TOWARD SOCIAL REGIONALISM IN THE AMERICAS

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I. INTRODUCTION

Whether current initiatives to unite the Americas into one hemispheric free trade area fail, succeed, or are translated into less ambitious expansions of existing regional trade blocs, concerns about the adverse social impact of trade liberalization are likely to remain.[1] In particular, the perception that this issue tends to be absent from the negotiating table leads to the fear that hard won labor protections will disappear as neo-liberal trade prevails. Advocates of a social dimension to trade fear that even the limited concessions made within the North American Free Trade Agreement (NAFTA) to adopt a side agreement on labor, the North American Agreement on Labor Cooperation (NAALC), will be hard to achieve within a broader dialogue among widely differing states.[2]

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1. The Free Trade Area of the Americas (FTAA) is scheduled to enter into force by 2005, although the likelihood that the deadline will be met is increasingly called into question.

2. Canada-Mexico-United States: North American Free Trade Agreement, Done at Washington Dec. 8 and 17, 1992, at Ottowa Dec. 11 and 17, 1992, and at Mexico City Dec. 14 and 17, 1992, 32 I.L.M. 289, 605 (1993), *available at* http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=78. For the NAALC, *see infra* note 100 and

The focus on NAFTA turns attention away from the potentially fruitful task of looking carefully at other approaches to social policy that may already exist within different regional arrangements in the hemisphere. Indeed, to date little attention has been paid to the ways that regional agreements of the South within the Americas[3] have addressed concerns about the social dimensions of trade.[4]

Three distinct approaches in the Americas illustrate several observations about the incorporation of social dimensions in open regional trade arrangements.[5] First, in the case of NAFTA, the social dimension has developed on a separate track from the main substance of trade, reflecting a somewhat adversarial model that has also had the effect of increasing trans-border activity among civil society groups. The NAALC is increasingly contrasted with developments within the main NAFTA text, which underscore the impact of trade regulation on domestic policy decisions, and obviate the need to consider whether existing transnational labor regulatory mechanisms are a suitable counterbalance for labor regulation. In the case of

accompanying text. *See* Craig Van Grasstek, *Labor Rights*, *in* TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS 487, 495-496 (1999).

3. For an overview of the range of common markets, free trade arrangements, unilateral and bilateral preferential programs, and broader regionalism initiatives, *see generally* Frank Garcia, *"Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63 (1997); *see also* J. Steven Jarreau, *Negotiating Trade Liberalization in the Western Hemisphere: The Free Trade Area of the Americas*, 13 TEMP. INT'L & COMP. L.J. 57 (1999).

4. Two notable exceptions are the bilingual (Spanish-English) publication by ADOLFO CIUDAD REYNAUD, LABOUR STANDARDS AND THE INTEGRATION PROCESS IN THE AMERICAS (2001); Lance Compa, *Works in Progress: Constructing the Social Dimension of Trade in the Americas*, *in* THE SOCIAL DIMENSION OF ECONOMIC INTEGRATION: PAPERS SUBMITTED FOR DISCUSSION AT A UNITED STATES AND EUROPEAN UNION SEMINAR, U.S. DEPT. OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS 27-55 (Jorge Perez-Lopez et al. eds., June 2000). Best efforts have been used to ensure the accuracy and currency of the information regarding the different regional arrangements; however, the limited availability of sources means that the discussion is invariably a selective account of developments, rather than an exhaustive study of the regimes.

5. On the distinction between open regionalism and previous models, *see* Alex E. Fernández Jilberto & André Mommen, *Globalization Versus Regionalism*, *in* REGIONALIZATION AND GLOBALIZATION IN THE MODERN WORLD ECONOMY: PERSPECTIVES ON THE THIRD WORLD AND TRANSITIONAL ECONOMIES 1, 9 (Alex E. Fernández Jilberto & André Mommen eds., 1998). CARICOM, MERCOSUR, and NAFTA are not the only sources of social policy in regional trade groupings in the Americas. *See* CIUDAD REYNAUD, *supra* note 4, at 155, who offers a description of nine sub-regional integration systems, including the OAS, that have a social dimension, however broadly defined. Reynaud argues that "[e]ven though the labour provisions of the various integration systems are quite varied, they have come to make up a rather coherent and mutually complementary whole, somehow avoiding contradictory or incompatible features." *Id.* at 156. Indeed, and despite the rhetoric, the relationship between social policy and economic integration seems to be broadly accepted in the region. This study focuses on three prominent regional trade bodies, in addition to the OAS's Conference of Labour Ministers, to illustrate the breadth of social responses that are possible. From these experiences, I contend that liberalized trade that seeks to leave behind the social dimensions is out of step with the prevailing approach in the Americas.

MERCOSUR, the social dimension has developed despite only rudimentary initial provision for it in the founding treaty. The growth can be attributed to a heightened awareness that the impact of economic activity on social policy is real, and that addressing social policy can enable those in favor of regional economic integration to achieve a broader consensus through their constituents. There are signs following the financial crisis in Argentina that this broadened consensus may be crucial when a Member State is facing serious economic difficulties. In the case of CARICOM, its social dimension—present at the outset but deepening over time—reflects the particular importance of democratic development in the region. It suggests a concerted effort to draw upon the strength attained through coordinated efforts, in a manner that would preempt certain labor policy matters from becoming the basis of regulatory competition with external trading partners. In all three cases, very different regimes have developed, which may reveal as much about the way that a social dimension is conceived within each region's tradition, as it does about its commitment to ensuring that labor rights remain a clear part of the trade agenda.

Indeed, this paper argues that some of the most appreciable and innovative changes in social policy, particularly concerning the fundamental principles and rights at work, are already underway within the context of less well-known regional groupings, such as CARICOM and MERCOSUR. These regional groupings have enabled Member States to retain an ability to set regional priorities within the social policy domain and to highlight and deepen the integration of social policy in quite distinct manners, reflective of the historical, cultural, and legal traditions of each region. A textured look at what is available may provide hints at what kind of social dimension could be included within an FTAA, and perhaps more importantly, what might be desirable in light of the broad range of traditions and interests reflected by groups of the North, the Southern Cone, and the middle, which is the Caribbean Basin.

It is unequivocally acknowledged in this paper that the social dimensions currently found in each of the three surveyed regional arrangements are incomplete, strikingly unequal to the task of counterbalancing the adverse impacts of deepening economic integration. However, the more telling story is not in what is obviously missing, but in the pressures to respond by deepening and broadening the commitment to core principles, to the preservation of certain regulatory systems, and to the development of democratic participatory structures. It is argued that the recognition of the

centrality and continuous enhancement of social dimensions in regional trade (social regionalism) may provide room for regions to resist unitary visions and totalizing approaches to globalization, by creating the structures that enable them to challenge globalization through the particulars of each geopolitical space. Creative approaches to social regionalism provide credible alternatives, potentially sensitive to the broader developmental realities of nations of the South. They may do this in at least two ways. First, they turn attention back onto the particular social conditions within the various sub-regions of the Americas, and force policymakers to grapple with these disparities in a manner that is reflective of the distinct cultural contexts in the region. Second, they draw civil society actors into the process of building cosmopolitan democratic structures for social dialogue, to ensure that social policies are increasingly brought to the center of liberal trade in the Americas.

Part II of this paper therefore provides a brief exploration of the FTAA process, to illustrate how limited attention to democratic participation and social concerns have been progressively incorporated into the construction of the FTAA. It underscores the inadequacies of this approach. Part III proposes a framework that would deepen regional integration by taking into account the social dimensions of trade. "Social regionalism" is a constructive challenge to neo-liberal visions of liberalization; it recognizes the legitimacy concerns that plague integration initiatives that seek to seal out policy considerations, like fundamental labor rights. It is imagined as a concrete attempt to provide hints at a principled approach to balancing these concerns, through the construction of new spaces through which the interface between labor rights and trade policy can be reconciled. Primarily because of the dearth of readily available material on the less well known regional arrangements, Part IV highlights in some detail selected historical and institutional aspects of the creative (albeit limited) attempts at reconciling these balances that have surfaced within NAFTA, the CARICOM and MERCOSUR. It also considers the OAS' Inter-American Conference of Ministers of Labor as an example of transgovernmental participation that may reinforce the capacity of the labor regulatory state to influence the construction of a social dimension for regionalism in the Americas. The paper concludes by underscoring the need to look beyond social

dimensions to trade, to think about the inherent connection between the social and the economic, or social regionalism.[6]

II. DEMOCRACY, SOCIAL POLICY, AND THE FTAA: THE ASSUMPTION OF NAFTA PRIMACY

The FTAA negotiations were launched on the assumption that they would extend a NAFTA-like arrangement to all of the Americas, save Cuba.[7] And like the initial NAFTA negotiations, labor and environmental concerns have not been included as separate items of negotiation.[8] Rather, within the FTAA context, these concerns initially translated into broad statements of commitment to strengthen democracy,[9] promote and protect human rights,[10] and invigorate the participation of civil society, including labor.[11] Interestingly, particular

6. As discussed *infra*, the language of "social regionalism" has been coined in this paper to move beyond an acknowledgement that there are social impacts of trade to think more systemically about what it means to argue that there is an inherent link between trade and labor. *See infra*, part III. *See also* Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 53-56 (1999).

7. *See* Garcia, *supra* note 3, at 65; Christopher M. Bruner, *Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA)*, 33 U. MIAMI INTER-AM. L. REV. 1, 39 (2002) (noting that the United States initially "favored the creation of the FTAA through NAFTA expansion on a bilateral basis, which would give the United States substantial negotiating leverage over other nations in the hemisphere. This would allow the United States to position itself as a gatekeeper to the FTAA."). *See also* Roberto Aponte Toro, *La Integración en America Latina y el Caribe*, 68 REV. JUR. U.P.R. 119 (1999) (reviewing the various catalysts toward integration and the contemporary regional examples, and noting that "[e]n una medida u otra, todos miran como su modelo a la Federacion Norteamericana, siempre vista en la epoca a la vez con admiración y con temor."). *See also* Stephen Haggard, *The Political Economy of Regionalism in the Western Hemisphere*, *in* THE POST-NAFTA POLITICAL ECONOMY: MEXICO AND THE WESTERN HEMISPHERE 334-336 (Carol Wise ed., 1998) (noting the impact of the United States' role as host of the first ministerial meeting in June 1995, and Brazil's challenge to this vision).

8. *See* Jonathan S. Blum, *Comment, The FTAA and the Fast Track to Forgetting the Environment: A Comparison of the NAFTA and the MERCOSUR Environmental Models as Examples for the Hemisphere*, 35 TEX. INT'L L.J. 435, 440 (2000) (contending that labor and environmental issues were excluded from the draft list of topics to be negotiated at the request of Brazil and Mexico). There is, however, a separate proposal, modeled on Mode 4 of the General Agreement on Trade in Services (GATS) of the WTO Agreements, to cover a limited element of movement of persons, covering citizens/nationals, and possibly permanent residents of the FTAA Member States. For a brief discussion, *see OECD Working Party of the Trade Committee*, *Labour Mobility in Regional Trade Agreements,* TD/TC/WP(2002)16/FINAL (Unclassified) (Apr. 9, 2002), *available at* http://www.oecd.org. There are also bracketed items under the investment chapter. *See also* Bruner, *supra* note 7, at 50.

9. In the *Miami Summit of the Americas Plan of Action* (1994), the heads of state and government agreed to promote the OAS as the "principal hemispheric body for the defense of democratic values and institutions" and support a range of its activities. They also commit to "strengthen the dialogue among social groups and foster grass roots participation in problem solving at the local level." *Available at* http://www.ftaa-alca.org/Summits/Miami/plan_e.asp.

10. In the *Miami Summit of the Americas Plan of Action*, Governments agree only to "give serious consideration to adherence to international human rights instruments to which they are not already party," but express their intention to promote certain policies and review certain

attention is placed on the need to "[g]uarantee the protection of the human rights of all migrant workers and their families."[12]

Despite frequent pronouncements on the democratic character and shared social understandings of members of the FTAA, negotiations on a concrete social dimension are conspicuously absent from the FTAA itself.[13] The group through which broad concerns of civil society have been channeled is the Committee of Government Representatives on the Participation of Civil Society.[14] This special committee has no negotiating authority.[15]

The lack of transparency of FTAA negotiations has also reinforced the perception that democratic participation was being sacrificed and that narrow trade interests were being promoted at the expense of broader social protections. The Civil Society Committee became a site where submissions from concerned non-governmental groups disappeared, as opposed to being forwarded to the relevant negotiating committees; although summaries were issued in a public report, the process took over a year and was undertaken only after considerable pressure from the United States. There was no other public forum to enable civil society groups to make direct representations about issues of concern.[16] The broad public concern expressed about the nature of trade negotiations that crystallized with the failed Seattle WTO Ministerial Meeting in December 1999

laws relating to women's rights, the rights of minority groups and indigenous peoples, peoples with disabilities, and children.

11. Civil society is understood broadly within the FTAA context, encompassing "individuals, the private sector, labor, political parties, academics and other non-governmental actors and organizations." Whether the same rights of access are needed by each of these groups may need to be questioned. For a discussion of the difficulties of an overly broad notion of civil society, *see* Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOB. LEGAL STUD. 401, 433-440 (2001).

12. *See Miami Summit of the Americas Plan of Action*, *supra* note 9.

13. Negotiations have been concentrated in nine groups: market access; investments; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, antidumping, and countervailing duties; and competition policy. For a recent discussion of the FTAA negotiation process, *see* José Manuel Salazar-Xirinachs, *The FTAA Process: From Miami 1994 to Quebec 2001*, *in* TOWARD FREE TRADE IN THE AMERICAS 279 (José M. Salazar-Xirinachs & Maryse Robert, eds., 2001).

14. Hereinafter "Civil Society Committee."

15. *See id.* at 283.

16. *See* Scott Otteman, *Trade Policy Today: Connecting Civil Society to the FTAA/ALCA Negotiations*, *in* the LATIN AMERICAN ADVISOR, (Aug. 12, 2001) at 3, *available at* http://www.thedialogue.org/publications/laa/LAA010813.pdf; Blum, *supra* note 8, at 442 (discussing civil society disenchantment with the Civil Society Committee, as well as criticism from within the committee itself). *See also* Mario Osava, *Labor/Trade—LATAM: Unions Want FTAA Put to Popular Vote*, INTER PRESS SERVICE, BRAZIL (Dec. 15, 2000) (reporting that approximately 700 representatives of the central trade unions of MERCOSUR criticized the lack of channels for civil society participation, and called on their governments called for "the creation of an economic and social bloc in Latin America.").

culminated in broader concern about the public relations dimensions of the Québec City Summit of April 2001. In Buenos Aires, immediately prior to the Québec City Summit, civil society pressure made it necessary for the trade ministers in the hemisphere to adopt an explicitly pro-transparency posture.[17] In addition to accepting that a "democracy clause" would be a part of the future FTAA,[18] the assembled heads of state decided to enhance the role and function of the Civil Society Committee, while promoting "best practices" on two-way communication with civil society.[19] After a series of meetings, the Civil Society Committee has identified a range of changes that, although modest in actual impact, reflect a sea change in the approach of the Committee since Québec. However, they continue to pale in comparison to the participatory rights enjoyed by business consultative groups.[20]

In addition, the recent OAS Inter-American Democratic Charter,[21] with its reference to the democracy clause adopted at the Québec City Summit of the Americas,[22] and to the ILO's 1998 Declaration on Fundamental Principles and Rights at Work,[23] is a reflection of the fact that Member State governments have taken steps to address the broad concerns of a wide range of civil society actors in the region to ensure that there is a social dimension to regionalism in the Americas. The preamble invokes a large notion of democracy, reaffirming the participatory dimensions that exist in OAS countries

17. For a discussion of the Hemispheric Social Alliance's "liberate the text" campaign, *see* http://www.asc-hsa.org.

18. *See* Bruner, *supra* note 7, at 11.

19. *See* Miami Ministerial Declaration, Nov. 20, 2003, Eighth Ministerial Meeting, *available at* http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp; Declaration of Nuevo León, Special Summit of the Americas, Monterrey, Mexico, Jan. 13, 2004, *available at* http://www.ftaa-alca.org/Summits/Monterrey/NLeon_e.asp.

20. For a discussion of the latter, *see* Mark Barenberg & Peter Evans, *The Impact of the Free Trade Area of the Americas on Democratic Governance*, *in* THE FTAA AND BEYOND: PROSPECTS FOR INTEGRATION IN THE AMERICAS (Dani Rodrik et al. eds., 2003).

21. Inter-American Democratic Charter, ORGANIZATION OF AMERICAN STATES (OAS), adopted by the General Assembly (Sept. 11, 2001), *available at* http://www.oas.org/charter/docs/resolution1_en_p4.htm. César Gaviria has commented on the powerful symbolism of the date of signature: "Además, la adopción de la Carta Democrática Interamericana en Lima, el mismo día que se realizaban los ataques terroristas en los Estados Unidos . . . constituyó un acto lleno de simbolismo. Representó un rechazo al terrorismo y la reafirmación de la voluntad de los Estados miembros de la OEA de fortalecer y afianzar los valores democráticos en el Continente americano." *See* César Gaviria, Discurso del Secretario General de la Organization de los Estados Americanos, en la Duodécima Conferencia Interamericana de Ministros de Trabajo, OEA/Ser.K/XII.12.1/TRABAJO/doc.22/01/18octubre 2001. Original in Spanish. *See also* the *Quito Declaration on the Enforcement and Realization of Economic, Social, and Cultural Rights in Latin America and the Caribbean*, 2 YALE HUMAN RTS. & DEV. L.J. 215 (1999) (which was signed by a range of civil society actors on July 24, 1998).

22. *Id.* at Preamble and Art. 19.

23. *Id.* at Art. 10.

in "different aspects of public life"; the Charter affirms that "democracy and social and economic development are interdependent and are mutually reinforcing."[24] Certainly, its provisions establishing mechanisms to strengthen and preserve democratic institutions focus on risks to democracy in the context of political exercises of power/political institutions, "unconstitutional alteration[s] of the constitutional regime that seriously [impair] the democratic order in a member state,"[25] and additional measures address the issue of observation missions for elections.[26] The role given to the broader range of democracy-building characteristics in the OAS region is essentially promotional.[27]

The shortcomings of these developments are obvious in an integration process that has marshaled considerable negotiating efforts into a daunting range of market-access initiatives, which, like the Uruguay Round single undertaking and NAFTA far exceed traditional approaches to trade in goods to deepen the extent of market access to comprise substantial non-tariff barrier concessions[28] and broaden it to encompass intellectual property rights,[29] trade in services[30] and investment-related measures.[31] Caution about the ability of a social dimension to act as a counterbalance to a decidedly neo-liberal model is therefore warranted.

However, there is more to the picture; an essential part of that picture includes recognizing the extent to which legitimacy claims have led to changes in the FTAA process. In part through the growing institutionalization in FTAA negotiations of the "process of

24. *Id.* at Art. 11.
25. *Id.* at Arts. 17-22.
26. *Id.* at Arts. 23-25.
27. *Id.* at Arts. 26-28.
28. *Agreement on Subsidies and Countervailing Measures*, 33 I.L.M. 1125 (1994), *Annex IA, to the Marrakesh Agreement Establishing the World Trade Organization*, 33 I.L.M. 81 (1994).
29. *See Agreement on the Trade Related Aspects of Intellectual Property Rights*, 33 I.L.M. 81 (1994). *See also* WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted Nov. 14, 2001, *available at* http://www.wto.org; WTO Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, adopted Nov. 14, 2001, *available at* http://www.wto.org. For an analysis, *see* Frederick W. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 JIEL 269 (2002).
30. *See General Agreement on Trade in Services*, 33 I.L.M. 44 (1994).
31. *Agreement on Trade Related Investment Measures Agreement*, *in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE Negotiations 143-146 (1999). Although the TRIMS is quite basic, NAFTA, ch. 11 provides extensive, highly controversial investor protections. *See* the discussion *infra*, Part IV. *See also* Jill Soloway, *Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11*, 33 CAN. BUS. L.J. 92 (2000).

summitry"[32] and the protests that surround summits,[33] Member State governments have had to show some commitment to "stimulate prosperity, promote social inclusion and a more equitable distribution of economic growth, eliminate hunger, raise living standards, generate new employment and investment opportunities, and promote decent work."[34] While the extent of the commitment to a deep development of these issues via regional fora needs to be ascertained and continually challenged, the point remains that the process of summitry has engendered a series of cross-border relationships and interactions for future "cooperation and interdependence among the countries in the Americas."[35] This paper seeks to establish that the fluid framework holds the seeds for a different form of integration, one that is more robust because it recognizes interconnections, and seeks to address in a systematic fashion the social dimensions of regionalism in the Americas.

