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NOTE: Mercosur and Labor Rights: The Comparative Strengths of Sub-**Regional Trade Agreements** in Developing and Enforcing Labor Standards in Latin American States

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SUMMARY:

... While trade agreements between States typically center on economic matters, the inclusion of social clauses requiring trading partners to observe certain labor standards has become increasingly common. ... This Note examines the strategy and success of the inclusion of labor standards in trade agreements involving Latin American States, focusing on two major agreements in the Western Hemisphere: the Common Market of the South (Mercosur) and the North American Free Trade Agreement (NAFTA). ... Sub-regional agreements such as the Common Market of the South (Mercosur), in which States have more of a shared history, political ideology, and sense of interdependency, and which take an incremental approach to incorporating labor rights, may prove more successful in upholding effective labor rights protections than the model endorsed by the United States, embodied by the North American Free Trade Agreement (NAFTA). ... Observers have noted that the agreement's flexible institutions and loose structural framework, which emphasize decision-making by consensus, have contributed to the slow and uncertain process of integration. ... While NAALC represents progress toward enforcing labor rights through multilateral trade agreements by tying violations to sanctions, the agreement is designed in such a way that sanctions are not readily available in certain instances of labor violations. ... /Chile FTA includes the parties' affirmation of their obligations as members of the ILO and of their commitments under the ILO's Declaration on Fundamental Principles and Rights at Work.

HIGHLIGHT:

While trade agreements between States typically center on economic matters, the inclusion of social clauses requiring trading partners to observe certain labor standards has become increasingly

common. This Note examines the strategy and success of the inclusion of labor standards in trade agreements involving Latin American States, focusing on two major agreements in the Western Hemisphere: the Common Market of the South (Mercosur) and the North American Free Trade Agreement (NAFTA). It argues that despite NAFTA's inclusion of sanctions for labor rights violations, a model backed by the U.S. in subsequent trade agreements, sub-regional agreements following a flexible, participatory approach as embodied by Mercosur have the potential to be more effective tools for developing and enforcing labor rights in the region.

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Introduction

In recent years, there has been a liberalization of trade characterized by a shift away from domestic-focused trade policies toward those that support the opening of markets worldwide. [n1] The proliferation **[*830]** of trade agreements between States has facilitated this process, with the purpose of promoting access to markets and creating strategic alliances between States. [n2] An interesting aspect of trade agreements is the inclusion of "social clauses" that hold parties to enforceable standards of conduct in areas traditionally lying within a State's domestic policy domain. Labor is frequently the subject of such social clauses, given its association with trade either as a factor of production to be regulated or as a byproduct of the trade liberalization process that carries economic and social consequences for member States. [n3] The attempt to enforce labor rights through trade agreements can take many forms. For instance, trade agreements can explicitly tie violations of labor standards to trade sanctions or they can include non-binding declarations on the part of member States to uphold internationally recognized labor principles.

Social clauses are not without controversy. Some are concerned that social clauses will be used for protectionist ends. [n4] Others argue that they allow a State's trading partners to intrude in its domestic affairs. These concerns are especially pronounced where there exists unequal bargaining power between trading partners due to one State's stronger economy or other advantages. In that situation, the weaker State may be reluctant to expand the boundaries of the trade agreement to include social issues due to the threat of unwanted interference in its domestic policies, with the result that it is faced with the choice of accepting an undesirable social clause as a condition of reaping the economic benefits of a trade agreement with the stronger State.

In the Americas region, similar concerns over the ability of a trade agreement to expose a State to the ulterior motives of a more powerful trading partner have emerged in the context of multi-lateral negotiations for the Free Trade Area of the Americas (FTAA). In particular, certain Latin American States have expressed strong opposition to U.S. plans for a hemisphere-wide free trade zone, suspecting the United States of attempting to impose a trade regime that will give it unlimited access to Latin American markets while disadvantaging **[*831]** those States in trade with

the U.S and global markets. [n5] This tension led to the deterioration of the most recent FTAA talks and has made the conclusion of this trade agreement highly unlikely in the near future. [n6]

This polarizing trend in inter-American trade issues affects the potential success of labor protections both in existing and future trade agreements in the region. Sub-regional agreements such as the Common Market of the South (Mercosur), in which States have more of a shared history, political ideology, and sense of interdependency, and which take an incremental approach to incorporating labor rights, may prove more successful in upholding effective labor rights protections than the model endorsed by the United States, embodied by the North American Free Trade Agreement (NAFTA). Indeed, NAFTA explicitly includes labor standards in a highly detailed framework, but contains weak and ineffective enforcement mechanisms that ultimately undermine its purpose.

This Note argues that Mercosur, despite its current limitations, has the potential to evolve into a successful sub-regional vehicle for labor rights protections. Part I examines the role of labor rights in the Mercosur trade agreement and the agreement's effectiveness in enforcing labor protections. Part II compares Mercosur's approach to labor protections to that of NAFTA, which has served as a model for subsequent trade agreements between the United States and Latin American States. Part II also addresses the influence of NAFTA on the treatment of labor rights in the bilateral Free Trade Agreement between the United States and Chile (U.S./Chile FTA), and the more recent Central American Free Trade Agreement (CAFTA). Part II ends with a discussion of the ideological conflict between the United States, in its approach of advocating the NAFTA model of trade agreements, and the Mercosur bloc of South American States as manifested in the FTAA negotiations. Part III argues that, in light of its position as a sub-regional agreement representing States with strong commonalities, its flexible institutional structure, and its incremental approach, Mercosur is a superior model for protecting labor rights. Finally, Part III discusses the institutional **[*832]** changes needed to strengthen labor protections in the current Mercosur agreement and the potential for achieving those changes given political and economic considerations.

I. Mercosur: An Incremental Approach to Labor Protections

A. Overview of the Creation and Development of the Mercosur Agreement

Beginning in the 1960s, increasing economic and political ties between Latin American States spawned several agreements aimed at liberalizing trade through reducing tariffs on non-competitive goods. [n7] The Latin American Free Market Association (LAFTA) was one such agreement; it was later replaced by the Latin American Integration Association (known by its Spanish acronym, ALADI) in 1981. [n8] However, during this time period, the integration process was undermined by political turmoil, protectionist national policies, and an adverse international economic environment. [n9] In 1986, Argentina and Brazil committed to a new bilateral trade agreement known as the Agreement on Argentine-Brazilian Integration that set up an Integration and Economic Cooperation Program between the two States. [n10] Factors leading to this agreement included the

increasing regional democratization of Latin America, the proliferation of similar economic agreements worldwide, and the perceived need to respond in a strategic manner to globalization. [n11] In 1988, the agreement was complemented by the execution of the Treaty of Integration, Cooperation, and Development, which aimed to create a common market within ten years. [n12]

[*833] In the Treaty of Asuncion in 1991, Argentina and Brazil recast their bilateral relationship and formally created the Common Market of the South (known by its Spanish acronym, Mercosur) with their neighbors, Paraguay and Uruguay. [n13] Since then, Mercosur has grown to incorporate most of the continent: Chile, Colombia, Ecuador, and Peru joined as associate members in subsequent years. [n14] In 2005, Venezuela was approved for full membership status. [n15] Although Venezuela is still in the process of changing its domestic policies to be consistent with Mercosur rules, it has assumed all the rights and obligations of membership. [n16] In addition, Bolivia was invited to become a full member at the end of 2005. [n17] Although the agreement and its institutional structures have been primarily shaped and influenced by the original four member States, these changes in membership foreshadow shifts in internal dynamics as Mercosur evolves to accommodate its newest participants.

The Treaty of Asuncion creates a framework for achieving a common market through a transitional approach. It envisions the development of free-trade zones with the gradual unification of customs, ultimately forming a common market with unrestricted transfer of labor and capital across member States' borders and a unified trade policy. [n18] Mercosur currently operates as a customs union, and significant work must still be made to create a common market. [n19] **[*834]** Observers have noted that the agreement's flexible institutions and loose structural framework, which emphasize decision-making by consensus, have contributed to the slow and uncertain process of integration. [n20]

In 1994, the Protocol of Ouro Preto expanded the Treaty of Asuncion by clarifying and consolidating Mercosur's institutional structure. [n21] As of 1994, Mercosur's main governing bodies are the Council of the Common Market (CCM) and the Common Market Group (CMG). The CCM is analogous to a legislature. It has decision-making responsibility and is tasked with leading the integration efforts to achieve the Treaty's objectives. [n22] The CMG is analogous to an executive organ, which oversees compliance with the Treaty of Asuncion. [n23] Some of its responsibilities include proposing draft decisions to the CCM, taking measures necessary to enforce the CCM's decisions, creating programs to ensure progress towards the Treaty's goals, and establishing working groups and special meetings. [n24] The other relevant bodies in the Mercosur framework are: the Trade Commission, which is focused on the custom union's common trade policies; the Joint Parliamentary Commission, which is linked to the parliaments of member States and helps to harmonize legislation across the group; the Economic-Social Consultative Forum, which represents the economic and social sectors; and the Administrative Secretariat, which is seated in Uruguay and provides operational support to the Mercosur institutions. [n25]

B. The Evolving Role of Labor in Mercosur

The Mercosur agreement was initially conceived to focus on trade and economic integration. [n26] For this reason, the Treaty of **[*835]** Asuncion did not include rules governing labor standards. The only references to social dimensions are contained in the Treaty's preamble, which "[considered] that the expansion of [member States'] domestic markets, through integration, is a vital prerequisite for accelerating their processes of economic development with social justice," [n27] and in Annex IV, which contained a "safeguard clause" that listed "level of employment" as one of the relevant factors in determining whether a State's economy was threatened with serious damage. [n28] However, labor interests in the member States, including Brazil's powerful union Central Unica dos Trabalhadores (CUT), lobbied for inclusion of labor protections in Mercosur. [n29] In the process, the groups created a cross-border collaboration of labor interests known as the Coordinadora de Centrales Sindicales del Cono Sur (CCSCS). [n30] Shortly after signing the Treaty of Asuncion, the Ministers of Labor of the four initial member States issued the Declaration of Montevideo, emphasizing the need to address socio-labor aspects of Mercosur. [n31] The Declaration represented an acknowledgment by government parties of the relevance of labor rights to the agreement, although it left unclear exactly how those rights would be incorporated into Mercosur. [n32]

In response to pressure from labor interests, labor rights principles made inroads into the Mercosur framework through the creation of Working Sub-Group 10 on Labor Relations, Employment, and Social Security in 1992. [n33] The initial mandate of Working Sub-Group 10 was to harmonize the labor laws and benefits of the member **[*836]** States. [n34] Working Sub-Group 10 has a tripartite structure that includes representatives from government, employer, and labor interests across the member States. [n35] It was originally divided into eight committees focusing on individual labor relations, collective labor relations, employment and labor migration, professional development, health and safety, social security, specific sectors, and labor principles. [n36] Since its inception, Working Sub-Group 10 has engaged in various activities within these areas, including conducting studies analyzing the feasibility and value of the harmonization efforts. [n37] Working Sub-Group 10 has also expanded its role to include responsibility for defining substantive labor rights norms for Mercosur, evident in its call for member States to ratify thirty-four International Labor Organization (ILO) Conventions that it determined were essential for fair labor standards. [n38] Another achievement of Working Sub-Group 10 was the establishment of a Labor Market Observatory, set up with ILO assistance, which is a permanently functioning technical body that serves as a source of information and analysis on issues relating to the labor markets of member States. [n39] The Observatory's implementation group researches the social dimensions of integration, in the process consulting with government, employers, and labor interests. [n40] Finally, Working Sub-Group 10 has taken on a direct monitoring role by carrying out labor inspections, sending teams of trilateral delegations along with labor inspectors to investigate labor practices in workplaces in the territories of member States. [n41]

