

## WORKS IN PROGRESS: CONSTRUCTING THE SOCIAL DIMENSION OF TRADE IN THE AMERICAS

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This paper reviews labor rights in the trade arrangements of four regional and binational settings in the Americas:

- the North American Free Trade Agreement (NAFTA) among Canada, Mexico and the United States;
- the Common Market of the South (Mercosur) among Argentina, Brazil, Paraguay and Uruguay;
- the Canada-Chile Free Trade Agreement (CCFTA); and
- the Caribbean Community (Caricom) embracing several island nations in a common market.

The labor rights agreements, charters and declarations examined here are at different levels of development and experience. They are "works in progress," just beginning to experiment with the central challenge of ensuring that no country gains competitive advantage in an integrated market by violating workers' fundamental rights. Each labor rights system studied here takes a different approach to this challenge. Sometimes the differences are slight, as with the labor agreements under NAFTA and the CCFTA; sometimes the differences are dramatic, as between social dimensions in NAFTA and Mercosur.

While this paper mainly explores differences, these attempts to build a social dimension into trade agreements have many similarities. They specify workers' basic rights. They define obligations of states (and sometimes of private actors) to respect those rights. They create an oversight mechanism to examine compliance, including opportunities for workers to invoke the mechanism. They stress cooperation among states and between trade unions and employers in resolving disputes. They provide a measure of reproof when violations are found, though here significant differences emerge on the issue of "linkage" and whether reproof is limited to public exposure or whether economic sanctions may be used to enforce workers' rights.

The Americas' experience is part of an even larger effort to construct a social dimension in trade regimes. While these instruments are new, the spirit of social justice that animates them is old. The same concerns inspired the White Phosphorus convention a century ago; the founding of the International Labor Organization (ILO) in 1919; the ambitious but doomed social plan for the International Trade Organization (ITO) after World War II; and today's demands for a labor rights working party at the World Trade Organization (WTO).

The dynamics of a globalizing economy and the related ability of multinational firms to make and withdraw investment anywhere in the world are seen by free trade proponents as "creative destruction" spreading the benefits of the market economy to ever-wider circles of countries and peoples. But investment and disinvestment are often made suddenly and with dire consequences for many workers and communities, who see mostly destruction in the new free trade model.

The demand for social justice in a process of economic globalization looks inevitably for a political opening. Workers, trade unions and their allies have demonstrated the will and the capacity to force a social dimension onto the trade policy agenda. The new, and in many respects still untested, results of their efforts in four trade areas of the Americas are presented here.

## **THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION**

The North American Free Trade Agreement (NAFTA) was negotiated in the early 1990s during the administrations of U.S. President George Bush, Mexican President Carlos Salinas, and Canadian Prime Minister Brian Mulroney. The three leaders announced agreement on NAFTA in August 1992 just as the U.S. presidential race of that year was heating up. Labor, environmental and human rights organizations pressured candidate Bill Clinton to repudiate NAFTA in his campaign for the presidency. They charged that the agreement favored multinational corporations and investors at the expense of workers and the environment.

Responding to both pro- and anti-NAFTA forces, candidate Clinton opted to support NAFTA if "side agreements" dealing with labor and the environment were added to the package sent to Congress for approval.<sup>1</sup> After taking office in January 1993, the new Clinton Administration began negotiations on these issues with Mexico and Canada. Agreements were reached in August 1993 on the North American Agreement on Labor Cooperation (NAALC) and a companion environmental accord, the North American Agreement on Environmental Cooperation (NAAEC). All three agreements took effect January 1, 1994.

### **Introducing the NAALC**

The North American Agreement on Labor Cooperation (NAALC) is the first international labor agreement directly connected to a trade pact with potential for economic sanctions as a means of enforcing labor rights. The accomplishments cited by NAALC supporters, and the shortcomings noted by NAALC detractors, provide important lessons for future attempts to fashion a viable labor rights-trade linkage.

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<sup>1</sup>Clinton's position was spelled out in a major campaign speech advertised as his definitive campaign statement on trade policy. See Governor Bill Clinton, *Expanding Trade and Creating American Jobs*, Address at North Carolina State University, Raleigh, North Carolina (October 4, 1992).

One starting point for understanding the NAALC is to set out two things it does *not* do:

- It does not set new common standards to which countries must adjust their laws and regulations. Instead, the NAALC stresses sovereignty in each country's internal labor affairs, recognizing "the right of each Party to establish its own domestic labor standards."
- The NAALC does not create a supranational administrative tribunal to take evidence and decide guilt or innocence in labor disputes or to order remedies against violators. This is left to national authorities applying national law. Nor does it create a supranational labor judicial body to take appeals from decisions of national tribunals and overrule decisions that arguably fail to "enforce" the NAALC. Decisions by the national courts are undisturbed by the NAALC.

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

The NAALC also includes provisions for sanctions. A fine of up to .007 percent of the volume of trade between the two disputing countries can be levied against a government if it fails to adopt an "action plan" recommended by an Arbitral Panel upon a finding of persistent pattern of failure to effectively enforce its laws related to one of three labor principles susceptible to dispute resolution.<sup>2</sup> This fine was approximately \$20 million when the NAALC took effect; it is now over \$50 million with the increase in the volume of trade among the three NAFTA partners.

The fine must be expended at the direction of the NAALC ministerial council to improve enforcement in the subject area of the arbitration. If the country complained against fails to pay the fine, the other countries may suspend NAFTA tariff benefits in an amount and for a time necessary to collect the fine. Such suspension of beneficial tariff treatment would apply to the "same sector or sectors" where violations of workers' rights occurred.<sup>3</sup>

It should be noted at the outset that no NAALC case has reached this stage. Practically speaking, it is unlikely that a case would reach this point because NAALC procedures include ample opportunity for a cooperative solution to disputes before reaching a point of sanctions.

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<sup>2</sup>NAALC Articles 38-40; Annex 39.

<sup>3</sup>*Id.*, Article 41; Annex 41B. Canada guarantees payment of any fine and is not subject to suspension of benefits.

## **Labor Principles and Obligations of the NAALC**

Under the NAALC, the United States, Mexico and Canada "are committed to promote" the following labor principles: (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; (7) elimination of employment discrimination; (8) equal pay for women and men; (9) prevention of occupational injuries and illnesses; (10) compensation in cases of occupational injuries and illnesses; and (11) protection of migrant workers.<sup>4</sup>

In connection with the eleven labor principles, the three countries adopt six "obligations" for effective labor law enforcement to fulfill the principles.<sup>5</sup> These obligations include:

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

## **Institutional Structure of the NAALC**

### *Commission for Labor Cooperation: Ministerial Council and Secretariat*

The NAALC creates a Commission for Labor Cooperation that includes a Ministerial Council and a permanent Secretariat. The labor ministers of each country are the Council that governs the Commission. The Commission's Secretariat was first based in Dallas, Texas, where it began operations in September, 1995. The Secretariat staff includes a dozen labor lawyers, economists and other professionals (four from each country) experienced in labor affairs in their countries. The NAALC Labor Secretariat undertakes comparative studies and reports on labor laws and labor markets of the three countries and serves as the general administrative arm of the Commission. The Secretariat would also serve as the support staff of an Evaluation Committee or Arbitral Panel. In 2000, the Secretariat moved from Dallas to Washington, D.C.

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<sup>4</sup> *Id.*, Annex 1.

<sup>5</sup> *Id.*, Articles 2-7.

