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Foundation-Building for Western Hemispheric Integration

*Frederick M. Abbott**

The United States is embarked upon an ambitious program of western hemispheric economic integration about which its domestic body politic is decidedly ambivalent. The process in which the North American Free Trade Agreement (NAFTA) was approved in 1993 revealed deep divisions between the major political parties and their various interest group constituencies concerning the appropriate scope of an economic integration agenda. The Mexican peso crisis that began in December 1994 provoked a deep crisis of confidence regarding Mexico's readiness to participate in a mature economic partnership with the United States and Canada. Subsequent revelations relating to corruption infecting the administration of former President Salinas deepened these concerns. As implementation of the NAFTA proceeded, pressures from within the Congress and the 1996 presidential election campaign put on hold negotiations concerning accession of Chile to the NAFTA.

Beyond the NAFTA, the United States is involved in a very large scale economic integration negotiation involving the entire western hemisphere, save Cuba. The Summit of the Americas Declaration of Principles of December 1994 envisions the completion of negotiation of a Free Trade Area of the Americas (FTAA) "no later than 2005 . . . with concrete progress toward the attainment of this objective . . . by

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the end of this century.”¹ A series of ministerial meetings subsequent to the initial Summit of the Americas has led to the establishment of an array of inter-governmental working groups undertaking to concretize the FTAA vision, as well as to the initiation of an active research program at the Organization of American States (OAS), among other regional organizations, designed ultimately to flesh out a blueprint for the FTAA.²

The creation of the NAFTA and the negotiation of the FTAA are profoundly important political and economic developments for the United States, just as the creation of the European Economic Community and the widening of the European Union are profoundly important political and economic developments on the other side of the Atlantic. Yet the logic of the western hemispheric integration process is not the logic of the European integration process. The historical situation of Europe is extraordinarily complex. Interstate violence played a central role in the creation and evolution of the European Union. The need for rapid post-World War II economic rebuilding of European industry and agriculture overshadowed purely national concerns and helped to overcome historical rivalries among the Member States and their citizens. The postwar threat of the Soviet empire provided a basis for Western European political cohesion that, in retrospect, may have been only dimly understood.³ Though the European Union is now struggling to find direction, there remains strong consensus that the core function of the Union in preserving European peace and security should remain intact.⁴

If there is a logic to the western hemispheric integration process, it is a different logic than the logic of Europe. Interstate violence has played a very limited historical role among the nations of the western

¹ Summit of the Americas: Declaration of Principles and Plan of Action [Dec. 11, 1994], 34 I.L.M. 808, Declaration of Principles at 811 (1995).

² See Joint Declaration of Western Hemisphere Trade Ministers, Summit of the Americas Trade Ministerial, 12 INT'L TR. REPTR. (BNA) 1166 (July 5, 1995) and Final Cartagena Trade Ministerial Declaration on FTAA, Summit of the Americas Second Ministerial Trade Meeting, Cartagena, Colombia, Mar. 21, 1996, Joint Declaration, INSIDE NAFTA, Mar. 25, 1996, at 7.

³ See George Soros, *Can Europe Work?*, 75 FOREIGN AFF. 8 (1996) (reflecting on the degree to which the fall of the Berlin wall in 1989 fundamentally changed the political dynamic of Europe).

⁴ See European Council Reflection Group's Report, Messina 2nd June 1995, Brussels, Dec. 5 1995 ¶ 12 (“The Group emphasizes that this guarantee of prosperity and peace is not perpetual and that it would be a grave error to underestimate the Community's main contribution to the Member States and their citizens, namely a shared view of life that has ruled out war as a means of settling differences . . .”). The Reflection Group was established by the European Council and directed to prepare a report identifying issues to be addressed at the 1996 Intergovernmental Conference. *Id.*

hemisphere. Internal strife, on the other hand, has plagued many nations of Latin America. Low rates of economic growth throughout the four decades following the Second World War worked great economic and social hardship. The promise of more rapid economic growth impelled a recent change in government attitudes towards trade and investment and paved the way for the FTAA negotiations.

