings, special research reports, seminars and conferences, worker education programmes and the like.

A "hard law" edge has been applied to three of the labour principles: those covering minimum wages, child labour, and occupational safety and health. An independent arbitral panel is empowered to fine an offending government for a "persistent pattern of failure to effectively enforce" domestic labour law. If the fine is not paid, the panel can apply trade sanctions on the firm, industry, or sector where the workers' rights violations occurred.¹²

In sum, the NAALC is not a full-fledged international enforcement mechanism. It is not intended to resolve specific complaints and to issue orders to reinstate workers unjustly discharged, orders to recognize and bargain with trade unions, orders to remove children from unlawful labour, orders to adjust pay for women to equal that of men, orders to install air filters to reduce health hazards, orders to provide compensation to injured workers, and other remedies associated with labour law enforcement. These matters are left to national legislation and national enforcement mechanisms.

The NAALC is intended as a review mechanism by which member countries open themselves up to investigation, reports, evaluations, recommendations and other measures so that over time enhanced oversight and scrutiny will generate more effective labour law enforcement. To the extent that legislative responses can be fashioned within national systems, rather than imposed by a supranational power, oversight under the NAALC can change the climate for labour law reform in each country to achieve greater adherence to NAALC principles and obligations.

Mercosur and the Social-Labour Declaration

When the Common Market of the South (Mercosur)¹³ took shape in 1991, a reference to "social justice" in the Preamble of the Treaty of Asunción was the only nod to a social dimension in regional trade plans. Mercosur countries quickly realized the need to respond to the demands of workers, trade unions and allied civil society forces for instruments and mechanisms to ensure that expanding regional trade did not create new incentives for social dumping and worker exploitation to obtain a

competitive advantage. That same year, labour ministers of the member countries responded to demands from labour and civil society by adopting the Montevideo Declaration insisting that the trade group address labour and social issues.

The 1994 Protocol of Ouro Preto finalized Mercosur's institutional structure and created two new organisms on labour matters: "Working Group 10" (WG10) and a new body called the Economic and Social Consultative Forum. WG10 is composed of labour ministry officials of each Mercosur member government in a tripartite government-labour-business structure, with one representative from each sector in each of the four countries. Labour and business representatives have the right to participate and vote in committees on conclusions and recommendations to send to the full Working Group.

A parallel structure is established within each country. Country committees have often invited non-governmental organizations like consumer groups, international organizations like the ILO, and labour centrals that might not have a seat on the committee to participate in committee meetings. Both national committees and WG10 have contracted with experts for special working groups or technical committees on particular subject matters.

WG10 also created a permanent Labour Market Observatory. The Observatory is a technical organ designed to provide "real-time" comparative information on labour market indicators to Mercosur governments to help them coordinate employment policies. Like other Mercosur social initiatives, the Observatory has a tripartite institutional structure. A 12-member management council named by WG10 oversees a secretariat of experts from each country selected by the country's tripartite national section.

The Economic and Social Consultative Forum (ESCF) is a setting for trade unions, employers and non-governmental organizations to voice their views and concerns about economic integration in the region. Like other Mercosur institutions, the ESCF is tripartite in structure, but with a key distinction: the Forum does not include government representatives. The three sectors of the ESCF are labour, business and NGOs.

Each of the four Mercosur countries have nine seats on the ESCF, creating a plenary body of 36 members. Each country may choose through its internal processes its nine members, with the sole requirement that labour and business seats be equal. Thus, for example, labour and business could have two seats each, opening up five seats to NGOs. In practice, these countries have generally chosen three labour and three business

representatives, with three NGO representatives joining them in the national delegation. NGO participants have come from consumer, environmental, educational, legal and other civil society groups.

The ESCF began functioning in 1996 after its four national sections were formed. It is strictly an advisory body, able only to forward non-binding recommendations to governments. The Forum provides space for civil society sectors in each country to learn about each other's concerns, to develop institutional rules, procedures and customs for tripartite work, and to seek common ground on social aspects of regional economic integration. These were important precursors to the new framework created by the Social-Labour Declaration of Mercosur.

Social-Labour Declaration of Mercosur

The Social-Labour Declaration of 10 December 1998 and the move to create a Mercosur Social-Labour Commission are the most significant developments in the region. Emitted not by a working group or even a council of ministers, but by the heads of state of the four Mercosur member countries, the declaration has exceptional solemnity and authoritativeness. The creation of a new, permanent Social-Labour Commission gives added impetus to the social dimension in Mercosur.

In its Preamble, the declaration invokes ILO Conventions such as the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the Universal Declaration of Human Rights, the 1995 Copenhagen summit and other multilateral and regional human rights instruments. The content of the declaration covers the usual core labour standards – freedom of association, child labour, forced labour and non-discrimination. However, it ranges beyond the usual core to address migrant workers' rights, the right to strike, social dialogue, employment and unemployment, training, health and safety, labour inspection and social security.¹⁴

The declaration does not establish harmonized norms and has no linkage to the Mercosur trade regime imposing economic sanctions for violations of workers' rights – key trade union goals for a social charter. Rather, the member countries “commit themselves to respect the fundamental rights inscribed in this declaration and to promote its application in conformity with national law and practice and with collective contracts and agreements”. In its closing article, the declaration states: “The States Party emphasize that their Declaration and its follow-up mechanisms cannot be invoked or used for other ends not contained herein; prohibited, in particular, is its application to trade, economic, and financial matters.”