### *National Administrative Offices (NAOs)*

The NAALC also sets up a National Administrative Office (NAO) in the labor department of each country. The NAOs receive complaints ("public communications" or "submissions" in NAALC parlance) from the public related to any of the eleven labor principles. There is no limitation on who may file a complaint. In the interest of having the process as open and accessible as possible, the regulations of each NAO set a fairly low threshold for acceptance for review.<sup>6</sup>

The scope of such reviews is "labor law matters arising in the territory of another Party."<sup>7</sup> This is an unusual but critical feature of the NAALC. Employers, workers, unions and allied NGOs must file their submissions with the NAO in *another* country, not the country where alleged violations occurred, to start the review process. The United States and Canada hold public hearings on complaints with transcripts and sworn testimony; the Mexican NAO holds private "informative sessions."

The NAOs issue public reports on submissions they have accepted for review. The public report contains a key make-or-break conclusion: whether or not it recommends ministerial consultations. If not, the matter is closed. If so, the matter moves forward. These ministerial consultations are open-ended efforts to resolve a problem before it enlarges. They have generally led to further hearings, special research reports, seminars and conferences, worker education programs and the like.

### *Evaluation Committees of Experts*

After ministerial consultations, the labor minister of a single country can request and obtain an independent Evaluation Committee of Experts (ECE) to pursue a matter. An ECE performs an independent evaluation of all three countries' labor law enforcement effectiveness in the matter forwarded for study.

At this stage, though, certain subject matters are not susceptible to ECE treatment. Namely, the so-called "industrial relations principles"-- involving freedom of association, collective bargaining and the right to strike -- cannot be taken up by an ECE. This means that ECEs are empowered to evaluate the countries' record in one or more of the following eight labor law matters, depending on the scope of the request: forced labor; child labor; minimum employment

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<sup>6</sup>See Revised Notice of Establishment of United States National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16,660-62 (1994); Regulation of the National Administrative Office of Mexico, *Diario Oficial de la Federación*, April 28, 1995; Canadian NAO Guidelines for Public Communications, available at Canadian NAO web site, <http://labour.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/guidlms-e.html> (November 23, 1998).

<sup>7</sup>*Id.*, Article 16(3).

standards; employment discrimination; equal pay for women and men; occupational safety and health; workers' compensation for occupational injuries and illnesses; and migrant workers' protection.

### *Arbitral Panels*

Of the eight principles susceptible to an ECE listed above, five cannot move from the ECE to the arbitration stage. After an ECE report, two out of three countries' labor ministers can demand an independent Arbitral Panel if they believe there is still a "persistent pattern of failure" by the third country to effectively enforce domestic labor laws in one or more of the three remaining areas: child labor; minimum wage; and occupational safety and health.

The Arbitral Panel is empowered to issue an "action plan" to be implemented by the country under scrutiny. If the government refuses or fails to implement the plan, the Panel can fine the offending government up to .007 percent of the volume of trade between the countries. The fine must be used to improve domestic labor law enforcement in the area or sector that provoked the complaint. If the fine is not paid, trade sanctions can be applied against firms or sector where violations occurred.

### **NAALC Complaints and Cases**

By the middle of 1999, nearly 20 complaints had been filed under the NAALC. The rate of submissions increased each year, and 1998 and 1999 saw the first cases dealing with Canadian labor law matters, the first case filed by Mexico's official CTM union federation, the first case filed by an employer organization, and several cases dealing with matters susceptible to evaluation and dispute resolution (though none has yet reached either stage). These developments suggest that the NAALC is getting some traction dealing with issues of workers' rights in North America and is likely to be a sustained forum for labor rights advocacy.<sup>8</sup> Three cases, one from each country, are selected here to illustrate how the case system operates:

#### *Pregnancy Testing in the Maquiladoras* (U.S. NAO Case No. 9701)

Two U.S.-based human rights groups, Human Rights Watch and the International Labor Rights Fund, along with the *Asociación Nacional de Abogados Democráticos* (ANAD) of Mexico, filed a complaint with the NAO of the United States in May 1997 alleging "a pattern of widespread,

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<sup>8</sup>Sometimes the NAALC has had an effect without a case being filed. In Canada, for example, the conservative provincial government of Alberta proposed a plan to privatize occupational safety and health enforcement in 1996. Labor advocates argued that the government was abdicating its enforcement of labor laws on workplace safety and health, and announced plans to file a NAALC complaint. The government dropped the proposal. See Allan Chambers, *Privatization of labour rules raises fears: Law may face NAFTA challenge*, Edmonton Journal, September 6, 1996, at 1; *Province's Halt of Privatization Plan Ends Looming NAFTA Complaint*, Inside NAFTA, December 25, 1996, at 14.

state-tolerated sex discrimination against prospective and actual female workers in the *maquiladora* sector along the Mexico-U.S. border."<sup>9</sup> The submission alleged a common practice requiring pregnancy testing of all female job applicants and denying employment to pregnant applicants. The complaint also said that employers pressure employees who become pregnant to leave their jobs.

The submitters argued that the practice by employers and the failure of the labor authorities to combat it -- sometimes by omission, sometimes by overt support for the employers' discriminatory policy -- violates Mexico's obligations under the NAALC. The complaint sought a U.S. NAO review, public hearings, and the formation of an Evaluation Committee of Experts to report on employment practices related to pregnancy in all three NAALC countries.<sup>10</sup>

A public hearing by the U.S. NAO generated widespread publicity about the practice involving well-known American firms like General Motors, Zenith, and Motorola. In January 1998 the U.S. NAO issued a report confirming widespread pregnancy testing that discriminates against female workers and recommending ministerial consultations in the matter.

Concluding ministerial consultations in October 1998, the labor ministers of Canada, Mexico and the United States approved a program of workshops for government enforcement officials, outreach to women workers and an international conference on gender discrimination issues. These programs have been underway, most recently with an international conference on women workers held in Mexico in March 1999, and with "outreach sessions" for women workers held along the U.S.-Mexico border. In the meantime, U.S. companies in the *maquiladora* zones announced they would halt pregnancy testing, and the Mexican federal government has prohibited pregnancy testing of females applying for employment in federal ministries. The pregnancy testing case may still give rise to the first ECE under the NAALC.

#### *Washington State Apple Industry (Mexico NAO Case No. 9802)*

A coalition of Mexican trade unions and farmworker organizations filed a wide-ranging complaint in May 1998 alleging failure of U.S. labor law to protect workers' rights in the Washington State apple industry. The submission cited the lack of legal protection for farmworker union organizing, widespread health and safety violations, discrimination against migrant workers, and employers' use of threats and intimidation in recent union representation elections in apple packing and shipping facilities.

The *Unión Nacional de Trabajadores* (UNT), a new independent labor federation, the *Frente Auténtico del Trabajo* (FAT), another independent labor group, and the *Frente Democrático*

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<sup>9</sup>See U.S. NAO Case No. 9701, *Submission Concerning Pregnancy-Based Sex Discrimination in Mexico's Maquiladora Sector*, at 4.

<sup>10</sup>*Id.*, at 37-39.

*Campeño* (FDC) of Mexico filed the complaint with the Mexican NAO. In preparing the submission, they collaborated with the U.S. Teamsters union and the United Farm Workers union, which are conducting organizing campaigns in the apple sector. The complaint called on the Mexican government to pursue multiple stages of review, consultation, evaluation, and arbitration under the NAALC.