In an attempt to strengthen Mercosur's commitment to labor rights, CCSCS drafted a Social Charter addressing fundamental labor rights that incorporated provisions of international human rights instruments and ILO Conventions; CCSCS submitted this draft to Working Sub-Group 10 for

consideration. [n42] The governments of the member States failed to support the Charter, which effectively blocked its progress, partly because representatives from the business **[*837]** sector opposed it. [n43] However, the member States have responded to labor interests' call for increased attention to labor rights by creating additional institutional space within the Mercosur framework focused on considering those rights. One example is the creation of the Economic-Social Consultative Forum (FCES is its Spanish acronym), in which business, labor, and social interests can make non-binding recommendations to the governments on labor rights and labor standards, among other economic and social concerns. [n44] Although the FCES by nature deals with a broad variety of subjects, it has addressed labor concerns to some extent, as is evidenced by its issuance of a Recommendation on Employment Policy. [n45] A drawback of the FCES is that it is limited to a purely advisory role, and does not have power actually to make policy on its own. [n46] The Joint Parliamentary Commission (CPC in Spanish) is another vehicle through which lawmakers of member States can consult with each other on labor topics - it serves as a bridge to their legislatures, although it also is solely an advisory body. [n47]

In addition to the creation of these institutional mechanisms, the Presidents of each member State issued the Mercosur Sociolabor Declaration in 1998, which represented a more expansive statement of support for the consideration of labor rights in the context of the trade agreement. [n48] The Sociolabor Declaration acknowledges that "integration involves certain social dimensions and effects, the recognition of which implies the need to anticipate, analyze, and solve the various problems arising as a result of integration." [n49] It affirms member States' support of a broad variety of labor rights, which include non-discrimination, equality, rights of migrant workers, elimination of forced and child labor, rights of the unemployed, training and development of human resources, occupational safety and health, and social security, in addition to endorsing the principal ILO Conventions and the Declaration on the Fundamental Principles and Rights at Work. [n50] It also creates a Sociolabor Commission, a tripartite **[*838]** body that includes government, employer, and labor interests and reports to the Common Market Group. [n51] The purpose of the Commission is to support the achievement of the Sociolabor Declaration's objectives by promoting labor rights among member States. [n52]

C. Weaknesses of the Mercosur Agreement in Developing and Enforcing Labor Standards

The Sociolabor Declaration is significant in that it goes beyond the "minimum" of core labor rights and sets higher standards by embracing a more comprehensive vision of labor rights. However, its main drawback as a tool for enforcing labor standards is that it explicitly separates labor from trade: "The States parties emphasize that neither this Declaration nor its follow-up mechanism shall be invoked or used for purposes other than those stipulated in it, and that it is prohibited, in particular, to apply it to trade, economic or financial matters." [n53] The Sociolabor Declaration thus embodies the principle that labor will be considered as separate from trade, not intended to affect the progress of economic integration or to cause trade sanctions to be imposed against members who violate the declared principles. [n54] Nor does the Sociolabor Declaration provide for any non-trade-related sanction for labor violations, such as fines or the suspension of voting rights.

The failure to provide a means of enforcing the stated labor standards is a major weakness in the Mercosur framework. The institutions concerned with labor rights serve a consultative and advisory function, but have no power to ensure that their recommendations are implemented. [n55] Even the Sociolabor Commission, which is expected to monitor adherence to the Sociolabor Declaration's principles, only has the power to "insist" that national governments observe these standards, while the authority to apply sanctions remains with the national governments. [n56] The Commission identifies least common denominators of compliance with labor standards across the member States, against which the labor practices of each member State are assessed. [n57] This approach strives for commonality, but fails to harmonize **[*839]** the labor laws of member States in a manner that incorporates the higher standards articulated either within domestic law or in the Sociolabor Declaration.

A consensus-based approach to developing enforceable standards is consistent with Mercosur's overall decision-making process as conducted by the CCM, which requires unanimous agreement by the member States. [n58] This model was influenced by the member States' reluctance to cede national autonomy to an authoritative supranational institution. [n59] However, it is hard to imagine successful monitoring and enforcement of labor standards without an independent supranational institution to ensure that those rights are evenly enforced. [n60] The alternative of simply leaving this responsibility to the discretion of the national governments suggests the potential for neglect or abuse of those standards. [n61] Mercosur is unique in its efforts to address labor by creating several institutions that consider labor standards and protections and adopting a definitive statement of endorsement for a wide variety of labor rights. However, with the current absence of an effective supranational institution to monitor those standards and to identify and impose sanctions for violations, Mercosur will likely fall short of realizing the principles stated in its Sociolabor Declaration.

II. Mercosur vs. the U.S. Approach Toward Linking Labor Protections with Trade Sanctions

A. Overview of Labor Protections in the Context of NAFTA/NAALC

To the north of the Mercosur region, another influential trade agreement that is widely seen as the dominant agreement in the Americas is the North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States. [n62] In response to strong lobbying efforts by human rights groups and U.S. labor interests, **[*840]** the U.S. government negotiated the North American Agreement on Labor Cooperation (NAALC), a side agreement to NAFTA. [n63] NAALC is notable because it is the first labor agreement linked to a regional trade pact that provides potential economic sanctions for labor rights violations. [n64] Although these sanctions have yet to be invoked against a member State, NAALC represents a significant step in experimenting with linkages between labor and trade in the context of **regional trade agreements.**

NAALC incorporates eleven labor principles, which extend beyond the core ILO labor rights and even beyond the scope of those articulated by Mercosur in its ambitious Sociolabor Declaration.

[n65] However, these principles are not binding on States. Instead, NAALC states that "the Parties are committed to promote [the principles], subject to each Party's domestic law, but [the principles] do not establish common minimum standards for their domestic law." [n66] A key characteristic of the NAALC agreement is that the enforceable labor standards are rooted in a member State's own laws, and NAALC contains no provision restricting a country's ability to "downgrade" their domestic labor laws to reflect lower standards after the agreement's effective date. [n67] However, the member States have relatively strong domestic labor laws, [n68] and arguably the greater threat to labor rights in the NAALC context arises from the member **[*841]** States' failure to enforce these laws systematically so that they constitute real protection for workers. [n69] This is despite the text of the agreement that commits member States to "promote compliance with and effectively enforce its labor law through appropriate government action." [n70] Instead, NAALC falls short of providing any mechanism to monitor member States' compliance with this requirement to enforce domestic labor law, the substance of which forms the agreement's basis for labor rights protection.

While NAALC represents progress toward enforcing labor rights through multilateral trade agreements by tying violations to sanctions, the agreement is designed in such a way that sanctions are not readily available in certain instances of labor violations. First, sanctions are only authorized for one "tier" of the labor principles articulated in the agreement: violations in the areas of minimum wage, child labor, and health and safety standards (as defined by the member State). [n71] Sanctions are clearly a last resort and are imposed on a discretionary basis only after the termination of an exhaustive process of investigation and consultation. [n72] At that point an Arbitral Panel (which is made up of five individuals chosen by the disputing parties) may choose to levy a "monetary enforcement assessment," which is limited to 0.007% of total trade between the parties for the most recent year. [n73] In order to collect this monetary enforcement assessment, the complaining party has the option of suspending **[*842]** NAFTA trade benefits up to the point at which the assessment is recouped. [n74] However, to date no monetary enforcement assessments or sanctions have been levied against member States for labor violations, and in the case of previous complaints, member State governments have refused to take the dispute resolution process past the stage of ministerial consultations to establish an Evaluation Committee of Experts (ECE), which is an intermediate step that occurs prior to the appointment of an Arbitral Panel. [n75]

The NAALC dispute resolution process lacks an adjudicative quality, and instead is more diplomatic in nature. [n76] It is designed to be collaborative, and contains ample room for negotiation between the parties. The danger in this approach is that standards will not be enforced strictly or consistently enough to deter violations. [n77] The approach also raises concerns about the fairness and transparency of the process from the perspective of stakeholders other than the governments of the member States. A vivid example highlighting flaws in the current NAALC dispute resolution process is the case of the Autotrim/Customtrim complaint, which was submitted on behalf of Mexican workers who alleged grievous violations of health and safety standards at several plants in Mexico. [n78] Under NAALC requirements, the workers were obliged to submit the complaint to the National Administrative Office (NAO) of another member State (in this case, the United States), where it was subsequently investigated. The NAO guidelines and procedures, which are developed

independently by each member State, proved confusing and burdensome to the Autotrim/Customtrim submitters. In addition, the openness and fairness of the process were called into question by actions on the part of the NAO, such as failing to share with the submitters hundreds of pages of documents submitted by Breed Technologies (the parent company of Autotrim and Customtrim) on behalf of the Mexican government, and participating in a private factory tour with the employer but without the submitters. [n79] Even though the NAO eventually issued a report that confirmed certain aspects of the submitters' account (i.e., indicating the presence of specific labor violations that **[*843]** the Mexican government had failed to enforce), submitters were excluded from the follow-up process of establishing a working group to study the issues and determine what future actions should be taken. [n80]

Such fragmentation and lack of coordination in the dispute resolution process can be attributed in part to the fact that NAALC, like Mercosur, does not have supranational institutions to enforce and monitor labor protections. NAALC's main body is the Commission for Labor Cooperation, which is comprised of the Council of Ministers and the tri-national Secretariat; it provides administrative support to the Council of Ministers and other groups as needed. [n81] The Council of Ministers includes the three labor ministers or their representatives, and is in charge of setting policy and making decisions. However, it appears to meet infrequently, and relies on the NAOs for actual implementation of policy. [n82] In theory, the Council of Ministers would also rely on ECEs and Arbitral Panels, which would be created on an ad hoc basis during the dispute resolution process. [n83] Although the monitoring and enforcement role within NAALC seems mostly to fall on the NAOs, [n84] the NAOs' effectiveness as supranational institutions is questionable because their processes are specific to the member State in which they are located and presumably reflect that State's strategic goals in implementing NAALC. [n85] Nor do the ECEs and the Arbitral Panels constitute effective supranational institutions, mainly because they are not permanent bodies through which all disputes are decided, but instead are created when requested and focus solely on the specific case at issue. [n86]

[*844] Although NAALC's processes for the enforcement of labor rights have proven difficult to utilize in practice, in certain other aspects NAALC has had positive effects. In particular, its labor complaint procedure has succeeded in fostering labor solidarity across borders as labor advocates work together to bring complaints to the attention of the dispute resolution system. [n87] This international collaboration is encouraged by the requirement that a complaint against a member State must be initiated in the NAO of another member State. [n88] The act of assisting with complaints can educate advocates about labor conditions elsewhere as well as the specific shortcomings of the current NAALC complaint system, and can galvanize them to push for greater effectiveness and enforcement of labor protections through the NAALC system. [n89]

The weaknesses of the NAALC agreement, as evident in the Autotrim/Customtrim experience, include its failure to require member States to enforce their domestic labor law, its unsuccessful process in responding to complaints, and the absence of effective supranational institutions for better monitoring and enforcement of standards. [n90] Drawing on these weaknesses, some critics have

attacked NAALC for what they argue is a misrepresentation of the agreement's incorporation of labor rights:

The NAALC is analogous to a simple truth in advertising law regarding Party countries' labor laws. Its main promise is that as to labor rights, "what you see is what you get.' But with the NAALC itself, citizens do not get what they believe they see: the tri-national commitment to fully effectuate domestic labor legislation is sabotaged by an emphasis on soft law and by the deceptive nature of the enforcement mechanisms and remedies. If strengthened labor rights are part of the consideration for enhanced free trade arrangements, then lack of definiteness, enforceability, and remedy render this consideration illusory; the apparent "obligations' undertaken become voluntary rather than **[*845]** binding. [n91]

Despite its claims to embracing wide-ranging labor principles and enabling sanctions against member States that violate their obligations in regards to labor, [n92] NAALC's decentralized institutional structure and weak enforcement mechanism negate any commitment to truly linking labor protections to trade. Moreover, NAFTA's failure to incorporate labor protections in its main text, instead promulgating NAALC as a side agreement, suggests that labor was a mere afterthought in the trade agreement, included as a result of political pressure, and not meant to have real consequences for member States. [n93]

B. NAFTA/NAALC Compared to Mercosur: The Advantages of Mercosur's Flexible Framework and Incremental Approach to Incorporating Labor Rights

NAFTA/NAALC [n94] can be explained in part by the complicated political negotiations that heralded its beginnings, resulting in an agreement that reflected the preferences of the member State governments, which were only willing to subject themselves to international scrutiny and control over their labor practices to a limited extent. [n95] In this sense it is akin to Mercosur, which faced similar challenges from its member States in confronting the process of integration. [n96] Both agreements are structured with a strong respect for national sovereignty, and both contain an absence of independent and effective supranational institutions responsible for monitoring and enforcing labor rights.