Social-Labour Commission

The declaration's application and follow-up clause creates a tripartite Mercosur Social-Labour Commission that reports to the Common Market Group (CMG). Composed of twelve government, labour and business members (one per sector per country), the Commission is empowered to act by consensus to:

- review annual reports from governments;
- develop recommendations;
- examine "difficulties and mistakes in the application and fulfilment" of the declaration;
- write its own analyses and reports on application and fulfilment; and,
- shape proposals for modifying the text of the declaration.

Each government must submit an annual report to the Commission on changes in national law and practice on matters addressed in the declaration, on progress in promoting the declaration, and on difficulties in applying it. Based on an examination of these reports, the Commission prepares a comprehensive report to the CMG.

As with the NAALC, Mercosur governments are reluctant to cede sovereign power over labour matters to a new, untested supranational authority or to create international norms that trump national law. Employers complain that the Social-Labour Declaration is too favourable to the trade union agenda and fails to promote much needed (from their perspective) flexibilization of labour law and practice in the region. However, they count as a victory the fact that the declaration does not have linkage to trade disciplines with potential for economic sanctions.

Unions see the declaration as lacking "teeth" precisely because it does not establish harmonized standards or trade sanctions against labour rights violators. Furthermore, it fails to halt harmful (from their point of view) trends toward greater flexibility, whether such changes stem from de facto moves by management or from labour law reforms often demanded by the International Monetary Fund or other international financial institutions. In the trade unions' view, such flexibilization undermines workers' rights won through decades of struggle, including the struggle against military dictatorships in all four Mercosur countries.

At the same time, trade unions welcome the significant role afforded to labour in the tripartite structure of the Commission. They have seen a broadening and deepening of social dialogue, which they view as progress in the long march toward an effective social dimension in trade.¹⁵

The Caribbean Community (CARICOM) and the Charter of Civil Society

CARICOM is an association of Caribbean nations created in 1973 to develop a common market and coordinated policies among its member states.¹⁶ Faced with the rise of regional trade agreements around them, and in particular, the new comparative advantages afforded to Mexico under NAFTA, CARICOM countries accelerated efforts to overcome strong distinctions and rivalries and built an effective trade group.¹⁷

CARICOM's social dimension is grounded in the Charter of Civil Society of the Caribbean Community, signed in 1994 and adopted by the countries in 1997. The purpose of the Charter is captured in the following statement by the commission:

CARICOM needs normative moorings; we have found widespread yearning for giving the community a qualitative character – values beyond the routine of integration arrangements to which [economic integration] can be made to conform. The Charter can become the soul of the Community which needs a soul if it is to command the loyalty of the people of CARICOM.¹⁸

The Charter of Civil Society is a comprehensive human rights instrument composed of 27 articles. Most notably, in comparison with similar international efforts, the CARICOM Charter subjects private actors – “social partners”¹⁹ – as well as states to its oversight mechanism.

The first grouping of articles covers classical civil and political rights – human dignity and the right to life, liberty and security of the person; equality before the law; political freedom; freedom of association, expression and religion. Article X on cultural diversity shifts the instrument's focus to economic and social rights as reflected in its clauses on indigenous peoples, women, children and the disabled; access to education and training; health; participation in the economy; environmental rights; and good governance.

Two articles of the Charter relate to a social dimension. Article XIX on Workers' Rights is the longest article of the Charter. It guarantees to “every worker” the right to form or belong to a trade union, to bargain collectively, to reasonable hours and pay, to withhold his or her labour, to a safe workplace, and not to be subjected to unfair labour practices. An exception is made for public employees which is said to be “reasonably justifiable in a free and democratic society”.

Article XIX enumerates the obligations of governments to:

- safeguard workers' right to freely choose occupations;
- recognize the desirability of decent pay;

- provide machinery for recognition and certification of trade unions freely chosen by a majority of workers;
- sensitize workers, unions and employers as to their respective and mutual obligations;
- provide protection against arbitrary dismissal;
- provide machinery for industrial dispute resolution;
- provide maternity leave and return-to-work rights after pregnancy;
- establish standards to ensure a safe and healthy workplace;
- provide adequate social security; and
- ensure social and medical assistance to retired persons.

Article XXII on Social Partners states briefly the undertaking of each government to establish a framework for genuine consultation among its social partners on the objectives, contents and implementation of national economic and social programmes and their respective roles and responsibilities in good governance.

The follow-up mechanism in Article XXV calls for periodic reports to the CARICOM Secretary-General on measures adopted and progress achieved in compliance with the Charter. Reports are to indicate “factors and difficulties, if any” affecting implementation. Governments are advised to consult with social partners in preparing the reports, and establish in each country a National Committee to oversee Charter implementation. The National Committee is to be made up of government representatives, representatives of the social partners, and “other persons of high moral character and recognized competence in their respective fields of endeavor”.

The Charter contains a complaint mechanism by which citizens may file with their National Committee “reports of allegations of breaches of, or non-compliance with” the Charter. Significantly, complaints may cite violations “attributed to the state or to one or more social partners”.

The National Committee must notify the state or social partner named in the complaint and request comments on the allegation. The complaint, comments and the Committee’s “own views” are then reported to the Secretary-General for forwarding to the Conference of Heads of Governments of the Caribbean Community. The deliberations of the Conference and any recommendations are sent back to the government and the National Committee of the country involved.

No further action is contemplated under the CARICOM Charter in situations alleging violations of Charter provisions, including workers’ rights. The Charter establishes an oversight system relying on peer pressure and moral force to change behaviour or to correct injustices. There is

no linkage to CARICOM trading arrangements and no plan for economic sanctions against human rights and workers' rights violators.