III. TOWARD SOCIAL REGIONALISM: FRAMEWORK FOR A TEXTURED APPROACH TO LABOR RIGHTS IN THE AMERICAS

Social regionalism may be considered a response: a response to the impact of trade liberalization on social conditions, including vulnerable regions.[36] The Washington Consensus promised growth and development on the basis of privatization, trade, and investment liberalization, and tight fiscal and monetary discipline.[37] And although

32. *See* Salazar-Xirinachs, *supra* note 13, at 294.

33. For the positions on the Hemispheric Social Alliance and the U.S.-based Alliance for Responsible Trade, *see generally* http://www.art-us.org.

34. Declaration of Nuevo León, *supra* note 19.

35. Salazar-Xirinachs, supra note 13, at 294. *See also* Elizabeth Jelin, *Cultural Movements and Social Actors in the New Regional Scenarios: The Case of Mercosur*, 22 INT'L POLIT. SCI. REV. 85, 87 (2001) [hereinafter "Jelin, *Cultural Movements*"] (noting in relation to MERCOSUR that, despite the lack of formal negotiating room, "the enormous amount of activity involved in the formal negotiations for integration has imparted a new dynamism to social actors traditionally outside of or excluded from such negotiations"). As Jelin also notes, "underlying the explicit subjects of negotiation there is another level of meaning linked to the cultural and subjective dimensions of such integration projects, the actions of other social agents (which may be excluded from the formal negotiations) and other arenas of social action and dialogue outside the formal negotiating structures." *See* Elizabeth Jelin, *Dialogues, Understandings and Misunderstandings: Social Movements in MERCOSUR*, 159 ISSJ 37, 38 (UNESCO, 1999) [hereinafter, "Jelin, *Dialogues*"].

36. These concerns are the basis of the first paper in this trilogy. *See* Blackett, *supra* note 6.

37. Economist John Williamson attached the label, "the Washington Consensus" to this set of policies, to recognize that the backing of the U.S. Treasury Department and the Washington-based and heavily U.S.-funded Bretton Woods institutions. *See* John Williamson, *What Washington Means by Policy Reform*, *in* LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 5 (John Williamson ed., 1990); *see also* John Williamson, *The Washington Consensus Revisited*, *in* ECONOMIC AND SOCIAL DEVELOPMENT INTO THE XXI CENTURY (Louis Emmerij ed., 1997).

the original Washington Consensus arguably contained a social component that was subsequently marginalized,[38] it has come to be epitomized as the neo-liberal solution, indiscriminately and fervently applied, but yielding disappointing results.[39] In a well-received critique of this model in the Latin American context entitled *Washington Contentious*, senior World Bank economist, Augusto de la Torre and Carnegie Endowment for International Peace senior associate Nancy Birdsall argue for a reconceptualization of the 10-point Washington Consensus, to give teeth to the discernible shifts in policy discourse emanating from major international institutions. Among the proposals, crafted with particular attention to Latin America, is "protecting workers' rights."[40]

Social regionalism recognizes that the link between trade and social policies, particularly labor policies, is inherent;[41] as a result, an economic agenda for the FTAA that fails to take into account the social dimensions of trade is invariably inadequate. Social regionalism takes seriously the fact that, in trade law, labor is considered to be a factor of production.[42] It recognizes that labor markets vary widely

38. *See* NANCY BIRDSALL & AUGUSTO DE LA TORRE, WASHINGTON CONTENTIOUS: ECONOMIC POLICIES FOR SOCIAL EQUITY IN LATIN AMERICA 4-10 (2001). In their reformulation of the Washington Consensus, the authors insist on the need for a "10+1" approach, the "Plus 1" being the reduction of rich-country protectionism: "Rich countries' barriers to agriculture and textile imports aggravate poverty and reinforce inequality in Latin America. Lowering them will do the reverse." *Id.* at 14.

39. A recent relevant critique is, of course, its application in Argentina. *See* Aurelio Martínez Estévez, *El Laberinto Argentino*, EL PAIS, Jan. 8, 2002, at 13 ("O la irresponsabilidad del FMI y de los economistas de la ortodoxia, cuyo única receta para Argentina pasaba por exigir una dolarización plena, reducir el deficit público y una mayor flexibilidad de los mercados."). *See also* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

40. According to the authors, "The poor bear the cost of a job contracting environment that has too little worker protection and too many legal rules. Latin America needs more aggressive protection of workers' rights of association and collective bargaining, more independent and democratic unions, and more social protection to replace inflexible rules that discourage job mobility and growth." *Id.* at 13. Protecting workers' rights is discussed in more detail in Part 2, chapter 7 of their report. Unfortunately, however, the chapter proposes dramatic reorientations of the labor regulatory frameworks in Latin America, without drawing on the experiences of the ILO in re-regulating labor market institutions in a way that reconciles productivity and workers' rights. The authors also list the need to deal openly with discrimination and providing automatic social safety nets as elements of the reformulation. *Id.* at 12-14.

41. *See* Brian Alexander Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE—LEGAL ANALYSIS 231, 236 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); JAIME BEHAR, COOPERATION AND COMPETITION IN A COMMON MARKET: STUDIES ON THE FORMATION OF MERCOSUR 4, 77-78 (2000) (asserting the impact of trade on employment in MERCOSUR countries). *See also* Adelle Blackett, *Defining the Contemporary Role of the State: WTO Treaty Interpretation, Unilateralism and Linkages*, *in* TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: CONFLICT AND COHERENCE 289 (Chi Carmody et al. eds., 2003).

42. *See* Américo Plá Rodríguez, *Problématica de los Trabajadores en el Mercosur in ILO/Relasur*, *in* EL DERECHO LABORAL DEL MERCOSUR 34 (1994) (expressing the concern that

across the region, as do labor costs. While it accepts that the cost of labor can be a legitimate source of comparative advantage,[43] it also recognizes that within the notion of comparative advantage a principled stopping point is needed[44] to ensure that labor is not commodified.[45] In the process, it recognizes the extent to which comparative advantage, to be meaningful, is itself a constructed notion.[46] Fundamental principles and rights at work,[47] despite critiques of their scope,[48] provide a principled starting point for defining a minimum core of standards on which competition should not be considered legitimate.[49]

In a region emphasizing trade between developing and industrialized countries, within which trade-related sub-regional disparities and disparities within regions of individual countries are accentuated and winners and losers shift and overlap, it accepts the complex impact of liberalization and the need for a robust approach to distributive justice resulting from trade.[50] These distributive justice concerns have to be thought of in terms that exceed the limited confines of a single "nation state" on which discussions of embedded

by seeking to regulate labor in the Mercosur context through the window of the free movement of persons, labor would become increasingly commodified).

43. For a discussion of the empirically inconclusive nature of the concerns over a "race to the bottom" and a critique of "social dumping" concept, *see* Mark Barenberg, *Federalism and American Labor Law: Toward a Critical Mapping of the "Social Dumping" Question*, *in* HARMONIZATION OF LEGISLATION IN FEDERAL SYSTEMS 93 (Ingolf Pernice ed., 1996). *See also* the discussion in Blackett, *supra* note 6, at 48-52. For a challenge to the assumption that low labor standards necessarily imply low labor costs, *see* OECD, Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade 80-82 (1996) (finding a mutually supportive relationship between successful trade liberalization and improved freedom of association rights).

44. *See* Langille, *supra* note 41, at 247. For a discussion of this notion within the NAFTA framework, *see* Marie-Ange Moreau & Gilles Trudeau, *La clause sociale dans l'Accord de Libre-échange Nord-Américain*, *in* XX RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 393, 397-399 (1996).

45. International Labour Organization Constitution, June 28, 1919, 49 Stat. 2712, 225 Consol. T.S. 378.

46. *See* Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29 (1995).

47. *See* ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted June 18, 1998, 37 I.L.M. 1233.

48. *See* Blackett, *supra* note 6, at 26-34.

49. Within that core of fundamental principles and rights at work, some of the principles can already be considered to have attained the status of *jus cogens* norms. *Id.* at 76-78; Adelle Blackett, *Mapping the Equilibrium Line: Fundamental Principles and Rights at Work and the Interpretive Universe of the WTO*, 65 SASK. L. REV. 369, 382 (2002). *See also* Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 694 (1997).

50. *See* Blackett, *supra* note 41, at 284-289. *See also* Alexandra Maravel, *Constructing Democracy in the North American Free Trade Area*, 16 NW. J. INT'L L. & BUS. 331 (1996).

liberalism tend to be based.[51] In other words, although under a vision that imagines distributive justice as essentially a domestic policy matter, trade specialist Robert Howse would be accurate to argue that "there may be good reasons of principle and/or policy to place a higher value on the avoidance of catastrophic losses to a small vulnerable group (for example, textile workers in Quebec) than on gains dispersed among millions of consumers (slightly lower prices for shirts and blouses),"[52] this approach overlooks the broader distributive justice considerations that are relevant in a trading environment that genuinely seeks to be open to trade that is beneficial to developing countries. In the disparate Americas, this may mean accepting that more vulnerable workers in small developing countries in robustly democratic Caribbean states, who earn a living wage, and whose labor rights are protected, but whose entire livelihood and that of their extended families depends on being able to supply garments to the Canadian and U.S. markets at a cost below that of garment workers in Quebec should in fact be privileged, from a distributive justice perspective. This is not to minimize the impact of the dislocations in a country like Canada, nor is it meant to suggest that the largely immigrant women who were segmented into the textile manufacturing industry in urban centers like Montreal should be abandoned; however, it poses the hard question of how to address adjustments in a way that recognizes that a country like Canada is relatively better able to provide adjustments than a country like Barbados, and may need to be willing to assist in adjustment costs, not only for itself, but jointly to ensure that trade impacts do not devastate small developing countries either. Equitable approaches to adjustment costs of trade are a crucial part of the regional liberalization project.

Labor regulatory frameworks, and broader redistributive policies attuned to the realities of different domestic contexts, gain their theoretical justification from the regulatory initiatives of the state, and

51. *See* John Gerard Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INTERNATIONAL ORGANIZATION 379 (Spring 1982) (analyzing how capitalist countries reconciled the efficiency of markets with the values of social community needed by markets to survive and thrive), drawing on KARL POLANYI, THE GREAT TRANSFORMATION (1944). For a recent application to trade law, *see* Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AJIL 94 (2002). For a compelling case of the need to view embedded liberalism transnationally, *see* John Gerard Ruggie, Taking Embedded Liberalism Global: The Corporate Connection (Unpublished Paper presented on the keynote panel, International Relations Theory and Global Governance, American Political Science Association, Annual Meeting, Boston, August 31, 2002) (copy on file with the *Comparative Labor Law & Policy Journal*).

52. *Id.* at 99.

the pluralist engagements of the "social partners,"[53] to prevent the commodification of labor. Trade agreements—in particular dispute resolution—have had a significant impact on a range of governmental policy initiatives, yet labor remains a field over which nation states seek to retain their domestic control (or sovereignty).[54] In the increasingly invasive trade law landscape, the effectiveness and applicability of labor regulatory frameworks are invariably challenged; the changing structure of labor markets engenders new regulatory pressures. Transnational solutions are increasingly sought, particularly by civil society actors who tend to perceive that economic liberalization generally—and trade treaty interpretation more specifically—are restricting nation states' ability to exercise the sought-after control over labor rights. That the regulatory pressures are often accompanied by a marked ideological shift away from state action toward that of presumably more "efficient" forms of governance creates additional pressures for re-regulation, pressures which are themselves highly questionable.[55]

Two contemporary examples illustrate these regulatory challenges. First, for some countries that would be a part of the FTAA, particularly small open economies such as the majority of CARICOM Member States, the Reports of trade decision-makers can have a devastating impact, not only on particular industries but on the industrial and employment policies of entire economies. The impact of the WTO's EC—Bananas Reports[56] on several eastern Caribbean

53. For a critical discussion of the participation of representatives of employers and workers in labor regulatory initiatives, *see* Blackett, *supra* note 11, at 433-440.

54. *See* Donald M. McRae, *The Contribution of International Trade Law to the Development of International Law*, *in* RECUEIL DE COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 99, 192-93 (1996).

55. *See* Blackett, *supra* note 11, at 418-423, 428-432.

56. GATT Panel Report, *EEC—Member States Import Regimes for Bananas* DS32/R (June 3, 1993); GATT Panel Report, *EEC—Import Regime for Bananas* DS38/R (Feb. 11, 1994); WTO Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/R/USA (Sept. 9, 1997); WTO Panel Report, *European Communities—Regime for the Importation, Sale & Distribution of Bananas* (Complaint by Guatemala) Doc. WT/DS27/R/GTM (Sept. 25, 1997); WTO Panel Report, *European Communities—Regime for the Importation, Sale & Distribution of Bananas, Appellate Body Report*, Doc. WT/DS/27/AB/R (Sept. 25, 1997); WTO Panel Report, *European Communities—Regime for the Importation, Sale & Distribution of Bananas—Recourse to Article 21.5 by the European Communities*, Doc. WT/DS27/RW/EEC (Apr. 12, 1999); WTO Panel Report, *European-Communities—Regime for the Importation, Sale & Distribution of Bananas—Recourse to Article 21.5 by Ecuador*, Doc. WT/DW27/RW/ECU (Apr. 12, 1999); WTO Panel Report, *WTO European Communities—Regime for the Importation, Sale & Distribution of Bananas—Recourse to Arbitration by the European Communities Under Articles 22.6 of the DSU, Decision by the Arbitrators*, Doc. WT/DS27/ARB (Apr. 9, 1999); WTO Panel Report, *European Communities—Regime for the Importation, Sale & Distribution of Bananas—Recourse to Arbitration by the European Communities Under Articles 22.6 of the DSU*, Decision by the Arbitrators, Doc. WT/DS27/ARB/ECU (Mar. 24, 2000).

countries[57] is but one of the most palpable examples. By deciding that the non-reciprocal trading arrangement that allowed preferential entry of bananas of former colonies of primarily Britain and France into the EU over the generally less costly "dollar bananas" produced primarily by U.S. multinational corporations based in countries like Colombia[58] and Guatemala, the WTO's decision ran the risk of crippling certain small nation states that depended almost exclusively on those access rights. Liberal trade restricts from its mandate the conditions under which the bananas were produced, unless an assertion can be made that, as a result, they are not "like products."[59] No other mechanisms are embedded in multilateral liberal trade to ensure that the adjustment toward greater liberalization is compensated. And, although one can certainly question the history of colonial-preferences that underlie many modern incarnations of non-reciprocal trade preferences in the first place, it is indeed unsettling that the "losers" are the countries that have strong democratic traditions and relatively robust labor standards; moreover, one of the goals of the Lomé/Cotonou arrangements under which the preferences were accorded is to promote respect for human rights.[60] Arguably the cost of the bananas in the affected Caribbean countries reflects a more legitimate valuation of the product, one that seeks to factor in the social costs.[61] Some of the "winners," on the other hand, face a litany of complaints about the conditions under which their "dollar bananas" are produced, and have had histories of

57. The decision, of course, affected a broader range of banana exporting countries, including in parts of Africa. The affected group is constituted under the Lomé Conventions of the time, and the current Cotonou Agreement, as the African, Caribbean and Pacific Group. *See* Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, signed June 23, 2000, *available at* http://europa.eu.int/eur_lex/fr/archive/2000/1_31720001215fr.html.

58. For a good overview, *see* Robert Read, *The Anatomy of the EU-US WTO Banana Trade Dispute*, 2 ESTEY CENTRE J. INT'L L. & TRADE POL. 270 (2001) (*available at* http://esteyjournal.com)(chronicling how Colombia and Costa Rica in particular became supporters of the WTO case, as a result of U.S. pressure).

59. So far, this determination has been made in relation to the difference between a proven cancer-causing substance, asbestos, and other products that would be used largely for construction-related activities. *See* WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (Complaint by Canada), Doc. WT/DS135/AB/R; 40 I.L.M. 1193 (2001) [hereinafter Asbestos Appellate Body Report].

60. *See supra* note 57. This dimension is not without controversy. *See* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

61. *See* Press Release, International Confederation of Free Trade Unions, International Unions Urge WTO to Consider Social Issues Behind Banana Dispute, (Mar. 9, 1999) (*available at* http://www.icftu.org). For detailed, critical information on the social and environmental aspects of the banana trade, *see* http://www.bananalink.org.uk.

undemocratic practices linked in part to U.S. multinationals in the banana trade.[62] A robust social regionalism within the FTAA context, encompassing both the regional "winners" and the "losers" in this case,[63] and including the home country of the major multinational enterprises that lobbied for the WTO challenges, would need to address the social dimensions of this kind of conflict to arrive at a solution that satisfies the demands of deep integration.

Not only is social regionalism an attempt to address the profound effects that the trade liberalizing decisions of dispute resolution bodies can have on domestic policy. It is also a response to the growing impact of foreign direct investment within the region. One concrete published example of this lies in the pressure faced by individual Caribbean states in relation to multinational enterprises, particularly in industries for which it is particularly dependent. According to a report submitted pursuant to the ILO's Tripartite Declaration on Multinational Enterprises, in 1999, a major investor intimated that it would relocate to a neighboring island if the labor relations practice of trade union recognition were applied to its enterprise. The investor apparently came from the Wagner Act tradition, in which certification, mediated by quasi-judicial bodies, was required for a union to represent workers. Management hostility toward unionization, and the virtual contest approach to a unionization drive, invariably accompanied by a proliferation of unfair labor practices and lengthy litigation, are all reasons that partially account for low unionization levels in the United States in particular and, to a more limited extent, in Canada. In the English-speaking Caribbean, however, the British tradition of voluntary recognition was followed. As the clash of industrial relations cultures came to the fore, Caribbean nation states recognized quickly that to compete on the basis of labor regulatory systems would set into place pressures favoring a race to the bottom. In the particular example in question, the heads of government met within the CARICOM framework and came to an agreement that the prospective investor and employer would be unwelcome within the territory of any CARICOM Member State, should it seek to transfer its operations. Under those

62. *See, e.g.*, Catherine C. LeGrand, *Living in Macondo: Economy and Culture in a United Fruit Company Banana Enclave in Colombia*, *in* CLOSE ENCOUNTERS OF EMPIRE: WRITING THE CULTURAL HISTORY OF U.S.-LATIN AMERICAN RELATIONS, 333-368 (Gilbert M. Joseph, Catherine C. LeGrand, & Ricardo D. Salvatore eds., 1998).

63. *See* Marsha A. Echols, *Regional Economic Integration*, 31 INT'L LAW. 453, 455 (1997) (noting that "[I]n spite of a dispute between Caribbean and Central American countries about banana trade with the EU, these constituencies and the Latin countries continued discussions in the 25-member Association of Caribbean States.").

conditions, the employer ultimately decided to stay within the initial island, and accept the unionization initiative.[64] The labor law harmonization project described below[65] provided a way for Caribbean countries to work through principles that were central to their industrial relations systems, arrive at agreement on broad approaches, but leave room for individual Member States to adopt the legislation as they see fit, to account for local conditions, and to render explicit local labor relations practices for an increasingly diversified set of investors. Social regionalism seeks to create the conditions to enhance this kind of action, while extending it to the broader construction of the historically sought-after but infinitely challenging hemispheric project.

Social regionalism that tackles the framework through which these two kinds of examples can arise holds the potential to respond to the perception of globalization as inevitable and ineluctible.[66] Recognizing that "[globalization]. . . is not just everything we know, or can predict, writ large"[67] underscores the point that "the underlying processes vary tremendously, as do the policy implications. Talk of globalization is not mere value-neutral description."[68] While it is crucial to avoid overstating the potential importance of a social dimension within a framework that has had at its core a particular neo-liberal vision of economic integration,[69] it is also crucial to investigate the sites at which a challenge to a totalizing vision of globalization through trade liberalization may manifest itself.[70] Regional reorganizations of economic relations provide important

64. *See* ILO Governing Body, Subcommittee on Multinational Enterprises, *Summary of Reports Submitted by Governments and by Employers' and Workers' Organizations for the 7th Survey on the Effect Given to the Tripartite Declaration of Principles Concerning Mulitnational Enterprises and Social Policy*, G B.280/MNE/1/2, 280th Session, Geneva, Mar. 2001 (Part II) at 301, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb280/pdf/mne-1-2.pdf.

65. *See infra*, Part IV.B.2.

66. For a discussion of this vision of globalization, *see* Adelle Blackett, *Globalization and its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 58 (1998).

67. *Id.* at 65.

68. *Id.* at 65-66.

69. *Id.* at 66 (noting the potentially provocative role of "careful juxtaposition" but warning against the "danger of reductionist analysis. . . when, for example, the activities of transnational corporations (TNCs) are not merely compared but equated with those of TANGOs, or when the flow of capital through foreign direct investment is deemed to be of parallel importance with the flow of migrant labor.").