Despite these limitations, both agreements endorse an expansive view of labor standards that extends beyond the ILO core labor rights - this view is articulated, in NAFTA/NAALC, in the form of **[*846]** its eleven principles [n97] and, in Mercosur, in the Sociolabor Declaration. [n98] However, NAFTA/NAALC and Mercosur are also alike in their failure to transform these principles from merely aspirational commitments into tangible and enforceable standards. Demonstrating a preference for domestic law over international standards, NAFTA/NAALC uses domestic laws as the baseline for member States' obligations, without providing the level of oversight necessary to force member States consistently to uphold those laws. [n99] Mercosur focuses on identifying the

lowest common denominator between member States' labor practices as the standard to be met, with a similar absence of enforcement mechanism to guarantee compliance. [n100]

While comparing the two agreements, it is important to keep in mind that Mercosur contemplates a deeper level of economic integration than NAFTA; Mercosur intends eventually to develop the region into a common market. [n101] While NAFTA may be viewed as a precursor for a hemisphere-wide trade agreement, achieving such an agreement is at this point speculative at best. [n102] Instead, the NAFTA agreement limits the extent of the relationship between the three member States to that which is detailed by the agreement, whereas the Mercosur agreement describes a future in which the economies of its member States will be further intertwined. [n103] This suggests that Mercosur member States may become more comfortable with addressing labor protections on a regional basis as they confront increasingly greater instances of political and economic integration. In fact, significant progress in this area has already been made, considering that Mercosur did not initially address labor protections at all. Although labor has since grown into a topic of consideration, supported by the work of the Working Sub-Group 10 and the Sociolabor Commission, [n104] Mercosur member States have still refused to allow labor protections to influence trade. [n105] NAFTA/NAALC, meanwhile, positioned itself from the outset as creating a process that linked labor violations with trade through sanctions imposed upon **[*847]** the failure of a member State to uphold labor standards. [n106]

One possible explanation for Mercosur's hesitation in the area of labor rights is the relative instability of its member States' economies as contrasted with those of the NAFTA States. For Mercosur States, "maintaining a balance between commitments to their partners and the need to bring about economic changes without causing undue social unrest" [n107] is more of a challenge. With this in mind, Mercosur has adopted a gradual approach, in which labor has been increasingly incorporated into the framework over time. [n108] A gradual approach to labor issues is consistent with Mercosur's institutional structure as well, which is flexible and has been set up through a transitional process that allows room for growth and adaptation as Mercosur matures into a common market. [n109] In contrast, NAFTA/NAALC is a highly detailed legal agreement that leaves little room for political debate after its adoption. [n110] This is evident in comparing the text of the two agreements: while NAFTA/NAALC is about 700 pages in length and includes 295 articles and ninety annexes (most of which have their own appendices), Mercosur's Treaty of Asuncion is a mere twelve pages, with twenty-four articles and five brief annexes. [n111] Mercosur contains more exceptions than NAFTA/NAALC, and leaves certain details to future negotiation between member States, indicating a preference that not all topics be strictly governed by a pre-set agreement. [n112] Furthermore, Mercosur's institutional structure facilitates this process of debate and consultation between the member States by including advisory bodies, such as the Working Sub-Groups, that draw from a variety of stakeholders and interests. [n113]

Both Mercosur and NAFTA/NAALC have serious shortcomings in their current approaches to labor rights that prevent those rights from being adequately enforced. However, Mercosur's flexible, **[*848]** participatory approach is preferable to NAFTA/NAALC's more rigid, detailed framework in

that it allows room for experimentation and revision. [n114] This is an important characteristic because the possibility of developing a perfect labor rights enforcement scheme within a trade agreement is questionable. Instead, the system will likely need to be refined over time to fit the local conditions of the member States and to eliminate flaws and loopholes. Therefore, the ability to revisit the agreement and continually to improve its effectiveness is essential. Mercosur, as opposed to NAFTA/NAALC, is still in an early stage of development as it moves towards the eventual realization of a common market and full economic integration, and is thus more likely to experience this process of growth and improvement in its labor rights protections.

Politically, the Mercosur approach is a more palatable way for member States to accept the idea of linking enforceable labor rights with trade in that it occurs in the context of a gradual process, with member State consent and participation solicited throughout. In contrast, the NAFTA/NAALC system forces member States to confront a comprehensive labor rights agreement from the outset. An incremental process of implementation may result in the achievement of stronger labor rights in the long run because it would allow the labor standards and enforcement mechanisms to be developed in the context of increasing cooperation and trust between member States over time instead of emerging through the highly politicized process of trade agreement negotiations. For these reasons, even though it has been less outwardly committed to protecting labor rights than NAFTA/NAALC, Mercosur provides a better-suited framework for the gradual development of effective labor rights enforcement.

C. The NAFTA/NAALC Model Reflected in Subsequent Trade Agreements in the Americas

Although it is less than effective, the NAFTA/NAALC approach to incorporating labor rights in trade agreements has become the dominant model for subsequent U.S. trade agreements. In particular, there are several examples of trade agreements in the Americas that can be considered to be modeled on both NAFTA and its labor rights component, NAALC. These agreements share NAFTA/NAALC's use of domestic legislation to define enforceable labor standards, enforceable in theory through sanctions. They similarly **[*849]** establish weak enforcement mechanisms, nullifying in many respects the substantive and remedial provisions. This section briefly addresses the similarities and innovations of two such agreements as compared with NAFTA/NAALC's approach: the bilateral United States/Chile Free Trade Agreement (U.S./Chile FTA), and the Central American Free Trade Agreement (CAFTA).

1. The U.S./Chile FTA

The U.S./Chile FTA was signed in 2003, [n115] and was a significant agreement for the United States in that Chile has what could be considered the most liberalized, free-market economy in Latin America and little of the economic instability experienced by its neighbors. [n116] It is also the first free trade agreement signed between the United States and a South American country. [n117] The agreement demonstrates some minor improvements over NAFTA/NAALC in its approach to labor protections: the U.S./Chile FTA incorporates the subject of labor in the main text of the agreement,

rather than as part of a side agreement. The U.S./Chile FTA includes the parties' affirmation of their obligations as members of the ILO and of their commitments under the ILO's Declaration on Fundamental Principles and Rights at Work. [n118] The text is limited to these basic ILO principles and does not include a broader affirmation of labor rights to the extent of NAFTA/NAALC's eleven principles. [n119] However, like NAFTA/NAALC, the U.S./Chile FTA limits enforceable labor standards to those espoused by each member State's domestic legislation. [n120] The agreement corrects one of the shortcomings in NAFTA/NAALC in this respect by prohibiting a member State from relaxing or downgrading its domestic law provisions relating to labor after the effective date of the agreement. [n121] The U.S./Chile FTA also represents an improvement over NAFTA/NAALC in that it does not limit the imposition of penalties to certain categories of labor violations, **[*850]** as does NAFTA/NAALC, but instead allows utilization of the dispute resolution system for any failure of a member State to enforce its labor laws "through a sustained or recurring course of action or inaction" and in a manner that affects trade between the States. [n122]

Structurally, the U.S./Chile FTA provides for a Labor Affairs Council, which contains representatives of the U.S. and Chilean governments and appears analogous to NAFTA/NAALC's Commission for Labor Cooperation. [n123] Its dispute resolution system is also similar: the two member States are permitted to discuss the dispute under a Cooperative Cooperation procedure, and if that procedure fails, the States may choose to submit the dispute to an Arbitral Panel. [n124] Only after the exhaustion of this process may sanctions be invoked. [n125] The U.S./Chile FTA provides for the option of fines up to $ 15 million in lieu of trade sanctions where violations occur, and if the fine is not paid, it may be collected through the suspension of trade benefits up to the point at which the amount is reached. [n126] The text of the agreement discourages the last step, warning that trade sanctions should only be imposed "bearing in mind the Agreement's objectives to eliminating barriers to bilateral trade and while seeking to avoid unduly affecting parties or interests not party to the dispute." [n127] Some critics and labor activists have interpreted the U.S./Chile FTA's emphasis on fines over trade sanctions as a retreat from NAFTA/NAALC's trade sanctions remedy, which had been expanded on in the bilateral agreement between the United States and Jordan. [n128] However, NAFTA/NAALC also presents fines in the form of "monetary enforcement assessments" as the preferred option, and only permits suspension of trade benefits in order to collect these assessments where the member State has not paid. [n129] From the standpoint of deterrence, the de-emphasis on trade sanctions may represent a weaker approach to labor rights since States are likely to be more deterred by the suspension of trade benefits than by the imposition of a fine, unless the fine is set at an amount high enough to have an actual impact on the member State. The U.S./Chile FTA provides **[*851]** a list of factors that should be taken into consideration in determining the amount of the fine, but factoring in the payment's deterrent impact on future violations is not specifically listed. [n130] Another potential consideration in setting the amount of the fine is making it proportionate to the size of the member State's economy. This is not the approach taken by the U.S./Chile FTA, which authorizes fines of up to $ 15 million, an amount which would likely impact the Chilean economy more than that of the United States. However, although trade sanctions may provide greater disincentives for member States, fines may ultimately be a better approach to penalizing labor violations. Indeed, trade sanctions can create unnecessary barriers to trade and may

end up actually hurting the workers they are intended to protect by making jobs scarcer. [n131] Whether or not the use of trade sanctions is preferable to fines, their inclusion in NAFTA/NAALC and the U.S./Chile FTA, even as a last resort, conveys a commitment to linking labor and trade that is absent in agreements such as Mercosur. [n132]

2. CAFTA

The similarities between the U.S./Chile FTA and the NAFTA/NAALC model are apparent in the focus of both agreements on domestic law as the source of labor standards, their ineffective monitoring and enforcement institutional design, their collaborative dispute resolution processes, and their remedial provisions, which emphasize fines with the possibility of trade sanctions. These qualities are also shared by CAFTA, the trade agreement signed in 2004 by the United States, Costa Rica, the Dominican Republic, El Salvador, **[*852]** Guatemala, Honduras, and Nicaragua. [n133] The use of the NAFTA/NAALC model in the context of the CAFTA agreement is notable because CAFTA member States are much less industrialized than are U.S. trading partners in NAFTA/NAALC and the U.S./Chile FTA. Moreover, the domestic laws of CAFTA member States, aside from the United States, have been characterized as diverging from ILO standards. [n134] Prior to the agreement, congressional labor advocates had warned that the U.S/Chile FTA (and similar agreements with Singapore and Jordan) might not be a good model for countries that do not appear to be committed to upholding ILO core labor rights. [n135] However, CAFTA, like NAFTA/NAALC and the U.S./Chile FTA, obligates a party to enforce its domestic labor legislation, with penalties authorized only for a member State's failure "to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties." [n136] Surprisingly, unlike the U.S./Chile FTA, [n137] CAFTA contains no requirement that a member State refrain from downgrading its domestic labor laws.