This submission is the broadest case yet filed under the NAALC,<sup>11</sup> citing labor law violations and inadequate enforcement involving seven of the NAALC's eleven labor principles. The Washington State apple industry complaint covers the right to organize, collective bargaining, minimum labor standards, non-discrimination in employment, job safety and health, workers' compensation, and migrant worker protection. The filing generated a burst of publicity calling attention to conditions of migrant workers and the opportunity for advocacy presented by the NAALC.<sup>12</sup>

The NAO of Mexico accepted the Washington State apple case for review in August 1998. In December 1998 the NAO of Mexico held its first-ever hearing on a NAALC complaint. It was not a public hearing in the quasi-legal style of the U.S. and Canadian NAOs, but rather an "informative session" under the Mexican NAO procedural guidelines conducted in private in a roundtable setting. A delegation of workers from packing sheds and orchards in Washington State attended the session and presented direct testimony about pesticide poisoning, discharge for union activity, minimum wage violations, discrimination in the workers' compensation system, discrimination against migrant workers, and other violations of workers' rights.

The hearing garnered widespread publicity in the news media of both the United States and Mexico.<sup>13</sup> The NAO of Mexico was to issue its report in February 1999, but it was delayed by personnel changes in the department of labor and the NAO. The report was finally issued in August 1999, and on August 20 Mexico's Secretary of Labor formally requested ministerial consultations with the U.S. Secretary of Labor. This development sparked a new round of publicity and related attention to the conditions of migrant workers in the apple industry.<sup>14</sup>

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<sup>11</sup>Most earlier cases addressed union organizing issues.

<sup>12</sup>See, for example, Steven Greenhouse, *Mexicans Were Denied U.S. Rights, Suit Says*, New York Times, May 28, 1998, at A18; Ken Guggenheim, *U.S. unions find new tool*, Seattle Post-Intelligencer, May 29, 1998, at C1; Raul Trejo Delarbre, *Casablanca Laboral*, La Crónica, June 1, 1998.

<sup>13</sup>See Molly Moore, *Mexican Farmhands Accuse U.S. Firms: Panel Hears Washington Apple Pickers*, Washington Post, December 3, 1998, at A36; Elizabeth Velasco, *Trabajadores agrícolas denuncian explotación en EU*, La Jornada, December 3, 1998, at 41; Arturo Gómez Salgado, *Denuncian migrantes violaciones laborales*, El Financiero, December 3, 1998, at 19.

<sup>14</sup>See, for example, Arthur C. Gorlick, *State's apple hands abused, Mexico says: Complaint could lead to special investigation and even sanctions*, Seattle Post-Intelligencer, September 9, 1999, at A1; *Farm workers are the subsidy*, lead editorial, Seattle Post-Intelligencer, September 19, 1999 (beginning: "Mexico's accusation that

*McDonald's* (U.S. NAO Case No. 9803).

Joined by the Quebec Federation of Labor and the International Labor Rights Fund, the Teamsters union and its Quebec affiliates filed a complaint in October 1998 before the U.S. NAO on the closure of a McDonald's restaurant in St-Hubert, Quebec, shortly before the union was certified to bargain for workers there. This was the first NAALC case implicating labor law in a Canadian jurisdiction.

Submitters argued that McDonald's used loopholes and delaying tactics to string out union representation proceedings before the Quebec labor board for one year. McDonald's routinely appealed decisions in the union's favor. Finally it shut the restaurant when the union certification was about to be issued.

Although Quebec labor law is generally favorable to workers and unions, it is impotent dealing with anti-union workplace closures. The Quebec courts evolved a doctrine allowing employers to close facilities to avoid unionization with impunity -- the only jurisdiction in North America that does so.<sup>15</sup>

In December 1998 the U.S. NAO announced that it accepted the McDonald's case for review.<sup>16</sup> In April 1999 the petitioners withdrew their complaint following an agreement by the Quebec government to undertake a special study of the question of anti-union plant workplace closures in the context of an overall review of the Quebec Labor Code.<sup>17</sup>

## Evaluation

Evaluating results of the NAALC is largely a matter of interpretation. At the Prince Edward Island ministerial meeting in October 1998, the three governments expressed general satisfaction with the results. They cited mainly the fruits of cooperative activities such as the increase in knowledge about each other's labor markets and labor law systems. At the same time, they pledged to "improve the future operations and effectiveness of the NAALC."

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Washington tolerates abuse of farm workers will be debated . . . but there's no debating that some agricultural sectors owe their success to systematic exploitation of migrant workers.").

<sup>15</sup>See reference to Quebec law and jurisprudence in Secretariat of the Commission for Labor Cooperation, *Plant Closings and Labor Rights* (1997), at 34 (available at web site of the Secretariat, [www.naalc.org](http://www.naalc.org)).

<sup>16</sup>See Toronto Star, *U.S. labour body probes anti-union move in Quebec*, December 21, 1998, at D3 (Associated Press wire story).

<sup>17</sup>See letter from Claude Melançon, Teamsters Canada attorney, to Irasema Garza, U.S. NAO Secretary, April 14, 1999.

Trade unions and allied NGOs, on one hand, and business organizations, on the other hand, all criticize the NAALC vociferously, but from diametrically opposed perspectives. The Canadian Labour Congress said "it falls far short of the mechanisms necessary to truly remedy market failures and halt the downward pressures on wages and standards. ... [E]ven when the workers have proven their case satisfactorily, the remedies have been inconsequential and the abuses have continued."<sup>18</sup> The AFL-CIO said the NAALC has "failed to achieve its stated goals." Some independent (i.e., not affiliated with the ruling PRI) Mexican union organizations said the NAALC "has not represented a real social counterweight to free trade" and "has shown serious limitations as an instrument" for improving workers' rights.<sup>19</sup>

Business organizations frowned on contentious aspects of the NAALC, especially the submissions process. They called instead for the NAALC to emphasize cooperative activities. The U.S. Council for International Business argued that the NAALC "has unduly emphasized [submissions] over positive cooperative activities ... it sets the wrong tone and focus." The U.S.CIB said that NAO acceptance of a submission should be an "exceptional act" after all domestic legal procedures have been exhausted, and that the sole results of submissions should be "joint studies and technical cooperation and assistance." Citing the practice of the ILO and the OECD, the U.S. employer council argued that the name of a specific company should not be part of the record in any submission, and that NAOs should not hold public hearings because they are "too confrontational."<sup>20</sup>

Mexico's Enterprise Coordinating Council (CCE), Coordination of Foreign Trade Enterprise Organisms (COECE), and Confederation of Chambers of Commerce (CONCAMIN) criticized the "publicity" surrounding NAALC cases in connection with "premature" acceptance of cases. They called public hearings by the U.S. NAO "contrary to Mexican sovereignty" and argued that no submission or related report should contain the name of a specific company.<sup>21</sup> A prominent consultant who earlier served in the Mexican labor ministry attributed the NAALC solely to pressure from anti-NAFTA protectionist groups in the United States and characterized actions of the U.S. NAO in accepting cases and holding hearings as a "distortion" of the NAALC.<sup>22</sup>

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<sup>18</sup>See *Review of the North American Agreement on Labor Cooperation (1999)*, *Public Comment* of Robert White, President of the Canadian Labour Congress, on file with Secretariat of the Commission for Labor Cooperation, Dallas, Texas, and available on the Commission's web site at [www.naalc.org](http://www.naalc.org).

<sup>19</sup>See *id.*, *Public Comments* of Berta Luján, General Coordinator, *Red Mexicana de Acción Frente al Libre Comercio*; Francisco Hernández Juárez, President, *Unión Nacional de Trabajadores*.

<sup>20</sup>See *id.*, *Public Comment* of Abraham Katz, President, U.S. Council for International Business.

<sup>21</sup>See *id.*, *Public Comment* of Juan Gallardo on behalf of these organizations.

<sup>22</sup>See *id.*, *Public Comment* of Norma Samaniego de Villareal, Directora General, Santa Fe Consultores, S.C.