The first draft of this article was prepared in early 1995 immediately following the Mexican peso crisis and was presented as part of a lecture series at U.C. Berkeley School of Law. The thesis of that draft was (1) that there was a net positive social welfare value to the NAFTA; (2) that there was a lack of political support for a socially progressive NAFTA in the United States that gave rise to doubts concerning its viability; and (3) that analytical tools developed by political and social scientists might assist public policy planners in the United States to address the underlying lack of support that threatened the NAFTA enterprise. Over the past two years the immediacy of the peso crisis has faded. The NAFTA increasingly appears as a component of a broader long-term hemispheric picture that is slowly coming into focus. For this reason, the focus of the article has changed.

This article is now directed to the steps that should be taken to build a foundation for the longer-term enterprise of western hemispheric integration. The article begins by reviewing the work of political and social scientists who have stressed that international and regional institution-building require the self-interest and support of key actors and interest groups involved in the process. The success of a regional integration effort may well depend on the presence of a sufficient confluence of self-interests among key actors and interest groups throughout economically-important countries in a region. This article concentrates as a starting point on United States interest groups and political actors and considers whether these key actors and interest groups have a self-interest in the success of hemispheric integration. It suggests some ways that domestic support for the future western hemispheric integration process may be enhanced.

Ultimately, the process of building the FTAA will not be successful simply because it is supported in the United States, even though it will certainly fail from a lack of U.S. support. The building of a regional integration arrangement requires support from throughout a region. There remains ahead the very large task of identifying the key actors and interest groups throughout the nations of the prospective FTAA and their self-interests in the integration process.

Western hemispheric economic integration can be undertaken in a socially responsible manner that will result in a net positive social welfare value for the people of the United States and the western hemisphere as a whole.⁵ The essential questions that must be addressed in the process of institution building concern the shape of the process: who will benefit and what will be its impact on the overall quality of life in the region? It certainly is not enough that a regional integration arrangement be built; an arrangement that promotes the social welfare interests of the people of this hemisphere must be built.

I. ANALYTIC TOOLS

A. Neo-Functionalism

1. *Development and Critique*

In *The Uniting of Europe*, published in 1958, Ernst Haas analyzed the formation of the European Coal and Steel Community (ECSC) of 1951/52, the predecessor to the European Economic Community of 1957/58.⁶ Haas concluded that the successful formation of the ECSC was based on a confluence of self-interests among European elite groups—most notably national political leaders, industry leaders and labor union leaders. This confluence of self-interests resulted in a willingness to forego narrow national advantages in favor of broader community advantages and in the cession of decision-making authority to regional institutions. Haas postulated that the confluence of elite self-interests drives the regional integration process. Moreover, he said, if a confluence of self-interests drives the integration process, then the integration process is likely to proceed by a series of incremental steps, rather than by a leap into a fully formed structure founded upon a political ideal.

Haas suggested that the formation of collective institutions at the regional level and the incremental process of decision-making leads to important “spillover” effects. As the process of collective decision-making proceeds, institutions extend the scope of their action. Thus, for example, institutions that were initially designed to address reductions in tariffs are concerned with the harmonization of company law

⁵ The draft of this article presented at Berkeley and distributed to participants in this ASIL IELIG conference contained a detailed analysis of the underlying value of regional integration in the NAFTA context. In the interests of brevity, this version refers instead to the excellent analysis of the economic and social welfare value of the NAFTA in Thomas J. Schoenbaum, *The North American Free Trade Agreement (NAFTA): Good for Jobs, for the Environment, and for America*, 23 GA. J. INT'L & COMP. L. 461 (1993).

⁶ ERNST B. HAAS, *THE UNITING OF EUROPE* (1958).

and control of the business cycle.⁷ Spillovers are of considerable importance in accelerating and deepening the integration process because they do not entail significant political decisions at the subregional level (which may be contentious). Haas observed that the spillover phenomenon was largely confined to regional arrangements that include collective decision-making institutions (as with the European Union), and did not appear to operate significantly in respect to free trade areas.⁸ Haas' insights into the regional integration process are referred to as "neo-functional" theory.⁹

Haas was not content to rest on his initial theorizing. He became his most important critic. The emergence of General Charles de Gaulle in France as a powerful opponent of the European integration process, based in French nationalism, led Haas to suggest that he may have seriously underestimated the capacity of a single charismatic political leader to interfere with the integration process.¹⁰ Haas later concluded that he and his neo-functional school colleagues may have failed to anticipate the "turbulent" nature of society.¹¹ He suggested that the ever-changing nature of human affairs makes it exceedingly difficult for elites to identify their self-interests, to evaluate how their self-interests may be maximized through the pursuit of alternative political strategies, and, therefore, to agree on the pursuit of regional objectives. Moreover, he suggested that regional integration mechanisms cannot be fully evaluated and understood as self-contained systems. The constituent countries of the regional integration arrangement (RIA) interact with a broader global community. The interests of third countries may not be consistent with that of the RIA, and the individual constituent countries of the RIA may find a greater confluence of interests with third countries, certainly in some cases,

⁷ See Ernst B. Haas, *The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing*, 24 INT'L ORG. 607, 617 (1970).