CAFTA's structure and dispute resolution procedure is also nearly identical to the two other agreements. Like the U.S./Chile FTA, CAFTA provides first for a monetary assessment of up to $ 15 million, which will be paid into a fund to use for improving labor or environmental standards in the offending member State's territory. [n138] If the assessment is not paid, the complaining party may suspend trade benefits in that amount; moreover, the text of the agreement bears a warning identical to that in the U.S./Chile FTA, that the purpose of not burdening trade or unduly affecting other parties should be kept in mind when determining whether to suspend trade benefits. [n139]

Much like NAFTA/NAALC and the U.S./Chile FTA, CAFTA has come under criticism by labor advocates and human rights groups as providing an ineffective framework for the enforcement of labor rights. [n140] The AFL-CIO has attacked CAFTA for its reliance on domestic **[*853]** labor laws given that those laws are of questionable strength. [n141] In particular, the AFL-CIO alleged that the labor laws of member States are far below ILO standards to which they have committed, particularly in the areas of freedom of association and the right to organize and bargain collectively. [n142] CAFTA is also decried as an unsatisfactory substitute to the previous regime of the Generalized System of Preferences (GSP) in which the fear of loss of benefits as a preferred trading partner

proved to be an effective incentive for certain Central American countries to improve their labor compliance. [n143] In addition, according to the AFL-CIO, CAFTA will replace existing programs that effectively promote labor rights in the region with new lesser-financed substitutes. [n144]

The NAFTA/NAALC model of incorporating labor rights into trade agreements, which has been replicated with slight alterations in the U.S./Chile FTA and CAFTA, is motivated in part by the U.S. government's attempts to satisfy the demands of labor interests such as the AFL-CIO, even though the ultimate outcome of the political negotiation process often leaves much to be desired from the standpoint of those interests. [n145] Political dynamics are also relevant in the perpetuation of the NAFTA/NAALC model in the Latin American region. In particular, the dominant bargaining position of the United States in negotiating trade agreements with its developing Latin American counterparts supports the inclusion of labor rights in these agreements, despite the often strong opposition from Latin American States. [n146] The United States is able to employ a "carrot and stick" approach in influencing the outcome of negotiations, in which the carrot is trade benefits and the stick is the threat of denial **[*854]** or withdrawal of those benefits. [n147] It provides a powerful combination of incentives for Latin American States, which may be persuaded to agree to a labor protections component in a trade agreement due to the stronger bargaining power of the United States. This has been described as the "go it alone" approach, in which the United States capitalizes on the fear of developing nations in becoming one of the few in their region not in a preferential trading agreement with the United States and of the resulting disadvantage to their economies. [n148] This pressure may be somewhat alleviated in the Latin American region if Mercosur is able to develop into a "Southern alternative" by creating a powerful trading bloc capable of courting other strong trading partners such as China and the EU. [n149] In the meantime, it is reasonable to expect that the United States will continue to exert considerable pressure in negotiating the conditions of future trade agreements in the Americas, and to express its preference for the NAFTA/NAALC model of labor rights enforcement. [n150]

D. Tension between the United States and Mercosur in the Context of the FTAA Negotiations

The recent setbacks in negotiations for a Free Trade Area of the Americas (FTAA) are illustrative of larger political and ideological tensions between the United States and Latin American States. The FTAA negotiations officially commenced in April 1998 at the Second Summit of the Americas in Santiago, Chile. [n151] The FTAA was originally conceived by the United States as an extension of the NAFTA model to the rest of the Western Hemisphere. [n152] Successful implementation of the FTAA could potentially render smaller sub-regional agreements like Mercosur obsolete. [n153] While some argue that the FTAA is a strategic move on the part of the United States to gain unlimited access to the Latin American market, the United States has maintained that the FTAA will benefit the region overall. [n154]

[*855] The plan for the FTAA negotiations called for nine technical working groups to focus on various aspects of the agreement, none of which included labor. [n155] Throughout negotiations, there has been a clash in perspectives between the United States and the Mercosur member States,

which are most strongly represented by Brazil. [n156] In particular, Mercosur has opposed U.S. insistence on maintaining agricultural subsidies and certain proposed anti-dumping rules. [n157] The most recent discussions at the Fourth Summit of the Americas in Mar del Plata, Argentina in November 2005 involved an even more direct confrontation between U.S. and Latin American interests, with Mercosur's newest full member, Venezuela, leading the charge. [n158] The Venezuelan President Hugo Chavez described the joint effort of the Mercosur countries in confronting the United States in dramatic terms, claiming, "we were five musketeers, kneeling, sword in hand." [n159] The tension and inability to come to agreement over key issues resulted in a number of leaders leaving the meeting early, and a final declaration that reflected the sharp differences between governments regarding the future of the FTAA. [n160]

Even if the FTAA can somehow overcome these challenges and resume effective negotiations, labor rights likely would play at best a marginal role. The Mercosur position reflects the concern of developing countries that labor will be used in the context of trade for protectionist purposes to their disadvantage. [n161] A related fear is that the United States is searching for leverage by which it can influence **[*856]** the behavior of its trading partners and essentially infringe upon their sovereignty to effect policies favorable to itself. [n162] Among Latin American States, this view is consistent with the suspicion that the United States is strategically consolidating its power in the hemisphere. [n163] This sentiment is also tied up with long-simmering resentment against U.S. economic and foreign policy in Latin America and the unilateral imposition of what has become known as the "Washington Consensus," which has been perceived as hurting the region over the past few decades. [n164] Whether or not the United States is pursuing such an agenda through its trade agreements with Latin America, it is clear that this suspicion has shaped FTAA negotiations and will continue to pose a barrier to efforts to create a hemisphere-wide free trade agreement. The recent wave of elections of leftist leaders in Latin America has been partly attributed to frustration with failed neoliberal policies promulgated by the United States and the collective desire of Latin American States to shift toward a more populist approach rooted in national and sub-regional initiatives. [n165] Because of these changes, it is not a foregone conclusion that Mercosur and other sub-**regional trade agreements** will give way to the will of the United States in imposing a NAFTA-style regime on the region. [n166]

III. The Comparative Strengths of Sub-**Regional Trade Agreements** in Protecting Labor Rights and the Opportunity for Mercosur to Realize This Potential

While Mercosur and the NAFTA/NAALC model, in their current forms, both suffer from flaws that prevent them from enforcing labor rights effectively, this section argues that Mercosur has the potential to become a stronger vehicle for labor rights enforcement than the NAFTA/NAALC model. The first part discusses the characteristics of an "ideal" trade agreement from the standpoint of labor rights protections, including the institutional features and processes that would be most likely to foster success in linking labor rights with **[*857]** trade. The second part addresses why, in the context of Latin America, labor rights are more likely to be effectively enforced through a sub-regional agreement such as Mercosur. Finally, this section concludes with an assessment of

Mercosur's potential to implement the changes that will be required for it to successfully enforce labor rights.

A. Ideal Features for Implementing an Effective Labor/Trade Linkage

There is no "one size fits all" formula that can dictate the requirements of how to design a trade agreement that creates a substantive link with labor rights. Presumably conditions are different in the context of every trade agreement, and so the incorporation of labor rights will have to take into consideration the unique circumstances of member States in order to work. The discussion below outlines certain characteristics of trade agreements that would seem to offer strong potential in supporting the enforcement of labor rights.

First, if an agreement is to be based on domestic labor law, to be truly effective it is important that domestic labor law contains adequate labor standards. [n167] One way of evaluating a State's domestic labor law is by determining whether its standards are reflective of international norms, as embodied in ILO conventions and other treaties. [n168] Another is to compare it to the domestic labor law of its trading partners. [n169] In some cases, member States should be required to "upgrade" their legislation to reach a level that is acceptable to its trading partners as a condition for establishing the trade agreement, which would likely involve a challenging negotiation process. [n170] However, as seen in many current trade agreements, States are often willing to accept aspirational labor standards. [n171] Making these standards **[*858]** part of States' enforceable obligations in the context of trade agreements merely takes this commitment a step further. The process could be designed such that the standards become enforceable in a gradual manner, beginning with those that are already observed or are the most important of labor rights (such as the elimination of forced labor), then incrementally increasing the enforceable obligations to encompass those standards that are more difficult to implement.

Tied to the issue of which labor rights would be enforced is the question of what types of sanctions should be involved. There are potential tradeoffs between the use of trade sanctions and fines. [n172] Whichever mechanism is used, it is important that these penalties have enough of an effect on States to provide a real disincentive to violate treaty commitments. States should consider having those employers who perpetuate labor abuses share in the penalties. [n173] Along with disincentives for violations, one mechanism that has been successfully implemented in a trade agreement is providing trade incentives for States that meet certain goals of labor rights enforcement. This approach has been utilized in the U.S./Cambodia Bilateral Textile Trade Agreement, which provides for quotas on twelve apparel product categories exported from Cambodia to the United States. [n174] In addition to the trade element, the agreement includes a labor standards provision, the first such provision ever to be included in a bilateral, trade agreement negotiated by the United States. [n175] Pursuant to this provision, if the United States determines that the Cambodian garment industry is in substantial compliance with Cambodian labor law and internationally recognized labor standards, the United States may choose to increase Cambodia's quotas. [n176] In the years following the effective date of the agreement, the United States has shown a

willingness to increase the quotas in response to what it perceives as good labor rights enforcement on Cambodia's part. [n177]

[*859] The framework of the agreement between the United States and Cambodia includes a role for the ILO as the central coordinator responsible for monitoring labor standards in Cambodia. [n178] The ILO runs an external monitoring program through which it ensures that Cambodia is complying with labor standards. [n179] The goal is to monitor each factory an average of six times per year, with the ILO issuing monitoring reports and discussing its findings with employers and workers. [n180] Meanwhile, the ILO is also involved in providing capacity building and technical assistance through training a core group of Cambodian labor inspectors on how to monitor. [n181] There are clearly some problematic elements to the agreement's approach to enforcing labor standards, such as the failure to provide mechanisms of accountability for individual factories. [n182] More troubling is the asymmetrical relationship between the trading partners, including the exclusive role of the United States in determining whether Cambodia has complied with labor standards and the extent to which Cambodia will be rewarded with increased quotas for its compliance. [n183] Although this agreement may not be "ideal" from the standpoint of enforcing labor standards, it is significant in its innovative use of incentives to spur compliance with labor rights as well as its incorporation of a neutral supranational "expert body" on labor rights.