Gleaning positive elements

An institutional role for civil society actors

In FTAA talks to date, governments have declared their intention to engage civil society on a social dimension in trade. Labour rights advocates should demand action through a labour rights chapter promoting a strong institutional role for civil society actors. The NAALC and NAALC-like agreements are weak on civil society involvement. They allow private parties to file complaints under the agreement, but after an initial filing there is no right of appeal or advancement to higher levels of the procedure. Such advancements are entirely controlled by governments.

NAALC-style agreements include trade union and employer representatives on advisory committees, but these committees are largely inactive. Applying the labour agreement is strictly a government-to-government operation with civil society marginalized.

In contrast, Mercosur and CARICOM provide valuable models of openness to civil society and respect for social actors. Mercosur created a civil society Economic and Social Consultative Forum (ESCF) for business, labour and NGOs to develop recommendations on human rights, labour and environmental matters in its member countries. Like other Mercosur institutions, the ESCF is tripartite in structure, but the three parts are non-governmental. Each of the four countries have nine seats on the ESCF, making for a plenary body of thirty-six members. Each country may choose through its internal processes the nine members to be drawn from business, trade union and NGO communities. The sole proviso is that business and labour representatives must be equal in number. In practice, countries have come up with three representatives from each constituency: labour, business and NGOs. NGO participants come from consumer, environmental, educational, legal and other civil society groups.

Mercosur has also created a Social-Labour Commission (SLC) under the declaration with ample space for trade union participation in setting a social agenda for member countries. The twelve-member SLC includes one labour, business and government representative from each of the four parties. This commission reviews annual government reports on labour law and practice, progress in promoting the declaration, and problems in

applying it. The SLC examines each country's report and prepares its own comprehensive analysis and recommendations to Mercosur's governing body, including proposals for changes to the declaration.

The Mercosur SLC is complemented by a national labour-business-government commission in each country, as well as sectoral commissions in textile, transportation, agriculture, telecommunications and other industries. Again, results should not be overstated. Recommendations flowing from this tripartite process are non-binding. However, requiring country self-reporting and forging consensus critiques and recommendations with the labour movement's full, equal participation is a valuable model for a hemispheric institutional setting. Moreover, the SLC has fostered innovative regional developments such as cross-border collective bargaining (for example, between Volkswagen and metalworkers unions in Brazil and Argentina)²⁰ and the unusual step of joint child labour and job safety inspections by multinational teams of enforcement officials from labour departments of member countries.

Borrowing from European discourse, CARICOM's Charter of Civil society sets out obligations not only for member governments, but also for "social partners" including trade unions, corporations and NGOs. In each country, a national committee made up of government officials, representatives of the social partners, and respected independent scholars and experts oversees the implementation of this Charter.

Complaint mechanisms

A strong institutional role guaranteeing a permanent "seat at the table" for trade unions and other civil society actors is an important feature in Mercosur and CARICOM's social dimension. This is lacking in the NAALC and its progeny. However, participatory mechanisms leading to consultations and recommendations are not enough. A robust complaint system is needed to give a voice and recourse to workers victimized by labour rights violations and to advocates who can act on behalf of victims. Mercosur and CARICOM lack such a mechanism, whereas the NAALC has something important to offer.

The NAALC and its offshoots have several positive elements of a complaint mechanism to weave into a new FTAA labour rights system. For one, the NAALC has no "standing" requirement that only victims or only trade unions or only citizens can file complaints about workers' rights violations. "Any person", meaning any individual or any organization, alone or in concert, regardless of citizenship, can file a complaint (called a

“public communication” in the soft diplomatic language of the NAALC) about violations of one or more of the eleven labour principles and the failure of a government to effectively enforce related laws.

In practice, most NAALC complaints have been submitted jointly by trade unions, human rights organizations, independent worker support groups and others from two or three countries working from a cross-border alliance. Indeed, the NAALC’s unusual requirement for complaints about violations in one country to be filed in another member country (to avoid conflict with national labour law bodies) forces advocates to work collaboratively in international coalitions, a valuable spin-off effect of the NAALC.

A new hemispheric labour rights regime should preserve the ample use of consultation with complainants, public hearings, commissioned research and detailed reports like those by the National Administrative Offices (NAOs) of the NAALC countries. Public hearings, in particular, allow affected workers and their advocates to state their claims through dramatic first-hand testimony. Hearings also create opportunities for protests, press conferences and other elements of strategic media campaigns.

Another favourable element in the NAALC complaint system is the absence of a requirement that complainants “exhaust” national mechanisms before resorting to the NAALC. Exhaustion of national remedies is a requirement of the Inter-American Commission and Court of Human Rights, for example. This severely crimps the timeliness of using it, since in most countries appeal procedures can take years before a case is finally resolved. Under the NAALC, aggrieved workers and their advocates can file unfair labour practice charges with their national authorities on Monday and with another country’s NAO on Tuesday.

Targeting corporate abusers

CARICOM countries recognized that in the context of regional economic integration, the power of multinational corporations over workers’ rights and labour standards often exceeds the governments’ power to regulate them. Thus, CARICOM expressly allows complaints against corporations as well as governments for violations of workers’ rights provisions in the Charter of Civil Society.