70. *See, e.g.*, Michael Niemann, who argues that in the wake of the "crisis of Fordism as a governing mode of social regulation . . . [g]lobalization represents the search for an alternative mode of social regulation of capitalism and regionalization is one manifestation of this search," MICHAEL NIEMANN, A SPATIAL APPROACH TO REGIONALISMS IN THE GLOBAL ECONOMY 16 (2000).

sites at which this rethinking can occur, yet analyses of regional developments have been few.[71]

Social regionalism is meant to suggest that the FTAA must contain more than the bare cloth of a free trade agreement;[72] instead, it must contain at least the threads that can begin to bind the area into a community that is able to address many of the considerations that render deeper integration meaningful. While this recognizes that the FTAA does not aspire to be more than a "free trade" arrangement, it equally recognizes that "it makes little sense to assess regionalism solely in terms of some fixed notion of "free trade" if regionalism represents a political dialogue aimed precisely at calling that concept into question."[73] Indeed, the diverging positions promoted by and between industrialized and developing countries, and sub-regional groupings in the Americas; the recognition of the limits of the multilateral system and the WTO's own attempts to promote a development agenda; and the sustained and increasingly influential critique by a broad constituency of civil society actors in the regional context[74] all act as challenges to a narrow neo-liberal trade agenda that discredits a mere "add-on" approach to regionalism in the Americas. This analysis challenges the assumption that market integration occurs autonomously of state action;[75] indeed, the massive marshalling of state regulatory action (executive or legislative)

71. *See* Nicola Phillips, *Regionalist Governance in the New Political Economy of Development: "Relaunching" the Mercosur*, 22 THIRD WORLD QUARTERLY 565, 565 (2001) (arguing that "regionalism—or the regional reorganization of development, capitalism, or governance—constitutes a pivotal dimension in the new political economy of development, but one which frequently is neglected").

72. *See* Alan C. Swan, *The Dynamics of Economic Integration in the Western Hemisphere: The Challenge to America*, 31 U. MIAMI INTER-AM. L. REV. 1, 4 (2000) (taking the argument much further to suggest that the text of the FTAA must be "a charter of fundamental domestic economic reform along neo-liberal, or more accurately, modern capitalistic lines" including foreign investor rights, modern intellectual property laws, competition policy. Interestingly Swan also considers a social justice component to this charter, to include workers' rights, notably "carefully crafted labor laws which allow for the collective expression by workers of their legitimate grievances without destroying the competitive capability of the very institutions upon which their jobs depend"; as well as a "reasonably progressive income tax"; "effective health and product safety legislation that fairly balances the users need for protection against the producers need to stay in business."); Robert Wolf, *The Regionalist Answer*, 9 MINN. J. GLOBAL TRADE 610, 621 (2000) (positing that "[a] regional economy cannot be sustained by the fact that people occupy a particular area. The ties that create community are those that cannot be quantified, including fair dealing and respect, but these bonds are developed as a regional consciousness and a sense of interdependence are deepened.").

73. *See* Bruner, *supra* note 7, at 68.

74. *See, e.g.*, Naiomi Klein, *A Fete for the End of the End of History*, THE NATION, Mar. 19, 2001, *available at* http://www.thenation.com (arguing that the annual World Social Forum held in Porto Alegre, Brazil is an occasion for serious thinking about alternatives to a particular pro-democracy vision of globalization and highlighting the role of the French coalition between unions, farmers and intellectuals like Susan George, ATTAC).

75. For an excellent critique of this view, *see* Paul, *supra* note 46, at 30.

entailed to secure multilateral and regional trade arrangement also challenges that assumption. Situating the integration process back into a framework that acknowledges that legislation is necessary "to reframe markets. . . in order to counter their indeterminacy and the massive social and environmental costs they sometimes generate,"[76] David Held argues for

> new regulatory terms – about child labour, trade union activity, social matters (such as childcare and parental leave) and environmental protection – into the articles of association and terms of reference of economic organizations and trading agencies. Only by introducing new terms of empowerment and accountability throughout the global economic system, as a supplement and complement to collective agreements and welfare measures in national and regional contexts, can a new settlement be created between economic power and democracy.[77]

Part of challenging a flattened, unidirectional vision of globalization is precisely to assert that the specificity of different countries and sub-regions within the Americas deserves attention[78] and must be accommodated within broader liberalization frameworks. This process is far from automatic,[79] but instead requires dedicated policies to achieve the harmonious realization[80] of these aims. The current attention within the WTO context to the compatibility of the WTO Agreement with development objectives[81] underscores the

76. *See* David Held, *Regulating Globalization? The Reinvention of Politics*, 15 INT'L SOCIOLOGY 394, 405 (2000).

77. *Id.*

78. *See* Elizabeth Iglesias, *Identity, Democracy and Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 583-84 (1999); Jelin, *Dialogues*, *supra* note 35, at 37-38; Jelin, *Cultural Movements*, *supra* note 35, at 90.

79. *See* Jelin, *Cultural Movements*, *supra* note 35, at 89.

80. For a discussion of the various bases on which harmonization claims may be made, and the relative strength of the assertions, *see* David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, *in* 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?—ECONOMIC ANALYSIS 41 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

81. *See* the Doha Ministerial Declaration, *supra* note 29 and ongoing negotiations in the so-called "development round." This attention to development concerns has also notably led to criticisms by leading mainstream trade lawyers and economists of attempts to engage trade linkage issues that fail to grapple with the considerations of developing countries, and to incorporate the voices of developing country participants. *See* José E. Alvarez, ed., *Symposium: The Boundaries of the WTO*, 96 A.J.I.L. 1-158 (2002), notably critiques by John H. Jackson, *Afterword: The Linkage Problem—Comments on Five Texts*, 96 A.J.I.L. 118, 118 (2002) ("One can also regret the absence of certain important viewpoints in this set of articles, particularly the absence of a representative of a developing, or least-developed, country"); Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 A.J.I.L. 126, (2002) (excepting Dean David Leebron's contribution, *Linkages*, 96 A.J.I.L. 5 (2002) from this critique with generous praise for his "splendid clarification of several aspects of linkage," but categorically asserting that "I suspect that Professor John Jackson shares my frustration, as when he regrets the omission of a paper in the symposium with a developing-country perspective, that almost none of the papers come to

importance of looking at the particulars of the countries that sign on to trade agreements.[82] To be successful, this must entail looking beyond the sameness attributed to the act of signature and ratification of an international agreement, to identify what is required for compliance that enhances the Member State's ability to meet both the terms and the objectives of the Agreement. In the case of the WTO, this includes "with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income"[83] as well as "the objective of sustainable development."[84] In the case of the FTAA, this arguably must include the democratic considerations and broader range of social concerns that the Members articulate in their Plans of Action. If the objectives of regionalism in the Americas are to be meaningful, then they must also hold the potential to lift assessments of the FTAA's effectiveness out from under the interminable, and invariably un-resolvable debate over whether regionalism promotes or impedes multilateral trade;[85] they acknowledge that the range of goals of regional trade may, indeed should, be different from those of the current multilateral trading system. The challenge then is to reconcile the global policy approaches to the particular social conditions of the reconstructed FTAA region. Social regionalism similarly seeks to reconcile regional economic development strategies to fundamental international human rights commitments, particularly, but not exclusively,[86] in the labor

terms with the important North-South divide that cuts across the corporations-nongovernmental organizations (NGOs) divide that exclusively dominates the perspectives . . . . That the richest and most active NGOs are based in the North, and that many of their positions generally tend to ignore the viewpoints of the NGOs, intellectuals and governments of the South, has long been known to anyone who cares to step out into the real world or, failing that, has bothered to familiarize herself with the legal, economic, political, and policy literature on the subject.").

82. *See* the recent partnership agreement between the Inter-American Development Bank and the WTO, *available at* http://www.wto.org for a recognition of the importance of aligning regional development initiatives to trade strategies.

83. See *Preamble, Marrakesh Agreement Establishing the World Trade Organization*, *supra* note 28.

84. *Id. See also* WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products ¶ 129, 38 I.L.M. 154-55 (1998) [hereinafter Shrimp Turtle Appellate Body Report] (deciding that the term "exhaustible natural resource" in Article XX(g) of the GATT 1994 should be interpreted in a manner that reflects the ordinary meaning in contemporary context, thus in keeping with the objective of sustainable development).

85. Even experts who have recently concluded that regional trade agreements in the Americas have not discouraged participants in their pursuits of multilateral negotiations add that there are other significant factors in the quest for regional agreements. *See* Annette Hester & Eugene Beaulieu, *Trade Agreements in the Americas: Regionalism Converging to Globalization*, 1 ESTEY CENTRE J. INT'L L. & TRADE POLICY 108, 118 (2000). *See also* Phillips, *supra* note 71, at 565, 581 (challenging the universal application of the "building blocks" view of regionalism in relation to globalization aims).

86. *See* Michael J. Trebilcock, Trade Policy and Labour Standards: Objectives, Instruments and Institutions, University of Toronto Faculty of Law, Law and Economics Research Paper No.

context. This entails ensuring that commercial rights of access are balanced with the construction of viable social policy. A social regionalism in the Americas might therefore encompass, for the purpose of creating trade relationships that are sustainable over the longer term, acceptance of a level of asymmetry, within which dominant trade actors like the United States and Canada agree to open their markets to goods and services that are within the clear comparative advantage of the smaller developing Member States at a faster pace than with other Member States.[87] Social regionalism would also recognize that there are competing claims to economic rights of development, ensuring that any notion of development espoused within regional agreements include its social components.

To make this objective realizable, both the globalization rhetoric that forecasts the disappearance of the nation state, and the paradoxical state-centered focus of multilateral trade are both de-centered when regionalism is considered. Regionalism provides an opportunity to consider the various spaces, some new, some old, and some reformulated, through which liberalization is mediated. Indeed, as international relations scholar Michael Niemann has argued, regionalism should be seen as "a process of constructing a new layer in global social space, a layer which does not have the kinds of ambiguous continuities of the state layer, a layer which in its makeup reflects the constitutive desires and needs of those social forces which can no longer operate properly in the contexts of existing layers."[88] Yet Niemann does not argue that the layers of the state or the multilateral need to disappear, or conflict with regionalism; rather, he envisages a process of continuity between layers.[89] Within the regional context, where the goals of regionalism are much broader than mere economic prosperity,[90] mechanisms to achieve deep compliance have as a sine qua non consideration of the social

02-01 (*available at* http://ssrn.com/abstract_id=307219) (justifying a broad approach to obtaining a "social clause" multilaterally).

87. *See* Garcia, *supra* note 3, at 94.

88. *See supra* note 70, at 90. *See also* Held, *supra* note 76, at 397-398 (affirming that in the transformation of state power, "any description of this as a simple loss or diminution of national powers distorts what has happened" as states not only initiated fundamental changes like "deregulation" but have also initiated new forms of collaboration; regional governance is one way by which states survey, mediate and manage these developments).

89. *Id.*

90. *Id. See also* Robert K. McCleery, *US Promotion of Regional Integration: Interests and Perceptions*, *in* COOPERATION OR RIVALRY? REGIONAL INTEGRATION IN THE AMERICAS AND THE PACIFIC RIM 52, 72 (Shoji Nishijima & Peter H. Smith eds., 1996) (arguing that an FTAA is not necessarily in the best economic interests of the United States, and that on economic grounds, the United States should prefer more economic integration with Asia and selective economic integration with Latin America).

dimensions of regionalism. And part of the regionalism question is where, in an increasingly integrated environment, certain crucial social questions are appropriately addressed.[91]

Within the regional context, deep compliance must then entail an evaluation of the importance of a textured approach to individual countries' productive capacity, while respecting the fundamental character of certain social protections, notably in the area of fundamental principles and rights at work. Social regionalism suggests that FTAA Member States need to be attuned to the specificity of the states and sub-regions that fall within its territorial scope. This sensitivity must include careful consideration of the dominant approaches to the role that labor relations may have played in the construction/reform of the various states and regions, particularly surrounding independence from former colonial powers, and in subsequent attempts in much of Latin America to move toward broadly democratic forms of governance. The vast differences between voluntarist, citizenship-based/corporatist and workplace democracy/Wagner Act models that all exist and interact in the Americas need to be taken into account when regional social dimensions are being considered. These concerns must take into account—but go beyond—the impact of the different existing legal traditions in the Americas, and the important differences between and within countries in the Americas that have received them.

In this sense, social regionalism may also provide another way to look at the question of regionalism: that is, regional integration as an opportunity to recreate/buttress/reconsider the regulation of social policy, in light of the tremendous restructuring and social displacement that took place in many developing countries, notably in the Latin American and Caribbean regions over the 1980s and 1990s through structural adjustment. Social regionalism opens up the possibility to regulate labor differently within a broader trade liberalization framework, to promote social protection in a way that might not otherwise have been possible. To accomplish this, however, greater attention is needed to the requisites of a deep form of integration in the Americas.

Social regionalism would recognize that deep integration in the Americas is invariably a "dialectical process through which the proper balance of economic and political goals for trade policy is debated and negotiated."[92] Through the process of deepening integration in the

91. *See* Held, *supra* note 76, at 401.
92. Bruner, *supra* note 7 at 67.

Americas, civil society actors must be called upon to participate. There is both an expressive and an institutional role in civil society participation in the regional integration process.[93] In their expressive capacity, civil society may help to craft collective identities, reconfigured to capture the reconstructed regional landscape. In their institutional capacity, they provide challenges to the existing frameworks that exclude them, bringing important correctives to the processes and, to the extent of the truly democratic capacity of the institutions, are permitted to become a part of the reconstruction of regionalism itself. In this way, civil society actors challenge the notions of community and citizenship, and pave the path toward reconstructing them at the regional level.

IV. DEVELOPING APPROACHES TO SOCIAL REGIONALISM IN THE AMERICAS

Beyond the normative question of whether a social dimension should be included within the FTAA lies the question of its nature. There are several models already in existence in the region, which very much reflect the historical specificities of each region. Within the institutional structures of the CARICOM, MERCOSUR and NAFTA, social dimensions have attained a certain level of attention, although in rather distinct fashions, reflective of the specificity of the individual regional groupings. While MERCOSUR and CARICOM aspire to establish full customs unions,[94] NAFTA is principally a free trade area. The different aspirations reflect themselves in dramatically different approaches to social policy. The North American side-agreement social policy model has in particular been extended by Canada to more recent bilateral trading arrangements with Chile and Costa Rica.[95] All three models are deeply limited, but all three merit detailed attention to the extent that they stand as reminders that the regional groupings were required to be seen to act to consider the social dimensions of regional trade.

93. *See* Jelin, *Dialogues*, *supra* note 35, at 47.

94. It is notable that on the worldwide scale, the number of customs unions is small in relation to the number of free trade areas. *See WTO, Regionalism and the World Trading System* 27 (Geneva, Mar. 1996).

95. *See infra* notes 103 and 104 and accompanying text; Donald Mackay, *Challenges Confronting the Free Trade Area of the Americas*, Canadian Foundation for the Americas Policy Paper FPP-02-7 (June 2002) *available at* http://www.focal.ca/images/pdf/caribbean.pdf.

A. NAFTA and the NAALC

The NAFTA free trade arrangement has been referred to as an "ephemeral institutional arrangement [that] belies the radical nature of the NAFTA's effect on national judicial power."[96] The weight of its governance is concentrated in dispute resolution, while the bureaucracy itself is thin, comprising the Free Trade Commission, a self-governing body of cabinet ministers from the three NAFTA parties, as well as its Secretariat, which carries out basic administration, and the standing committees that offer fora for consultation, negotiation, and policy-formation. NAFTA has no distinct executive or legislature, although the functions seem to be regrouped within the bureaucracy. Despite this minimalist institutional framework, in the scope, content, and dispute resolution mechanisms, NAFTA aspires to a particularly far-reaching form of trade discipline, particularly through its strikingly powerful investment rules in Chapter 11.[97] The level of economic integration has indeed led some commentators to consider it a deeper form of integration than others existing in Latin America.[98]

Although the main text of the agreement illustrates that "[t]he NAFTA's social ambitions are modest,"[99] NAFTA does foresee particularly limited rights of temporary migration (entry) for certain categories of businesspersons. Chapter 17 is a far cry from the notion of free movement of persons across borders within the free trade area; unlike in other regional arrangements, it is not the conceptual tie for the labor dimension to free trade in North America.

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96. *See* Maravel, *supra* note 50, at 344. For a discussion of the legal character of the NAFTA, *see* Armand de Mestral, *The North American Free Trade Agreement: A Comparative Analysis*, *in* RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 223 (1998). *See also* Frederick M. Abbott, *The North American Integration Regime and its Implications for the World Trading System*, *in* THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE 169 (J.H.H. Weiler ed., 2000) (contrast with the EU).

97. *See* discussion of Ch. 11, *infra*. *See also* Barenberg & Evans, *supra* note 20.

98. *But see* Haggard, *supra* note 7, at 302, 310 (noting this tendency but challenging it as "misleading" in that some other agreements like MERCOSUR have deeper integration in some of their ultimate commitments to infrastructural integration and macro-economic policy coordination.) *See* the discussion of MERCOSUR, *infra*.

99. *See* Abbott, *supra* note 96 at 196.

It is perhaps ironic, then, that the NAALC,[100] a "side agreement" to NAFTA[101] considered by learned observers to offer only thin paper protections,[102] is the model most widely reproduced in other bilateral agreements, notably between Canada and Chile,[103] and Canada and Costa Rica,[104] and (optimistically, initially) imagined as being translated into the FTAA.[105] Part of the justification provided for the replication of NAFTA and its side-agreement approach was to facilitate eventual entry of countries like Chile into an enlarged NAFTA agreement. The movement toward an FTAA seems to have consolidated this approach,[106] although the theoretical justifications are less clear.[107] Indeed, as Aponte Toro has suggested, there is a tendency simply to replicate judicial forms that have previously been

100. The North American Agreement on Labour Cooperation (NAALC) Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, was signed on September 13, 1993 and entered into force on January 1, 1994, 32 I.L.M. 1499 (1993) (*available at* http://www.naalc.org/english/agreements.html). In the NAFTA region, it was the particular timing of the Clinton election in the United States after the bulk of the trade accord had been negotiated that created a certain reticence to reopen the negotiations of the main trade treaty, but at the same time a strong momentum to ensure that labor, as well as environmental, issues be dealt with. Clinton opted to support NAFTA if "side agreements" on these issues were added to the package that would be sent for congressional approval. *See* E.J. Dionne, Jr., *Clinton Cautiously Backs Free Trade Pact*, WASHINGTON POST, Oct. 5, 1992, at A6.

101. For a comprehensive discussion of the NAALC, *see* Lance Compa, *The North American Free Trade Agreement (NAFTA) and the North American Agreement on Labor Cooperation (NAALC)*, *in* INTERNATIONAL ENCYCLOPEDIA OF LAWS, LABOUR LAW AND INDUSTRIAL RELATIONS (Roger Blanpain, ed., 2001). This brief discussion of the NAALC does not seek to reproduce the abundant commentary on this topic, but rather to place the NAFTA within broader comparative perspective.

102. *See, e.g.*, Katherine Van Wezel Stone, *To the Yukon and Beyond: Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 94, 111-112 (1999).

103. Agreement on Labour Cooperation between the Government of Canada and the Government of the Republic of Chile, *available at* http://labour.hrdc-drhc.gc.ca.

104. Agreement on Labour Cooperation between the Government of Canada and the Government of the Republic of Costa Rica, *available at* http://labour.hrdc-drhc.gc.ca.

105. *See* Alex E. Fernández Jilberto & Barbara Hogenboom, *The Politics of Open Regionalism and Neo-Liberal Economic Integration in Latin America: The Case of Chile and Mexico*, *in* REGIONALIZATION AND GLOBALIZATION IN THE MODERN WORLD ECONOMY, *supra* note 5, at 251, 277.

106. *See* Bruner, *supra* note 7, at 19 (arguing that despite the ambivalence over NAFTA side agreements, "it has become increasingly apparent that a trade deal of the magnitude of the FTAA has little chance of achieving substantial legitimacy in the United States without addressing these issues in some way").

107. *See* Aponte Toro, *supra* note 7, at 139 (discussing the various social considerations influencing the hegemony of the NAFTA model, including race and the desire of the primarily white elites in some Latin American countries, like Puerto Rico, to associate themselves with the "North"). *See also* Gil Gott, *Globalization or Global Subordination?: How Latcrit Links the Local to the Global and the Global to the Local: Critical Race Globalism?: Global Political Economy and the Intersections of Race, Nation, and Class*, 33 U.C. DAVIS L. REV. 1503, 1507-1509 (2000) (discussing the complex impact on race of the ostensibly "colorblind" neoliberal economic policies in free trade expansion).

adopted, no matter the reasons.[108] Moreover, the replications can only be imperfect to the extent that replication fails adequately to account for the historical and geopolitical specificity of the regions to which they are being applied. It is suggested that the construction of a social regionalism should act as a counter-current to this approach, by bringing to light the particularities of different regions and by countering the implicit supposition that alternatives do not exist.