The use of incentives should be considered as a strategy in crafting a trade agreement that links labor with trade. However, incentives should not be used to replace penalties such as trade sanctions or fines, but rather should be used in conjunction with them. Without providing disincentives to violating labor standards, there is the danger that labor standards will be seen as optional by the member States, which may choose to forego the incentive rather than comply with labor standards. [n184]

Any trade agreement that includes labor rights protections will need a strong institutional framework and processes of enforcement to ensure that these commitments do not become meaningless. **[*860]** A supranational institution must be available to monitor and enforce labor standards; relying on individual States to police their own borders is inadequate. [n185] An institution made up of combined staff from member countries could best serve this purpose, perhaps with training and technical assistance provided by the ILO during its initial stages. The staff should be drawn equally from each of the member countries and supervised in some manner to protect against corruption or capture by one of the member States. A second part of the requirement of supranational institutions is a body that can serve a quasi-judicial function - that of determining where labor violations are taking place and imposing penalties (or rewards) on member States. [n186] The highest governing bodies in trade agreements (such as the CCM in Mercosur) could fill this role, with their decisions informed by the reports and inputs of the monitoring body.

Supranational institutions must be supported by transparent and participatory processes, which will help gain member State support for the decisions of the institutions as well as legitimizing the validity of the system. [n187] The process by which employers and member States are monitored must

be defined by clear criteria, linked to the labor standards agreed upon by the member States, and accompanied by reports issued by the monitoring body. Stakeholders beyond the governments of the member States, such as workers, employers, and labor advocacy groups should also have access to the information disseminated by the monitors and the ability to discuss and challenge the results with monitors and decision-makers. [n188] The decision-making process should be similarly transparent, with penalties and incentives issued in a systematic, consistent manner, and should include the ability to appeal decisions. Mechanisms that provide a forum for stakeholders to examine labor issues and to advise the monitoring and decision-making bodies should be included as part of the institutional framework to allow for broader participation in the process and to ensure that the process is continually improving.

Although this discussion is by no means exhaustive, it provides **[*861]** certain key characteristics that would contribute to promoting the linkage of trade and labor in the context of trade agreements. It is clear that there will be political challenges to incorporating these features into trade agreements, particularly where member States are concerned that labor will be used for protectionist purposes or that yielding to the authority of supranational institutions will pose a grave threat to national sovereignty. While these difficulties are considerable, they are not insurmountable. Where certain shared goals and a level of trust between member States exist, it may be more likely that such an agreement will be successfully implemented.

B. Why a Sub-**Regional Trade Agreement** Is Preferable in Developing and Enforcing Labor Rights in Latin American States

In the current Latin American context, certain political considerations would favor a sub-regional model of trade agreement as a vehicle for developing and enforcing labor rights over other alternatives. In particular, the growing distrust on the part of some Latin American States as to U.S. intentions in the region makes agreements such as CAFTA and bilateral agreements between Latin American States and the United States difficult platforms from which to design institutions and processes that support the enforcement of labor rights. [n189] Many of the developing countries in this region are opposed to any linkage between labor rights and trade. [n190] However, as seen in Mercosur, adopting a gradual approach to the incorporation of labor rights that is shaped by the will of the member States rather than predetermined by a comprehensive plan may be a more politically feasible way for States to commit to labor obligations enforced through trade regimes. This approach requires much cooperation, negotiation, and compromise between States as they decide step by step how to advance the enforcement of labor rights, and will also require the strong participation and activism of labor groups and other stakeholders in ensuring that labor remains on the agenda and is strengthened, rather than weakened, through subsequent developments in the agreement.

A trade agreement within a sub-region in Latin America **[*862]** would be better suited to fostering the necessary conditions for effective labor rights enforcement, compared to other types of trade agreements, given the close relationship between Latin American States as well as their sense

of interdependency in shaping the economic future of the sub-region. [n191] In this context, neighboring States that have strong cultural and political ties would be better positioned to utilize these shared connections to promote open trade. Often neighboring States will have a history of exchange that has fostered a sense of cooperation and affinity between them, despite occasional skirmishes and tensions that inevitably occur. [n192] This is likely to be most true in cases where the States are at approximately the same stage of economic development and have similar forms of government. Indeed, this dynamic between States implies a certain level of "trust" that may facilitate the inclusion of labor and other social provisions in trade agreements. States may be more willing to commit to binding labor standards and to cede some of their control to supranational institutions when they feel they are engaged in a shared endeavor to promote mutual well-being. This contrasts with a situation in which a State is suspicious of its trading partner's true intentions, or where a great disparity in wealth and global power exists. In such circumstances, it may be more difficult for a State to agree to those measures necessary to enforce labor standards effectively.

In Latin America, the advantages of sub-regional agreements are especially apparent. One reason is the threat of U.S. power in the region through a hemisphere-wide FTAA modeled on NAFTA, or alternately through the continuation of bilateral U.S. agreements with less powerful Latin American trading partners. In response to the hegemonic threat of the United States in the region, smaller States have turned to sub-regionalization as a way to strengthen their own economic positions and increase their bargaining power to gain access to U.S. and other attractive markets. [n193] This is evident in the case of Mercosur, the creation of which was set against the launching of NAFTA negotiations in 1990. [n194] Even Brazil, which has traditionally preferred the freedom of creating multilateral relationships over a more regionalist model (a source of tension with its Mercosur partners), has demonstrated a preference for sub-regional integration over a hemispheric FTAA model led by the United States. [n195] Meanwhile, **[*863]** other sub-regional agreements such as the Andean Community and Caricom have also thrived in Latin America. [n196] These developments, which indicate an interest in sub-regionalization as an alternative to a U.S. model, hold promise for the incorporation of labor standards in trade agreements. Developing countries may have less to fear from the use of trade for protectionist purposes or loss of control over domestic strategies relating to labor if the agreement is sub-regional in character. If the parties to a trade agreement have a relationship of parity, mutual dependence, and goodwill, perhaps the objections to linking labor with trade will soften somewhat to permit the gradual incorporation of labor protections.

The example of Mercosur, whose members are "profoundly linked by history and geography, [and] have always had highly porous borders ensuring economic, political, and socio-cultural exchange," is illustrative of the type of inter-State dynamic that can provide a strong platform from which an agreement can evolve and adapt, facilitating the input of each member State in strengthening its commitment to labor protections. [n197] The close geographic and cultural ties between Mercosur States have broadened participation by enabling other stakeholders to collaborate across borders, as seen in the formation of the CCSCS and other civil society groups, which have played a crucial role in pushing for further development of labor and social protections within

Mercosur. [n198]

C. Potential for Mercosur to Develop its Capability to Enforce Labor Rights

While Mercosur is well positioned as a strong sub-regional agreement, it must take necessary steps to realize its potential in enforcing labor rights. Most importantly, the member States will need to accept a linkage between trade and labor so as to make labor protections an enforceable set of standards that are incorporated through institutional mechanisms. This linkage does not necessarily need to take the form of trade sanctions, but it must include some sort of concrete **[*864]** penalty such as fines, perhaps coupled with incentives, in order to make the obligations enforceable. [n199] Effectively linking labor and trade will represent one of the biggest challenges for Mercosur, as Brazil has been a vocal opponent to such linkage in the context of the FTAA agreements, and Mercosur's Sociolabor Declaration reflects this position. [n200] However, perhaps as labor is increasingly brought to the attention of the member States through institutional advisory groups such as Working Sub-Group 10, the FCES, and the Sociolabor Commission, in addition to the pressure exerted by the CCSCS and other interest groups, this position of staunch trade/labor separation will be revisited. The mere existence of institutional spaces in which member States can debate and find common ground in their views on labor protections is a positive attribute of the agreement. [n201] In the past, these mechanisms have been underutilized because of their current emphasis on seeking the lowest common denominator of labor compliance across States. [n202] Instead, the emphasis should be shifted to raising the bar by determining how member States could adapt their legislation and policies to reflect the higher standards embodied both by domestic legislation and the commitments of the Sociolabor Declaration.

In addition to developing a uniform, expansive set of labor standards, Mercosur States must ultimately take the step of making these labor standards enforceable through monitoring, penalties, and possibly incentive structures. This step must be accompanied by institutional changes that support the enforcement of labor standards, including the creation of new supranational institutions that will be dedicated to monitoring and enforcement, or the adaptation of existing institutions to perform these functions effectively. Mercosur's loose, flexible framework is designed for long-term adaptability, and it is well suited to such institutional change. In contrast, such changes would be difficult, if not impossible, to graft onto a more detailed, comprehensive arrangement such as NAFTA/NAALC without having to reconceptualize the entire agreement. [n203]

While there will be difficulties involved in further integration **[*865]** through institutional change, the repeated interactions between Mercosur States and their social, cultural, and geographic ties will likely facilitate this process. One issue that needs to be considered as the development of labor protections in the Mercosur agreement takes place is the current power disparity among member States that could work against the advantages of a sub-regional agreement. Brazil has by far the largest economy of the group, and has taken a leadership role in negotiations with external trading partners. [n204] Argentina is also powerful in comparison to the two smaller States of Paraguay and Uruguay, although its position has been affected in recent years by its economic collapse and

subsequent rebuilding process. [n205] This power dynamic will most likely undergo some changes in the next few years, with oil-wealthy Venezuela joining as a full member, and with the possible accession of Chile, with its thriving economy, to full membership status. The effects of these membership changes could weaken Brazil's dominant role and create a more balanced distribution of control among member States. Alternatively, this reconfiguration could permit a few powerful States to overshadow their smaller counterparts.

To avoid some of the same pitfalls that make it difficult for these States to bargain with the United States, the disparities in wealth and influence among member States must be balanced by processes that provide for equal participation in decisions by all member States and that emphasize the shared goals of the group over the agendas of individual States. There is considerable support for Mercosur's ability to achieve this dynamic going forward in examining the progress Mercosur has made so far in overcoming national differences to create an effective agreement. As Blackett writes, "despite wariness over Brazil's leadership role, and centuries of misunderstanding between Argentina and Brazil, there remains a sense of "regional identity' and "common destiny' that characterizes **[*866]** the Mercosur and renders the integration - and its social dimensions - less than wholly "new.'" [n206] The ties between the Mercosur member States have supported a more formalized integration process and will continue to provide a strong foundation for the agreement as it moves into the next phase of integration.

This strength is also evident in the durability of Mercosur as it weathered the financial crises of the 1990s that particularly affected Brazil and Argentina. [n207] While some critics thought the economic difficulties that followed those events spelled the end of Mercosur, it has instead proven its resilience and entered a new period heralded by its "relaunch" in 2000, which has been accompanied by a renewed and deepened commitment to integration that extends to the political level. [n208] As Mercosur continues to develop and to confront the challenges of globalization in the 21st century, the important connection between trade and labor conditions is likely to be recognized and addressed by the agreement in a more meaningful and effective way.

IV. Conclusion

Despite its origins as a purely economic agreement and the subsequent disavowal of the linkage between labor and trade, Mercosur has gradually and increasingly protected labor rights. There is a clear contrast between Mercosur's gradual integration and development and the dominant U.S. approach as exemplified in NAFTA/NAALC, which calls for agreements with detailed pre-negotiated frameworks that are inflexible once they come into force. Although the U.S. approach provides fines and the potential suspension of trade benefits as a penalty for violations of labor rights, weak enforcement mechanisms render these protections meaningless. A more flexible trade agreement framework such as that of Mercosur is likely to be more successful in fostering the development of comprehensive labor standards and strong institutional enforcement mechanisms.