The public comments for the Commission's 4-year review were made in early 1998, when a total of ten complaints had been submitted under the NAALC, and nine of them involved labor law matters in Mexico. This created an impression that NAFTA's labor side agreement was really an exercise in Mexico-bashing, not a balanced agreement subjecting each country equally to scrutiny by its partners. In 1998, though, the submission of important new complaints like the Washington State apple case and the Canadian McDonald's case has brought more equilibrium to the NAALC.

Perhaps the most important outgrowth of the NAALC and its complaint mechanism is an unprecedented increase in exchange, communication and coordination among labor rights advocates and labor researchers at the trinational level. The NAALC's submission mechanism has sparked a significant increase in cross-border labor and NGO collaboration. Since a submission about workers' rights violations and failure of government authorities to effectively enforce domestic law in one country must be submitted with the NAO of another country, submitters are encouraged to seek partners in the other country to assist in pursuing the case in the other country's NAO review process. Nearly every submission has been signed by a coalition of organizations based in at least two countries, and sometimes in all three.

The NAALC contains many procedural and substantive flaws giving rise to valid criticisms. These include its lack of harmonized standards, the absence of concrete remedies for workers whose rights are violated, and the lesser treatment afforded fundamental rights of association -- organizing, collective bargaining and the right to strike. However, even justifiable criticism should not be measured against a theoretically ideal but practically unattainable agreement linking trade and labor rights. Criticism must take into account the reality of international relations and trade and labor controversies in the global economy today.

That reality begins with a strong concern for sovereignty in labor affairs that is generally shared by all countries, rich and poor. Sovereignty is an especially sensitive matter among NAALC partners, given the relative weight of the United States in continental affairs. The sovereignty issue is joined by a fear on the part of developing countries that a labor rights-trade linkage will be used for protectionist purposes by larger, richer countries to deprive them of a comparative advantage in lower labor costs.

The approach developed in the NAALC, emphasizing cooperation and effective enforcement of domestic labor law, is a more practical and attainable starting point for an accord linking labor rights and trade. Any system of law is only as good as its enforcement system. U.S. experience with a resurgent "sweatshop" industry in major American cities should give pause to demands that developing countries raise their standards to the levels of industrialized countries before labor law enforcement is strengthened in every country.<sup>23</sup>

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<sup>23</sup>For an extensive treatment of sweatshops in the United States, see Andrew Ross, ed., *NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS* (1997).

While preserving sovereignty in labor matters, the NAALC countries opened themselves up to international scrutiny of their labor law enforcement regimes, first through reviews by another country's NAO, then by independent evaluation or dispute resolution bodies made up of independent, non-governmental experts from all three countries. This represents an extraordinary degree of candor in international labor matters.

The NAALC's broad subject matter is another positive feature. The labor principles include "core" standards, but they go farther to embrace other matters vitally important to workers -- safety and health, minimum wages, hours of work, compensation for workplace injuries and illnesses, and migrant worker protection.

The NAALC is "user-friendly," with both cooperative activities and complaint mechanisms open to participation not only by unions and employers, but also by NGOs and concerned citizens. None of these need to have a material interest in a matter, and they can approach any of the three NAOs for attention to the issues they want to raise. The NAALC mechanism requiring complaints about events in one country to be submitted to authorities in another country drives a process of communication and collaboration across national borders by trade unions, NGOs and other social actors.

The NAALC's spirit of respect for sovereignty alongside openness to international scrutiny and mutual accountability, the reach of its labor principles beyond a "core" formulation, its openness to civil society involvement, and its encouragement of international labor solidarity and collaboration provide important lessons for governments and social actors grappling with the challenge of linking trade and international labor rights on the eve of the 21st century.

## **MERCOSUR AND THE SOCIAL-LABOR DECLARATION**

The Common Market of the South (Mercosur)<sup>24</sup> has moved rapidly in recent years, even recent months, to develop a social dimension to its economic integration arrangements. Since the initiation of the regional trade group with the Treaty of Asunción (March 26, 1991), there are three main institutional markers of Mercosur's social dimension:

- Sub-Group 11 (SG11) from 1991 through 1994;
- Working Group 10 (WG10) and the Economic and Social Consultative Forum (ESCF) from 1994 to the present; and
- Since late 1998, the Social-Labor Declaration of Mercosur and the related Social-Labor Commission.

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<sup>24</sup>The four Mercosur members are Argentina, Brazil, Paraguay and Uruguay. Chile and Bolivia are associate members.

## Sub-Group 11

When the Mercosur took shape in 1991, a reference to "social justice" in the Preamble of the Treaty of Asunción was the only nod to a social dimension in regional trade plans. Very soon, however, labor ministers of the member countries responded to demands from labor and civil society by adopting the Montevideo Declaration (May 9, 1991) insisting that the trade group address labor and social issues.

The Mercosur governments acted in December 1991 to create Sub-Group 11 (SG11) on labor, employment and social security, alongside other subgroups dealing with trade issues. SG11 set up eight committees dealing with individual and collective labor relations, employment, migrant workers, training, health and safety, sectoral issues in transportation and agriculture, and ILO Conventions.

SG11 held its first meeting in March 1992 and its last meeting in November 1994. The group and its committees were tripartite in structure, but only government representatives could approve their non-binding recommendations to the Mercosur governments. SG11 carried out an examination of ILO ratifications by member countries and comparative studies on labor costs and labor legislation.

Also significant is what SG11 did *not* do: it never adopted a Charter of Fundamental Labor and Social Rights called for by the Coordination of Trade Union Centrals of the Southern Cone (CTUCSC). This trade union coordinating body was formed in 1986 when it became clear that expanded regional trade was inevitable. Grouping the major labor federations of the four member countries, the CTUCSC drafted a comprehensive Social Charter with 79 articles covering a broad range of political, civil, economic, and social rights. The proposed charter also contained "linkage" of labor rights and trade requiring economic sanctions against countries, sectors, or companies that violate workers' rights.

Mercosur governments rejected the idea of a trade-linked Social Charter at a presidential summit meeting in August 1994. Brazil was willing to adopt a broad charter with no economic sanctions. Argentina said that a social charter should be taken up at the end of the process of economic integration, not at the beginning. Buenos Aires was willing to adopt a NAALC-style accord committing the countries to effective enforcement of national legislation on core labor standards and a complaint system with limited sanctions. At the end of the day the governments could not reach a consensus. But the exercise is seen by social charter proponents as worthwhile and important because it laid the groundwork for later consideration of the 1998 Social-Labor Declaration of Mercosur. Labor rights advocates hope that the Declaration is a bridge to an effective social charter to be won in the future.<sup>25</sup>

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<sup>25</sup>See Geraldo von Potobsky, *La Declaración Sociolaboral del Mercosur*, REVISTA DEL DERECHO DEL TRABAJO (publication of the Ministry of Labor of Argentina, July 1999).

## **Working Group 10**

SG11 ceased functioning at the end of 1994 in anticipation of the new Protocol of Ouro Preto (December 17, 1994) that finalized Mercosur's institutional structure. The Protocol established the Common Market Council (CMC) as the highest ruling body. Made up of Foreign Affairs and Economics ministers, the CMC meets twice yearly to take overarching decisions for the regional trade group. The Common Market Group (CMG) became the executive operational body of Mercosur. It meets several times yearly to adopt resolutions forwarded by subgroups and committees. Representatives of Finance ministries joined those from Foreign Affairs and Economics on the CMG. The Protocol also established a Trade Commission and a Joint Parliamentary Commission.