⁸ *Id.* See LAURA D'ANDREA TYSON, WHO'S BASHING WHOM? TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES 32 (1992) (discussing "spillovers" in the economic context).

⁹ "Neo" is used in this context because Haas built on earlier theorizing that regional integration proceeded because of the "functional" requirements of its participants, for example, the requirement to integrate markets to promote economic efficiencies. Haas more deeply examined the social and political factors, the elite self-interests, which he concluded drove the integration process, and attempted to identify a route by which integration was more likely successfully to proceed.

¹⁰ Ernst B. Haas, *The Uniting of Europe and the Uniting of Latin America*, 5 J. COMM. MKT. STUD. 315 (1967).

¹¹ See generally ERNST B. HAAS, THE OBSOLESCENCE OF REGIONAL INTEGRATION THEORY (1975).

than they find with their regional integration partners.¹² This lead Haas to suggest that integration should be studied and understood as a broad global phenomenon, and should not be confined to the regional unit.

The progression of Haas' thinking is very important. There is a growing awareness that the global economy involves at its outer edge a single large-scale integration system and that the actions and reactions of each actor create effects throughout the system. This progression points to the importance of considering the relationship of regional systems such as the European Union and NAFTA within the larger World Trade Organization system.

From the perspective of value-orientation, Haas appears principally concerned with whether and to what extent regional integration arrangements will enhance global public order.¹³ His inquiry also extends to "whether regional common markets are really better for industrialization and effective welfare policies than is a global division of labor, whether they lead to redistribution and the equitable sharing of scarce resources — or to more competition for such spoils."¹⁴ His work on regional integration identifies the variables at work in the integration process, attempts to explain the phenomenon, and is concerned with identifying or developing predictive tools.

2. *The Realpolitik of Neo-Functionalism*

The neo-functionalist approach to the study of regional integration demands a close attention to the social forces at work throughout a region. Integration planners and analysts in the United States have access to a great deal of information concerning the social structure and economic forces at work in this country and should be able to identify the interests of the various groups with a significant stake in, and influence over, the integration process. There is, however, a considerable gap in the United States between the level of understanding of the domestic/local socio-economic process and the level of understanding of the socio-economic processes in other countries (and

¹² See Frederick M. Abbott, *Crosscurrents in European Union External Commercial Relations: The Controversy over the Germany-United States Treaty of Friendship*, 54 ZAORV 756 (1994) (illustrating the difficulties arising when national and regional interests diverge with respect to third countries).

¹³ See, e.g., Haas, *The Study of Regional Integration*, *supra* note 7, at 608. Haas stresses the importance to the political scientist of maintaining a neutral observational standpoint. His early work appears to be principally concerned with identifying the variables that influence the regional integration process. See HAAS, *supra* note 6, at 3-11.

¹⁴ Haas, *supra* note 7, at 608.

parts) of the hemisphere. Explaining the NAFTA in satisfactory neo-functional terms requires an analysis of how the political systems of Canada and Mexico operate: who are the political actors and what interests do they represent? The neo-functional approach requires an analysis of the economic system of Mexico: who are the owners of Mexican industry, what goals are they seeking, and how do they plan to achieve them? A satisfactory neo-functional analysis must identify other important interest groups and leaders. Who are the leaders of the labor unions? What goals are they trying to promote? How do they evaluate the potential impact of regional integration on their interests?

The interests of the managers of large businesses in the United States and Mexico with respect to the removal of barriers to trade and investment may be quite different. A U.S. manager may see the removal of a Mexican trade barrier as a benign business opportunity that will allow his or her business to expand its operation south of the U.S. border, thereby increasing profits and job security. The Mexican manager may see the removal of the same barrier in opposite terms, *i.e.*, as creating a threat to his or her job by encouraging the appearance of an efficient competitor.