Mercosur also demonstrates potential as a vehicle for labor protections in its role as a successful sub-regional agreement. Because of the strong ties between member States in many sub-regional agreements, conditions may be more hospitable for the type of political cooperation and trust necessary to agree to be governed by collective **[*867]** labor standards and to cede control to supranational institutions responsible for monitoring and enforcing those standards within the member States' own borders. Given collective distrust of the United States and shared regional goals, Latin American States in particular have demonstrated an orientation toward sub-regional agreements which indicates that labor protections would have a greater chance of being fostered in that context. [n209]

It will require a strong commitment on the part of the Mercosur States to agree to the institutional changes necessary to enforce labor protections through the agreement, a willingness that has not been demonstrated thus far. However, there is much potential for this to occur eventually given the increasing consideration of labor issues by the agreement, and the opportunities presented by the process of "relaunching" the agreement after the financial crises of the last decade. It remains to be seen whether Mercosur will be able to overcome the formidable political barriers and create effective protections for workers in the region. In order to do so, Mercosur's member States will first need to recognize that labor is an essential factor in any process of economic integration, one to which the economic and social well-being of the member States is intricately linked.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral OverviewInternational LawSovereign States & IndividualsHuman RightsGeneral OverviewInternational Trade LawTrade AgreementsIntellectual Property Provisions

FOOTNOTES:

n1. See Renato Ruggiero, Opening Remarks at the 50th Anniversary Symposium, in From Gatt to the WTO: The Multilateral Trading System in the New Millennium 1, 2 (2000); Jon M. Tate, Note, Sweeping Protectionism Under the Rug: Neoprotectionist Measures Among Mercosur Countries in a Time of Trade-Liberalization, 27 Ga. J. Int'l. & Comp. L. 389, 389 (1999).

n2. See generally Michael Reynolds, Examining the Foundation for a Free Trade Zone in the Americas, 3 J. Int'l L. & Prac. 521, 522 (1994) (explaining the motivations of States in pursuing greater international trade).

n3. Arne Vandaele, International Labour Rights and the Social Clause: Friends or Foes 54-55 (2005); Thomas I. Palley, The Economic Case for Labor Standards: A Layman's Guide, 2 Rich. J. Global L. & Bus. 183 (2001) (describing the linkages between labor standards, trade, and economic development).

n4. See, e.g., Sandra Polaski, Protecting Labor Rights Through Trade Agreements: An Analytical Guide, 10 U.C. Davis L. Rev. 13, 19 (2003).

n5. See Mario E. Carranza, Mercosur, The Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America, 27 Fordham Int'l L.J. 1029, 1039 (2004); Suzanne Elmilady, A Step in the Right Direction: How to Make the Free Trade Agreement of the Americas a Cohesive Agreement That Will Better Serve Integration of Free Trade in the Western Hemisphere, 11 Currents: Int'l Trade L.J. 70, 78-79 (2002) (discussing Brazil's concern that membership in the FTAA would result in a reduction of its trading power).

n6. Robert Plummer, Little Hope for Americas Free Trade Plan, BBC News, Nov. 2, 2005, http://news.bbc.co.uk/1/hi/business/4399354.stm.

n7. See Tate, supra note 1, at 391.

n8. Both LAFTA and ALADI were attempts to implement the view of the United Nation's Economic Commission for Latin America (ECLA) that economic development in Latin America would require regional economic integration and the eventual development into a common market. Rafael A. Porrata-Doria, Jr., Mercosur: The Common Market of the Southern Cone 7-9 (2005). LAFTA's failure has been attributed, in part, to the lack of member State agreement on its purpose and objectives, the absence of regional trade, a demanding treaty framework, and the weakness of its institutional infrastructure. Id. at 13-14.

n9. See Roberto Bouzas et. al., In-Depth Analysis of Mercosur Integration, Its Prospectives and the Effects Thereof on the Market Access of EU Goods, Services and Investment 10 (2002), available at http://mkaccdb.eu.int/study/studies/32.doc; Tate, supra note 1, at 391.

n10. Porrata-Doria, Jr., supra note 8, at 23-24.

n11. Roberto Bouzas et. al., supra note 9, at 11.

n12. Id. at 12-13.

n13. Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Treaty of Asuncion].

n14. As of this date, the members of Mercosur include the following States (the date in parentheses indicates the year in which they attained that status): Argentina (1991), Brazil (1991), Paraguay (1991), Uruguay (1991), and Venezuela (2006). The following States currently have associate member status: Bolivia (1997), Chile (1996), Colombia (2004), Ecuador (2004), and Peru (2003). Secretaria Mercosur Preguntas Frecuentes, http://www.mercosur.int/msweb/principal/contenido.asp (last visited Mar. 4, 2007) (information on Venezuela updated by author).

n15. See Solicitud de Adhesion de la Republica Bolivariana de Venezuela al Mercado Comun del Sur, Dec. 8, 2005, MERCOSUR/CMC/Dec. No. 29/05, available at http://www.mercosurpresidencia.org/por/pdf/adhesion venezuela.doc.

n16. Protocolo de Adhesion de la Republica Bolivariana de Venezuela al Mercosur arts. 3, 4, 10, July 4, 2006, available at http://www.mercosur.int/msweb/SM/Noticias/es/Protocolo%20Venezuela%20ES.pdf.

n17. Bolivia currently has associate member status while it is in the process of joining as a full member.

n18. Tate, supra note 1, at 394. The Treaty of Asuncion includes four instruments intended to facilitate the move toward a common market: a) a trade liberalization program concluded on December 31, 1994 consisting of progressive tariff reductions accompanied by the elimination of non-tariff restrictions and any other restrictions on trade between the member States; b) the coordination of macroeconomic policies to be carried out gradually and in

parallel to the elimination of non-tariff restrictions; c) a common external tariff; and d) sector agreements to optimize the use and mobility of factors of production and to achieve efficient scales of operation. Treaty of Asuncion, supra note 13, art. 5.

n19. Tate, supra note 1, at 402.

n20. See, e.g., Ivan Bernier & Martin Roy, NAFTA and Mercosur: Two Competing Models?, in The Americas in Transition: The Contours of Regionalism 69, 76-79 (Gordon Mace & Louis Belanger eds., 1999) (comparing Mercosur's process of integration to that of NAFTA).

n21. Additional Protocol to the Treaty of Asuncion on the Institutional Structure of Mercosur, Dec. 17, 1994, 34 I.L.M. 1244 [hereinafter Protocol of Ouro Preto].

n22. Id. art. 3.

n23. Id. art. 10.

n24. Id. art. 14.

n25. See id. §§III, IV, V, VI. For a more extensive treatment of Mercosur's structure and dispute resolution system, see Luis Olavo Baptista, Mercosur, Its Institutions and Juridical Structure (1998), available at http://www.sice.oas.org/geograph/south/mstit2 e.pdf.

n26. Pharis J. Harvey et al., Developing Effective Mechanisms for Implementing Labor Rights in the Global Economy (1998). However, the fundamental objective of economic integration arguably presupposes a certain level of political integration, and could extend into social and cultural areas as well. Hector Gros Espiell et al., El Derecho de la Integracion del MERCOSUR 39-40 (1999).

n27. Treaty of Asuncion, supra note 13, pmbl.

n28. Id. annex IV, art. 3.

n29. Pharis J. Harvey et al., supra note 26.

n30. Gerardo Castillo et. al., Los Trabajadores y el Mercosur: Creacion, Desarrollo y Politicas Sindicales de la Coordinadora de Centrales Sindicales del Cono Sur (CCSCS) 39 (1996). CCSCS has developed its strategy for promoting the interests of labor in Mercosur based on four premises: 1) demanding that Mercosur include a social and labor dimension; 2) raising the need for Mercosur to rely on a tripartite negotiating body between the member State governments, the business sector, and labor interests on issues relating to labor; 3) supporting the development of union participation on both a global and sector-specific level; and 4) creating the Union Commission of Mercosur within CCSCS to design specific policies

and coordinate activities. Id. at 20.

n31. Int'l Inst. for Sustainable Dev. et al., Social Rules and Sustainability in the Americas 28 (2003), available at http://www.ciedur.org.uy/Publicaciones/bajar/DYG/SRSA.pdf.

n32. Castillo et al., supra note 30, at 76 n.2; Adelle Blackett, Toward Social Regionalism in the Americas, 23 Comp. Lab. L. & Pol'y J. 901, 945 (2002).

n33. Castillo et al., supra note 30, at 76. Note that the group was originally created as Working Sub-Group 11, but was changed to Working Sub-Group 10 in a 1995 resolution by the CMG that reorganized the Working Sub-Group structure. Resolucion No. 20/95 del Grupo Mercado Comun, Estructura del GMC, art. 1 (MERCOSUR/GMC/Res. No. 20/95), available at http://www.observatoriomercosur.org.uy/es/documentos2.php?d=32.

n34. Harvey et al., supra note 26.

n35. Int'l Inst. for Sustainable Dev. et al., supra note 31, at 29.

n36. Blackett, supra note 32, at 948 n.242.

n37. Id. at 949.

n38. These thirty-four conventions are ILO Conventions 1, 11, 13, 14, 19, 22, 26, 29, 30, 77, 78, 79, 81, 90, 95, 97, 98, 100, 105, 107, 111, 115, 119, 124, 135, 136, 139, 144, 151, 154, 155, 159, 162, and 167. Note that No. 87, The Freedom of Association and Protection of the Right to Organize, one of the ILO's "core conventions," is omitted from the list. Id. at 949 n.247.

n39. See Observatoria Mercosur, Historia, http://www.observatorio.net/ (last visited Mar. 4, 2007).

n40. Blackett, supra note 32, at 948-49.

n41. Id. at 949.

n42. Castillo et al., supra note 30, at 30-32.

n43. Id. at 31; Pedro da Motta Veiga & Miguel F. Lengyel, International Trends on Labor

Standards: Where Does Mercosur Fit In? 16 (Latin Am. Trade Network, Working Paper No. 18, 2003), available at http://www.latn.org.ar/pdfs/Motta Lengyel laborestantards.pdf.

n44. Protocol of Ouro Preto, supra note 21, § V.

n45. Blackett, supra note 32, at 945.

n46. Oscar Ermida Uriarte, La Ciudadania Laboral en el Mercosur 8 (2000), available at http://www.ilo.org/public/spanish/region/ampro/cinterfor/publ/sala/ermida/ciud lab/ciu lab.pdf.

n47. Id. § IV.

n48. Declaracion Sociolaboral del Mercosur, Dec. 10, 1998, available at http://www.trabajo.gov.ar/crem/documentacion/declaracion.htm.

n49. Id. pmbl. (author's translation).

n50. Id. pmbl., arts. 1-6, 15, 16, 19.

n51. Id. art. 20.

n52. Id.

n53. Id. art. 25 (author's translation).

n54. Da Motta Veiga & Lengyel, supra note 43, at 16; Blackett, supra note 32, at 953-54.

n55. Harvey et al., supra note 26 (referring to the limitation of FCES and CPC in particular as advisory, rather than binding authorities).

n56. Da Motta Veiga & Lengyel, supra note 43, at 17.

n57. Id.

n58. Baptista, supra note 25, at 70-71.

n59. Da Motta Veiga & Lengyel, supra note 43, at 15-16.

n60. Weiss, supra note 69, at 752. See also Polaski, supra note 4, at 17-20 (discussing the importance of supranational enforcement mechanisms in linking labor standards with trade).