Although not integrated within NAFTA's institutional structure,[109] the NAALC puts into place a rather elaborate institutional framework of its own, which may culminate in trade sanctions[110] (thereby entailing some interplay with the structure of NAFTA). It provides a loose blend of cooperative and adversarial procedures. The cooperative mechanisms have invariably generated a fair amount of cross-border cooperation by both government members and civil society. They include in particular the Commission for Labour Cooperation, comprising both a Ministerial Council that oversees NAALC implementation and a Secretariat that provides public information and reports on submissions, while serving as the administrative arm to the institutions created for dispute resolution, notably an independent Evaluation Committee of Experts (ECE). The National Administrative Offices (NAOs) established within each Party to the NAALC assist the Commission by organizing a range of cooperative activities while receiving submissions (not necessarily complaints) on "labor law matters arising in the territory of another Party."[111] The ECE and other adversarial procedures have not been

108. *See* Aponte Toro, *supra* note 7, at 156 (considering that there are no alternatives to the broad economic approaches to regionalism that he discusses; however, but for a brief reference to the Andean Social Charter, Aponte Toro does not assess the parallel development of social dimensions in the regional agreements surveyed). *See also* Van Grasstek, *supra* note 2 (noting that although it is not alone in the Americas to consider labor rights, "NAFTA remains the foremost example of a trade agreement that is tempered by a 'social clause'"). *See also* Marta Figueroa-Torres, *Consideraciones legales de la integración economica caribena: Identidad regional vs. Agenda Hemisferica?*, 32 REV. JUR. U. INTERAMER. DE PUERTO RICO 397 (1998) (arguing that although Caribbean countries may be interested in regional integration and may need such integration does not justify adopting integration that may be contrary to their juridical and institutional reality).

109. For a discussion of the negotiating history that led to a separate labor side agreement, *see* Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917 (1994).

110. See Article 41 and Annex 41B on the suspension of NAFTA tariff benefits. Note, however, that the Canada-Chile labor side agreement provides for fines, but stops short of allowing trade sanctions to be awarded. *See supra* note 103, at Part Five—Resolution of Disputes, notably Article 37 on domestic enforcement and collection.

111. One interesting procedural difference is that the NAOs of Canada and the United States hold public hearings on complaints with transcripts and sworn testimony at different locations within the country of the NAO receiving the submission; in contrast, the Mexican NAO holds closed-door "informative sessions" at which it receives comments by concerned

called upon to date. Interestingly, although the social partners are fully engaged in the consultative and dispute resolution processes as potential participants, they are excluded from the formal representative structures of the NAALC, which instead places considerable emphasis on independent experts chosen in part for their objectivity. Tripartism is not a driving characteristic of the NAALC;[112] indeed, unlike the companion side agreement on the environment, the NAALC does not even contain explicit institutions like the Joint Public Advisory Committee (JPAC) to foster direct public access and participation.[113]

Canada, Mexico, and the United States agree in the NAALC to "promote compliance with and effectively enforce its labour law through appropriate government action"[114] in relation to eleven categories of labor rights or principles,[115] subject, however, to each party's domestic law.[116] To avoid the concern that unratified ILO standards might be applied indirectly via the NAALC to the United

parties. A further procedural element found in the United States' NAO's final Procedural Guidelines is that if the matter is brought before another international labor rights regime, notably before the ILO's supervisory system, then review by the NAO is barred. In contrast, appropriate relief has to have been sought, though not exhausted, before the domestic laws of the Party before a submission before the NAO may be brought. *See* Revised Notice of Establishment of United States National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16,660-62 (Apr. 7, 1994) ["Procedural Guidelines"].

112. *See* Moreau & Trudeau, *supra* note 44, at 401.

113. For a discussion of this difference, *see* Maravel, *supra* note 50, at 381-392 (although Maravel's early 1996 account of the NAALC did not foresee the considerable use that NGOs, trade unions and even business groups would make of the submissions process; *see* discussion *infra*).

114. NAALC, *supra* note 100, at Art. 3. This includes appointing and training inspectors; monitoring compliance and investigating suspected violations, including thorough on-site inspections; seeking assurances of voluntary compliance; requiring record keeping and reporting; encouraging the establishment of worker-management committees to address labor regulation of the workplace; providing or encouraging mediation, conciliation and arbitration services; or initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor laws. Parties to the NAALC also must ensure that legally interested persons have "appropriate access" to justice to enforce labor laws.

115. The principles are: 1. freedom of association and protection of the right to organize; 2. the right to bargain collectively; 3. the right to strike; 4. prohibition of forced labor; 5. labor protections for children and young persons; 6. minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; 7. elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws; 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. *See* NAALC, *supra* note 100, at Art. 49.

116. *See* NAALC, *supra* note 100, at Annex. In the Annex, the Parties clarify that the principles are not meant to establish common minimum standards for the domestic laws, but rather broad areas of concern "where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces."

States, no reference is made even to the term "internationally-recognized" labor rights, prevalent in U.S. GSP legislation.[117]

As of September 2001, there had been twenty-three submissions to the NAOs. While the mechanism was, at the outset, used exclusively against Mexico,[118] the range has broadened such that all three countries have now seen NAO submissions brought regarding their laws; in addition, the mechanisms have been used by Management as well as trade unions and pro-labor NGOs. While it is beyond the scope of this comparative review to provide a detailed account of these cases,[119] it bears noting that the focus at the NAO has largely been on violations of the freedom of association and right to organize,[120] with more recent attention to issues such as the elimination of discrimination as it relates to pregnancy testing,[121] occupational safety and health,[122] migrant workers' rights,[123] and

117. *See* Hagen, *supra* note 109, at 924. Indeed, the only references to the ILO are in Article 24(1) relating to the Rules of Procedure of the Council, and Article 45 of the NAALC, in which the Parties agree to "establish cooperative arrangements with the ILO to enable the Council and Parties to draw on the expertise and experience of the ILO for purposes of implementing Article 24(1) [the rules of Procedure]."

118. For a critique of some pervasive generalizations about Mexican labor regulatory and enforcement mechanisms, *see generally* Michael Joseph McGuinness, *The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico*, 21 U. PA. J. INT'L ECON. L. 1 (2000).

119. For a comprehensive discussion, *see* Lance Compa, *The North American Free Trade Agreement (NAFTA)*, *supra* note 101.

120. For a table of submissions to Sept. 2001, *see* http://www.iie.com/publications/papers/nafta-labor2.htm, at 5-10.

121. Pregnancy-based Sex Discrimination, concerning Mexico, U.S. NAO, Submission No. 9701, (May 15, 1997). Public Report of Review (Jan. 12, 1998). *See id.*

122. *See*, *e.g.*, Solec, Inc., concerning the U.S., Mexican NAO, Submission No. 9801, Public Report of Review Aug. 1999 and Ministerial Agreement between Mexico and the United States, May 2000 (anti-union activities and ineffective State enforcement of domestic law on union organizing and occupational health and safety); Auto Trim De Mexico, S.A. De C.V., Matamoros, Tamaulipas, Mexico, And Custom Trim/Breed Mexicana, S.A. De C.V., Valle Hermoso, Tamaulipas, Mexico, concerning Mexico, U.S. NAO, Submission No. 2000-01, Public Report of Review (Apr. 6, 2001) (recommending that U.S. Labor Secretary Elaine L. Chao seek consultations with her Mexican counterpart) (persistent failure to enforce occupational safety and health laws in automotive workplaces and to provide appropriate medical referral, and disability benefits for work-related accidents and illnesses). *See id.*

123. *See*, *e.g.*, Washington State Apple Industry, concerning the U.S., Mexican NAO, Submission No. 9802 Public Report (Aug. 1999), Ministerial Agreement between the United States and Mexico, May 2000, Public outreach July 2000 (right to organize, bargain collectively, minimum labor standards, non-discrimination in employment, job safety and health, workers' compensation and migrant worker protection); U.S. Labor Department—Immigration and Naturalization Service Memorandum of Understanding, concerning the U.S., Mexican and Canadian NAOs, Submission No. 98-2 (Canada) and 9804 (Mexico), Public Report of Review from Mexican NAO Nov. 2000; Canadian NAO declined to accept the submission for review (counterproductive MOU which would impede labor law enforcement and jeopardize migrant workers' rights). Canadian file closed Apr. 1999. Mexican report recommended Ministerial Consultations. *See id.*

broader issues of enforcement of a panoply of labor laws.[124] Frequently, submissions have made reference to ILO Conventions; this has been particularly relevant for Mexico, because its Constitution provides that ILO Conventions form a part of the domestic law.[125]

In some cases, submissions have been withdrawn before NAOs have even completed their reports. In the case of *McDonald's*, the Quebec Federation of Labour, the International Labor Rights Fund, the Teamsters' Union and its Quebec affiliates filed a complaint before the U.S. NAO in October 1998 after a McDonald's restaurant in Quebec was closed shortly before workers could be certified to bargain, and after McDonald's had relied on a number of legal loopholes and delaying tactics during representation proceedings for over one year. Although the U.S. NAO agreed to accept the McDonald's case for review, the submission was withdrawn after the Quebec Government agreed to study the question of anti-union plant closures, as part of a general review of the Quebec Labour Code.[126]

The NAO may also issue a report that it cannot make the requested finding. Or, it can render a finding, and recommend cabinet-level consultations with the labor Secretaries and Labour Minister, known as Ministerial Consultations, based on one of the reports. Or, one or more of the ministers themselves can seek to engage in a consultation on any labor law matter, through the fora of Ministerial Consultations. In any event, the ministerial consultations need not be preceded by a complaint.[127]

The Ministerial Consultations stage has been reached in several of the cases before NAOs.[128] The *Sprint* case is one of the most developed examples. After a Spanish-language telemarketing facility of Sprint Corporation in San Francisco California was closed suddenly, the Sindicato de Telefonistas de la República Mexicana (STRM) filed a submission with the Mexican NAO alleging that the

124. *See*, *e.g.*, DeCoster Egg Farm, concerning the U.S., Mexican NAO, Submission No. 9803, Public Report of Review Dec. 1999, Ministerial Agreement between Mexico and the United States, May 2000 (failure effectively to enforce laws minimum wage, health and safety, housing, workers' compensation and basic conditions of work). *See id.*

125. *See*, *e.g.*, Pesca Union concerning Mexico, U.S. NAO, Submission No. 9601, Public Report of Review (Jan. 27, 1997). *Id.*

126. McDonald's, concerning Canada, U.S. NAO, Submission No. 9803, Submission Withdrawn (Apr. 14, 1999).

127. NAALC, *supra* note 100, at Art. 22.

128. *See e.g.*, the first case in which Ministerial Consultations were ordered, Sony, U.S. NAO, Submission No. 940003, Public Report of Review, (Apr. 11, 1995) and Follow-up Report, (Dec. 4, 1996); and a more recent example, Pregnancy-based Sex Discrimination, concerning Mexico, *supra* note 121.

closure was motivated by anti-union bias. The Mexican NAO agreed to review the submission, and reported its concern about the effectiveness of certain measures to guarantee the freedom of association and the right of workers to organize.[129] The Mexican NAO called for Ministerial Consultations, which led mainly to a public forum.[130] Although the National Labor Relations Board (NLRB) ultimately ruled that the plant closings by Sprint were motivated by anti-union animus and ordered Sprint to rehire the workers with back pay in other divisions of the enterprise,[131] the U.S. Court of Appeals reversed that decision, finding instead that the closing was motivated by legitimate business concerns.[132]

Although after ministerial consultations, a Party to the NAALC can ask an independent Evaluation Committee of Experts (ECE) to examine the matters raised in the consultation,[133] so long as they relate to technical labor standards,[134] the mechanisms have not yet been used. Understandably, therefore, there has been a perception that NAO proceedings are lengthy and inconclusive, and that the failure to reach even the ECE stage suggests that the NAALC is not being effectively enforced. Indeed, use of the ECE mechanism might well become a necessary follow-up to enable experts to hone guiding principles for the social dimension of the North American regionalism.

Concern over enforcement of the NAALC remains understandable, despite the fact that the NAALC has been used by all

129. Sprint, concerning the U.S., Mexican NAO, Submission No. 9501, Public Report of Review, (May 31, 1995) (alleging anti-union bias in plant closure).

130. The forum entailed the following: (1) presentations by workers affected by the plant closing, by union representatives from STRM, the Communications Workers of America (CWA), and trade unionists from Germany and Great Britain, by a law professor on behalf of Sprint, and by other academic analysts; (2) a special report prepared by the Secretariat, entitled Plant Closings and Labor Rights, which explained the legal frameworks for, and reviews the case law on, union organizing in the three countries during plant closures. The Report considered anti-union tactics during plant closing to be more prevalent in the United States than in Canada or Mexico. It attributed the difference to stronger enforcement mechanisms in Canada, and the rare incidence of campaign-style elections in union-organizing in Mexico; (3) request to keep the Ministers updated on developments in legal proceedings before the U.S. domestic legal bodies. *See* Sprint, concerning the U.S. Mexican NAO, Subcommission No. 9501, Ministerial Consultations—Agreement on Implementation, (Feb. 13, 1996).

131. La Conexion Familiar & Sprint Corp. v. CWA Local 9410 & AFL-CIO, 322 N.L.R.B. 137 (1996).

132. Sprint Corporation v. NLRB, 129 F.3d 1276 (D.C. Circ. 1997).

133. If the ECE is convened, it issues a Draft Evaluation Report for consideration by the Council, then a Final Evaluation Report unless the Council decides otherwise.

134. If a Party obtains a ruling under Annex 23 of the NAALC to the effect that the matter before the ECE is not trade-related or is not covered by mutually recognized labor laws, then the ECE may not be convened. NAALC, *supra* note 100, Art. 23(3).

of the social partners in relation to all three Parties to the NAALC.[135] For even the participatory structure of the NAALC (and newer bilateral arrangements) is strikingly different from other social arrangements in the Americas. As mentioned above, the social partners are not represented on any of the institutional bodies, nor do they have any privileged access. They have worked, however, with broader stakeholders, notably labor-rights or management-rights NGOs, to test or develop the NAALC institutions.[136] And, although those institutions were crafted with considerable attention to the promotion of cooperation, the mechanisms have been drawn upon in the classic North American (or perhaps more accurately United States and Canadian) tradition of seeking settlements of labor disputes largely through (often adversarial) quasi-judicial proceedings. Even if the results do not lead to standard court-like remedies, the NAALC measures serve the role of the spotlight, casting public attention on problematic behavior, galvanizing public support in favor of certain labor principles and leading public officials to pay more attention to enforcement.[137] This attention may either reinforce the perception that regional integration is undesirable, or to the extent that integration is perceived to be inevitable or a "good," enable social partners to shape the nature of that integration, by ensuring that it retains some social content.

Ultimately, though, the malaise surrounding the approach to social dimensions of trade liberalization embedded in the NAFTA side agreement reflects the NAALC's conceptual failure to grapple with the inherent link between trade and labor, and the reasons why integration offers a preferable policy option to protectionism that seeks to preserve relatively high labor standards. In other words, the NAALC model does not, nor has not been marshaled to, call for deeper societal adjustments to ensure that trade liberalization promotes social justice and to ensure that domestic regulatory

135. For a detailed critique of the NAALC by a prominent human rights organization, *see* Human Rights Watch, *Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement* (New York, April 2001) *available at* http://www.hrw.org.

136. For a discussion of union activism across borders linked to NAFTA and the NAALC, *see* DALE HATHAWAY, ALLIES ACROSS THE BORDER: MEXICO'S "AUTHENTIC LABOR FRONT" AND GLOBAL SOLIDARITY 169-194 (2000). *See also* Compa, *NAFTA's Labor Side Agreement*, *supra* note 120, at 462 (illustrating the "platform-building" potential of the NAALC, to "foster new ties of solidarity and sustained work among labor rights advocates" across NAFTA borders).

137. *See* OAS, *Study on the Operation and Effects of the NAFTA*, *available at* http://www.sice.oas.org. *See also* James Mercury & Bryan Schwartz, *Creating the Free Trade Area of the Americas: Linking Labour, the Environment, and Human Rights to the FTAA*, 1 ASPER REV. INT'L BUS. & TRADE L. 37, 41 (2001) (suggesting that NAALC has led to greater funding in Mexico on the enforcement of labor laws).

capacity is reinforced. That is, some attempt needs to be made to ensure that trade policies and labor policies are mutually enhancing, to ensure that there is some equilibrium.[138] This goes beyond a search for a "formal" linkage, for, as Chapter 11 illustrates, formal linkage as in the inclusion of investment rules within NAFTA is not the central dimension at all.[139] Rather, it is the theoretical acceptance that some policy preferences favor certain outcomes that may either be detrimental to or reinforcing of other policy considerations. Simply put, if an attempt is not made to balance them, one is likely to undermine the other.

Indeed, NAFTA Chapter 11 has crystallized the implications of the different approach. A part of the agreement with particularly robust arbitral mechanisms to ensure compliance, and an expansive interpretation of the notion of "expropriation," the investment chapter has been used by private corporations as claimants against NAFTA state actors, to claim damages for "regulatory takings." That is, beyond their generally-recognized power of exit (thus power to threaten exit) from their host countries, multinational investors under NAFTA could claim compensation for expropriation as a result of environmental, health and safety, or other similar regulatory initiatives by federal or sub-federal entities.[140] The regulatory chill resulting from that capacity only multiplies the pre-existing fear of capital flight.

When contrasted with the NAALC's structural and institutional framework, Chapter 11 illustrates the difference between full integration in a manner that yields concrete (if highly contested on a democratic level) results for capital, and a mechanism that severely limits the ability to place concerns of labor linked to integration in context. The NAALC, therefore, tips the pendulum too far to one side, by reinforcing the perception that trade is fundamentally separate from social policy, while yielding credence to those who consider that trade liberalization is problematic per se, given its inability to grapple with social consequences. Ironically, the side agreement approach may also reinforce the perception that social

138. *See* Blackett, *supra* note 6.

139. *See* Barenberg & Evans, *supra* note 20 for a compelling discussion of the Chapter 11 investment constitution. *See also* David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757 (2001).

140. *See* José Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1 (2001) (discussing *Loewen*); Barenberg & Evans, *supra* note 20 (offering a critical discussion of the Ch. 11 process, with a careful analysis of the various cases).

dimensions are unnecessary, additional layers of process[141] that further obfuscate the decision-making capacity of trade liberalizing institutions. Instead, construction of social regionalism necessarily entails rethinking the central integrating institutions at the heart of the eventual FTAA, particularly those that create spaces for the kind of democratic engagements increasingly called for within any proposed hemispheric agreement.

B. CARICOM

The reasons for integration, and the eventual incorporation of a developed social dimension in the Caribbean Common Market (CARICOM) has rather different roots from the NAFTA-NAALC model. A much older regional grouping, the CARICOM, was established by the Treaty of Chaguaramas in 1973.[142] It covers a total population of approximately six million persons[143] in fifteen Member States,[144] all but three[145] of which are small islands. Nine of its members are considered within the region to be "less developed countries."[146] Most have historically been heavily dependent on the export of a few primary commodities, notably bananas and sugar, to industrialized country markets,[147] although tourism, production of

141. *See* Maravel, *supra* note 50, at 408.

142. The Treaty was signed by the Prime Ministers of Barbados, Guyana, Jamaica, and Trinidad and Tobago at Chaguaramas, Trinidad on July 4, 1973. It came into force on August 1, 1973. It is *available at* http://www.caricom.org (information services) [hereinafter Treaty of Chaguaramas]. For a thorough discussion of the precursor institutions to the CARICOM, *see* P.K. Menon, *Regional Integration: A Case Study of the Caribbean Community (CARICOM)*, *in* 5 CARIBBEAN L. REV. 81, 85 (1995). Summary information can be found *at* http://www.caricom.org. The institutional structure of the Caribbean Community has been repeatedly revised by virtue of protocols.

143. *See* WILLIAM G. DEMAS, WEST INDIAN DEVELOPMENT AND THE DEEPENING & WIDENING OF THE CARIBBEAN COMMUNITY (1997).

144. Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts & Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad & Tobago.

145. Belize, Guyana, and Suriname.

146. The Central American country of Belize and the nine others (Antigua and Barbuda, Dominica, Grenada, the Grenadines, Haiti, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent) joined together to form the Organisation of Eastern Caribbean States under the Treaty of Basseterre of 1982. Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, and the Turks and Caicos Islands are Associate Members.