Labor union leaders in the United States and Mexico may have dissimilar interests in the regional interest process. The NAFTA may be more likely to raise wages in Mexico than in the United States. This might appear to provide the basis for support of labor union leaders in Mexico. But Mexican labor unions may be dominated by large political parties, and the leaders of these unions may be threatened by the transparency that the NAFTA promises to create. These union leaders may prefer an entrenched system in which they operate together with political leaders outside public scrutiny.

Mexico's socio-economic system may be extremely difficult, for U.S. planners at least, to analyze. Former President Carlos Salinas was hailed by the United States and in the international community as a progressive visionary opening up the Mexican economy to foreign trade, investment and competition. He spearheaded an ambitious privatization program. Yet during the President's term in office, his brother was accumulating a fortune through suspect dealings with Mexican business leaders, and associates of the President accumulated vast wealth as the privatization program proceeded.

It is apparent that an identification and analysis of actors and interests in the FTAA context would be a far more difficult and complex task than an identification and analysis in the isolated NAFTA con-

text. Who are the political leaders of Argentina, Brazil, Colombia, Peru and Venezuela? What is their power base? Who are the owners of industry? What might their goals be in an economic integration process involving the United States? Are the labor pools organized? What are the structures of the unions? Are they allied to political parties? What are the interests and goals of the union leaders?

3. Neo-Functional Tools

As a political scientist, Ernst Haas sought to develop a set of tools which would permit a robust prediction of the success of a regional integration arrangement. Haas criticized his neo-functional theory as a tool of prediction on the grounds of complexity. Regional integration arrangements are an interconnected part of a global political-economic-social system. The interests of actors and groups extend outside of the regional arrangement, and interests outside the RIA will impact its development in ways that cannot be predicted by studying the forces inside the RIA alone. Moreover, individual charismatic leaders may be able to alter, or at least temporarily stall, the regional integration process with a personal agenda that swims against an otherwise "neo-functionally adequate" confluence of interests.

It is doubtless important to keep in mind the limitations of neo-functional theory. It may not permit a robust prediction of the success or failure of an RIA based on a confluence of elite interests. Yet whether or not neo-functional theory permits extrapolation of the future, there is nevertheless important insight in Haas' work. The chances for an RIA's success should be substantially greater if important decision-makers in a region share interests and objectives. If integration planners identify the common interests of key decision-makers in the planning phase of an RIA, they may be able to design the integration structure in a way that will minimize conflict during the RIA approval and implementation phases. Conversely, a failure by integration planners to recognize the presence of competing interests among disparate actors in the various nations of a region may substantially undermine the RIA's prospects for success.

4. The Limits of the Elite

Haas focused on the role of elites in the formation of the European Economic Community and subsequent Latin American integration arrangements because he concluded that the leaders of important interest group communities were able to steer the direction of government and industry. The development of the mass media over

the past several decades may have altered, at least somewhat, the relationship between the elite and the common individual. In making and implementing policy, political leaders in the United States have become highly dependent on polling and the reaction of the general public to policy proposals. While leaders in the mass media may play a significant role in shaping public opinion, it is becoming increasingly clear that in an open society political leaders cannot make and pursue policies that are contrary to views and values widely held by the public at large. For example, the Republicans who captured control of Congress in 1994 discovered that the vast majority of U.S. citizens value environmental protection. Adverse public reaction to the Republican agenda to eliminate environmental programs not only precluded the implementation of the agenda, but apparently led to a significant undermining of the role of the congressional Republican leadership.

This is not to suggest that elites have ceased to play the key role in formulating and implementing policy. The public at large is unlikely to formulate new policy initiatives in the field of international trade. On the other hand, it seems apparent that the influence of the public at large on government decision-making, largely as the result of technological advances in the information industries, has increased since the late 1950s when the EEC was created. The recent European experience with the Maastricht Treaty approval process demonstrates that the failure of political leaders to appreciate and address underlying popular sentiments may lead to important roadblocks in the process of regional integration.