n61. See Thomas J. Manley & Luis Lauredo, International Labor Standards in Free Trade Agreements of the Americas, 18 Emory Int'l. L. Rev. 85, 113 (2004) (referring to the perceived ineffectiveness of allowing governments to enforce their own labor standards in the context of the proposed Free Trade Area of the Americas).

n62. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 296-456, 605-799 [hereinafter NAFTA].

n63. The North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1499 (1993) [hereinafter NAALC]; Katherine A. Hagen, Fundamentals of Labor Issues and NAFTA, 27 U.C. Davis L. Rev. 917, 918 (1994).

n64. Harvey, Collingsworth & Athreya, supra note 26.

n65. The following are the principles protected by NAALC: 1) Freedom of association and the right to organize; 2) The right to bargain collectively; 3) The right to strike; 4) The prohibition of forced labor; 5) Labor protections for children and young persons; 6) Minimum employment standards; 7) Elimination of employment discrimination; 8) Equal pay for men and women; 9) Prevention of occupational injuries and illnesses; 10) Compensation in cases of occupational injuries and illnesses; and 11) Protection of migrant workers. NAALC, supra note 63, annex I. In comparison, the ILO Core Conventions include Conventions 29 (forced labor), 87 (freedom of association and protection of the right to organize), 98 (right to organize and collective bargaining), 100 (equal remuneration), 105 (abolition of forced labor), 111 (discrimination), 138 (minimum age), and 182 (worst forms of child labor). International Labour Organization, International Labour Standards, http://www.ilo.org/public/english/standards/norm/introduction/what.htm (last visited June 16, 2007).

n66. Id.

n67. Manley & Lauredo, supra note 61, at 104.

n68. For instance, Article 123 of the Mexican Constitution provides substantial protections for workers, such as the right to organize unions, to bargain, and to strike, along with certain minimum labor standards. Emmanuelle Mazuyer, Labor Regulation in the North American Free Trade Area: A Study on the North American Agreement on Labor Cooperation, 22 Comp. L. & Pol'y J. 239, 245 (2001).

n69. The NAALC framework has been criticized, especially at the higher stages of the enforcement process, as diluting the responsibility of States to enforce their labor laws:

This standard [of commitment to labor laws] is weakened by requiring that the country have engaged in a systematic "pattern of practice' of violation and narrowed by requiring that the pattern demonstrably be "trade-related' in its effects ... it is further weakened by their exclusion from higher steps of the enforcement process ... .

Marley S. Weiss, Two Steps Forward, One Step Back - Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond, 37 U.S.F. L. Rev. 689, 711 (2003).

n70. NAALC, supra note 63, art. 3.

n71. Id. arts. 39-41.

n72. Weiss, supra note 69, at 733. The dispute resolution process for complaints about a State's labor law enforcement includes the following stages before sanctions are imposed: 1) Consultation between the National Administrative Offices of the States involved, 2) Consultations at the ministerial level of the States, 3) The establishment of an Evaluation Committee of Experts (ECE) that investigates the complaint and drafts a report submitted to the Council of Ministers, 4) Council consideration of the report, 5) State request for consultations with the accused State, 6) State request of a special session of the Council, 7) Council creation of an arbitral panel, 8) Panel's submission of a report and plan for implementation, 9) State request of the panel to be reconvened due to failure of State to implement plan, 10) Assessment of a monetary enforcement, 11) State request for a second reconvening of panel, 12) Suspension of benefits under NAFTA in an amount not to exceed the monetary enforcement assessment. NAALC, supra note 63, arts. 20-41.

n73. NAALC, supra note 63, arts. 29-33, annex 39.

n74. Id. annex 41B.

n75. Monica Schurtman, Los "Jonkeados' and the NAALC: The Autotrim/Customtrim Case and its Implications for Submissions under the NAFTA Labor Side Agreement, 22 Ariz. J. Int'l. & Comp. Law 291, 303-04 (2005).

n76. Weiss, supra note 69, at 699.

n77. See Harvey et al., supra note 26 ("There is no question that NAALC was designed to be a cooperative process that did not interfere with domestic labor law standards.").

n78. For a full account of this case and the challenges involved in submitting the complaint through the NAALC dispute resolution system, see Schurtman, supra note 75.

n79. Id. at 320-21.

n80. Id. at 336-37.

n81. NAALC, supra note 63, arts. 9-13.

n82. See Commission for Labor Cooperation, The Council of Ministers, http://www.naalc.org/english/council.shtml (last visited Mar. 4, 2007) (indicating that the most recent Council of Ministers meeting took place in 2003 and the meeting before that was held in 1999).

n83. NAALC, supra note 63, art. 23.

n84. The NAOs are responsible for receiving, investigating, and reviewing complaints that a non-governmental party submits. See NAALC, supra note 63, art. 16; Commission for Labor Cooperation, The National Administrative Offices, http://www.naalc.org/english/nao.shtml (last visited Mar. 4, 2007).

n85. Although the work of the NAOs is extra-territorial in function, they are "strictly domestic" in that they are housed in each State's ministry of labor and staffed by that State's citizens. Lance Compa, Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA, 10 Conn. J. Int'l L. 337, 353 (1995). In addition, whether and how to respond to a particular complaint lodged against another party is left to the complete discretion of the NAO. See Human Rights Watch, Trading Away Rights: The Unfulfilled

Promise of NAFTA's Labor Side Agreement (2001), available at http://www.hrw.org/reports/2001/nafta/.

n86. Besides their ad hoc nature, these bodies also lack the authority necessary to develop and enforce supranational standards. See Michael J. McGuinness, The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation, 30 Stan. J. Int'l L. 579, 596 (1994) (arguing that the Arbitral Panels would be better constituted in the form of a supranational court such as the European Court of Justice in order to link national law more successfully to continental labor concerns).

n87. Schurtman, supra note 75, at 356-58.

n88. NAALC, supra note 63, art. 21. The dispute resolution process begins by the NAO initiating a review of a complaint received regarding labor law matters in another party's territory. Mazuyer, supra note 68, at 246-47.

n89. Harvey et al., supra note 26.

n90. Weiss, supra note 69, at 698-99.

n91. Id. at 699-700.

n92. NAALC, supra note 63, arts. 39, 41, annex 1.

n93. The parties did not originally address labor issues in the NAFTA negotiations, believing them to be outside the scope of NAFTA. In order to appease labor unions and other politically-influential groups concerned about NAFTA's impact on workers' rights, the Clinton Administration succeeded in implementing the labor side accord, which was said to be a "lengthy and challenging feat," given opposition to its inclusion by the other parties. Mazuyer, supra note 68, at 242-43.

n94. " NAFTA/NAALC" is used here to refer to the overall framework created by the NAALC side agreement within the broader context of NAFTA.

n95. Weiss, supra note 69, at 703-04.

n96. See, e.g., Eduardo Gudynas, MERCOSUR and the FTAA: New Tensions and New Options (2003), available at http://www.globalpolicy.org/globaliz/econ/2003/1111mercosurftaa.htm (discussing in particular Brazil's resistance to ceding national control to stronger supranational Mercosur institutions).

n97. NAALC, supra note 63, annex 1.

n98. Declaracion Sociolaboral del Mercosur, supra note 48.

n99. See Compa, supra note 85, at 356.

n100. See da Motta Veiga & Lengyel, supra note 43, at 15-17.

n101. Treaty of Asuncion, supra note 13, art.1.

n102. See discussion of the prospect of establishing the FTAA, infra Part II.D.

n103. See Ana Maria de Aguinis, Can Mercosur Accede to NAFTA? A Legal Perspective, 10 Conn. J. Int'l L. 597, 597-98, 631 (1995) (differentiating between Mercosur, which is a "treaty-framework", and NAFTA, which is a "treaty-law").

n104. See supra Part I.B.

n105. da Motta Veiga & Lengyel, supra note 43, at 1 ("[Mercosur's] member countries officially oppose any attempt to link trade and labor issues and, particularly, the claim that the diffusion of higher labor norms should be fostered through trade sanctions.").

n106. NAALC, supra note 63, arts. 39, 41.

n107. Bernier & Roy, supra note 20, at 77.

n108. See Blackett, supra note 32, at 955.

n109. Bernier & Roy, supra note 20, at 76.

n110. Id. at 73.

n111. Id. at 72-73.

n112. One example is the agreement's temporary exclusion of certain sensitive sectors of member States' economies from the free trade area in order to give those sectors time to adapt

to the new conditions of the regional submarket. Id. at 77. Another example of an area left to future negotiation between member States is the coordination of macroeconomic policies to occur in parallel with tariff reductions and elimination of non-tariff restrictions. Treaty of Asuncion, supra note 13, art. 5.

n113. See Blackett, supra note 32, at 947 (describing the increased dialogue and exchange between groups in civil society that accompanied Mercosur, such as the Foro de Mujeres del Mercosur, which addresses women's issues in the context of regional integration).

n114. An example of this flexibility is the creation of new institutions such as the FCES in response to perceived needs or areas for improvement. See supra Part I.B.

n115. United States-Chile Free Trade Agreement, Jun. 6, 2003, 42 I.L.M. 1026, available at http://www.ustr.gov/Trade Agreements/Bilateral/Chile FTA/Final Texts/Section Index.html [hereinafter U.S./Chile FTA].

n116. David Travers, You Have to Fight for your Right to Work: The U.S.-Chile Free Trade Agreement and Global Labor Standards, 29 Suffolk Transnat'l L. Rev. 337, 347 (2006).

n117. Office of the United States Trade Representative, Press Release, United States and Chile Sign Historic Free Trade Agreement, June 6, 2003, available at http://www.ustr.gov/Document Library/Press Releases/2003/June/United States Chile Sign Historic FreeTrade Agreement.html.

n118. U.S./Chile FTA, supra note 115, art. 18.1(1).

n119. See supra note 65 for a description of NAFTA/NAALC's eleven principles.

n120. U.S./Chile FTA, supra note 115, art. 18.1(2).

n121. Id. art. 18.2(2).

n122. Id. art. 18.2(1)(a).

n123. Id. art. 18.4.

n124. Id. ch. 22.

n125. There are also certain restrictions to access the dispute resolution system, depending

on the nature of the matter. All matters are first subject to Cooperative Consultation, and those that are not resolved through this procedure are submitted to the Labor Affairs Council for further consideration. Only those matters that involve a State's "failure to effectively enforce its labor laws" are eligible for the dispute resolution system that can result in sanctions. Id. art. 18.6; Travers, supra note 116, at 350-51.

n126. U.S./Chile FTA, supra note 115, art. 22.16(2).

n127. Id. art. 22.16(5).

n128. Manley & Lauredo, supra note 61, at 110; Weiss, supra note 69, at 722.

n129. NAALC, supra note 63, annex 41B.

n130. The list includes the following factors for consideration by the panel in determining the monetary assessment to be levied:

(a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;

(b) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;

(c) the reasons for the Party's failure to effectively enforce the relevant law;

(d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;

(e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel, including through the implementation of any mutually agreed action plan; and

(f) any other relevant factors.