147. For a brief overview of the history and current challenges to Caribbean economic policy, *see* Denis Benn, *Global and Regional Trends: Impact on Caribbean Development*, *in* CARIBBEAN PUBLIC POLICY: REGIONAL, CULTURAL, AND SOCIOECONOMIC ISSUES FOR THE 21ST CENTURY 15 (Jacqueline Anne Braveboy-Wagner & Dennis J. Gayle eds., 1997). *See also* Mariama Williams, *Financing Development in the Context of Globalisation and Trade Liberalisation: Opportunities and Constraints facing the Caribbean*, presentation to a conference on Gender Budgets, Financial Markets, Financing for Development: The Gender Dimensions of the Global Financial Architecture, Feb. 19-20, 2002, Berlin, Germany (offering a helpful discussion of the contemporary changes to the Caribbean economy, and the gendered nature of

garment and clothing in free trade zones, off-shore banking and data-processing services have taken hold.[148] As such, the trade focus is outward,[149] in that the CARICOM seeks to offer a united forum through which trade arrangements may be negotiated with major industrialized nations. The most apparent example is the negotiation of NAFTA-parity with the United States to counter the trade-diversionary effects on CARICOM Member States of increased U.S. trade with Mexico.[150] It has also sought to ensure access to larger developing country markets, within the Americas and beyond.[151] Due largely to its geographical location and trade potential, one commentator has considered the Caribbean region to be a "key component in the creation of the [FTAA]."[152]

The CARICOM's institutions have not evolved beyond state control: decisions of the Conference of heads of government, the Council, and Ministerial Committees are taken on a unanimous basis. Each government is then responsible for implementing those decisions, in keeping with national constitutional, legal, and administrative requirements. True, the Council has the authority to refer a dispute to an arbitral tribunal in the event of a dispute that parties are otherwise unable to settle; it is obliged to refer the dispute to an arbitral tribunal at the request of a party to the dispute.[153] However, after the arbitral decision has been rendered, the Council can only make recommendations to the parties that are non-binding; the unanimity requirements make the sanctions prospect rather unrealistic. As a result, the CARICOM's institutional structure

some of the changes, notably the heavy reliance on female labor in the garment and clothing production in free zones and in data processing), *available at* http://www.genderandtrade.net/Research/Ffd.html.

148. *See* Ransford W. Palmer, *Hemispheric Trends: Regional Impact of the North American Free Trade Area*, *in* CARIBBEAN PUBLIC POLICY, *supra* note 147, at 33-34 (fearing the development of "boutique economies" as Caribbean economies are forced to restructure by developing even greater specialization) *See also* Aponte Toro, *supra* note 7, at 134-139 (noting the trade diversionary effects of NAFTA).

149. *See* Haggard, *supra* note 7, at 321 (observing that between 1973 and the early 1990s, intraregional trade levels actually decreased). For a detailed example of the nature of a Caribbean nation state's economy, *see* the WTO's Trade Policy Review of Barbados, July 11, 2002, TPRB/194, *available at* http://www.wto.org.

150. *See* Figueroa-Torres, *supra* note 108, at 402. *See also* Paul Esquivel, *Beyond NAFTA: The Caribbean*, *in* NAFTA: LAW AND BUSINESS REVIEW OF THE AMERICAS 137, 141-142 (1995) (characterizing the fears of trade diversion in the Caribbean due to NAFTA, as well as CARICOM's interests in greater regional trade).

151. *Id. See also* Aponte Toro, *supra* note 7, at (noting initiatives vis-à-vis South Africa).

152. *See* Esquival, *supra* note 150, at 137.

153. Treaty of Chaguaramas, *supra* note 142, Annex, art. 11. *See also* Garcia, *supra* note 3, at 118 (noting the resemblance of this mechanism to Ch. 20 of the NAFTA).

cannot yet be characterized as supranational.[154] Despite the influential West Indian Commission[155] 1992 report entitled *Time for Action*,[156] which served as a catalyst for some enhanced integration, chief among the revisions was the establishment in 1992 of a customs union with the modest concession of a maximum tariff rate of 30% and the elimination of intra-union licenses on imports.[157] The CARICOM's integration has focused primarily on regional organization to promote regional development, largely through trade and investment facilitation by coordinating issues such as transportation matters and migration concerns recognized as a CARICOM goal in Art. 45 of the revised Treaty of Chaguaramas.[158]

Despite the lack of progress on internal trade liberalization, the CARICOM initiative, including a recently-created Regional Negotiating Machinery, is meant to facilitate the ability to speak with one voice when negotiating with other trading partners. The shared history and broad cultural influences that characterize the inhabitants of the Caribbean Community facilitate this common approach; it also facilitates a common development of social policy initiatives within the regional framework. According to a former Secretary General of the CARICOM, Roderick Rainford:

> In the case of CARICOM, one such critical predisposing condition has been the sense of affinity and mutual belonging—indeed the "sense of community"—that has characterized the peoples of the member states of the grouping. . . . In other words, CARICOM

154. *See* Figueroa-Torres, *supra* note 108, at 408 (discussing the concrete implications of this institutional deficit). Due to this, a widely perceived failure of Member States to implement decisions, in 1989 the Grand Anse Declaration was signed, which sought among other matters to deepen the economic union by the year 2000 and to replace the current final court of last appeal, the U.K. Judicial Committee of the Privy Council (JCPC) with a Caribbean Court of Justice. The Agreement to establish the Caribbean Court of Justice (CCJ), dated Feb. 14, 2001, came into force in July 2002, but all Member States have not yet completed the necessary steps to establish the CCJ. *See* Secretary-General Welcomes Belize Move on CCJ, Press Release 18/2004 (Feb. 12, 2004), *available at* http://www.caricom.org (CCJ). *See also* Duke Pollard, *The Caribbean Court of Justice in Regional Economic Development*, *available at* http://www.caricom.org/archives/ccj-regionalecondev-dp.htm (arguing that the CCJ goes beyond replacing the JCPC, because it is "structured to be an international tribunal . . . interpreting and applying the revised Treaty of Chaguaramas").

155. The West Indian Commission, established under the Grand Anse Declaration of 1989, assumes the role of initiating, negotiating and ensuring follow-up of trade agreements. *See* DEMAS, *supra* note 143, at 32-33.

156. Time for Action, Report of the West Indian Commission, 1992. *See* discussion in DEMAS, *supra* note 143, at 33-35.

157. This is the Caribbean Single Market and Economy (CSME), which was to be fully functional in 2002, and of which all CARICOM countries save the Bahamas and the associate members/observers are members. For a statement of intent on implementation from Barbados, the country with the lead responsibility for CSME implementation, *see* the WTO, Trade Policy Review of Barbados, *supra* note 149, Part IV. *See also* Haggard, *supra* note 7 at 322.

158. *Id.*

> integration happens to be effectively rooted, even if tenuously, in the shared culture of its peoples.[159]

This sense of community has arguably facilitated the introduction of (none the less controversial)[160] measures on the free movement of persons[161] such as the establishment of free movement of university graduates, other professionals and skilled persons, as well as other occupations.[162] All but three CARICOM Member States have enacted legislation to implement the Free Movement of University Graduates,[163] and six have adopted legislation to implement the free movement of the other Approved Categories.[164] Since the early days of the CARICOM, the sense of community also facilitated educational links, notably through the shared University of the West Indies that has campuses in different Member States; more recently, it has facilitated the development of "disaggregated" networks[165] of government officials, as in the meetings of CARICOM Ministers of Labour discussed below,[166] and the creation of a Caribbean Association of Ombudsmen, dedicated to promoting more

159. *See* Roderick Rainford, *Regional Trends: Cooperation and Integration—In Search of Viability*, *in* CARIBBEAN PUBLIC POLICY, *supra* note 148, 63 at 65.

160. *See* Final Report of Grenada's National Consutations on the CARICOM Charter of Civil Society, held in October 2001 and January 2002, St. Georges, Grenada, *available at* http://www.caricom.org [hereinafter the Grenada Report].

> It was evident that fear existed about the free movement of people, particularly with regard to other nationals coming to Grenada to secure jobs and purchase land. Subsequent to this civil society was advised that the mass movement of people to secure jobs was unlikely to be a reality. An example was cited of the European Union, where only small percentage of persons actually moved from one state to the other, for settling purposes. An opinion was offered that the movement of persons would not be a detriment to Grenada, but, ought to be viewed as a service industry encouraging a nation's populace to be well-educated.

161. The free movement of persons is recognized as a CARICOM goal in Art. 45 of the revised Treaty of Chaguaramas, *supra* note 142.

162. *See* Protocol II: Establishment, Services and Capital, *supra* note 142. This also includes the elimination of passport and work permit requirements as well as facilitated entry at immigration points for professionals. *See also* OECD, *Labour Mobility in Regional Trade Agreements*, *supra* note 8, at 10.

163. The Bahamas (not a CSME member), Montserrat, and Suriname have not implemented this Agreement of the CSME. *See* CARICOM, Status of Free Movement of Skills and the CARICOM Social Security Agreement, *available at* http://www.caricom.org/archives/freemovementmatrix.htm. The most recent matrix is dated October 2002 (last verified Mar. 29, 2004).

164. Belize, Dominica, Guyana, Jamaica, Saint Lucia, and St. Vincent and the Grenadines. In Barbados, the free movement of these categories is being dealt with through administrative procedures. *Id.*

165. *See generally* Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 177 (Michael Byers ed., 2000); ANNE-MARIE SLAUGHTER, GLOBAL GOVERNMENT NETWORKS, GLOBAL INFORMATION AGENCIES, AND DISAGGREGATED DEMOCRACY (Harvard Law School Public Law Working Paper No. 018), *available at* http://papers.ssrn.com/abstract=283976.

166. *See* discussion of the CARICOM labor harmonization project, *infra*, Part IV.B.2.

participatory governance in the CARICOM.[167] This sense of community may also have facilitated the development of Caribbean-wide civil society organizations, dedicated to promoting a vision of regional integration that is concerned with the status of marginalized societal groups.[168]

In the CARICOM, under Protocol No. 1, the Council for Human and Social Development (COHSOD) is given the responsibility to "promote and develop coordinated policies and programs to improve living and working conditions of workers and take appropriate measures to facilitate the organization and development of harmonious labor and industrial relations in the Community."[169] Other than through the constitutional framework documents, the social dimension has crafted a rich variety of instruments of varying legal character. These include the 1995 CARICOM Declaration of Labour and Industrial Relations Principles,[170] and the 1996 CARICOM Agreement on Social Security.[171] Among the more noteworthy vehicles are a Charter that articulates fundamental principles and the harmonization of laws via the regional elaboration of model laws, both of which suggest attempts to provide democratic participation in the development of spaces for the infusion of the social in integration initiatives.

167. *See* Saint Lucia, Consultation on Civil Society within the Context of the Caribbean Single Market and Economy (CSME), Oct. 19, 2001, *available at* http://www.caricom.org [hereinafter the St. Lucia Report].

168. The activities of women's organizations and networks, like CAFRA and DAWN-Caribbean, are two examples. *See* Williams, *supra* note 147, at 16. *See also* the St. Lucia Report, *supra* note 167, at 15 (stressing the need to provide for persons with disabilities, and in particular to address the growing incidence of HIV/AIDS in the region through the adoption of a "unified approach").

169. Article VI of Protocol I, replacing Article 10 of the Treaty of Chaguaramas with Article 8(C)(2)(c). Formerly, Article 10 of the Treaty of Chaguaramas had clarified that one of the Ministerial Committees is responsible for promoting co-operation among Member States in relation to labor, and empowered them to "formulate such policies and perform such functions as are necessary for the achievement of the objectives of the Community." *See supra* note 142.

170. Apr. 28, 1995, *available at* http://www.caricom.org (information services). *See also* Ciudad Reynaud, *supra* note 4, at 202-208.

171. *Available at* http://www.caricom.org (information services). The Agreement covers invalidity, disability, old age/retirement and survivors' pensions, as well as death benefits paid in the form of pensions. It takes the particularly important step toward facilitating the free movement of persons, by allowing for certain social security benefits to be accumulated across Member States, and overcoming some of the procedural hurdles associated with different legislative requirements, such as totalizing required contribution periods to ensure that concerned persons do indeed benefit from the social security entitlements. *See, e.g.*, Articles 2, 16-17 of the CARICOM Agreement on Social Security.

1. The Charter of Civil Society

The Charter of Civil Society was adopted on February 19, 1997.[172] It is one of the instruments supplementing the Treaty that establishes the Caribbean Community. In it, the People of the Caribbean Community "resolve to pay due regard" to the "principles by which our Governments commit themselves to respect and strengthen the fundamental elements of a civil society."[173] The Charter defines its scope broadly to include the "Government of a State, Associations of Employers, Workers Organisations and such Non-Governmental Organisations as the State may recognise."[174] The Charter considers the freedom of movement within the Caribbean Community to be fundamental.[175] Equal opportunity for employment and equal remuneration for work of equal value, are recognized along with non-discrimination in the event of pregnancy and lactation within a framework "aimed at strengthening gender equality."[176] In Article XVIII, rights of participation in the economy are outlined, and a commitment to full employment policies is expressed. The States undertake in particular to collaborate with the social partners to provide creative employment for young people and disabled persons.

In Article XIX of the Charter, workers' rights are set out in some detail, including a range of freedom of association, collective bargaining, occupational safety and health, non-discrimination, and social security rights. Although protections in the Charter may vary somewhat from those contained in other international instruments, the savings clause in Article XXVII clarifies that "[n]othing in this Charter shall be interpreted as impairing the provisions of any regional or international agreement to which States are parties."[177]

Finally, special attention is paid to the role of the social partners in Article XXII, to the extent that the States "undertake to establish within their respective States a framework for genuine consultations among the social partners in order to reach common understandings on and support for the objectives, contents and implementation of national economic and social programs and their respective roles and

172. *See* Charter of Civil Society Resolution, 1997. Both the Charter of Civil Society and the Resolution adopting it are *available at* http://www.caricom.org (information services).

173. Charter of Civil Society, *Id.* Preamble.

174. *Id.* at Art. I.

175. *Id.* at Art. II(e).

176. *Id.* at Art. XII (b) & (c).

177. In this regard, it is telling that civil society participants in the Grenada Consultations "refuted the official line that there was no child labour in Caribbean countries," highlighting the "growing practice" and calling for "deliberate intervention to address this problem." *See* Grenada Report, *supra* note 160.

responsibilities in good governance." Those consultations have been taking place, if on a somewhat ad hoc basis. In some countries, there have been initiatives to ensure that consultations take place on a regular basis, in an effort to "'break down' the barriers between the State and NGO's."[178]

The CARICOM example suggests that even the basic, formal requirement of periodic state reporting on compliance with the Charter[179] can foster social regionalism, particularly since the preparation of the reports must be undertaken through consultation with the social partners[180] (indeed, each State is required to establish a tripartite plus[181] National Committee or designate another body to monitor and ensure compliance). Several recent reports reveal detailed consultation with civil society on an expansive set of social considerations, including in areas on which the community has made important progress like the movement of CARICOM nationals as extended to a range of professionals and university graduates.[182] And, the reports unequivocally stress the need for deepened civil society participation at all levels, formalized through the creation of appropriate implementation mechanisms.[183]

178. *See* Defining the Role of Civil Society in Caribbean Development: A National Perspective—Report on Trinidad and Tobago's National Consultation, Oct. 2, 2001, *available at* http://www.caricom.org [hereinafter Trinidad & Tobago Report].

179. *Supra* note 172. Article XXV(2) requires them to submit a report every three years on a rotating basis. Special Reports may be requested by the Conference at any time.

180. *Id*. Article XXV(3). Some reports are under preparation, and suggest that civil society wishes to see their participation deepened. *See, e.g.*, the Grenada Report, *supra* note 160 (in which the participants recommended that the link between civil society and government should be strengthened, to promote more local government. They expressed the need for more effective civil society collaboration with government. *See supra* note 160) and the Trinidad and Tobago report, *supra* note 178 (recommending that "[t]here is an urgent need for a direct link between the region's civil societies to allow ideas and programmes to be filtered into the programmes and policies of regional governments").

181. The composition includes representatives of the State, the other social partners, as well as other persons of high moral character and recognized competence in their fields of endeavor, but does not address the details of ensuring equitable representation between the traditional social partners within the ILO's definition of the term. *Supra* note 172, at Art. XXV(4(1))(a)-(c).

182. *See* Grenada Report, *supr*a note 160 (in which civil society also reported that Caribbean social values focused on academic achievement, but should be encouraged to be broadened to promote technical accomplishments as well); Information also *available at* www.caricom.org (illustrating the range of Member States that have modified their legislation to respect the free movement of persons as defined in the report).

183. *See* St. Lucia Report, *supra* note 167 (in particular the presentation on behalf of NGO's generally by Darnley LaBourne); Trinidad & Tobago Report, *supra* note 178; Grenada Report, *supra* note 160.

Yet, the limits of the Charter process remain patently clear:[184] Member States have not fully implemented the institutional requirements of the Charter, either at the national or the regional level, and no mechanisms are in place to compel them to do so.[185] This deficit is not particular to the Civil Society Charter, as the earlier brief discussion of other CARICOM integration efforts reveals. It nonetheless calls into question the commitment to the process of engaging civil society in an effective manner in the construction of a Caribbean Community. The Civil Society Charter might at best be understood as an initiative that has focused attention on the need for greater societal buy-in and engagement with the construction of the CARICOM and other liberalization projects. It opens up a space through which that participation can be obtained, while creating a tension for the CARICOM in its failure to facilitate greater interaction through this vehicle. It is therefore not surprising that in the consultations with civil society that have been taking place, participants have recommended that integration be made meaningful, so that it may embrace a "concept of regional governance . . ." and effective monitoring mechanisms.[186] They have called consistently for the CARICOM to include civil society more regularly, and in the process to "bridge the chasm between simple consulting and policy formulation."[187] These engagements, in a community with already robust NGO actors, provide a solid base through which greater

184. The National Committee has the power to analyze any problems and difficulties experienced in implementing the Charter, which would suggest that it is vested with independent research and investigative powers. The National Committee or other body is also required to receive reports of allegations of breaches or non-compliance with the Charter. The breach or non-compliance can be on the part of the State or one or more social partners. The one apparent restriction is that the matter cannot have been "adjudicated upon" by an international body whose decision is "binding" upon the State. And, while the National Committee or other body is required to notify the State or social partner concerned of the allegation and request their comments, ultimately, the National Committee or other body is required to report to the Secretary-General of the CARICOM. That report is to include the National Committee's views on the matter. The Secretary-General submits the reports for consideration by the Conference on an annual basis, and is responsible to inform the States and National Committee of the results. Charter of Civil Society, *supra* note 172, at Art. XXV(4). Similarly, under the CARICOM Agreement on Social Security, a Committee is established to "settle every administrative question" arising from the terms of the Agreement. This Committee is apparently not meant to take the place of national administrative bodies that address social security questions, however: the procedures established for claimants to apply for benefits focus on the competent institutions within each Contracting Party to the agreement. *Supra* note 171.

185. This information is based on e-mail correspondence with Mr. Steven MacAndrew, an official in the CARICOM Secretariat, dated July 8, 2002 (on file with author).

186. *See* Trinidad and Tobago Report, *supra* note 178, at 2 (including a Report on the Presentation, Michael Als & Corrine McKnight, *Alternative Development Strategies*).

187. *Id.* at 3 (adding that "Government's policy needs to be reformulated to ensure that feedback from civil society actually informs policy").

challenges to a narrowly neo-liberal approach to integration can be challenged, and constructive alternatives devised.

2. The CARICOM Labor Law Harmonization Project

The labor law harmonization project is one such constructive alternative. It reflects a creative initiative to reconcile the CARICOM's attempt to recognize the free movement of persons in the context of liberal trade, while promoting certain labor and human rights principles, all within a framework that is still dependent on unanimous agreement. It offers a flexible mechanism that nonetheless promotes a convergence of norms and heightened collaboration.

In 1992-93, a comprehensive Report was commissioned by the CARICOM,[188] which laid the background for labor law reform initiatives. The Antoine Report recommended that a creative approach to harmonization should be taken, so that labor harmonization would not merely be an attempt to retain the current status of the laws, but would also be used as an opportunity to improve them.

With international technical assistance, the process of drafting model laws was put into action. The drafts were discussed at regular meetings of labor officials. To date, four CARICOM model laws have been completed, on the termination of employment, trade union recognition, occupational safety and health, and the working environment, as well as equality of opportunity and treatment.[189]

The decision to draft model laws within the context of a labor law harmonization process is innovative and flexible, suitably adapted to the local context. Building on a pre-existing foundation of cooperation that existed between States that share similar historical and democratic traditions, it fashions a way for them to accomplish two particularly important purposes. First, as individual micro-States, which face trade liberalization and the need to compete to attract foreign investment, Caribbean nations need mechanisms to address

188. *See* ROSE-MARIE BELLE ANTOINE, THE CARICOM LABOUR LAW HARMONIZATION PROJECT (1992) [hereinafter THE ANTOINE REPORT].

189. Completed model laws are *available at* http://www.caricom.org (information services). Apparently, governments, unions, and employers were not in favor of a fifth draft on the protection of employees during industrial action. (Based on email correspondence with Steven MacAndrew, an official at the Caricom Secretariat dated July 8, 2002 (on file with author). Model legislation on a range of issues related to gender equality, including on equality for women in employment, is *available at* http://www.caricom.org (information services).

sensitive policy issues in a collective manner to avoid undesirable forms of competition.