The Mercosur countries took two new measures in Ouro Preto dealing with a social dimension to their trade arrangements. A new Working Group 10 (WG10) took over labor matters. The eight committees of SG11 were reduced to three: one on employment relations; one on employment, migration and training; and one on health and safety, labor inspection and social security. Alongside WG10, but distinctive both in structure and mission, the Protocol established a new Economic and Social Consultative Forum.

WG10 is composed of labor ministry officials of each Mercosur member government, but its three committees retain the tripartite government-labor-business structure of their predecessors, with one representative from each sector from each of the four countries. Labor and business representatives have the right to vote in committee on conclusions and recommendations to send to the full Working Group. They may also participate in WG10 meetings and express their views, but labor and business representatives may not vote on decisions to forward matters to the Common Market Group.

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

When it began functioning in 1995, WG10 picked up where its predecessor SG11 had ended. WG10 continued analyzing Mercosur countries' ratification and implementation of ILO Conventions, noting that Paraguay lagged far behind its partners with 35 ratifications, compared with 102 for Uruguay, 85 for Brazil and 69 for Argentina. It resumed comparative labor law studies on such issues as termination of employment contracts, 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. An attempt to compare labor costs factoring in labor law and social security indices on a country-by-country basis foundered on methodological difficulties. The CMG instructed WG10 to undertake industry-by-industry salary studies instead.<sup>26</sup>

Under WG10 auspices, unprecedented multilateral labor inspections were carried out in all four countries in 1997 and 1998. Tripartite representatives joined labor inspectors from each country reviewing payroll records and examining health and safety conditions at construction sites in each country, followed by a review and discussion of the experience. Though limited, such activity can be viewed as a prototype of eventual enforcement of common labor standards.

WG10 also resumed discussion of a Social Charter, pressed anew by the CTUCSC with demands for linkage to trade disciplines. Although the social charter did not advance institutionally, keeping the debate alive is seen by labor rights advocates as contributing to one of WG10's signal achievements, the later adoption of the Social-Labor Declaration of Mercosur.

Between 1995 and 1998, Mercosur's Working Group 10 made concrete advances in three major projects. First, it achieved a Multilateral Agreement on Social Security to regulate eligibility and benefits for workers employed outside their own country. The social security agreement did not harmonize benefits at higher common denominators, a goal sought by the trade unions but opposed by employers and some governments. However, it did establish guarantees that workers will receive proper credits for employment in another country on which their benefits will be based, and that they will receive the health insurance, pensions and other benefits due them -- normally, the benefits provided in the country of employment for the period of employment in that country. The agreement also called for creation of a 12-member tripartite commission to oversee its implementation.

The social security agreement was adopted in December 1997 by the Council, the highest Mercosur body. It still awaits ratification by the parliaments of the member countries, a necessary step for implementation. Nevertheless, says one expert,

the fact that it is the first social-labor disposition resulting from Mercosur institutions, with the added value of its tripartite preparation, discussion and analysis, gives the Agreement symbolic value for the social actors who in seven years of prior activity had not succeeded in crystallizing any proposal with substantive content.<sup>27</sup>

A second achievement of WG10 was the creation of a permanent Labor Market Observatory. The Observatory is a technical organ designed to provide "real-time" comparative information on

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<sup>26</sup>See Pablo Arnoldo Topet, *Integración Regional y Relaciones Laborales Mercosur* (ILO background paper, January 1999), at 36.

<sup>27</sup>See Topet, *op.cit.*, at 36 (author's translation).

labor market indicators to Mercosur governments to help them coordinate employment policies. Like other Mercosur social initiatives, the Observatory has a tripartite institutional structure. A 12-member management council named by WG10 oversees a small technical secretariat of four persons, one from each country selected by the country's tripartite national section. Not having a specified source of funding, the technical secretariat is staffed by labor ministry employees still located in each country's labor ministry. This secretariat carries out a work plan adopted by the management council.

Although it does not have its own office or discretionary budget, the Mercosur Labor Market Observatory has been able to develop an information bank on comparative labor market indicators and plans to establish a web site on the Internet by the end of 1999. WG10 has charged the Observatory with conducting new sectoral labor market studies in textile, agriculture, land transport and other industries.

Before turning to the new Social-Labor Declaration of Mercosur and the even newer Mercosur Social-Labor Commission, a second initiative undertaken at Ouro Preto must be examined. The 1994 Protocol created an Economic and Social Consultative Forum (ESCF) as a setting for trade unions, employers and non-governmental organizations to voice their views and concerns about economic integration in the subregion. Like other Mercosur institutions, the ESCF is tripartite in structure, but with a key distinction: the Forum does not include government representatives. The three sectors of the ESCF are labor, business and NGOs.

Each of the four Mercosur countries has nine seats on the ESCF, making for a plenary body of 36 members. Each country may choose through its internal processes its nine members, with the sole requirement that the number of labor and business seats be equal. Thus, for example, labor and business could have two seats each, opening up five seats to NGOs. In practice, the countries have generally chosen three labor and three business representatives, with three NGO representatives joining them in the national delegation. NGO participants have come from consumer, environmental, educational, legal and other civil society groups.

The ESCF began functioning in 1996 after its four national sections were formed. It is a strictly advisory body, able only to forward non-binding recommendations to the Common Market Group. In its twice-yearly meetings between 1996 and 1998, the ESCF formulated a handful of recommendations for the CMG on promotion of employment, defense of the consumer, relations with the Free Trade Agreement of the Americas (FTAA), and other matters. None was adopted. In general, the governments ignored the ESCF. They gave it no budget or other material or administrative aid, and did not consult with the ESCF on labor matters. Without resources, the ESCF was unable to reach out to the general public, which remained unaware of its existence or its work.

Despite disappointment with its concrete results, however, the ESCF had the beneficial effect of providing space for civil society sectors in each country to learn about each other's concerns, to develop institutional rules, procedures and customs for tripartite work, and to seek common

ground on social aspects of regional economic integration. These were important precursors to the new framework created by the Social-Labor Declaration of Mercosur.

### **Social-Labor Declaration of Mercosur**

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

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

The Declaration also contains a novelty in international labor rights instruments: a management's rights clause. This language declares that "[T]he employer has the right to organize and direct economically and technically the enterprise, in conformity with national law and practice."<sup>28</sup> According to trade union and government representatives and advisors of WG10, the employer representatives' initial proposal called 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 of a free enterprise system, the separation of powers, and more.

The Declaration does not establish harmonized norms and has no linkage to the Mercosur trade regime imposing economic sanctions for violations of workers' rights -- key trade union goals for a social charter. Instead, the member countries "commit themselves to respect the fundamental rights inscribed in this Declaration and to promote its application in conformity with national law and practice and with collective contracts and agreements."<sup>29</sup> In its closing article, the Declaration says "The Parties emphasize that their Declaration and its followup mechanisms cannot be invoked or used for other ends not contained herein; prohibited, in particular, its application to trade, economic, and financial matters."<sup>30</sup>

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<sup>28</sup>Article 7.

<sup>29</sup>Article 20.

<sup>30</sup>Article 25.

The Declaration's application and followup clause creates a tripartite Mercosur Social-Labor Commission that reports to the Common Market Group. Composed of 12 government, labor and business members (one per sector per country), the Commission is empowered to act by consensus to:

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

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

The Declaration authorized an interim tripartite Commission to formulate a Regulation for the functioning of the permanent body. September 3, 1999, was given as a deadline for completing this task and submitting a Regulation to the CMG for approval. However, the deadline was not met. Labor and business members of the interim Commission clashed sharply on such matters as 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; and public disclosure of Commission proceedings. Most important, they could not reach consensus on an adequate budget and creation of a permanent staff secretariat for the Commission. In meetings at the end of August and early September 1999 the sectors remained at impasse on these matters. The deadline has been extended.