B. Regional Integration as Social Process

The neo-functional school of political science can be productively integrated with the contextual social science approach to the problems of society, politics and human development suggested by Harold Lasswell. There is a high degree of complementarity in the two approaches to society and its development.¹⁵

Like Haas, Lasswell and his collaborators focused on the power of ruling elites to influence the course of social development.¹⁶ Simi-

¹⁵ Haas on occasion refers to Lasswell in footnotes, while reserving most social science reference to Karl Deutsch and communications theory. Lasswell likewise refers to Deutsch. This author is not aware of reference by Lasswell to Haas, but the work of both scholars is extensive, and no detailed study has been made to determine whether any cross-references exist.

¹⁶ Starting with HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935), Lasswell sought to demystify the world political process by identifying and analyzing the deep psychological, symbolic, cultural and economic factors that underlie and motivate social behaviors. Lasswell, both alone and in collaboration with others, later developed highly detailed

larly, Lasswell observed that elite groups would seek to pursue their self-interests — which he referred to as value accumulation — and would not be likely to act in ways that would undermine their status (in its broad sense). Lasswell identified the tools by which elite groups seek to achieve their aims—for example, by the granting and deprivation of material benefits, and by the manipulation of symbols of identification (*e.g.*, symbols of nationalism), in addition, of course, to employing instruments of violence.

Two divergent — though not inconsistent — features of Haas' and Lasswell's work may be identified. Lasswell, more than Haas, focused on the importance of the common individual (or rank and file) in the social process. Lasswell stressed that the elite are dependent on the acceptance of their dominant role by the rank and file. To put it plainly, the rank and file, in discontent, have the power to threaten the status of the elite. As a second divergent feature, Lasswell's work is more explicitly directed to establishing goal- or value-orientations.¹⁷ Haas principally identifies public order concerns, and secondarily developmental interests. Having focused on the European integration process, Haas may well have viewed the underlying social welfare value of regional integration as self-evident.¹⁸ Lasswell's work focused on the importance of the dignity of the individual, of freedom of personal development and expression, and of distributing the benefits of development widely. Lasswell accepted that society must improve itself through conscious public choice. Improvements in social welfare may not automatically flow from economic development. Institutions must be designed so as to promote the attainment of preferred values.

The insights of Ernst Haas and Harold Lasswell provide important tools to assist in enhancing the prospects for successful implementation of regional integration arrangements such as the NAFTA and

contextual maps of the structure and behavior of human societies. See, *e.g.*, HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936); HAROLD D. LASSWELL, *WORLD POLITICS FACES ECONOMICS* (1945); HAROLD D. LASSWELL AND ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK OF POLITICAL INQUIRY* (1950); and, Harold D. Lasswell and Allan R. Holmberg, *Toward a General Theory of Directed Value Accumulation and Institutional Development*, in *COMPARATIVE THEORIES OF SOCIAL CHANGE* (Hollis W. Peter ed., 1966). Lasswell's principal collaborator in the development of the contextual school of legal analysis was, of course, Myres McDougal. See generally, HAROLD D. LASSELL AND MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* (1992).

¹⁷ This is a major theme of the New Haven School of jurisprudence. See generally LASSWELL AND MCDUGAL, *supra* note 16.

¹⁸ This is intimated in *The Study of Regional Integration*, where Haas, in discussing the reasons for studying the regional integration process, concludes that "[a]ll this should be self-evident. But it has been hidden by the concern of some students of integration for the canons of social science and its language." Haas, *supra* note 7, at 608.

FTAA and in maximizing their benefits to society as a whole. The neo-functionalists stress the importance of identifying the actors, including groups, who drive the integration process and who also may stall it. In order to stimulate the integration process, the interests of the various key actors may be identified, and that information may be used to frame institutional structures that will productively channel those interests. The neo-functionalists and social scientists suggest to us the importance of coalition- and consensus-building. They intimate that the proposal of "better ideas" from a social welfare perspective may be futile, if these ideas are not adequately grounded in the interests of important actors in the regional integration process.

II. U.S. INTEREST GROUPS¹⁹

A. The Business Community

Among U.S. interest groups, the business community plays the most significant role in the formulation and implementation of trade policy. The business community exercises its influence through the lobbying activities of various well-known associations such as the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Foreign Trade Council, and the Pharmaceutical Research and Manufacturers Association. Individual firms exercise their influence through lobbying activities and the contribution of funds to political campaigns. Lawyers and other consultants with expertise in the formulation and implementation of trade-related legislation play an active role on behalf of the business community by, *inter alia*, closely tracking legislative proposals and assisting in commenting on such proposals as they proceed through the legislative process.