The labor law harmonization process simultaneously allows Member States to update and render more accessible legislation that in some cases still reflects pre-colonial norms and may be ill-suited to contemporary concerns. [190] They identify, through a tripartite process, a practical, principled, and acceptable regulatory level and framework. Then, each Member State has a certain amount of flexibility as it chooses to adopt the legislation within its own legal context, in some cases as a part of an initiative to reform an entire labor code. While the Member State is free to deviate from the norm, the fact of the matter is that the tripartite actors already have a publicly-available draft, reflective of a negotiated consensus, supported by the broader regional community and the ILO, upon which to agree.

This original endeavor reflects the ways that regionalism and globalization can intersect to create options that neo-liberal approaches to liberalization might otherwise be considered to circumscribe. They reinforce the potential to act in a manner that reaffirms the importance of social dimensions, implicitly forcing correctives to a uni-dimensional approach to liberalization. They are a reminder as well of the ways that international organizations can contribute to broadening the panoply of regulatory options, by offering timely solutions to the overlapping challenges in a constantly renegotiated labor law landscape. This kind of initiative warrants careful attention and cultivation.

C. MERCOSUR

When the Southern Common Market (MERCOSUR) was established by Argentina, Brazil, Paraguay, and Uruguay[191] under the Treaty of Asunción in 1991,[192] the regional entity had only a

190. *See generally* ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 12-22 (1999).

191. Bolivia and Chile are associate members of the MERCOSUR.

192. Tratado para la constitución de un mercado común entre la Republica Argentina, La Republica federativa del Brasil, La Republica del Paraguay y la Republica oriental de Uruguay, Mar. 26, 1991, *available at* http://www.mercosur.org.uy. While the original Spanish and Portuguese versions are considered equally authentic, an unofficial English version is *available at* http://www.sice.oas.org. For a history of this development, *see generally* Enrique J. Aramburu, *Historical Perspective: The Evolution of Mercosur in a South American Integration*, 13 PACE INT'L L. REV. 183 (2001). For a discussion of the Common Market and the institutional framework, *see generally* 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 (1999).

temporary,[193] if flexible,[194] institutional structure. Beyond the common external tariff, there was little policy coordination at all, not even at the level of macroeconomic policies that are considered to facilitate trade.[195] Still, at its peak, MERCOSUR managed to multiply significantly the amount of intra-MERCOSUR growth,[196] and position itself for further extra-MERCOSUR trading opportunities. Moreover, there was initially no requirement that Member States establish systems of democratic government to become a Member State of MERCOSUR. And, the only references to a social dimension were found (1) in the 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*;"[197] and (2) in Annex IV, which contained an "escape clause" that listed "level of employment" as one of the factors in the determination of "grave prejudice" to the economy of a country. Instead, MERCOSUR at its outset placed virtually complete attention on the economic integration process, which focused on the cardinal objective for the grouping of creating a common market and pursuing a program of commercial liberalization.

At a fairly rapid pace, however, limited institutional, democratic and social dimensions of the second largest trading bloc in the Western Hemisphere[198] with a highly segmented labor market of

193. *See* Aponte Toro, *supra* note 7, at 153 (adding that "el Tratado de Asunción por el que se crea Mercosur es un pequeño tratado . . . pero que ha continuado ganando en substancia").

194. *See* Jason R. Wolff, *Putting the Cart Before the Horse: Assessing Opportunities for Regional Integration in Latin America and the Caribbean*, 20 FLETCHER J. WORLD AFF. 103, 117 (1996).

195. *See* Werner Baer, Tiago Cavalcanti, & Peri Silva, *Economic Integration without Policy Coordination: The Case of Mercosur*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=283461. The authors note as well that the common external tariff (CET) itself has not been fully implemented, although MERCOSUR has led to an important reduction in external protection (at 4-6). However, MERCOSUR still represents an important break from previous regionalization efforts in Latin America, given its emphasis on open trade. *See also* Alejandro Pastori, *Strategies Toward Integration: Argentina and Uruguay*, *in* COOPERATION OR RIVALRY?, *supra* note 90, 112, 113-114 (explaining why "the most serious difficulty for MERCOSUR concerned the harmonization of macroeconomic policies"); M. Anaam Hashmi, *Role of Mercosur in Regional Trade Growth*, 26 MANAGERIAL FIN. 41, 43-44 (2000) (describing the declining economic fortunes of the region, and the rise of protectionism within MERCOSUR, with particular reference to the automotive sector).

196. *See* Hashmi, *supra* note 195, at 44-47. *See also The Americas: Brazil and Argentina: Fingers Crossed*, 362 THE ECONOMIST, Jan. 5, 2002, at 42 (noting that trade within MERCOSUR accounts for only 18% of members' total exports, down from 25% at the 1998 peak).

197. Emphasis added.

198. *See* BEHAR, *supra* note 41, at 85 (noting that "[b]y 1996, MERCOSUR comprised nearly 206 million people, who generated a GDP of $664 billion (in 1990 prices)" with a "rapid growth in trade within the group"). *See also*, Miguel Teubal, *Regional Integration Processes in Latin America: Argentina and MERCOSUR*, *in* REGIONALIZATION AND GLOBALIZATION IN THE MODERN WORLD ECONOMY, *supra* note 105 , 230 at 242-243 (noting in particular the large

which one third is in the informal economy[199] have been recognized and addressed.[200] This development, far from surprising, reflects the fact that the members of MERCOSUR, profoundly linked by history and geography, have always had highly porous borders ensuring economic, political, and socio-cultural exchange.[201] 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 the MERCOSUR and renders the integration—and its social dimensions—less than wholly "new."[202]

First, in 1994, a more developed institutional structure of MERCOSUR was established under the Ouro Preto Protocol[203] to the Treaty of Asunción. According to the Protocol, the highest organ in MERCOSUR is the Common Market Council (CMC), a decision-making body that seeks to ensure that regional objectives are fulfilled. MERCOSUR's executive is represented in the Common Market Group (GMC), which is assisted in overseeing the instruments on common commercial policy by the Trade Commission (CCM). The Parliaments of each MERCOSUR Member State are represented on the Joint Parliamentary Committee (CPC), which has since issued proposals to construct institutions with parliamentary, legislative, and consultative functions.[204] An Administrative Secretariat (SAM) based in Montevideo provides services to the various MERCOSUR bodies.[205] Established under the 1991 Brasilia Protocol but in force only since 1995,[206] the ad hoc arbitral tribunal only issued its first ruling in 1999, in a dispute raised by Argentina over non-tariff measures taken by Brazil.[207] In general, the consensus and full

social disparity that characterizes MERCOSUR members and the worsening social conditions in countries like Argentina).

199. *See* Teubal, *supra* note 198, at 248 (noting also the IMF structural adjustment policies that have been applied in MERCOSUR countries to promote "flexible" labor markets and that have led to real wage reductions).

200. *See* Phillips, *supra* note 71, at 567 (noting that the Brazilian focus on loose economic association contrasted with Argentinian attention to deepened integration and the small Member States' insistence that institutions and special treatment were needed).

201. *See* Jelin, *Dialogues*, *supra* note 35, at 39 (adding that "[t]hese exchanges have produced networks of family relationships of employment that are of the greatest importance for the daily life of large sections of the population").

202. *Id.* at 39-40.

203. Dec. 17, 1994, *available at* http://www.mercosur.org.uy.

204. *See* Phillips, *supra* note 71, at 577.

205. *See* http://www.mercosur.org.uy. Comparative information on the Member States can also be found *at* http://www.ilo.org/public/spanish/region/ampro/mercolab.

206. *See* Emilio J. Cárdenas & Guillermo Tempesta, *Arbitral Awards under Mercosur's Dispute Settlement Mechanism*, 4 JIEL 337, 343 (2001).

207. Aplicación de Medidas Restrictivas al Comercio Recíproco, Apr. 28, 1999, *available at* http://www.mercosur.org.uy. For a discussion of the Non-Tariff Measures Award, *see* Cárdenas

attendance requirement for policy decisions and the overlap between personnel in MERCOSUR organs and domestic bodies limits both the independence, and the potential for conflict, of the MERCOSUR institutional framework.[208] However, the decisions of the arbitral tribunal are ultimately not subject to appeal, and are compulsory,[209] signaling its potential to promote integration through dispute resolution.[210]

Second, in the transition from dictatorial rule in MERCOSUR Member States,[211] convergence over the importance of a democratic requirement was reached in San Luis, Argentina in June 1996 within two days of a threatened return to military rule via coup d'état in Paraguay. Three political resolutions were approved, one of which is a "democratic clause,"[212] which establishes that the respect for democratic institutions is a *sine qua non* for MERCOSUR Member States. The initiative effectively preempted the political crisis in Paraguay, and more generally demonstrates a broader understanding of the relationship between democratic governance and the market.[213] Moreover, a later Protocol of Ushuaia led to full integration in the Treaty of Asunción and the Integration Agreements signed by Chile and Bolivia of the terms of the 1996 Declaration.[214] Indeed, democratic governance and liberalization were arguably coupled to prevent a return of authoritarian rule in the region.[215] This early recognition of the importance of a democratic basis from which to conduct trade foreshadows the FTAA developments,[216] and

& Tempesta, *id.* at 347-35. At least nine other awards, have since been rendered. The texts of the awards are *available at* http;//www.mercosur.org.uy. *Id.* at 346, 354-365.

208. *See* NIEMANN, *supra* note 70, at 155. *See also* Gilson Schwartz, *Brazil, MERCOSUR and SAFTA: Destructive Restructuring or Pan-American Integration?*, *in* COOPERATION OR RIVALRY?, *supra* note 90, at 129, 138-139; Cárdenas & Tempesta, *supra* note 206, at 340.

209. *See* Cárdenas & Tempesta, *supra* note 206, at 344.

210. *See* Cárdenas & Tempesta, *supra* note 206, at 364.

211. *See* Jelin, *Cultural Movements*, *supra* note 35, at 86. *See also* Pastori, *supra* note 195, at 120.

212. Declaración Presidencial sobre el Compromiso Democrático en el Mercosur, July 26, 1996, *available at* http://www.mercosur.org.uy.

213. *See* Schwartz, *supra* note 208, at 140 (arguing that "[d]emocratization has led to a new generation of ECLAC-inspired thinking—highly critical of the Washington consensus and especially perceptive of technological gaps and weaknesses in industrial policies. It seems unlikely that even under a more liberal regime this new perspective would be discarded.").

214. Protocolo de Ushuaia sobre Compromiso Democrático, July 24, 1998, *available at* http://www.mercosur.org.uy. *See also* Declaración Politica del Mercosur, Bolivia y Chile como zona de paz, July 24, 1998, *available at* http://www.mercosur.org.uy; MARÍA CARMEN FERREIRA, LA FORMACIÓN PROFESSIONAL EN EL MERCOSUR 125-126 (2002).

215. *See generally* NIEMANN, *supra* note 70, at 154 ("A crucial aspect of Mercosur is the fact that the regionalization in the Southern Cone takes place against the backdrop of a transition from authoritarian rule to liberal democratic systems and it is not accidental that the current episode of trade liberalization is embedded in the context of regionalization.").

216. *See* Part II, *supra*.

underscores the moral strength of the claims by civil society organizations that the democratic base of hemispheric trade need to be deepened.

Third, the Ministers of Labour of the four founding Member States, who report directly to the GMC, issued a Joint Declaration in 1991,[217] which emphasized that the socio-labor aspects of the MERCOSUR needed to be addressed to ensure that there would in fact be effective progress in the conditions of work of the Member States. They affirmed their willingness to sign onto an instrument linked to the Treaty that would address the inevitable labor and social questions. They called for cooperation to achieve mutual understanding of each country's labor relations and social security systems.[218] However, on the movement of persons, the MERCOSUR has replicated the GATS model.[219]

The high-level social policy institution of MERCOSUR is the tripartite Social and Economic Consultative Forum (FCES), a consultative body that has the power to formulate recommendations to the GMC.[220] It is accorded a high degree of autonomy under the Protocol, which some considered to be a source either for great potential to fill a distinct social policy role akin to that of the Economic and Social Council of the European Union, or to flounder as a potentially marginal body.[221] Although it deals with a particularly wide range of subject matter that reflect the various economic and social sectors of MERCOSUR, it has embraced some topical labor concerns, notably in a Recommendation on Employment Policy.[222]

In the wake of the contraction of intra-regional trade after the Brazilian real was devalued in early 1999[223] and the ensuing deep financial crisis in Argentina,[224] the future of MERCOSUR might have

217. May 9, 1991, *available at* http://www.mercosur.org.uy.

218. *See* M. Cristina Etala, *El Objetivo del Progreso Social en el Proceso de Integración. El Caso del Mercosur*, 12 DERECHO DEL TRABAJO LII (1992). *See* FERREIRA, *supra* note 214 at 70-72. This development is seen as consistent with a variant of the "desarollista" approach to development through integration, a vision that seeks to recognize that many factors contribute to development and that real buy-in from a vast representation of social actors is required in order for the development objectives to be met. *See generally* Teubal, *supra* note 198, at 235-236.

219. *See* OECD, *Labour Mobility in Regional Trade Agreements*, *supra* note 8, at 15.

220. Ouro Preto Protocol, *supra* note 203, at § V, Arts. 28-30.

221. *See generally* OSCAR ERMIDA URIATE, MERCOSUR Y DERECHO LABORAL, 53-58 (1996).

222. Interestingly, there has been some suggestion from Civil Society that the FTAA Civil Society Committee should function in a manner similar to the FCES. *See* Blum, *supra* note 8, at 442.

223. *See* Phillips, *supra* note 71, at 568.

224. *See* Martínez Estévez, *supra* note 39; Fernando Gualdoni, *La crisis bancaria paraliza Mercosur: La falta de créditos a la exportación hunde el comercio entre los cuatro miembros del*

been questioned;[225] instead, although deeper integration initiatives[226] may have been placed on hold,[227] the events have also led to a rethinking of the role of MERCOSUR in the broader project of regional development. Certainly, the financial crisis has provided opportunities for Brazil—often viewed as using MERCOSUR as a position of power from which to confront the United States, rather than as a bloc that is valuable in its own right, and within which it should exercise a constructive leadership role[228]—to act instead as a leader within the regional bloc, promoting development and stability within.[229] But beyond Brazil's strategic opportunity, the crisis imposes a rethinking of neo-liberal approaches to regionalism, giving greater credence to the initiatives underway within MERCOSUR to mediate their social impacts.[230] This responsibility has fallen directly on the state, in its domestic governance capacity and capacity to create additional layers of governance in the MERCOSUR infrastructure, as

bloque, EL PAIS, Jan. 12, 2002 (noting the decline in trade but citing experts from the Interamerican Development Bank, the São Paulo School of Business Administration, and the Council for Latin America and the Caribbean (CEPAL) on the probability that over the mid-term, MERCOSUR would actually be strengthened).

225. The option of abandoning the MERCOSUR project has been on the table, at least in Brazil. *See* Phillips, *supra* note 71, at 569. However, it is too soon to evaluate how much impetus remains for the optimistic "Little Maastricht" proposals to promote monetary union within the MERCOSUR bloc, as discussed by Phillips prior to the Argentinian crisis, *supra* note 71, at 573. For a discussion of IMF approaches in the Southern Cone region between Brazil and Uruguay, on the one hand, and the hard-line approach to Argentina, *see* Alexander Haslam, *Argentina: Governance in Crisis*, Canadian Foundation for the Americas (FOCAL) Policy Paper FPP-03-02 (Ottawa, 2003) *available at* http://www.focal.ca.

226. For a discussion of the broad range of proposals made at the XVI Summit of MERCOSUR Heads of State in Asunción in June 2000, including strengthening the Administrative Secretariat and other institutions, perfecting the Brasilia Protocol dispute resolution mechanisms, reducing the common external tariff, promoting competition policy, enhancing trade relations with third parties, enhancing macroeconomic coordination, improving incentives for investment, and coordinating external relations, *see* Phillips, *supra* note 71, at 573-574. *See also* Haggard, *supra* note 7 at 313.

227. *But see* the authoritative report prepared by the Equipo Interdisciplinario de Análisis de la Realidad of the Universidad Católica de Córdoba, *Argentina en emergencia. Aspectos estructurales y coyunturales* May 3, 2002, at 17 (on file with author) in which the authors call for MERCOSUR to be deepened and strengthened, to facilitate other international trade negotiations, particularly the FTAA, that can be negotiated en bloc. They call for the deepening of MERCOSUR's institutions on a priority basis, to facilitate exchange with the Brazilian market. *See also* Martínez Estévez, supra note 39, (calling for a common currency in MERCOSUR). And, talks of deeper integration within regular negotiating fora have continued. *See* Llega el delegado de Cardoso, La Nacion, Mar. 14, 2002, *available at* http://www.lanacion.com.ar.

228. *See* Bruner, *supra* note 7, at 61.

229. For a modest example, *see* Fernando Gualdoni, *La Crisis en Argentina: Brasil paga las deudas de los importadores Argentinos*, EL PAIS, Jan. 15, 2002 (reporting that the Brazilian Central Bank provided loans to be repaid by the Argentinian Central Bank within six months, to pay importers of Argentinian goods).

230. *See* Phillips, *supra* note 71, at 571.

well as space for clearer developmental priorities.[231] These governance layers include broadened participation of civil society.

Professor Jelin of the National Council for Scientific and Technical Research[232] in Argentina observes that with the advent of MERCOSUR, formal channels in the regional bloc are serving as fora for dialogue and exchange between social actors.[233] Moreover, even the manner in which academic and other civil society activities within Member States are constituted has changed;[234] for example, the *Foro de mujeres del MERCOSUR* provides space for women's participation in the regional integration process.[235] For Jelin, this reflects a deeper level of integration whereby "nationality and national identity not only exist but reinforce each other in regional dialogue and negotiations."[236] This integration simultaneously forges and challenges the creation of "a collective regional identity."[237] A particularly striking specific example of this in the labor context within MERCOSUR was the conclusion in May 1999 of a trans-national collective agreement between the multinational employer, Volkswagen Argentina, and Volkswagen Brazil and trade unions in both countries, which specifically references the relationship between capital and labor within the MERCOSUR context.[238] This dynamic extension of labor law across borders is a crucial example of the ways that labor linkages are increasingly being sewn into the fabric of regional trade. The existence of a MERCOSUR union federation, the Coordinadora de Centrales Sindicales del Cono Sur (CCSCS) and its

231. *Id.* at 571-572, 580 (observing that "the political climate shifted to discussions of the necessary and appropriate role for governments and for states in producing a more socially acceptable version of the economic model. As such, there is general convergence in the literature on Latin America (and particularly South America) on the notion of a basic market vision 'softened' by government action in a variety of policy areas.").

232. Consejo Nacional de Investigaciones Cientificas y Tecnicas.

233. *See* Jelin, *Cultural Movements*, *supra* note 35, at 88.

234. *See* Jelin, *Dialogues*, *supra* note 35, at 43 (offering the example of conference organizers increasingly frequently concerning themselves to have balanced participation from all of the MERCOSUR member countries).

235. *See* Jelin, *Cultural Movements*, *supra* note 35, at 94-95 (noting, however, that it is too early to assess the results of this activism).

236. *See* Jelin, *Dialogues*, *supra* note 35, at 43.

237. *Id.*

238. A copy of the Agreement, translated from the original Portuguese to Spanish, is reprinted in FERRIERA, *supra* note 214, at 182-185. As Compa observes, "[t]he agreement recognizes the new context of Mercosur's trading arrangements" including measures to promote information exchanges, improve competitiveness, facilitate dispute resolution, enhance worker training, recognize factory committees, continually improve the collective agreement through social dialogue in the MERCOSUR framework. *See* Compa, *supra* note 4, at 12. *See also* FERREIRA, *supra* note 214, at 81, 136-137 (noting the particular relevance of this agreement with respect to the promotion of social dialogue and professional development, backed up by real information-sharing requirements).

MERCOSUR Labour Committee, and the Employers' groups, the MERCOSUR Industrial Council and the Council of Chamber of Commerce of MERCOSUR, further illustrates the organization of worker identity across the regional integration space.[239]

1. Subgroup on Labor, Employment, and Social Security Matters

Directly subordinate to the GMC are work subgroups that conduct studies on specific MERCOSUR concerns and draw up minutes of decisions to be considered by the Council. When MERCOSUR was established, Annex V of the Treaty of Asunción foresaw only ten subgroups; Subgroup No. 11, the Labour Relations, Employment, and Social Security Matters Subgroup, came into being through the Additional Protocol of Brasilia of December 1991, as a consequence of the Declaration of 1991.[240] It was reconstituted in 1995 with a minor change in name and number, as Subgroup No. 10 on Labour, Employment, and Social Security Matters.[241] And, although Subgroup No. 11 initially had eight thematic committees,[242] during the first meeting of the newly reconstituted Subgroup No. 10 on October 1995, it was decided that themes should be prioritized and matters addressed in special work groups.[243]

The structure of current Subgroup No. 10 bears one key difference from the others: it is tripartite, with direct representation from governments, workers, and employers representatives. Subgroup No. 10 has also resolved to use a gender-inclusive approach in its work since its May 2001 meeting.[244] And it has undertaken original initiatives that suggest a serious effort to consider the social dimensions of trade. The first example is the Labour Market "Observatory"; established with ILO assistance, it is a permanently functioning technical body designed to provide information to all MERCOSUR institutions with competency in social and labor matters. The Observatory has an Implementation Group whose

239. *See* FERREIRA, *supra* note 214, at 128.