NAALC complaints technically run against governments’ failure to effectively enforce national laws. In practice, targeted governments have been joined in the dock by corporate abusers of workers’ rights. Cases are

called the *GE case*, the *Sony case*, the *Duro Bag case* (all cases “against” Mexico), the *Sprint case* (“against” the United States), the *McDonald’s case* (“against” Canada) and so on. Enforcement is the focus of the NAALC, but the questions “enforcement of what?” and “enforcement against whom?” cannot be delinked from the inquiry. When the US NAO first sought public comment on its proposed regulations, employer groups demanded a prohibition on naming any corporation in a complaint or in an NAO report.²¹

Workers’ rights violations do not occur in a vacuum; they occur in a defined place and time, and usually in a place of employment. Fortunately, the US NAO rejected this employer demand so that complaints could weave together allegations about countries’ failure to effectively enforce their laws in connection with specific workers’ rights abuses by corporations.²²

In the years since it took effect, NAFTA’s labour side agreement has given rise to a varied, rich experience of international labour rights advocacy. Nearly thirty complaints and cases on behalf of workers in all three countries have arisen under the NAALC. They embrace workers’ organizing and bargaining efforts, occupational safety and health, migrant worker protection, minimum employment standards, discrimination against women, compensation for workplace injuries, and other issues.

A rapid summary of just a few cases demonstrates how advocates get results. Gains are not made through direct enforcement by an international tribunal, but through indirection, by exploiting the spaces created by this new labour rights instrument to strengthen cross-border ties among labour rights advocates and to generate unexpected pressures on governments and on transnational enterprises. To be effective, labour rights advocates using the agreement must seek help from their counterparts across the border.

- In 1996, the provincial government of Alberta announced plans to privatize workplace health and safety enforcement. Labour inspectors would have become independent contractors. The public employees’ union declared it would file a NAALC complaint charging Alberta with not just a failure, but with a complete abdication of its responsibility to effectively enforce health and safety laws. The government dropped its plan.²³
- In 1996, Mexican labour authorities dissolved a small democratic trade union in the fisheries ministry when that agency merged with a larger

environmental ministry, who held larger pro-government bargaining rights. Together with US human rights groups, the dissident union filed a NAALC complaint in the United States alleging failure to enforce the Mexican constitutional guarantee of freedom of association. At a public hearing in Washington, DC, Mexican government officials and leaders of both Mexican unions, labour law experts from both countries, and US labour and human rights advocates testified, generating wide publicity in both countries and a sharply critical report by the US NAO. As a result, the smaller dissident union regained its registration and has continued its activity in the democratic union movement.²⁴

- A 1997 complaint by a coalition of US and Mexican labour, human rights and women's rights groups challenged the widespread practice of pregnancy testing in the maquiladora factories. A public hearing in Texas exposed the involvement of well-known US companies such as General Motors and Zenith which led to a US NAO report confirming the abuses.²⁵ Several US multinational firms announced that they would halt the practice and advocacy groups in Mexico launched new efforts seeking legislative reform to halt pregnancy testing in employment. In 2003, Mexico adopted a new far-reaching anti-discrimination law prohibiting pregnancy testing and other forms of discrimination against women.²⁶
- A 1999 complaint to the US NAO by flight attendants' unions in the United States and Mexico charged Mexico with failing to enforce the right to freedom of association by denying flight attendants represented by a "wall-to-wall" pro-government union at the TAESA airline the right to form an independent union. A March 2000 public hearing in Washington, DC buttressed the workers' claims and demonstrated international support for Mexican flight attendants who undertook protest actions in major airports. Later in 2000, in a parallel situation at another airline, the Mexican government reversed its stance and allowed flight attendants to vote separately on union representation to avoid a new round of international scrutiny.²⁷
- Canadian and US unions filed a NAALC complaint with the US NAO in 1998 after McDonald's closed a Montreal restaurant where workers had formed a union. The complaint targeted flaws in Quebec's labour law that allowed companies to close work sites based on anti-union motivation. When the US NAO accepted the complaint and scheduled public hearings, Quebec trade unions, employer federations, and labour department officials agreed to resolve the matter in a labour code reform bill rather than have Quebec's labour policies aired in a US

public hearing. The unions withdrew their complaint and the hearing was cancelled.²⁸

- Twenty-five unions, health and safety advocacy groups, human rights organizations and an allied community support network filed a major complaint with the US NAO in 2000 for workers suffering egregious health and safety violations at two Auto-Trim manufacturing plants in the *maquiladora* region. The 100-page complaint reflects long and careful collaboration among the filing organizations, a high level of technical competency and legal argument, and a powerful indictment of the government's failure to enforce health and safety laws.²⁹ These advocates filed a parallel complaint with Canada's NAO, and the two complaints led to a series of public hearings and sharply critical reports. Mexico claimed to strengthen its health and safety enforcement in response to the complaints. The labour-community coalition was not satisfied, but claimed for its part the creation of a permanent new network of health and safety advocates in North America.
- The Washington state apple case is a rich example of strategic use of the NAALC and how it can foster new ties of solidarity. More than 50,000 Mexican workers labour in the orchards and processing plants of the largest apple-growing region in the United States. Employers crushed their efforts throughout the 1990s to form trade unions, to bargain collectively, to have job health and safety protection, to end discrimination, and to attain other workplace gains. In 1997, the Teamsters union and the United Farm Workers agreed to develop a NAALC case on these issues. They reached out for support from Mexican unions, farm worker advocacy groups, and human rights organizations, and filed a NAALC complaint with the NAO of Mexico. In December of 1998, a hearing was held in Mexico City, with widespread media coverage.³⁰ The Mexico NAO report and follow-up ministerial consultations initiated a campaign involving workers which lasted for over a year and attained a number of gains for workers.³¹ For example, international scrutiny under the NAALC helped convince two large apple warehouse companies to agree to a "card-check" certification which led to union recognition.³²