The business community has far more capital to invest in policy-influencing activities than other U.S. interest groups. This significantly advantages the business community in the political process. The business community has a large and direct stake in the outcome of decisions on trade policy, and the success of U.S. business directly affects the income and standard of living of U.S. citizens. There is sound reason for the business community to be concerned with the formulation

¹⁹ According to Lasswell and Kaplan, "[a]n *interest group* is an interest aggregate organized for the satisfaction of the interest. . . . All groups might be regarded as interest groups, since they all involve demands (preferences if not determinations) and expectations. But we may distinguish among various patterns of group activity those concerned with the satisfaction of interests—rather than, say, propagation of faiths or evocation of loyalties—and characterize the group as an interest group with regard to these patterns." LASSWELL AND KAPLAN, *supra* note 16, at 40 (italics in original).

and implementation of trade policy, and there is sound reason for the federal government to take into account the interests of the business community in trade policy formulation and implementation.

In one of the most insightful papers on the future of international trade policy to have appeared in recent years, Gary Hufbauer observes:

This robust outlook for trade in goods and services does not depend on whether the WTO or regional groups predominate in setting the commercial agenda. Rather it depends on the conjunction of opportunities for profitable trade and the underlying political arithmetic of removing barriers.

In my political arithmetic, firms are the decisive political unit, and they can be divided into three groups. When I classify a firm in one of the three groups, I am referring to all its stakeholders — shareholders, creditors, managers, employees, and local communities. Differences can arise between the various stakeholders, but they usually adopt a common line towards international commercial questions.

Firms in the first group oppose import liberalization because they will face lower prices and lose market share, with few offsetting gains. USX and Burlington Industries come to mind. In a crude way, these firms understand economics, and they know they operate at a competitive disadvantage.

Firms in the second group support liberalization because they can get cheaper and better quality inputs. Large retailers such as Sears and Walmart, and many U.S. electronics firms are in this category.

Firms in the third group endorse liberalization as a means of achieving better access to foreign markets, enabling them to increase sales volume and spread overhead costs. Microsoft, Disney and Boeing belong to this group.²⁰

The NAFTA, as an international commercial proposition, promised clear benefits to the second and third category of firms identified by Hufbauer. NAFTA was principally directed at removing Mexico's barriers to imports and inward direct investment.²¹ There would be steep reductions in the Mexican tariffs paid by U.S. exporters, and a broad range of Mexican quotas would be eliminated. Reductions in U.S. trade and investment barriers would be minimal since U.S. tariffs and quotas were not significant impediments to imports from Mexico. Much of Mexico's consumer export trade to the United States was already conducted under the Maquiladora program. Successful large-

²⁰ Gary Hufbauer, *The WTO and Regional Groups: Rules of Coexistence*, paper presented at *The Multilateral Trade Regime in the 21st Century*, Columbia University, 316-17 (Nov. 4-5, 1995) (unpublished manuscript on file with author).

²¹ See generally, FREDERICK M. ABBOTT, *LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATIONAL SYSTEM* 61-96 (1995).

scale U.S. retailers would benefit from low priced Mexican exports to the U.S. market, even though some parts of the U.S. textile and agricultural sectors would be adversely affected as U.S. barriers to imports were eliminated. In addition, retailers such as Sears and Walmart were in the process of establishing a significant direct investment presence in Mexico. The investment rules of the NAFTA would benefit them.

United States exporters across a broad range of industries would benefit from improved access to the Mexican market. Mexican exports would not be a threat to American high value-added manufacturers in the U.S. market. Mexican banks and insurance companies posed no threat to the dominance of U.S. service providers in the United States.

Of course, some firms (in Hufbauer's first category) would not gain from the NAFTA. Losses could be anticipated in a few formerly protected agricultural industries, such as the tomato and avocado industries, in the textiles manufacturing sector, and in a few other sectors that had required significant trade barriers to protect them against imports from Mexico. Some of these protected industries, such as textiles, in any event stood to lose much of their protection as a result of the GATT Uruguay Round negotiations.²² The prospective losers from the NAFTA represented a very small proportion of U.S. business.²³ For most of the U.S. business community, the NAFTA was a no-lose proposition, and the very strong support of the NAFTA by this community is not difficult to explain.