240. The Additional Protocol of Brasilia is *available at* http://www.mercosur.org.uy. The subgroup's mandate is to address "las ineludibles cuestiones laborales y sociales que traerá consigo la puesta en marcha del MERCOSUR."

241. Resolution No. 20/95 of the GMC, Estructura del GMC (MERCOSUR/GMC/Res. No. 20/95), Art. 1, *available at* http://www.mercosur.org.uy.

242. The Committees were: 1. Individual Employment Relations, 2. Collective Labour Relations, 3. Employment and Labour Migration, 4. Professional Development, 5. Safety and Health, 6. Social Security, 7. Specific Sectors, and 8. Principles.

243. *See* Acta No. 1/95 del Subgroupo No. 10, *available at* http://www.mercosur.org.uy. *See also* discussion in ERMIDA URIATE, *supra* note 221, at 14-15.

244. *See* FERREIRA, *supra* note 214 at 132.

mandate is to facilitate, through tripartite consultation, research on the social dimensions of integration, focusing notably on information collection, analysis, and dissemination (including via a database) of topics requested by the Subgroup (including analyses of the employment effects of political decisions).[245] A second example is that Subgroup No. 10 has taken the issue of labor inspections seriously in the region; teams of trilateral delegations accompanied labor inspectors in their investigations of labor practices in workplaces. And a third example has been the preparation of studies on whether the harmonization of labor legislation within the MERCOSUR framework should be promoted, focusing on identifying differences or asymmetries within the region that could impede integration.[246] Within Committee No. 8 (Principles) of then Subgroup No. 11, attention was specifically turned to facilitating convergence through the promotion of state ratification of 34 selected ILO conventions.[247] Once the ILO's 1998 Declaration was adopted, MERCOSUR Member States were exhorted to subscribe to the relevant conventions deemed to consecrate the fundamental principles and rights at work.[248] An attempt by Subgroup No. 10 to compare the labor costs of labor laws in each country faced unresolved methodological difficulties, leading the GMC to instruct it to undertake industry-based wage analyses instead.[249] Yet legislative work in Subgroup No. 10 on social security has led to the adoption in 1996 of the Multilateral Agreement on Social Security.[250]

Subgroup No. 10, although an original initiative, is not supported by implementation machinery. It only has the power to make recommendations. The power of Subgroup No. 10 is simply not on

245. *Id.* at 127.

246. For a discussion of this attempt to link national laws to the regional level, *see* FERREIRA, *supra* note 214, at 57-58. *See also* ROBERTO DROMI ET AL, DERECHO COMUNITARIO: SISTEMAS DE INTEGRACION REGIMEN DEL MERCOSUR, BUENOS AIRES, EDICIONES CIUDAD ARGENTINA 470 (1995); Information provided by the Sectoral Committee for MERCOSUR (COMISEC) 8/8/95, Red Académica Uruguaya, Aporte a la comprensión del Sector Laboral de MERCOSUR *at* http://www.rau.edu.uy/mercosur/faq/pre25.merco.htm. *See also* Compa, *supra* note 4, at xx (reporting that Working Group No. 10's comparative studies concerned the "termination of the employment contract, temporary employment, hours of work, and probation periods, identifying asymmetries that saw Uruguay emerge as the exception, with a relatively spare labor law regime compared with the highly detailed labor codes of its Mercosur partners.").

247. These were Conventions Nos. 1, 11, 13, 14, 19, 22, 26, 29, 30, 77, 78, 79, 81, 90, 95, 98, 100, 105, 107, 111, 115, 119, 124, 135, 136, 139, 144, 151, 154, 155, 159, 162, and 167. *See* FERREIRA, *supra* note 214, at 58-59, who notes that eight (8) conventions were considered fundamental: Nos. 29, 98, 100, 105, 111, 144, 151 & 154. Surprisingly, Convention No. 87 is not on the list, and Convention No. 95 was not selected as a fundamental one.

248. *See* FERREIRA, *supra* note 214, at 59.

249. *See* Compa, *supra* note 4, at 5.

250. *See supra* note 218 and accompanying text.

par with that under the Treaty of Asunción and various Protocols to reduce or reorient state regulation to facilitate capital movements.[251] Yet the activities of the subgroup suggest precisely the growing interest in investigating links between social policy and economic integration in creative if currently limited ways. And in some cases, such as the labor inspection prospect, it can be argued that "[t]hough limited, such activity can be viewed as a prototype of eventual enforcement of common labor standards."[252] Moreover, it does so in a way that affirms the relevance of action within individual Member State territory by actors from throughout the region, underscoring the development of a regional identity asserted by Jelin. Key to the interest of these examples, therefore, is less their obvious limits and more the recognition of the value of exploring at the regional level mechanisms to understand the interface and foster deep compliance with labor regulations in the integrated regional space.

2. Sociolabour Declaration

The attempt in MERCOSUR to address democratization and social protection within the liberalization framework has created a space for workers' representatives to enhance the social dimensions of the agreement. One of the major initiatives toward a social dimension in MERCOSUR has been the attempt to establish a Social Charter, or Charter of Fundamental Labour Rights. This was alluded to in the 1991 Joint Declaration of the Ministers of Labour,[253] after which a draft was introduced by the Coordinator of the *Centrales Sindicales del Cono Sur* in 1993. The draft was subjected to considerable debate over its precise juridical nature and potential overall impact.[254] However, a Charter, particularly if in the form of a Protocol with robust enforcement mechanisms,[255] was seen by many as one of the best ways to ensure that the social dimension of regional integration in MERCOSUR would not be marginalized.[256] Ultimately, though,

251. See John Weeks, *Economic Integration in Latin America: Impact on Labour*, ILO, Geneva, Employment and Training Papers, No. 18, at 22-23 (1998), *available at* http://www.ilo.org/public/english/employment/strat/publ/etp18.htm.

252. *Id.* at 6.

253. *See supra* note 217 and accompanying text.

254. *See* Oscar Ermida Uriate, *Características, Contenido y Eficacia de una Eventual Carta Social del MERCOSUR*, *in* ILO/RELASUR, UNA CARTA SOCIAL DEL MERCOSUR? TRABAJOS DE LA JORNADA TÉCNICA SOBRE LA CARTA DE DERECHOS FUNDAMENTALES EN MATERIA LABORAL DEL MERCOSUR 26-27 (1994).

255. *See generally* Rodolfo Capón Filas, *Mercosur y Negociación Colectiva Transnacional*, 5 DERECHO DEL TRABAJO 590 (1993); ILO/RELASUR, *supra* note 254.

256. *See* Geraldo von Potobsky, *Naturaleza, Contenido y Eficacia de una Eventual Carta Social del MERCOSUR*, *in* ILO/RELASUR, *supra* note 254, at 29. *But see* Niemann, *supra* note

controversy forced Subgroup No. 10 to turn its attention toward the articulation of a regional standard, albeit in the form of another Declaration.

The MERCOSUR Sociolabour Declaration was ultimately signed not by the Labour Ministers, but by the Presidents of each Member State on December 10, 1998 in Rio de Janeiro.[257] It takes the important step toward affirming that social progress is a key companion to the still central economic dimensions of the regional integration progress in MERCOSUR. In the Preamble of the Declaration, the reference in the Treaty of Asunción to "social progress" is recalled, as is the commitment to raise living standards through economic policies. In the substantive provisions of the Declaration, Member States reaffirm that their commitment to the principles of political democracy and the respect of the civil and political rights of persons is an "irrevocable" aspect of the integration project.

The assertions on fundamental principles and rights at work are particularly instructive. First, the Member States recall that they are members of the ILO. They reaffirm the fact that they have ratified the core Conventions. They add that they largely adopt and follow the Recommendations that promote the quality of employment, safe and healthy conditions at work, the principles of social dialogue, and the general well-being of workers. They proclaim their support for the ILO Declaration of Fundamental Principles and Rights at Work, which they understand requires them to respect, promote, and put into practice the rights and obligations expressed in the Conventions recognized to be fundamental both within and outside the ILO. Several other key human rights principles, from the UN and OAS in particular, are cited as relevant. They consider the need to foresee, analyze, and resolve the different social problems generated by integration, and pledge to act. In sum, the focus of the preamble reflects a keen sensitivity to the ways that broader social principles are integral to the overall integration process, and in this sense concretizes the move of social issues from the margin to the center of the theoretical understanding of regionalism in MERCOSUR. Indeed, the preambular language has sparked a lively doctrinal discussion on

70, at 159 (arguing that "[a] social charter as such will not change the position of labor in the face of lax enforcement, especially if such weak enforcement is justified by the necessities of globalization.").

257. Reproduced in FERREIRA, *supra* note 214, Annex at 155, *available at* http://www.ilo.org/public/spanish/region/ampro/mercolab. The added political force of the presidential declaration is discussed by FERREIRA, *supra* note 214, at 68.

the juridical nature of the Sociolabour Declaration, leading some to posit two key values to the text. First, the substantive content of the Declaration is greater than its specific content, in that it incorporates key international human rights instruments. Second, it is said to incorporate fundamental human rights in a manner that signals agreement by Member States, irrespective of whether the incorporated texts have been ratified by each Member State.[258] Indeed, María Carmen Ferreira offers the most enthusiastic interpretation of the Sociolabour Declaration, concluding that it is an immediately applicable instrument capable of a dynamic, open, flexible use, and more easily revisable than a treaty.[259]

The substantive aspects of the Sociolabour Declaration address—albeit in fairly general terms and with frequent references to national practice—a broad range of standard labor rights, including the individual employment rights to non-discrimination,[260] equality promotion,[261] the rights of migrant workers,[262] the elimination of forced labor,[263] and child labor.[264] Tellingly, the Sociolabour Declaration also contains a "management rights" clause,[265] a

258. *See* FERREIRA, *supra* note 214, at 67.

259. According to FERREIRA, *supra* note 214, at 68, "Era una forma instrumental dinámica, abierta, flexible y más facilmente revisable que un Tratado, lo que le daba una vocacion de perfeccionamiento continuo acorde a la consolidación y desarollo de los aspectos sociolaborales."

260. Sociolabour Declaration, *supra* note 257, at Art. 1. This provision contains a broad list of grounds of discrimination, including sexual orientation and such other social or family conditions, but all in conformity with the legal provisions in force, presumably nationally. It is not clear whether equal pay for work of equal value is included within the framework of the Sociolabour Declaration, as neither Article 1 nor Article 3 refers to it explicitly.

261. *Id.*, at Arts. 2, on persons with disabilities, and 3, which speaks of equal treatment between men and women.

262. *Id.*, at Art. 4. This provision also considers the rights of fronterizos, who work along/regularly cross the borders to work. An ad hoc group studying the integration of frontizeros was created by a Resolution of the GMC No. 5/02. Subgroup 10 is studying the free movement of workers. *See* FERREIRA, *supra* note 214, at 63, 79-80.

263. Sociolabour Declaration *supra* note 257, at Art. 5.

264. *Id.*, at Art. 6. This provision is relatively weak, as it simply states that the general minimum age should be in conformity with national legislation of the Member States, and that it cannot be lower than the obligatory schooling age. The parties commit themselves to policies and actions to abolish child labor and progressively raise the minimum age of work. It does, however, establish that for certain forms of unhealthy, dangerous or immoral work, the minimum age cannot be less than 18. It should, however, be noted that a Declaration on the Eradication of Child Labour has been adopted, signaling the need to formulate common policies with respect to child labor. This development is the result of an analysis by MERCOSUR's Sociolabour Committee, discussed *infra*, pursuant to Art. 6 of the Sociolabour Declaration. *See* FERREIRA, *supra* note 214, at 61, 72.

265. Sociolabour Declaration *supra* note 257, at Art. 7, according to which an employer has the right to organize and economically and technically direct the workplace, in conformity with the law and national practice. *See also* Compa, *supra* note 4, at 9 (noting that the clause was a compromise in the face of proposals calling for "a long recitation of employers' rights including the right to hire and fire with more flexibility, the right to change employees' work schedules, the right to make and move investments at will, the sanctity of private property, the permanence

development unparalleled in ILO instruments. Collective rights, including the freedom of association and trade union freedom,[266] collective bargaining,[267] the right to strike,[268] and social dialogue[269] are also addressed. The Sociolabour Declaration further addresses employment creation,[270] protection against unemployment,[271] professional development, and the development of human resources,[272] safety and health at work,[273] labor inspection,[274] and social security.[275]

For Ferreira, the Sociolabour Declaration is, without a doubt, the most important normative document on harmonization in the region, with enormous potential to promote the consolidation of a social dimension and future development of social policy in MERCOSUR.[276] But Ferreira also acknowledges that the Sociolabour Declaration is a starting point, not a final destination for social policy in MERCOSUR.[277] And, indeed, one cannot but problematize the Sociolabour Declaration in relation to its provisions for application and follow-up. For, the text seeks to avoid any direct link with the trade dispute resolution mechanisms; moreover, the Sociolabour Declaration takes great pains to prohibit unintended trade uses of the Sociolabour Declaration.[278] Arguably, though, the recent decisions of the ad hoc Arbitral Tribunals nonetheless provide potential to

of a free enterprise system, the separation of powers, and more"). *See also* FERREIRA, *supra* note 214, at 63-64 (remarking upon the exceptional nature of this clause on a comparative law basis).

266. Freedom of association is articulated in its broad form in Art. 8, to include employers and workers, while Art. 9 focuses more specifically on workers and their protection against anti-union discrimination, including victimization at work. Sociolabour Declaration, *supra* note 257.

267. *Id.*, at Art. 10.

268. *Id.*, at Art. 11, which includes the proviso that this right be exercised in conformity with the national provisions in force, and Art. 12, which addresses preventative and alternative measures to minimize recourse to strikes.

269. *Id.*, at Art. 13. Social dialogue is to be promoted both at the national and regional levels. *See* FERREIRA, *supra* note 214, at ch. 6.

270. Sociolabour Declaration *supra* note 257, at Art. 14.

271. *Id.*, at Art. 15.

272. *Id.*, at Art. 16.

273. *Id.*, at Art. 17.

274. *Id.*, at Art. 18.

275. *Id.*, at Art. 19. There remains some attempt to coordinate the social security systems, in keeping with the principle of freedom of movement of persons. The principle would be to permit workers to cumulate their social security benefits acquired in one member State with those earned in others. Bilateral accords exist, and preliminary documents have been prepared.

276. *See* FERREIRA, *supra* note 214, at 61.

277. *Id.* at 70. Ferreira also acknowledges that the Declaration may seem insufficient or unsatisfactory with respect especially to the content, follow-up and promotion as well as the juridical nature, but points out that the document remains the fruit of a consensus-based process. *Id.* at 61.

278. Sociolabour Declaration *supra* note 257, at Art. 25 clarifies that the Declaration cannot be used for unforeseen purposes, in particular commercial, economic or financial questions.

consider whether restrictions on the use of non-tariff barriers should be attenuated in light of "non-commercial values,"[279] in a manner not unlike recent WTO decisions.[280] Instead, the Sociolabour Declaration focuses on enhancing compliance through the creation of a new institution, the tripartite, purely-promotional Sociolabour Committee, which has both regional and local elements, and which reports to the GMC.[281] Member States also accept a range of reporting requirements. Hence, although the Declaration itself reflects an attempt to grapple with social consequences of trade, and the Sociolabour Committee provides a space within which those consequences can be considered, the perennial problem of the potential efficacy at addressing the trade-labor interface looms large. For example, despite the long list of responsibilities given to it,[282] the Regional Sociolabour Committee is required to sit only once per year;[283] moreover, its composition is not determined within the text of the Declaration,[284] and has been the source of controversy.[285]

279. *See* discussion of the *Non-Tariff Measures Tribunal*, *in* Cárdenas & Tempesta, *supra* note 206, at 354 (noting that in its interpretation, the Tribunal drew on Art. 50 of the ALADI Treaty, into which MERCOSUR has been integrated through the Acuerdo de Alcance Parcial de Complementación Económica No. 18 of Jan. 23, 1992, to argue that non-tariff measures may be adopted to protect such non-commercial values as "public morals." For a discussion of the interplay between non-tariff measures and labor regulation, *see* Langille, *supra* note 41, at 236; Blackett, *supra* note 6, at 52-56.

280. *See in particular* WTO Asbestos Appellate Body Report, *supra* note 59, notably the concurring statement of one Appellate Body member, who felt compelled to question the value of relying on traditional market-based tests rather than arriving at a conclusion regarding the limits of "likeness" under the GATT Art. III:4 on the basis of health policy (at ¶¶ 152-153). For a discussion of this decision, *see* Blackett, *supra* note 41, at 294-295.

281. Established by Resolution 15/99 of Mar. 9, 1999 by the GMC. *See* FERREIRA, *supra* note 214, at 66, 126-127. According to Ferreira, these instances began functioning effectively in 2001.

282. The Regional Sociolabour Committee is responsible for, among other things: (a) examining, commenting upon and channeling the reports prepared by the Member States under the Declaration; (b) formulating plans, programs of action and recommendations to promote the application of the Declaration, (c) examining observations and consultations over difficulties and errors in the application and fulfillment, (d) clarifying areas of doubt over the application of the Declaration, (e) preparing analyses and reports on the application and fulfillment of the Declaration, and (f) examining, providing advice and appropriately following-up on proposals to modify the text of the Declaration. Sociolabour Declaration *supra* note 257, at Art. 20.

283. *Id.*, at Art. 21.

284. *Id.*, at Art. 22 leaves it to the Commission, within six months of its establishment, to promulgate its own regulations and those that will pertain to the National Committees, and submit them to the GMC for its approval. That deadline had to be extended. As Lance Compa reports, this was due to strong disagreement over "the frequency of Commission meetings, whether presidency should rotate among government members only or among members from all three sectors, the role of outside experts and advisors and whether they can participate in Commission meetings, requirements for a quorum, the right to release dissident or minority reports when consensus cannot be achieved, public disclosure of Commission proceedings . . . an adequate budget and creation of a permanent staff secretariat for the Commission." Compa, *supra* note 4, at 10-11.

285. Compa, *supra* note 4.

Moreover, Member States' reporting requirements, including requirements for tripartite consultation, are annual, and focused on (1) changes to legislation and national practice relating to the application of the Declaration and (2) progress made in the promotion of the Declaration, as well as difficulties encountered in its application.[286]

The limits to the developing interface between social policy and trade policy in the MERCOSUR are, therefore, quite plain and easily criticized. The more telling story, though, is that there have been real and ongoing pressures within the region to move toward ensuring some labor policy content to the agreement. MERCOSUR's rapid steps toward broadening its social dimension, through a commitment to key principles, the establishment of new institutions for engaged tripartite discussion[287] and research show that there is a recognized need to temper the concern that the factor "labor" has been subsumed to commodification. The prioritization of professional training and development via social dialogue[288] holds the potential to move in the direction of integrating social adjustments costs of trade liberalization into the fabric of the regional agreement, thereby enhancing the development of a social regionalism. While the economic policy diversions are, of course, considerably more deeply developed, MERCOSUR illustrates the complementary pressure to act on social policy, a pressure that can only be seen as increasingly urgent in light of the tremendous social impacts of the economic crisis in Argentina. The dramatic electoral shift to the left in Brazil with the recent election of Luiz Inacio Lula da Silva as president may lend greater strength to calls for a robust social regionalism in the eventual approach to hemispheric trade.

D. The OAS Conference of Ministers of Labour

There is another process of summitry that runs parallel to the FTAA process discussed in Part II, but that receives only a glimmer of the attention that the hemispheric trade initiative has understandably garnered: the OAS Conference of Ministers. It is my assertion that it

286. Sociolabour Declaration *supra* note 257, at Art. 23.

287. For Ferreira, the conditions for real social dialogue are in place in the MERCOSUR structure. They include political and trade union freedoms, a common recognition of the importance of sociolabour norms for the process of integration and development, the existence of strong, representative and able participants in debates on the topic, and adequate information-sharing. *See* FERREIRA, *supra* note 214, at 129.

288. *See generally* FERREIRA, *supra* note 214, ch. 6.

can have a valuable bridging role to facilitate the emergence of social regionalism in the Americas.

Regional integration was not initially within the mandate of the OAS when its Charter was signed in 1948,[289] although the signing underscored a history of attempted regional cooperation dating back at least to Simón Bolívar's convening of the Congress of Panama to create a regional association of states in 1826. Subsequent attention to trade liberalization policies in the hemisphere has led to institutional reorganization within the OAS to prioritize liberalization.[290] Yet the OAS' mandate is much broader, and as the discussion in Part II of the OAS Inter-American Democratic Charter would suggest, the OAS has linked integration in the Americas to participatory democracy and to social development.[291] Specifically on the labor front, the OAS has a dedicated body, the Inter-American Conference of Ministers of Labor; this example of disaggregated state activity[292] through which ministers and ministries of labor across the Americas cooperate with relevant international and regional organizations[293] on labor matters in the hemisphere holds the potential to act as a catalyst toward social regionalism in the Americas.