## **Evaluation**

The debate over Mercosur's social dimension mirrors that in other multilateral and regional settings. Governments are reluctant to cede sovereign power over labor matters to a new, untested supranational authority or to create international norms that trump national law. Employers complain that the Social-Labor Declaration is too favorable to the trade union agenda and fails to promote much needed (from their perspective) flexibilization of labor law and practice in the region. However, they count as a victory the fact that the Declaration does not have linkage to trade disciplines with potential for economic sanctions.

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

At the same time, trade unions welcome the progress represented by the Declaration, seeing it as forward movement in a long march toward an effective social dimension in trade.<sup>31</sup> They also value the significant role afforded to labor in the tripartite structure of the Commission, and the possibility of later revisions to the text of the Declaration in a review process required after two years of operation "in view of its dynamic character and advances in the process of subregional economic integration."<sup>32</sup>

Equally important for both employers and trade unions, their involvement in a new Mercosur social dynamic has compelled a broadening and deepening of social dialogue. This result has been achieved at both the Mercosur level and the national level, since each tripartite Mercosur body has four national tripartite organisms underneath it. Tripartite meetings have also been held at Mercosur and national levels for different economic sectors, notably textiles and apparel, transportation, printing, agroindustry and telecommunications.

One result of this new dynamic is something employers and trade unions in North America have not been able to accomplish: negotiation of a single collective agreement across national borders between trade unions and a major multinational corporation. In April 1999 Volkswagen of Brazil and Volkswagen of Argentina negotiated a collective agreement with metalworkers unions of the two countries. The agreement recognizes the new context of Mercosur's trading arrangements. It calls for exchange of information, measures to improve competitiveness, rapid and amicable dispute resolution, enhanced worker training, recognition of factory committees, and a commitment "to continually improve this contract, in a dynamic and consensual manner, including important matters for the permanent social dialogue of Mercosur."<sup>33</sup>

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<sup>31</sup>Interviews with trade union and employer representatives and advisors, Sao Paulo and Brasilia, Brazil, August 19-25, 1999.

<sup>32</sup>Article 24.

<sup>33</sup>See *Contrato Coletivo entre a Volkswagen do Brasil Ltda. e Volkswagen de Argentina S.A. e o Sindicato dos Metalurgicos do ABC, Sindicato dos Trabalhadores nas Industrias e Oficinas Metalurgicas, Mecanicas e de Material Eletrico e Eletronico de Taubete, Tremembe e Distritos, a Confederacao Nacional dos Metalurgicos da CUT, e o Sindicato de Macanicos e Afins de Transporte Automotor da Republica da Argentina e as Comissoes Internas de Fabrica*, April 16, 1999.

When Mercosur was launched in 1991 with the Treaty of Asunción, a passing mention of "social justice" in the Preamble was the only reference to a social dimension. But Mercosur countries quickly realized the need to respond to demands of workers, trade unions and allied civil society forces for instruments and mechanisms to ensure that expanding regional trade did not create new incentives for social dumping and worker exploitation to obtain competitive advantage. Governments and social actors have forged new institutions and new relationships. The Social-Labor Declaration of Mercosur and its Social-Labor Commission are the latest results of the new dynamic, but surely not the last. Based on experiences still to come, the tripartite actors will continue to build Mercosur's social dimension.

### **THE CANADA-CHILE FREE TRADE AGREEMENT AND THE CANADA-CHILE AGREEMENT ON LABOR COOPERATION**

When NAFTA was approved and implemented in 1994, expectations were high that Chile would soon become a fourth party to the agreement. Negotiations toward this end were derailed, however, with the peso crash at the end of 1994 and the resulting economic crisis in Mexico. Growing anti-NAFTA sentiment in the United States led to President Clinton's failure to obtain renewed Fast Track negotiating authority from Congress after it expired in 1994. Chile did not want to have the terms of its accession to NAFTA picked apart by Congress, so negotiations on NAFTA accession stopped.<sup>34</sup>

Instead of pursuing the NAFTA route, Chile undertook a series of bilateral trade negotiations with Canada, Mexico and Mercosur. Canada and Chile signed a trade agreement in 1996 and followed in early 1997 with the Canada-Chile Agreement on Labor Cooperation (CCALC). In most substantive respects, the CCALC is identical to the NAALC. It sets forth the same eleven labor principles and related obligations for effective enforcement of national law. It creates a Commission for Labor Cooperation to oversee the accord.

Like the NAALC, the CCALC emphasizes cooperative consultations and cooperative work programs. It also provides a similar mechanism for receiving complaints ("public communications"), for independent evaluations by independent committees of experts, and dispute resolution by ad hoc arbitral panels. As with the NAALC, the eleven labor principles of the CCALC are divided into three tiers, limiting dispute resolution to child labor, minimum wage, or health and safety labor law enforcement. In a targeted but significant deviation from the NAALC, sanctions under the CCALC's dispute resolution mechanism stop with fines against

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<sup>34</sup>"Fast track" is Washington shorthand for the constitutionally necessary delegation of trade negotiating authority from Congress to the President. Under fast track terms, any trade agreement negotiated by the executive must be voted up or down by Congress with no amendments. Without fast track, individual members of the House or Senate may propose amendments to protect their local industries. Trade partners are generally reluctant to negotiate with the United States without fast track conditions, since Congress might then repudiate any U.S. concessions.

an offending government. It does not take the further step provided in the NAALC of potential *trade* sanctions through loss of beneficial tariff treatment against a company or industry that violates workers' rights.

As a bilateral pact, several of the trinational features of the NAALC are transformed in the CCALC. Obviously the Ministerial Council consists of two, not three labor ministers. There is no permanent, trinational Secretariat created to serve the Council. Instead, the functions of the NAALC Secretariat and the three NAOs are combined in a CCALC national secretariat in each country. Canada's same National Administrative Office -- now renamed the Office of Inter-American Labour Cooperation -- performs this function for Ottawa. The national secretariats are responsible for developing cooperative activities, preparing reports and studies, supporting any committee or working group set up by the Council, and receiving and reviewing public communications on labor law matters arising in the other country.

From the start, the Canadian and Chilean governments announced that they would not substantively deviate from the NAALC in their negotiations on a labor agreement. Since it was still hoped that Chile would eventually accede to NAFTA, the bilateral negotiators did not want changes in their agreement that might require a full-scale renegotiation on terms of accession. Canadian and Chilean trade unions and NGOs roundly criticized this stance. They argued that new labor negotiations should be seen as an opportunity to improve the "toothless" NAALC.<sup>35</sup>

Labor rights advocates also protested the implication in the agreement that Chilean labor law and practice conforms to the eleven labor principles. While the harshly repressive Pinochet labor code was eased by a series of reforms after Chile returned to democratic rule, several features that arguably violate the accord's labor principles remain in place. These include provisions:

- permitting wide latitude for employers to dismiss workers, including union organizers and supporters, based on "needs of the business" as defined by the employer;
- denying organizing and collective bargaining rights to public employees and to seasonal and temporary workers;
- frustrating collective bargaining negotiations above the level of the single workplace;
- denying union access to corporate financial information for use in collective bargaining;
- severely limiting the topics susceptible to collective bargaining;
- limiting the right to strike and permitting permanent replacements.

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<sup>35</sup>See *Labor charges Canada missing chance to improve side agreements in Chile pact*, 1996 BNA Daily Labor Report No. 87, Bureau of National Affairs (May 6, 1996), at A-8.