1. A Critique of the Business Community Perspective on the NAFTA

During fairly extensive interviewing of business officials in Japan, I was frequently told that the Japanese viewed Mexico as a market whose risks, for the time-being at least, appeared to outweigh its rewards.²⁴ For example, Mexico lacks adequate infrastructure development, a major deficiency that is not likely to be remedied with any immediacy. Mexico is also politically unstable, and its regulatory sys-

²² The Uruguay Round Agreement on Textiles ultimately required the phasing out of textile quotas over a ten year period. See Agreement on Textiles and Clothing, WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 85 at, e.g., art. 2 (1995).

²³ See, e.g., U.S. International Trade Commission, *The Likely Impact on the United States of a Free Trade Agreement with Mexico*, USITC Pub. No. 2353, Feb. 1991, and *Potential Impact on the U.S. Economy and Selected Industries of the North American Free-Trade Agreement*, USITC Pub. No. 2596, Jan. 1993.

²⁴ ABBOTT, *supra* note 21, at 144.

tem is very difficult to navigate. Chile, it was observed, is a much better candidate for investment, and the myriad of investment opportunities in the developing countries of Asia further reduce Mexico's relative appeal to the Japanese business community. The NAFTA was more likely to result in an increase in Japanese investment in the southern States of the United States than in Mexico proper.²⁵

The American multinational business community did not approach the NAFTA with a plan to address the shortcomings identified by the Japanese. The business community activity lobbied against measures and institutional arrangements intended to protect and improve the environment and to improve the conditions of labor. The NAFTA all but ignored fiscal and monetary implications. The peso crisis and the general level of political upheaval in Mexico during the two years since the advent of the NAFTA may yet cause the American multinational business community to rethink the advantages of a *laissez faire* approach to Mexico and other Latin American markets.

2. Changing the Business Community Perspective on the FTAA

The business community will not be convinced to undertake any enterprise of significance unless it is convinced of the self-interest inherent in that enterprise. For the sake of argument, one can accept the drive for greater profits as representing that self-interest. But the American multinational business community reflects a diversity of interests and perspectives even on the narrow question of the generation of profits. Industry characteristics vary widely, perspectives on the desirability of short- versus long-term benefits differ, and differences in corporate culture reflect themselves in different perspectives on the role of the corporation in the community. A thorough analysis of the methods for influencing the behavior of the American multinational business community would take into account all of these factors.

However, almost all multinational businesses share at least some basic perspectives that can be addressed in a general way. First, larger scale business enterprises prefer political stability to instability, even though a high-risk operator might be able to generate greater gains in an unstable environment. The People's Republic of China is a preferable investment site to Russia because the former is more stable, even

²⁵ *Id.* Lower-wage southern States with well-developed infrastructure would provide a strong platform for exports to the Mexican market by capital intensive industries such as the automotive industry. *Id.*

if arguably more repressive. The history of Latin American investment patterns is replete with illustrations of U.S. multinational preferences for governmental stability. Second, wide fluctuations in macroeconomic conditions are undesirable. This reflects a preference for economic stability that permits longer-term business planning. Rapid changes in currency valuation are undesirable, even though hedging mechanisms may offset risk to a certain extent. Third, infrastructure development is necessary to conduct business effectively, and should be paid for with public as opposed to private self-funding. Fourth, efficient systems of governmental regulation are far preferable to inefficient systems. Harmonized regulations improve the efficiency of production and distribution. Governmental corruption and non-transparency are likely to benefit inefficient local operators over efficient multinational operators.

Of course, one can quibble over the details of each of the points just made. But on the whole they lead to the following conclusion: it is in the best interests of the American multinational business community to seek to promote political stability in Mexico and elsewhere in Latin America, to pursue stable fiscal and monetary policies in Mexico, to encourage the development of public infrastructure, to encourage the approximation or harmonization of regulatory systems among the FTAA countries, to oppose the corruption of government regulators, and to increase the transparency of the FTAA/Latin American regulatory system. None of these are short-term business endeavors.

The business community must be careful not to equate political stability and political oppression. Long-term political stability throughout Latin America will come only from the gradual democratization of political institutions. Military rule has been tried throughout much of Latin America, and it has resulted in instability, internal violence and slow economic growth.