The Inter-American Conference of Ministers of Labor was established as a specialized conference of the OAS to "review the labor situation and the progress achieved in that field by the member states,"[294] with the authority to submit recommendations to the OAS on "national or international activities."[295] The Conference also has a Permanent Technical Committee on Labor Matters (COTPAL), which serves as an advisory committee composed of specialists from the Ministries of Labour of the Member States of the OAS; it seeks among other goals to promote compliance with the Conference's resolutions and recommendations, promote cooperation among labor institutions in the region, "with a view to obtaining the harmonious development of the social and labor area of the region."[296]

289. *See* Charter of the Organization of American States (OAS Charter), 61 U.N.T.S. No. 1609, entered into force Apr. 30, 1948.

290. *See* Figueroa-Torres, *supra* note 108, at 400.

291. *See* discussion of the OAS Inter-American Democratic Charter, *supra* note 21 and accompanying text.

292. *See* Slaughter, *supra* note 165.

293. It is noteworthy that representatives of the CARICOM and MERCOSUR, as well as the regional development banks, and ECLAC, attend the Conferences, along with the ILO.

294. Rules of Procedure of the Inter-American Conference of Ministers of Labor, *available at* http://www.oas.org/documents/conferenciatrabajobrazil/default.asp.

295. *Id.*

296. *See* Organization Plan of the Permanent Technical Committee on Labor Matters (COTPAL) (Provisional), OEA/Ser.L/XIX.12 COTPAL/doc.2/01 Sept. 28, 2001, Original in Spanish.

Both the XII Inter-American Conference of Ministers of Labor, held in Ottawa, Canada, in October 2001, and the XIII Inter-American Conference of Ministers of Labor, held in Salvador do Bahia, Brazil, in September 2003, were attended not only by national government representatives but also representatives of several regional trade blocs. The discussions, Declarations, and Plans of Action of these conferences reflect a pronounced shift toward a social dimension in the Americas. In Ottawa, the Conference of Ministers of Labor pledged to "assess the labor implications of the Declaration of Quebec City [of the Third Summit of the Americas]. . . and work to develop appropriate actions."[297] More comprehensively, the Ministers of Labor agreed to "examine the labor dimensions of the Summit of the Americas process in order to identify areas of agreement and issues where further work needs to be done, and in particular, we will create a process for improved collaboration and coordination on these matters with other appropriate ministries."[298] The Declaration and Plan of Action of Ottawa establish and implement Working Group 1[299] to "examine the labor dimensions of the Summit of the Americas process, including the questions of globalization related to employment and labor" and to carry out the process of identification of issues and create the process for collaboration and coordination contemplated by the Ministers of Labor.

Also in the Declaration of Ottawa, the Ministers of Labor commit themselves to promoting the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up within the hemisphere. A separate working group, "building the capacity of labor ministries" will have carriage of this mandate, while working

297. Declaration and Plan of Action of Ottawa, OEA/Ser. L./XII.12.1/Trabajo/doc.36/01 rev. 2, Oct. 19, 2001 Original in English (Adopted at the third plenary session, held on Oct. 19, 2001, and reviewed by the Style Committee). The Conference of Ministers of Labor cite the Declaration of Quebec City, in its affirmation that "free trade, without subsidies or unfair practices, along with an increasing stream of productive investments and greater economic integration, will promote regional prosperity, thus enabling the rising of the standard of living, the improvement of working conditions of people in the Americas." In The Declaration of Quebec City, the Inter-American Conference of Ministers of Labor was instructed "to continue their consideration of issues related to globalization which affect employment and labor."

298. *Id.*

299. Working Group 1: Labor Dimensions of the Summit of the Americas Process, building on the "Working Group on Globalization of the Economy and its Social and Labor Dimensions" established under the previous Declaration of the XI Inter-American Conference of Ministers of Labor, held in Viña del Mar, Chile in October 1998. According to the Minister of Labour and Social Security of Chile and Chair pro tempore of the Eleventh Inter-American Conference of Ministers of Labour, Mr. Ricardo Solari Saavedra, the initial working group made progress on labor reforms and the integration processes in the Americas, and addressed cross-border issues such as seasonal migrations in North America. *See* address, OEA/Ser.K/XII.12.1/TRABAJO/ doc.12/01, Oct. 9, 2001, Original in Spanish.

with the assistance of the ILO on the Declaration.[300] It will "continue the work of the Working Group on Modernization of the State and Labor Administration" that was created under the previous Declaration of Viña del Mar. Member States are called upon to "devote the necessary and available economic and/or technical resources to enable the implementation of the Action Plan"; and, Member States and relevant international organizations are also asked to make "voluntary contributions," both to support the activities and projects under the Plan of Action of Ottawa, and "to facilitate the participation of the Trade Union Technical Advisory Council (COSATE)[301] and the Business Technical Advisory Committee on Labor Matters (CEATAL).[302] Despite the broad statements in the Declaration of Ottawa about the need for openness and transparency, as well as cooperation with civil society broadly understood, no other provisions are made in the Plan of Action of Ottawa to facilitate this cooperation.[303] As for COSATE and CEATAL, they issued a Joint Declaration calling on Member States in the Americas to play an active role in consulting with the social partners on the social and labor dimensions of regional integration, and to work with them to achieve decent work, based on principles of freedom, equality, security, and human dignity. The Joint Declaration

300. The Plan of Action of Ottawa specifically mentions the Worst Forms of Child Labour Convention, 1999 (No. 182), 38 I.L.M. 1207.

301. COSATE is a special advisory council of the Inter-American Conference of Ministers of Labor, made up of "one representative of the national free, democratic trade-union organizations of each of the member states" of the OAS. Its purpose is to "[promote] the effective participation of labor organizations in the development of the Inter-American Conference of Ministers of Labor," by advising both the Conference and COTPAL on programs that have "special significance for workers." *See* OAS, Inter-American Council for Integral Development (CIDI), Amended *Organization Plan of the Trade Union Technical Advisory Council (COSATE)* (Provisional) OEA/Ser.K/XII.12.1/TRABAJO/doc.8/01/28 (Sept. 28, 2001) (Spanish).

302. CEATAL is also an advisory council of the Conference of Ministers of Labor, with the mandate "to promote the effective participation of business organizations in the labor field" by providing technical advice on programs that have "special significance for entrepreneurs"; it also seeks to participate in "development activities at both the national and international level." It also includes among its purposes to "promote contacts with . . . COSATE with a view to furnishing joint advisory services on matters of common concern, in the interest of dealing with them more effectively." OAS, Inter-American Council for Integral Development (CIDI), *Organization Plan of the Business Technical Advisory Committee on Labor Matters (CEATAL)* (Provisional) OEA/Ser.K/XII.12.1/TRABAJO/doc.7/01/28 (Sept. 28, 2001) (Spanish).

303. The Declaration of Ottawa states that "As expressed by our Heads of State and Government, we welcome and value the contributions of civil society, including business and labor organizations and in particular those of . . . COSATE and . . . CEATAL. We affirm that openness and transparency are vital to building public awareness and legitimacy for our undertakings. We call upon all citizens of the Americas to contribute to our work, and look forward to cooperating with the non-government sector."

called on the ILO for technical support to implement the Plan of Action of Ottawa.[304]

The Salvador Declaration of September 26, 2003 follows in the same direction, with quite pronounced references to the need to influence the Free Trade of the Americas process. The Ministers "note that the upcoming Special Summit of the Americas, to be held in Mexico, will focus on equitable economic growth, social development, and democratic governance."[305] Ministers "commit to working through the Summit of the Americas process, including the Special Summit" to accomplish their objectives."[306] They reaffirm that they "follow attentively the development of the different processes of regional and subregional integration, as well as of bi- and multilateral free trade agreements that are implemented in the Hemisphere, as well as their social and labor impacts."[307] They also "caution that the policies implemented by our countries in the process of globalization sometimes do not achieve sustainability or reactivation of economic growth."[308] Affirming their conviction that "economic growth and social progress are interdependent and inter-related aspects of the same project for building prosperous, united and equitable societies,"[309] they go so far as to "propose a more active role for the Ministries of Labor in the region, one that takes into account the need for the integration of social, labor and economic policies . . . ."[310] The "new role of the Labor Ministries" is visualized as follows:

> [A]t the domestic level, it is important to establish and deepen the institutional relations of the Labor Ministries with the areas of the State in charge of creating and implementing economic policies; at the regional and hemispheric levels, the fundamental issue is to incorporate this focus into the regional and subregional integration and free trade processes.[311]

304. Declaration of Ottawa, signed by Daniel Funes de Rioja, President of CEATAL and Hassan Yussuff, President of COSATE, Oct. 17, 2001.

305. OAS, CIDI, *Salvador Declaration*, OEA/Ser.K/XII.13.1 TRABAJO/doc.3/03 rev. 4, (Sept. 26, 2003) (Spanish) Art. 6. *Available at* http://www.oas.org/documents/conferenciatrabajobrazil/default.asp.

306. *Id.* Their more proactive stance has shown results: in the Miami Ministerial Declaration, *supra* note 19, the Ministers responsible for Trade state that they share the views of the Ministers of Labour, "as expressed in the Salvador Declaration"; and, in the Declaration of Nuevo León, *supra* note 19, the Heads of State and Government "recognize and support the important work of the Inter-American Conference of Ministers of Labor," while expressing the "conviction that respect for workers' rights and dignity is an essential element of achieving poverty reduction and sustainable social and economic development for our peoples."

307. *Id.* at Art. 8.

308. *Id.* at Art. 14.

309. *Id.* at Art. 17.

310. *Id.* at Art. 18.

311. *Id.*

Turning specifically to the FTAA process, they "emphasize the importance of considering the social and labor components of hemispheric integration during all stages of the negotiations process so that they will be given merited treatment."[312] In particularly strong language, they affirm that "[t]he Labor Ministries must play an essential role in this process."[313]

Ultimately, though, the implementation devices in the Salvador Plan of Action[314] remain largely the same as those maintained in the Plan of Action of Ottawa, namely the two working groups. In addition, a document calling for a feasibility study for an Inter-American Cooperation Mechanism for Professional Labor Administration, a work product of Working Group 2 on Building Capacities of Labor Ministries, is appended to the Plan of Action. It argues that an inter-American cooperation mechanism for professional labor administration is needed, and outlines the kind of efforts that may be supported to improve their functioning. It is a concrete text that is attuned to many of the deficits of national labor administrations, including inspection services; however, despite calls for pooling of resources, it is distinctly national in its anticipated (re-) regulatory outputs.[315]

Finally, in the Joint CEATAL-COSATE Declaration, appended to the Salvador Declaration, a request for greater social dialogue is made. CEATAL and COSATE request that their status be changed from that of advisory bodies to consultative organs within the IACML. They ask that the ILO involve its respective employers and workers bureaus, ACTEMP and ACTRAV, in the meetings of the working groups. They also reaffirm their request that governments "facilitate the necessary financial mechanisms for ensuring that presence and participation."[316]

Like the examples of social dimensions in regional integration initiatives, the OAS Conference of Ministers of Labor is a deeply limited forum, hardly the institutional parallel to NAFTA, CARICOM or MERCOSUR. But unlike them, its framework does not seek to be a counterweight to parallel trading arrangements, but rather to establish a framework through which experiences with a range of initiatives, including regional integration efforts, can be

312. *Id.* at Art. 22.
313. *Id.*
314. OEA/Ser.K/XII.13.1/TRABAJO/doc.4/03 rev. 3 (Sept. 26 2003) (Spanish). *available at* http://www.oas.org/documents/conferenciatrabajobrazil/default.asp.
315. Funding sources and deadlines remain quite vague and tentative in the document.
316. *Supra* note 305, TB01269E01, Appendix to the Salvador Declaration.

shared, and deepened. It provides a space to take account of the development of different approaches to social dimensions throughout the region, allowing governmental representatives to learn from the specificities of the regulatory approaches in each.

The Conference of Ministers of Labor, particularly if the mechanisms for limited participation by trade union and employer representatives are deepened and broadened to a tripartite-plus range of actors, could have the ability to formulate concrete recommendations not just to the limited civil society structures in the FTAA, but also directly to government negotiators of the FTAA. The pledge in the Ottawa Declaration to involve other ministries in addition to labor in their analyses of areas where further work is needed on the labor dimensions of the FTAA process bodes well for this deepened trade link. The pronounced emphasis on the essential, specific role of the Ministers of Labor in the FTAA process and their need to develop deepened institutional relations with the areas of the State in charge of economic policy confirms this analysis of the Ministers' intention to attempt to take up this role. While individual, relatively marginalized, representatives of labor ministries might independently be hard-placed to influence individual negotiating positions of their own governments, the Conference of Ministers of Labor, employed effectively, could enable them to present joint positions that might not as readily be ignored. The Salvador Declaration is one of the strongest manifestations to date of this intention, which, given the recent fate of WTO Ministerial Meetings, the FTAA negotiators would do well to take seriously.

V. CONCLUSION

The previous overview highlights initiatives developed within regional arrangements to address, with varying levels of success, the linkage considerations inherent to economic liberalization. They are affirmations of the need for frameworks that infuse regional economic integration with responsiveness to social concerns. The initiatives all create limited, but real, transnational fora through which a critically-constituted, and increasingly fluid range of "tripartite plus" actors[317] can participate. Each initiative reflects the specificities of the given region, but contains elements that can inform the construction of

317. *See* Blackett, *supra* note 11, at 436-440 (offering a critical assessment of civil society participation in transnational frameworks, focused on a fluid understanding of the notion of "tripartism plus" that "recognizes that the term 'worker' is at once a partial representation and a composite of different actors.").

social regionalism in the Americas. Be it the increased expenditure of resources to buttress labor relations machinery as a result of NAALC investigations, or governmental initiatives via a model-laws approach to labor law harmonization upward that enabled Caribbean states to resist the labor regulatory competition, or cross-border labor inspections engaging tripartite representatives from MERCOSUR Member States, or the sharing of experiences between states and regions in the OAS Inter-American Conference of Ministers of Labor, each suggests that the interface between social regionalism and trade liberalization can be constructed in a manner that certainly does not impede integration,[318] and more likely enhances the integration process. They hold the potential to empower democratic governments to resist purely market-based approaches, in part by promoting cooperation via differently-constructed "transgovernmental" networks between them.[319] And, increasingly, as illustrated most recently with the Salvador Declaration of the Inter-American Conference of Ministers of Labor, there is strong resolve on the part of labor ministries and social actors to influence the FTAA process in a manner that brings social regionalism to the center of the regional integration negotiations.

I have argued that these forms of collaboration across a varied assortment of institutional arrangements create spaces for governmental and civil society actors to interact and deepen the prospects for social regionalism to develop as a meaningful challenge to neoliberal trade. In their necessary engagement with labor conditions in a North-South framework, they cannot but put front and center distributive justice concerns that exceed the confines of a single nation state. Yet they do so in a limited, some would say manageable, fashion by building on the construction of subregional and regional identities that facilitate the understanding of the need to act in the interests of the entity as a whole, rather than simply one nation state.

The incremental, painstaking, but unmistakably increasing attention in the sampled regional arrangements to the social dimensions of trade illustrate that a unidimensional vision of globalization is increasingly contested in the region. Particularly interesting, in a context in which social regulation is often perceived to

318. *See* Abbott, *supra* note 96, at 197 (affirming that "[t]he NAFTA has moved in advance of the WTO on environment and labour matters, and it would be hard to make a case that the NAFTA has harmed the multilateral trading system in the process.").

319. *See* Slaughter, *Governing the Global Economy*, *supra* note 165, at 177-206; *see also* Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001).

be most effective when undertaken through corporate social responsibility initiatives,[320] is the reaffirmation of the role of the state, albeit increasingly through an overlapping layer of regional cooperation, in re-regulating to promote decent work through integration. The creation and broadening of these potential participatory spaces can be witnessed particularly in MERCOSUR, through the use of the Sociolabour Declaration's provisions for the national and regional Sociolabour Committee, to broaden spaces for social dialogue in the hemisphere. The potential witnessed in the CARICOM's meetings of Ministers of Labour and the growing use of the Inter-American Conference of Ministers of Labor to assert a crucial role in the FTAA negotiations process are indicia that this process is increasingly prevalent, and likely to remain.

This analysis has focused primarily on the labor dimensions of a social regionalism in the Americas, with some reference to broader human rights and migration concerns. The focus on labor has been to elucidate the deep nexus that is present between integration through trade and the regulation of labor markets, a nexus that flows logically from trade theory's attention to the factors of production. It is the case that a much broader range of considerations, including educational and health-related policies, could justifiably be considered in a broadened notion of social regionalism, where the goals are to secure a range of social goods through trade. This entails rethinking the interface between these policies and the proposed agreements on intellectual property rights, investment, and services.

A key premise of this paper is that beyond participatory and re-regulatory structures to incorporate a social dimension to the liberalization project in the Americas, the institutional framework of the trade arrangement needs to be rethought, to ensure that social dimensions are not mere add-ons to a liberalization process that is deeply at odds with "other" considerations. This entails ensuring that the regional trade regime itself is repeatedly questioned to ascertain its effectiveness at meeting the broad statements of commitment to social policies that the parties to the agreement have set for themselves. A mechanism to review the FTAA's capacity to fulfill broader social aims, through the vehicle similar to the Trade Policy Review Mechanism of the WTO, but broadened to require explicit consideration of data on the social dimensions and expanded to

320. *See* critique in Adelle Blackett, *Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries*, *in* SOFT LAW, HARD CHOICES 125-138 (John Kirton & Michael Trebilcock eds., forthcoming 2004).

include participants qualified to make these broader assessments, should be encouraged.[321]

Frequent allusions have been made in this paper to the need for re-distributive mechanisms to ensure that the "losers" of trade in the region have mechanisms to counteract potentially devastating trade impacts on employment. The failure of the WTO's September 2003 Cancun Ministerial Meeting, largely attributed to the organization's failure to concretize its stated attempt in its 2001 Doha Ministerial Meeting to adopt a development-sensitive approach to trade, underscores the centrality of addressing these real redistributional concerns. The mechanisms alluded to in this paper and advocated at a regional level in North-South arrangements might be seen as building-blocks toward this deeper understanding of development. They might be constituted in the form of a fund distributed to developing countries at appropriate moments both to counteract negative trade impacts and to encourage the proactive development of comparative advantage in the region. Adjustment cost transfers can be one way to temper the impact of reciprocal arrangements. Another complementary solution is, of course, to adopt a more textured approach to trade in a region dominated by the world's greatest hegemon, one that continues to combine preferential trade to promote market access within the region with ensuring effective industrialized country liberalization in highly protected areas like agriculture, textiles, and clothing. Progressive reciprocity would be an aspiration, as greater development in the region is achieved.

The key to these initiatives, and other suggestions, is that an integration attempt in the Americas that fails to come to grips with the reasons why social dimensions have developed in other trade agreements is out of step with the prevailing developments in the Americas. Any such omission runs the risk of plaguing the entire FTAA exercise with concerns over the legitimacy of undertaking region-wide trade integration without giving serious attention to the broadly-recognized social dimensions. The paper is ultimately cautiously optimistic, because it recognizes that some of the recent initiatives in the region signal a process of accepting that labor concerns have a place in regional trade, and can be addressed in creative, context-sensitive ways. These examples move the discussion

321. It should be noted that the ICFTU currently provides data to the WTO on the social conditions in different countries for consideration in their trade policy review process. The reports are *available at* www.icftu.org. *See also* Diana Bronsen & Lucie Lamarche, *A Human Rights Framework for Trade in the Americas* (Rights & Democracy Policy Paper, Mar. 2001) at 27, *available at* www.rightsanddemocracy.org.

of social dimensions beyond broad assertions that entire blocs of countries simply refuse to consider social dimensions of trade in negotiations, by illustrating in concrete terms the fertile ground for consensus that exists among a range of tripartite-plus actors that span the region. It also considers that attempts to address social regionalism within the FTAA negotiators' ambitious 2005 deadline will invariably only be starting points. As the initiatives in different regional groupings of the Americas suggest, the need for a social regionalism is likely to grow, and with it, the trans-governmental and trans-border civil society coalitions that are likely to deepen will repeatedly expose the deficiencies of trade that is pursued without careful attention to social consequences. Sustained reflection will continue to be needed, along with a thick theoretical understanding of how to create fluid sites for cosmopolitan democratic participation,[322] to enable the broad range of actors in the hemisphere to build a robust social regionalism for the Americas.

322. *See* Blackett, *supra* note 11, at 433-436, 446 (discussing cosmopolitan democratic participation in the labor relations context).