In each of the aforementioned examples, new alliances were built among groups that had hardly ever communicated until the NAALC complaint gave them a concrete venue for working together. For leaders and activists of independent Mexican trade unions in particular, access to international allies and to a mechanism for scrutiny of repressive tactics long hidden

from international public view provided strength and protection to build their movement.³³

This accounting is not meant to overstate the NAALC's impact. Each of the examples provided are more complicated than these capsule summaries can convey, and the advantages gained are uneven. Asking workers to turn to the NAALC to air their grievances must be joined by honest cautions that it cannot directly result in regained jobs, union recognition, or back pay for violations. Unions and allied groups have to weigh the value of using the NAALC in light of staff time, energy and resources that might be allocated elsewhere when a specific payoff in new members or new collective agreements cannot be promised. Gains come obliquely, over time, by pressing companies and governments to change their behaviour, by sensitizing public opinion, by building ties of solidarity, and by taking other steps to change the climate for the advancement of workers' rights.

The NAALC allows transnational social actors to demand investigations, public hearings and government consultations on workers' rights violations. Advocates now have the opportunity to strategize and plan together in a sustained fashion, gathering evidence for drafting a complaint, crafting its elements, setting priorities, defining demands, launching media campaigns, meeting with government officials to set the agenda for a hearing and to press them for thorough reviews and follow-up, preparing to testify in public hearings, engaging technical experts to buttress a case with scientific elements (a health and safety case, for example), influencing the composition of independent experts' panels and the terms of reference of their investigation among other concrete tasks.

This is not meant to be a wide-eyed endorsement of using the NAALC at every opportunity. Choices about resource allocation and measurement of potential gains have to be made. Actors face unavoidable compromises using instruments and procedures created by governments more attuned to corporate concerns than to workers' interests. But given the structurally defensive position of workers in a corporate-dominated system, sole reliance on denunciation, confrontation and rejection, while scorning involvement in efforts to link workers' rights to trade or to use the inevitably flawed agreements that follow, surrenders the chance for a savvy, strategic exploitation of pressure points found in international human rights and labour rights instruments, however flawed they may be, compared with what labour rights advocates would create on their own without governments or transnational enterprises to contend with.

Research and oversight bodies

The NAALC created a small permanent Secretariat (originally placed in Dallas, Texas, but now in Washington, DC) to serve as the research and administrative arm of the council of labour ministers. A half-dozen economists, lawyers and labour policy experts from the three member countries have produced valuable, book-length comparative labour law and labour market studies, along with shorter guides to workers' rights.³⁴

Mercosur has created a social-labour *Observatorio* to monitor developments and produce reports and analyses on labour markets and workers' rights in member countries.³⁵ The Observatorio has produced valuable comparative studies on child labour, discrimination, social dialogue, migration, job creation, training and other important topics.

The NAALC Secretariat and the Mercosur *Observatorio* provide solid models for a new, hemispheric labour rights research and reporting body. Such new body should have an adequate staff and budget to carry out an expanded programme, and it should have guarantees of greater independence in its work. Its mandate should also include strengthened oversight on the efficacy of labour rights mechanisms in a hemispheric agreement, "blowing the whistle" when governments and companies violate workers' rights and exposing failures to provide effective enforcement and remedies.

Enforcement

The ever-present question of "teeth" in labour rights-trade linkage arises in the FTAA context. Critics have lambasted all the models discussed in this paper for lacking teeth, for not providing specific remedies like reinstatement of workers dismissed for union organizing, recognition of independent unions, enforceable orders to halt pregnancy testing in *maquiladora* factories, and other on-the-ground targets of NAALC or CARICOM complainants.

Such criticism is fair. However, we have to recognize that countries are not going to set up a supranational mechanism that can overturn national labour laws and overrule national supreme courts in labour cases. Instead, international labour rights mechanisms provide new opportunities to foster organizing and solidarity. Advocates make gains indirectly, when using these labour rights mechanisms as part of a broader strategy of workplace organizing and cross-border solidarity campaigns. We can shape even farther-reaching opportunities in a hemispheric setting.

The NAALC and its progeny have some teeth in the form of potential fines or trade sanctions against countries or sectors that violate workers' rights. However, no case has ever reached such a point. Only member governments, not social actors, can invoke the sanctions phase of the NAALC process.

Applying sanctions is unlikely while governments control the process. They too often put superficial cooperation ahead of honest engagement and criticism on workers' rights violations. However, preserving the sanctions option is a critical goal in FTAA negotiations to drive home the truth that labour rights and trade are bound up with each other and that, under certain circumstances, violators will be punished. Realistically, economic sanctions should only be a last, extreme resort when all intermediate opportunities for settling problems have been exhausted. But unless the *possibility* of sanctions exists, stubborn companies and governments can resist change with impunity.

A possible innovation in the FTAA would be to allow complaining parties like workers, unions and NGOs to "appeal" cases to higher levels, forcing the creation of independent evaluation committees and arbitral panels that can make binding recommendations and impose sanctions. This would further engage civil society actors in the process and provide new opportunities for negotiated settlements before any sanctions are applied.