Further reforms to cure some of these deficiencies have been introduced by the Chilean government but blocked by the unelected, appointed bloc of senators in Chile's upper house. This is seen by critics as itself evidence of a continuing democratic deficit there, calling into question Chile's readiness to sign a labor accord with Canada espousing the labor principles.<sup>36</sup>

Notwithstanding these problems, Canada and Chile signed their labor cooperation agreement on February 6, 1997, and it went into effect on July 9, 1997. Since then, the two national secretariats have undertaken an ambitious cooperative work program with several workshops, seminars and conferences similar to those sponsored under the NAALC. The CCALC Ministerial Council met in Santiago on October 22, 1998 to review accomplishments of the first year of the agreement's operation and to approve the first annual report on the agreement.<sup>37</sup>

The cooperative work program began with a seminar in Santiago in January, 1998, on individual employment standards and occupational health and safety legislation. It covered labor standards and enforcement systems, compensation for workplace injuries and illnesses, and mining industry health and safety. Later events, some government-to-government and some involving employer and trade union representatives, took place in Ottawa, Toronto, Montreal, and again in Santiago. Subjects taken up included industrial relations legislation and the role of labor boards and labor courts in regulating labor-management relations and resolving disputes;<sup>38</sup> new forms of work and the implications for industrial relations; income security; and workplace health and safety.

Most recently, a public conference on Working Women in the 21st Century took place in Santiago on September 1-3, 1999. The agenda included women's participation rates and employment patterns, work and family issues, legislation affecting women workers, and emerging trends and innovations.

Canadian employer and trade union representatives have participated in tripartite public events in both countries, as have Chilean employer representatives. However, Chilean trade unionists have only joined events that took place in Santiago.

Contrary to the NAALC experience, no complaints have yet been filed under the CCALC. Chilean unions have also not taken up offers from their Canadian counterparts to file complaints

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<sup>36</sup>See Carol Pier, *Labor Rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade*, 19 *COMPARATIVE LABOR LAW AND POLICY JOURNAL* 185 (Winter 1998).

<sup>37</sup>The annual report is available at the web site of the Canadian national secretariat, <http://labour.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/backen.htm>.

<sup>38</sup>Canadian trade unionists at the April 1998 conference in Ottawa raised sharp, probing questions for Chilean government representatives on what they saw as critical deficiencies in Chilean labor law. Chilean spokesmen fended off criticisms with claims that the basic labor law structure reflected the labor principles and that the government was working to correct remaining problems.

under the CCALC to bring problems of Chilean labor law and practice under international scrutiny afforded by the agreement.<sup>39</sup>

## THE CARIBBEAN COMMUNITY AND THE CHARTER OF CIVIL SOCIETY

The Caribbean Community (CARICOM) is an association of English-speaking Caribbean nations created in 1973 to develop a common market and coordinated policies among the member states.<sup>40</sup> Faced with the rise of regional trade agreements around them, in particular the new comparative advantages afforded Mexico under NAFTA, CARICOM countries have accelerated efforts to overcome still strong distinctions and rivalries and build an effective trade group.<sup>41</sup>

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

CARICOM needs normative moorings; we have found widespread yearning for giving the community a qualitative character -- values beyond the routine of integration arrangements to which [economic integration] can be made to conform. The Charter can become the soul of the Community which needs a soul if it is to command the loyalty of the people of CARICOM.<sup>42</sup>

The Charter of Civil Society is a comprehensive human rights instrument composed of 27 articles. Most notably, in comparison with similar international efforts, the CARICOM Charter subjects private actors -- namely, the "social partners"<sup>43</sup> -- as well as states to its oversight mechanism. The first grouping of articles cover classical civil and political rights -- human dignity and the right to life, liberty and security of the person; equality before the law; political freedom; freedom of association, expression and religion. Article X, on cultural diversity, shifts The instrument's focus to economic and social rights reflected in clauses on indigenous peoples,

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<sup>39</sup>Interview with Canadian Labour Congress representative, August 1999.

<sup>40</sup>CARICOM members are Antigua and Barbuda, Belize, the Bahamas, Barbados, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago. Haiti is close to becoming a member, which will change the group's linguistic character. Associate members are Anguilla, British Virgin Islands, and Turks and Caicos Islands.

<sup>41</sup>See Gary Younge, *Caribbean at the crossroads: ...the region's search for an identity to call its own*, The Guardian (London), April 15, 1999, at 2.

<sup>42</sup>Cited in CARICOM Secretariat statement on Declaration of Industrial and Labour Relations Principles (see below), January 6, 1999.

<sup>43</sup>"Social partners" are defined in Article I as "the government of a State, Associations of Employers, Workers' Organizations and such Non-Governmental Organizations as the State may recognize."

women, children and the disabled; access to education and training; health; participation in the economy; environmental rights; and good governance.

Two articles of the Charter relate to a social dimension. Article XIX on Workers' Rights is the longest single article of the Charter. It guarantees to "every worker" the right to form or belong to a trade union, to bargain collectively, not to be subjected to unfair labor practices, to a safe workplace, to reasonable hours and pay, and to withhold his or her labor. An exception is made for public employees "which are reasonably justifiable in a free and democratic society."<sup>44</sup> Article XIX goes on to state obligations of governments to:

- safeguard workers' right to freely choose occupations;
- recognize the desirability of decent pay;
- provide machinery for recognition and certification of trade unions freely chosen by a majority of workers;
- sensitize workers, unions and employers as to their respective and mutual obligations;
- provide protection against arbitrary dismissal;
- provide machinery for industrial dispute resolution;
- provide maternity leave and return-to-work rights after pregnancy;
- establish standards to ensure a safe and healthy workplace;
- provide adequate social security; and
- ensure social and medical assistance to retired persons.<sup>45</sup>

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

The followup mechanism in Article XXV calls for periodic reports to the CARICOM Secretary-General on measures adopted and progress achieved in compliance with the Charter. Reports

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<sup>44</sup>Article XIX, paragraphs 1 and 2.

<sup>45</sup>*Id.*, paragraph 3.

should also indicate "factors and difficulties, if any" affecting implementation.<sup>46</sup> Governments should also consult with social partners in preparing the reports, and establish in each country a National Committee to oversee Charter implementation. The National Committee is made up of government representatives, representatives of the social partners, and "other persons of high moral character and recognized competence in their respective fields of endeavor."<sup>47</sup> The first reports are due in 2000.

The Charter contains a complaint mechanism by which citizens may file with their National Committee "reports of allegations of breaches of, or non-compliance with" the Charter. Significantly, complaints may cite violations "attributed to the state or to one or more social partners."<sup>48</sup> No such complaints have been filed under the Charter as yet.<sup>49</sup>

The National Committee must notify the state or social partner named in the complaint and request comments on the allegation. The complaint, comments, and the Committee's "own views" are then reported to the Secretary-General for forwarding to the Conference of Heads of Governments of the Caribbean Community. The deliberations of the Conference and any recommendations are sent back to the government and the National Committee of the country involved.<sup>50</sup>

No further action is contemplated under the CARICOM Charter in cases alleging violations of Charter provisions, including workers' rights. The Charter establishes an oversight system relying on peer pressure and moral force to change behavior or correct injustices. There is no linkage to CARICOM trading arrangements and no plan for economic sanctions against human rights and workers' rights violators. Because the Charter took effect only last year, there have been no complaints or reports yet filed under its oversight mechanism.<sup>51</sup>

### **The CARICOM Declaration of Labour and Industrial Relations Principles**

In April 1993, the Standing Committee of Ministers Responsible for Labour of CARICOM commissioned the drafting of a Declaration of Labour and Industrial Relations Principles for the

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<sup>46</sup>Article XXV, paragraphs 1 and 2.

<sup>47</sup>*Id.*, paragraphs 3 and 4 (1).