U.S./Chile FTA, supra note 115, art. 22.16(2).

n131. Polaski, supra note 4, at 21.

n132. For an argument in support of the necessity of fines or sanctions to compel parties to uphold their commitment effectively to enforce their labor laws in the context of the U.S./Chile FTA, see Travers, supra note 116, at 354.

n133. The Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, available at http://www.ustr.gov/Trade Agreements/Bilateral/CAFTA/CAFTA-DR Final Texts/Section Index.html [hereinafter CAFTA].

n134. See, e.g., AFL-CIO, The Real Record on Workers' Rights in Central America pt. IV (2005), available at http://www.globalpolicy.org/socecon/trade/2005/04realrecord.pdf.

n135. Manley & Lauredo, supra note 61, at 110.

n136. CAFTA, supra note 133, art. 16(2)(1)(a).

n137. U.S./Chile FTA, supra note 115, art. 18.2(2).

n138. Id. art. 20.17.

n139. CAFTA, supra note 115, art. 20.17.

n140. See, e.g., Human Rights Watch, CAFTA's Weak Labor Rights Protections: Why the Present Accord Should Be Opposed (2004), available at http://hrw.org/english/docs/2004/03/09/usint8099.htm.

n141. AFL-CIO, supra note 134, pt. IV. In addition to the strength of the labor laws, the record of labor law enforcement in Central America has been criticized. In response to one report issued by the International Labor Rights Fund documenting weak enforcement of labor laws in Central America, the U.S. Labor Department referred to the findings as "biased" and "flawed," and reportedly tried to block the release of the report. Juan Forero, Report Criticizes Labor Standards in Central America, N.Y. Times, July 1, 2005.

n142. AFL-CIO, supra note 134, pt. V.

n143. Id.

n144. Id.

n145. See Hagen, supra note 63 at 918 (discussing the political pressures that influenced NAFTA and the fact that the ultimate compromise reached on labor issues in the form of NAALC did not meet the expectations of labor and other interest groups).

n146. Sidney Weintraub, The Meaning of NAFTA and its Implications for the FTAA, 6 NAFTA: L & Bus. Rev. Am. 303, 305-06 (2000). For a discussion of this tension between U.S. pressures to include labor protections in trade agreements and the resistance of its Latin American trading partners in the context of U.S./Chile FTA negotiations, see Travers, supra note 116, at 353-56.

n147. Weiss, supra note 69, at 694.

n148. Carranza, supra note 5, at 1041.

n149. Id. at 1043.

n150. See id. at 1055-56 (highlighting continuing attempts on the part of the United States to push through a NAFTA-like FTAA agreement, although pointing to a shift in power dynamics that may result in greater leverage for its Latin American counterparts in negotiations).

n151. Id. at 1030.

n152. Id.

n153. See, e.g., Claudio Katz, Free Trade Area of the Americas: NAFTA Marches South, in NACLA Report on the Americas 27, 30 (2002).

n154. See, e.g., Office of the United States Trade Representative, Press Release, Zoellick to Lead U.S. Effort to Advance FTAA in Key Miami Meeting, Nov. 14, 2003, available at http://www.ustr.gov/Document Library/Press Releases/2003/November/Zoellick to Lead US Effort to Advance FTAA in Key Miami Meeting.html.

n155. The nine groups focused on the following: 1) Market access; 2) Investment; 3) Services; 4) Government Procurement; 5) Dispute Settlement; 6) Agriculture; 7) Intellectual Property Rights; 8) Subsidies, Antidumping, and Countervailing Duties; and 9) Competition Policy. Summit of the Americas, Fourth Trade Ministerial Joint Declaration, Mar. 19, 1998, available at http://www.ftaa-alca.org/Ministerials/SanJose/SanJose e.asp [hereinafter San Jose Declaration].

n156. For an examination of the competing interests of Brazil and the United States in FTAA negotiations, see Elmilady, supra note 5, at 78-80.

n157. Gustavo Gonzalez, Sub-Region Integration a Challenge to FTAA, Inter Press Service News Agency, Jan. 18, 2005, available at http://www.bilaterals.org/article-print.php3?id article=1202.

n158. Matt Moffett & John D. McKinnon, In Blow to U.S., Chavez Taps Latin America's Discontent to Fight Opening of Markets, Wall St. J., Nov. 7, 2005, at A1.

n159. Id.

n160. Marcela Valente, Summit of the Americas: Leaders Agree to Disagree on FTAA, Inter Press Service News Agency, Nov. 5, 2005, available at http://www.ipsnews.net/print.asp?idnews=30901.

n161. See Travers, supra note 116, at 352-53 (describing this concern in the context of the U.S./Chile FTA).

n162. Mark B. Baker, No Country Left Behind: The Exporting of U.S. Legal Norms Under the Guise of Economic Integration, 19 Emory Int'l L. Rev. 1321, 1329-30 (2005) (referring to the critique of free trade agreements initiated by the United States as rooted in unequal bargaining positions and perpetuating differences in conditions that are unfavorable to U.S. trading partners).

n163. Gonzalez, supra note 157.

n164. See Carranza, supra note 5, at 1048-49. See also Blackett, supra note 32, at 909-10.

n165. Moffett & McKinnon, supra note 158.

n166. Carranza, supra note 5, at 1062-65.

n167. See, e.g., Weiss, supra note 69, at 726-27 (arguing that agreements that rely on domestic labor law must result in an upward harmonization of labor standards, rather than accepting weak or nonexistent standards).

n168. Polaski, supra note 4, at 16-17; da Motta Veiga & Lengyel, supra note 43, at 9 (pointing out that "labor standards" present in legislation or trade agreements are increasingly equated with fundamental labor standards articulated by the ILO).

n169. See Weiss, supra note 69, at 711 (describing a comparison of sorts in the context of NAFTA/NAALC, in which the negotiators concluded that each of the States had domestic labor laws that met "high labor standards").

n170. For example, labor interests urged that the United States require its CAFTA trading partners to improve their domestic labor standards and enforcement, a call that went unheeded. See Carol Pier, The Right Way to Trade, Wash. Post, Aug. 1, 2003, reprinted in AFL-CIO, supra note 134, pt. VI.

n171. One example is the U.S./Chile FTA, which acknowledges the duties of the States as members of the ILO, and goes beyond these fundamental principles to include aspirational

obligations such as "acceptable work conditions with regards to minimum wages, work hours and occupational health and safety." The trade agreement does so though international obligations predicated on domestic labor laws. Da Motta Veiga & Lengyel, supra note 43, at 7 (paraphrasing the U.S./Chile FTA, supra note 115, art. 18.8.

n172. See discussion of this topic in Part II.C(1).

n173. Polaski, supra note 4, at 22-23.

n174. Agreement Relating to Trade in Cotton, Wool, Man-Made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Government of the United States of America and the Royal Government of Cambodia, Jan. 20, 1999, available at http://phnompenh.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh texttile.pdf [hereinafter U.S./Cambodia Agreement].

n175. Kevin Kolben, Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories, 7 Yale H.R. & Dev. L.J. 79, 90 (2004).

n176. U.S./Cambodia Agreement, supra note 174, § 10(D).

n177. Kolben, supra note 175, at 90.

n178. Id. at 100.

n179. Id.

n180. Id. at 101.

n181. Id. at 100-01.

n182. Id. at 103.

n183. Don Wells, "Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement, 27 Comp. Lab. L & Pol'y J. 357, 365 (2006).

n184. See Terry Collingsworth, An Essential Element of Fair Trade and Sustainable Development in the FTAA Is an Enforceable Social Clause, 2 Rich. J. Global L. & Bus. 197, 206 (2001) (arguing that incentives may not be enough to ensure State compliance, and that

an enforcement mechanism is also needed to address State failures to comply).

n185. Weiss, supra note 69, at 752.

n186. Id. An example of potential rewards for compliance could include an increase in trade quotas, as demonstrated by the U.S./Cambodia Agreement. See description of the U.S./Cambodia Agreement, supra note 174.

n187. See Stephen J. Powell, Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Free Trade Agreements, 17 Fla. J. Int'l L. 59 (2005) (discussing the importance of processes that reflect principles of transparency and accountability in supporting the rule of law that underlies the enforcement of human rights through trade agreements).

n188. Int'l Inst. for Sustainable Dev. et al., supra note 31, at 53; Blackett, supra note 32, at 961-62 (referring to the importance of the inclusion of a "fluid range of "tripartite plus' actors" in crafting a social dimension to regional economic agreements).

n189. For an account of the distrust of Latin American States toward U.S. free trade designs in the region, see Greg Grandin, Latin America's New Consensus, Nation, May 1, 2006.

n190. See, e.g., Frederick W. Mayer, The Politics of Hemispheric Integration, Integration in the Americas Conference (Apr. 2, 2002), available at http://laii.unm.edu/conference/mayer.php.

n191. Porrata-Doria, Jr., supra note 8, at 21.

n192. Blackett, supra note 32, at 943.

n193. See Gonzalez, supra note 157.

n194. Roberto Bouzas and Hernan Soltz, Institutions and Regional Integration: The Case of MERCOSUR, in Regional Integration in Latin America and the Caribbean: The Political Economy of Open Regionalism 95, 112 (Victor Bulmer-Thomas ed., 2001).

n195. Maria Regina Soares de Lima, Brazil's Alternate Vision, in The Americas in Transition: The Contours of Regionalism 133, 136 (Gordon Mace & Louis Belanger eds., 1999).

n196. For an examination of the developments and progress made by these smaller regional agreements, see Shelton Nicholls et al., Open Regionalism and Institutional Developments Among the Smaller Integration Schemes of CARICOM, and Andean Community and the

Central America Common Market, in Regional Integration in Latin America and the Caribbean: The Political Economy of Open Regionalism 141 (Victor Bulmer-Thomas ed., 2001).

n197. Blackett, supra note 32, at 943.

n198. Id. at 947.

n199. Polaski, supra note 4, at 20.

n200. This is evidenced by the Declaration's disavowal of applying the principles of the Sociolabor Declaration to trade, economic, or financial matters. Declaracion Sociolaboral del Mercosur, supra note 48, art. 25.

n201. Blackett, supra note 32, at 947-48.

n202. Da Motta Veiga & Lengyel, supra note 43, at 17.

n203. See Bernier & Roy, supra note 20, at 76-77 (describing the gradual sequence of integration in Mercosur as opposed to the rigid framework of NAFTA). See also Miles Kahler, International Institutions and the Political Economy of Integration 132 (1995) (highlighting the advantages of flexible, decentralized international institutions in the context of economic integration).

n204. Thomas Andrew O'Keefe, A Resurgent Mercosur: Confronting Economic Crises and Negotiating Trade Agreements 8 (The North-South Agenda Paper No. 60, 2003); Elmilady, supra note 5, at 78. Brazil's strength has been somewhat of an obstacle to regional integration among Latin American States. See de Lima, supra note 195, at 34 (explaining that the size of the Brazilian economy compared with those of other countries in the region has inhibited regional cooperation both because other countries see Brazil's size and power as a threat, and because Brazil's leaders have tended to regard the country as destined for its own independent future).

n205. Argentina and Brazil combined are responsible for about 80% of Mercosur's internal trade flows. O'Keefe, supra note 204, at 4. After the collapse of the Argentine financial system in 2002, Argentina relied on support from its Mercosur trading partners to prop up its ailing economy. For example, Brazil modified its bilateral managed trade regime with Argentina in the automotive sector to allow the Argentine automotive industry to export the equivalent of U.S. $ 2 worth of goods for every U.S. $ 1 exported by Brazil to Argentina, deviating from the initially fixed one-to-one parity. Id. at 8.

n206. Blackett, supra note 32, at 943.

n207. See O'Keefe, supra note 204, at 4-8.

n208. See Nicola Phillips, Regionalist Governance in the New Political Economy of Development: "Relaunching' the Mercosur, 22 Third World Q. 565 (2001).

n209. Moffett & McKinnon, supra note 158 (describing the trend towards sub-regional agreements in Latin America).

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