Effective enforcement of national law

The NAALC and agreements modeled on the NAALC (United States – Chile, Canada–Chile, Canada–Costa–Rica) all make "effective enforcement" of national labour laws a central obligation of the parties, distinct from a need to change laws to comply with new supranational standards. This is a reasonable starting point for a new hemispheric agreement, as long as national laws comport with fundamental rights.

The capacity for enforcement is critical to protecting workers' rights. One need only see the re-emergence of apparel sweatshops in many US cities or the well-documented failure of US authorities to protect workers' organizing rights to appreciate that effective enforcement of national law is a general problem, not one limited to poor countries. Fixing it should be a priority in hemispheric trade. This threshold promise to improve performance by enforcing national laws is one that countries can readily accept.

International standards

Commitment to enforcing national laws creates a threshold problem: what about laws that are inadequate or that outright violate workers' rights? This is a central problem in current negotiations between the USA and Central American countries on a Central America Free Trade Agreement (CAFTA). Several of these countries' laws fall short of compliance with international standards on fundamental workers' rights.³⁶

Here is where a strong normative statement setting baseline standards comes into play. The NAALC and NAALC-based agreements all contain eleven "labour principles" covering freedom of association, forced labour, child labour, discrimination, safety and health, migrant worker protection and more. CARICOM's Charter of Civil Society and Mercosur's Social-Labour Declaration go further, addressing all the NAALC principles as well as social dialogue, job training and promotions, protection against dismissal, maternity leave, social security and other issues.

It is worth noting at this point that all of these instruments extend beyond the ILO's four-part definition of core labour standards: freedom of association, elimination of forced labour, abolition of child labour and elimination of discrimination at work. Indeed, labour rights advocates in the Americas can make an important stand by not limiting their discourse to ILO core standards. The ILO's core definition is important, but focusing just on them invites the logical conclusion that other labour rights and standards, mostly dealing with economic and social rights, are less worthy of attention because they fall outside the "core". Governments in this hemisphere have already created broader definitions of workers' rights. Labour rights supporters should build upon this "core-plus" approach in the FTAA.

A sustained independent review process

Implicit in the charter-like statements on workers' rights in the Americas is an assumption that countries' laws honour them. In many cases, they do not. Central American countries are not alone in the region in falling short of international norms. Mexico's labour law makes it difficult for workers to dislodge a corrupt, undemocratic union. Chile's labour code bars company-wide and industry-wide bargaining. Ecuador and other countries' labour laws allow employers to string together "temporary" employment contracts to frustrate workers' organizing rights. US labour

law fails to protect the rights of millions of workers to organize by excluding them from coverage under the National Labour Relations Act or other protections of the right to organize. Furthermore, Canada has come under consistent criticism from the ILO for denying associational rights to various categories of public employees.³⁷

At least some elements of most countries' labour laws violate international standards. It would be unrealistic to expect wholesale, immediate, pro-worker labour law reforms throughout the hemisphere as part of a trade deal. However, the implicit commitment to meet basic norms of decency expressed in existing labour rights clauses in the Americas can be made explicit. As part of a hemispheric agreement, countries could agree to thoroughly review their labour laws with help from a neutral, non-governmental international body such as the International Society for Labour Law and Social Security or the International Industrial Relations Association, or perhaps in collaboration with ILO experts, that can shape recommendations and a plan for change where needed.

The purpose of a sustained review process would not be to hold trade hostage until every nation's labour code is pristine. Rather, the goal is to create incentives for positive labour law reforms by accelerating trade benefits for countries moving swiftly in order to bring their laws into compliance with international norms. In other words, we should reverse the race to the bottom dynamic, not only by removing incentives to keep low labour standards to attract investment, but by adding incentives to harmonize labour standards upward to gain trade benefits.³⁸

Conclusion

A comprehensive overview of helpful and harmful language in existing labour rights agreements in the Americas is beyond the scope of this paper. The purpose of this paper has been to provide some examples for the argument that governments negotiating a hemispheric trade pact should include a viable workers' rights chapter by building upon models that have already been freely adopted. For example, the United States, Mexico and Canada can say to Central American, Mercosur and Caribbean island countries, "We like the way you developed an institutional role for trade unions and NGOs; let's weave together the best threads of what we have each accomplished in a new cloak of protection for workers' rights in this hemisphere." This way, the larger countries can approach the smaller countries on the basis of equality, not imposition.

This is not to say that labour rights advocates should be content with patching together current models. We should also demand new provisions that advance workers' interests. For example, an FTAA labour rights chapter should specify that a substantial portion of the budget of a labour rights commission or secretariat created under the labour agreement ought to be devoted to cross-border educational work such as conference support and research grants to trade unions and non-governmental organizations.

Another clause should provide heightened transparency in hemispheric labour affairs, requiring a "labour information audit" of companies involved in FTAA commerce. Audit information should be provided to and posted on the website of an FTAA labour secretariat with information such as corporate ownership structure, the location of facilities and their products or service lines, the number of employees, their salaries, benefits and working hours, the unionization status of any groups of employees, copies of collective bargaining agreements, and other relevant information.

In addition, a clause based on the principle of compliance with national law should be incorporated. This would allow targeted trade sanctions against companies found guilty of repeated violations of national labour laws linked to labour principles or other charter-like statements in an FTAA labour rights chapter.

This is all easy to say in a policy paper. The hard part in months and years ahead will be building a cross-border movement of trade unions and allies to demand an effective labour rights chapter in a hemispheric trade agreement – and a credible threat to defeat an agreement if governments fail to include such a chapter.