<sup>48</sup>*Id.*, paragraph 4 (2).

<sup>49</sup> According to a CARICOM representative, "Civil society is looking more at the specific national regulations than at the Charter as they view problems, etc. in a national context rather than in a regional context" (e-mail interview, September 13, 1999, on file with author).

<sup>50</sup>*Id.*, paragraphs 4 (3) and 5.

<sup>51</sup>E-mail interview with CARICOM Secretariat staff, August 12, 1999.

Community. A two-year process of consultation with trade unions, employer groups and labor law scholars led to the Ministers' adopting the Declaration in April 1995.

The Declaration is characterized by the Standing Committee of Ministers Responsible for Labour as "an important policy guide on labour matters for the social partners [that] provides the bases for the development of national labour policies, and informs the enactment of labour legislation."<sup>52</sup> It is described by the Secretariat as "an expansion" of workers' rights in Article XIX of the CARICOM Charter of Civil Society. A Secretariat statement accompanying the Declaration points to "the tradition of adversarial industrial relations" in the region and an "urgent need for better cooperation amongst the social partners to combat the burning issues brought by globalisation, trade liberalisation and structural adjustment programmes."

The Declaration begins by invoking the CARICOM Charter, the ILO's Declaration of Philadelphia, the Universal Declaration of Human Rights, and ILO conventions and recommendations. The Declaration's 45 articles cover freedom of association, collective bargaining, non-discrimination in employment, forced labor, health and safety, job training and career promotion, employment policy, labor administration, dispute settlement, consultation and tripartism, and many other aspects of labor and employment relations.

As indicated earlier, the Declaration is a policy guide that is purely hortatory. It has no binding force. It is not linked to trade disciplines that would permit economic sanctions against violators. No oversight or followup mechanism is contained in the Declaration, although its terms could certainly be relied on in complaints arising under the Charter.

### **CARICOM Social Security Agreement**

Separate from the Charter or Declaration, the CARICOM nations signed a social security agreement in 1996 to ensure continuity of social insurance for persons employed or retired outside their country of origin. To date, eleven member states have ratified the agreement. As with the Mercosur social security agreement, the pact does not harmonize benefits at a community-wide level, but seeks to ensure that workers will receive what is due them for work performed in other countries.

The agreement sets conditions for eligibility of workers in different economic sectors, methods of calculating employment credits, and determination of benefits. It regulates such matters as dependents' coverage, survivors' benefits, disability benefits, and medical examinations. It establishes a mechanism for filing claims and spells out documents that should accompany claims. Finally, the social security agreement creates a dispute resolution mechanism using ad

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<sup>52</sup>CARICOM Declaration of Labour and Industrial Relations Principles, *Foreword*.

claims. Finally, the social security agreement creates a dispute resolution mechanism using ad hoc arbitral panels to settle conflicts between governments.<sup>53</sup>

## **CONCLUSION**

The four labor rights-in-trade experiments examined here are still new. States and social actors are still learning which features are successful and should be kept, which have failed and should be changed, and which are still untried and bear testing. The most instructive distinctions emerge in three key areas: (1) tripartism; (2) complaint and oversight mechanisms; and (3) "soft" moral sanctions versus "hard" economic sanctions.

### **Tripartism**

The trinational NAALC and the binational CCALC limit the institutional role of employers, trade unions, NGOs and other elements of civil society. These social actors engage the social dimension of trade mainly by filing complaints and pressing governments for action. In contrast, the Mercosur and CARICOM arrangements give greater weight to tripartism in their institutional structures. Employers, trade unions, and sometimes other social actors have formal roles in Mercosur's working groups, forum and commission, both at the Mercosur level and in national bodies. The same civil society forces participate formally in the national committees that take up matters under the CARICOM Charter of Civil Society.

### **Complaints and Oversight**

Alongside cooperation and consultation between governments, NAALC and CCALC submission and oversight mechanisms contemplate specific complaints by social actors against governments and firms that allegedly violate workers' rights. Complaints may be followed by public hearings, public reports, evaluations and recommendations by independent, non-governmental experts, and dispute resolution by independent arbitrators. In contrast, Mercosur and CARICOM integrate the social actors into their institutional regimes. Complaints can be filed with tripartite national bodies under both systems, but governments retain control of outcomes with little apparent space for public hearings or other forms of public pressure by social actors. There is no place for independent, non-governmental decision making.

### **Sanctions**

The issue of sanctions is another marker of key differences among the four systems studied here. A spectrum of sanctions can range from "soft" reproof like self-reporting requirements or quiet diplomatic chiding among governments to "hard" reproof like fines or trade sanctions. Intermediate measures involve escalating investigations, reviews and reports, independent

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<sup>53</sup>The CARICOM Social Security Agreement is available at the Community's web site at <http://www.caricom.org/socsec.htm>.

publicize behavior by states, industries and firms. While such measures are often dismissed as toothless, public exposure can sometimes have economic consequences that also changes abusive behavior.

CARICOM is silent on the subject of sanctions. Its oversight mechanism is limited. Once citizens have filed a complaint with a national committee, the sequence that follows is one of reports, comments, and non-binding recommendations. Mercosur explicitly renounces economic sanctions in Article 25 of the Social-Labor Declaration. Instead, it sees labor rights matters best addressed by a robust tripartite dynamic and moral pressure by the Common Market Group, the Council, and if necessary by heads of state.

The CCALC permits fines against a government for systematic failure to enforce laws on child labor, minimum wage, or occupational safety and health, but precludes suspension of the trade agreement's tariff benefits. The NAALC takes this final step, allowing sanctions against companies or firms that violate workers' rights, though it must be kept in mind that this measure has never been applied and would seemingly only be applied in unusual circumstances.

#### **AFTERWORD: LOOKING AHEAD TO THE FTAA**

The models and variations in American regional trade arrangements reviewed here will ultimately be taken up in talks to link NAFTA, Mercosur and other regional trade agreements in a Free Trade Agreement of the Americas (FTAA). At a December 1994 summit meeting in Miami, Western hemisphere presidents and prime ministers announced intentions to achieve the FTAA by 2005.

The issue of a social dimension to the FTAA has already been joined. The 34 heads of state (missing only Cuba) began free trade talks at a widely reported "Summit of the Americas" in Santiago, Chile, in April 1998. A parallel "peoples' summit" in Santiago attracted more than 1,000 leaders and activists from trade unions and non-governmental organizations throughout the hemisphere. These summitters launched an ambitious program of their own to force social issues like labor, environmental and human rights concerns onto the governments' free trade agenda.

The governments have not ignored these developments. A final document by the heads of state in Santiago called for a "social action plan" to promote core ILO labor standards, improve education, reduce poverty and inequality, expand democracy, and guarantee human rights. The governments also agreed to create a Committee on Civil Society, with Canada as interim chair, to officially hear the views of labor, environmental and other non-governmental organizations as FTAA negotiations proceed.<sup>54</sup>

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<sup>54</sup>Trade unions and NGOs have created a Hemispheric Social Alliance to coordinate action on the FTAA. Part of their work has been the elaboration of an *Alternatives for the Americas* document detailing elements of a social dimension in any hemispheric trade agreement. The *Alternatives* document is available at the web site of the

A social dimension in the FTAA could take shape by combining elements of the models outlined here -- the NAALC's complaint system, Mercosur's tripartism, CARICOM's national committees, for example. Alternatively, FTAA countries could agree to maintain these separate regional systems even while economic integration proceeds, allowing a longer period of experimentation with different models. Understanding and evaluating experience with the four "works in progress" studied here will play a large part in shaping the social dimension of hemispheric integration.