The fate of the FTAA does not hinge only on labour rights. Other "killers" stalk an agreement, like NAFTA's "investor-state" chapter letting corporations sue governments for regulatory actions harming profits and corporate pressure to privatize basic social services. Other social demands, if unmet, should also force labour advocates to join a struggle to defeat the FTAA, like the need for environmental protection, debt relief, equitable agricultural trade, guarantees of democracy, and sustainable development policies that include North-South economic aid.

Labour rights advocates are not alone in their struggle to build a strong social dimension into the architecture of hemispheric trade and investment. We should offer to engage governments with realistic proposals for a viable labour rights chapter in an agreement of the Americas building upon what countries have already done and not demand totally new and untested instruments and mechanisms. We should also be ready to join

allies in other social movements to kill an FTAA that fails a broad test of social justice.

Notes

1. See, for example, Economic Policy Institute, "NAFTA at Seven: Its impact on workers in all three countries" (2001) online: http://www.epinet.org/content.cfm/briefingpapers.nafta01_index; Gordon H. Hanson, "What Has Happened to Wages in Mexico Since NAFTA? Implications for Hemispheric Trade", National Bureau of Economic Research, Working Paper 9653 (2003), online: <http://papers.nber.org/papers/w9563>. For some recent journalistic treatment in the United States, see Tessie Borden and Sergio Bustos, "Hurt by NAFTA, Mexican Farmers Head North", *Arizona Republic*, 19 June 2003, p.1D and Katherine Yung, "El Paso No Longer Believes in NAFTA after Garment Industry Fades, Jobless Ranks Mount", *Dallas Morning News*, 13 April 2003 p.1D.
2. See, for example, Suzanne Duryea, Olga Jaramillo and Carmen Pagés, "Latin American Labour Markets in the 1990s: Deciphering the Decade" (Inter-American Development Bank, 2003), available online: <http://www.iadb.org/sds/doc/PANlaborEAR4.pdf>; see also the country labour market reports produced by the Global Policy Network, available online at <http://www.gpn.org>.
3. See Raymond Colitt, "Free Trade Area of the Americas: Brazil's government-elect drops hostility to proposal; Lula's party backs free trade area talks" *Financial Times*, 8 November 2002, p. 11. For a comprehensive discussion of FTAA regional politics (written prior to Lula's election), see Christopher M. Bruner, "Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA)" (2002) 33 *University of Miami Inter-American Law Review* 1.
4. For a valuable analysis and comparison, see Edward Mazey, "Grieving Through the NAALC and the Social Charter: A Comparative Analysis of their Procedural Effectiveness" (2001) 10 *Michigan State University – D.C.L. Journal of International Law* 239.
5. For more on these exclusions from EU competence, see European Industrial Relations Observatory, "Social policy provisions of draft EU constitutional Treaty examined", available online: <http://www.eiro.eurofound.ie/2003/08/Feature/EU0308204F.html>.
6. For journalistic analysis of the status and debates on the EU's charter of rights in the new treaty, see Edward Rothstein, "Europe's Constitution: All Hail the Bureaucracy" *New York Times*, 5 July 2003, p. B9; "Your darkest fears addressed, your hardest questions answered – Europe's constitution", *The Economist* (American Edition), 21 June 2003. A recent legal analysis can be found in Manfred Weiss, "The Social Dimension as Part of the Constitutional Framework", in Reiner Hoffmann et al. (eds), *European Integration as a Social Experiment in a Globalized World* (Hans Böckler Stiftung, Düsseldorf, 2003), 31–46.

7. See European Industrial Relations Observatory, "France and EU in legal tussle over women's right work", available online: <http://www.eiro.eurofound.eu.int/1999/05/Feature/FR9905183F.html>.
8. See Case 450/93, *Kalanke v. Frei Hansestadt Bremen*, [1995] ECR I-3051, [1996] 1 CMLR 175. The *Kalanke* decision was later softened by the ECJ in Case 409/95, *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363, [1998] 1 CMLR 547, and by the 1997 Treaty of Amsterdam, which contained a new clause, Article 141(4), which reads:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or compensate for disadvantages in professional careers.

For extended discussion, see Christopher D. Totten, "Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach" (2003) 21 *Berkeley Journal of International Law* 27; Sean Pager, "Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice" (2003) 26 *Boston College International and Comparative Law Review* 35.

9. See, for example, Human Rights Watch, "Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards" (2000), available online: <http://www.hrw.org/reports/2000/uslabour>.
10. For important, creative contributions to this discussion from Canadian perspectives, see Pierre Verge, "La place des droits relatifs au travail dans le projet d'integration des Ameriques" *Les Cahiers de Droit* (Université Laval, 2003); James Mercury and Bryan Schwartz, "Creating the Free Trade Area of the Americas: Linking Labour, the Environment, and Human Rights to the FTAA" (2001) 1 *Asper Review of International Business and Trade Law* 37.
11. See "Revised Notice of Establishment of United States National Administrative Office and Procedural Guidelines", 59 Fed. Reg. 16,660-62 (1994); "Regulation of the National Administrative Office of Mexico", *Diario Oficial de la Federación*, 28 April 1995; "Canadian NAO Guidelines for Public Communications", available at the Canadian NAO website, online: <http://labour.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/guidlms-e.html>.
12. Through a complex legal mechanism, Canada guarantees that it would pay any fines required under the NAALC, and is thus insulated against economic sanctions. See NAALC Annex 41A.
13. The four Mercosur members are Argentina, Brazil, Paraguay and Uruguay. Chile and Bolivia are associate members.

14. For extended description and discussion, see Geraldo von Potobsky, "La Declaración Sociolaboral del Mercosur" in *Revista del Ministerio del Trabajo* (Ministry of Labour of Argentina, 1999).
15. Author interviews with trade union and employer representatives and advisors, São Paulo and Brasilia, Brazil, 19–25 August 1999.
16. CARICOM members are Antigua and Barbuda, Belize, the Bahamas, Barbados, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago. Associate members are Anguilla, British Virgin Islands, and Turks and Caicos Islands.
17. For a recent discussion, see Peter Richards, "Economy: Caribbean Region Preparing for Globalization" *Inter-Press Service*, 16 October 2002.
18. Cited in CARICOM Secretariat statement on *Declaration of Industrial and Labour Relations Principles*, 6 January 1999.
19. "Social partners" are defined in Article I as "the government of a State, Associations of Employers, Workers' Organizations and such Non-Governmental Organizations as the State may recognize".
20. See "Contrato Coletivo entre a Volkswagen do Brasil Ltda. e Volkswagen de Argentina S.A. e o Sindicato dos Metalurgicos do ABC, Sindicato dos Trabalhadores nas Industrias e Oficinas Metalurgicas, Mecanicas e de Material Eletrico e Eletronico de Taubete, Tremembe e Distritos, a Confederacao Nacional dos Metalurgicos da CUT, e o Sindicato de Macanicos e Afins de Transporte Automotor da Republica da Argentina e as Comissoes Internas de Fabrica", 16 April 1999.
21. See, "Comments on Implementation of US National Administrative Office", Letter of 15 February from US Council for International Business to US NAO, on file with US NAO (1994).
22. For more discussion of the shaping of NAO procedures, see Lance A. Compa, "The First NAFTA Labour Cases: A New International Labour Rights Regime Takes Shape" (1995) 3 *United States – Mexico Law Journal* 159.
23. See Allan Chambers, "Privatization of labour rules raises fears: Law may face NAFTA challenge", *Edmonton Journal*, 6 September 1996, p. 1; "Province's Halt of Privatization Plan Ends Looming NAFTA Complaint", *Inside NAFTA*, 25 December 1996, p. 14.
24. See US NAO, "Public Report of Review", NAALC Submission No. 9601 (1997).
25. See US NAO Case No. 9701, "Submission Concerning Pregnancy-Based Sex Discrimination in Mexico's Maquiladora Sector" (1997) and US NAO, "Public Report of Review", NAALC Submission No. 9701 (1998).
26. See John Nagel, "Mexico's President Fox Signs New Anti-Discrimination Law", *BNA Daily Labour Report*, 11 June 2003, p. A-4.
27. See US NAO, "Public Report of Review", NAALC Submission No. 9901 (2000).
28. See Associated Press "U.S. labour body probes anti-union move in Quebec", *Toronto Star*, 21 December 1998, p. D3; see also letter dated 14 April 1999 from Claude

- Melançon, lawyer for Teamsters Canada, to Irasema Garza, US NAO Secretary, on file with US NAO.
29. See US NAO, "Public Report of Review", NAALC Submission No. 2000-01 (2001).
 30. See, for example, Molly Moore, "Mexican Farmhands Accuse U.S. Firms: Panel Hears Washington Apple Pickers", *Washington Post*, 3 December 1998, p. A-36; Elizabeth Velasco, "Trabajadores agrícolas denuncian explotación en EU", *La Jornada*, 3 December 1998, at p. 41; Arturo Gomez Salgado, "Denuncian migrantes violaciones laborales", *El Financiero*, 3 December 1998, p. 19.
 31. See *Informe de Revisión Comunicación Pública Mex 9802* (Public Report of Review of Mexico NAO Submission No. 9802), August 1999.
 32. See Florangela Davila, "Judge Confirms Teamsters' Victory", *Seattle Times*, 20 October 1999. Following a change in national Teamster leadership, the union could not consolidate its victory, and later renounced bargaining rights at one of the plants. See Lynda V. Mapes, "Unionizing of Apple Workers Unravels", *Seattle Times*, 8 December 2001.
 33. For more on this point, see Bertha Lujan, "Los sindicatos frente al ACLAN", in Graciela Bensusán (ed.), *Estándares laborales después del TLCAN* (Ebert/FLACSO, 1999).
 34. The Secretariat's publications are generally available online: <http://www.naalc.org>.
 35. Online: <http://www.observatorio.net>.
 36. For detailed description of the shortfalls in those countries' laws and how a labour rights clause in the CAFTA should correct them, see Carol Pier, "El Salvador's Failure to Protect Workers' Human Rights: Implications for CAFTA", *Human Rights Watch Briefing* (May 2003); Sandra Polaski, "How to Build a Better Trade Pact with Central America", *Carnegie Endowment for International Peace (CEIP) Issue Brief* (July 2003); "Central America and the U.S. Face Challenge – and Chance for Historic Breakthrough – on Workers' Rights", *CEIP Issue Brief* (February 2003). They are available respectively on the websites of Human Rights Watch and the Carnegie Endowment for International Peace.
 37. Information on workers' rights problems in all these countries and others in the hemisphere can be reviewed at the website of the ILO's Committee on Freedom of Association and Committee of Experts on the Application of Ratified Conventions, with cases organized by region and by country, online: <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?lang=EN>.
 38. For an elaboration of this strategic approach, see Sandra Polaski, "Trade and Labour Standards: A Strategy for Developing Countries", *Carnegie Endowment of International Peace Briefing Paper* (2003).