Private business enterprises do not want to be responsible for financing the construction of roadways, ports and airports. They do not want to pay for the construction of massive farmland irrigation systems. These are all public enterprises that require thoughtful long-term planning. Business enterprises want governments and the public to pay for such endeavors. It was disingenuous for the American multinational business community to urge the restriction of the scope of the NAFTA's goals and measures in the name of *laissez faire* economic principles. Business enterprises need and want governmental

intervention. They should play an important role in the government planning process.

It is well known that the U.S. business community faces pressure to focus on short term profitability because of the short term perspective often exhibited by the financial/investment markets. Foreign direct investments, however, require a medium to long-term perspective. An automobile plant in Latin America will not return its capital investment in five years. The hundreds of millions of dollars invested will need to be recovered over a longer period. If capital investment is to be successful, security and infrastructure are very important. The pressure for short term results in the U.S. financial markets should not obscure the clear longer term interests of investors.

Though the commercial calculus of U.S. businesses with respect to the FTAA will be more complex than the calculus with respect to the NAFTA, it is reasonable to anticipate that the business community will *on the whole* view the enterprise as representing an important commercial opportunity. In the process of influencing the FTAA negotiations, the various industry associations that are responsible for corporate lobbying in Washington should step back from the immediate goal of achieving a short term trade and investment vehicle — a goal that was accomplished in the NAFTA — and focus on longer term self-interests. The business interest in the FTAA should include attention to institutional structures designed to improve infrastructure planning and development, and the coordination of regulatory policies (including harmonization of rules where appropriate). Insofar as rules are applicable to all investors, whether local or foreign, U.S. investors should not be disadvantaged from a more comprehensive FTAA arrangement.²⁶

²⁶ A business leader wants to assure that his or her cost structure is not undercut by a competitor, such as a competitor who can avoid compliance with environmental regulation. If all firms in a sector are subject to the same compliance costs, whether those costs are high or low, competition within the relevant sector should be stable, except that firms which cannot adapt to the regulatory environment (*e.g.*, because it is too expensive) may be harmed. If Mexican environmental regulation both required a high level of protection and was strictly enforced, U.S.-based firms that have more capital, technology, and experience with compliance, may be more successful than their Mexican competitors. Similarly, U.S.-based firms that offer higher levels of employee benefits, including better working environments, might find it in their interests to see similar standards applied in Mexico if this produced a competitive advantage over Mexican firms in the same sector. The problem confronting the U.S. business community (which European Union business must also face), is that it must compete not only with its NAFTA integration partners (*i.e.*, Canada and Mexico), but with Southeast Asia's business community, which will not face similar regulatory compliance costs.

B. Organized Labor

Over the past several decades labor unions have represented a declining proportion of U.S. workers. In the early 1950s, over 30% of U.S. workers in the non-agricultural labor force were members of a labor union. By 1989, only 16.4% of U.S. workers were represented by unions.²⁷ Declines in union membership have particularly affected the manufacturing sector, while the proportion of union membership among government and service employees has generally remained constant.²⁸ Just as with respect to the business community, the various U.S. unions and their memberships reflect diverse interests. By 1988, about 40% of unionized workers were white-collar workers.²⁹ United States services workers are not as vulnerable as U.S. manufacturing workers to the loss of jobs to foreign workers. Services unions do not face the same threat from foreign wage competition as do manufacturing unions. Nevertheless, services unions have an indirect interest in the maintenance of the U.S. industrial base that requires services support.

1. *The Unions and the NAFTA*

United States labor unions vehemently opposed the NAFTA from the outset.³⁰ The inability of union leaders to alter the structure of the NAFTA in the manner they advocated, and the clear failure of the unions in decisively influencing the outcome of the approval vote, demonstrated the present state of union influence over the U.S. political process. Nevertheless, in a pluralistic democracy, the major political parties cannot ignore the leadership and voice of 16 to 17 million union members, even assuming that only half of the union members (*i.e.*, in the manufacturing sector) consider themselves to have a direct stake in the trade policy agenda.

²⁷ Gary N. Chaison and Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, in *THE STATE OF THE UNIONS 3-4* (George Strauss et al. eds., 1991). In 1991, there were some 16.6 million union members in the United States. Hoyt N. Wheeler, *Industrial Relations in the United States of America*, in *INTERNATIONAL AND COMPARATIVE INDUSTRIAL RELATIONS* 55, 66 (Greg. J. Bamber and Russell D. Lansbury eds., 2d ed., Routledge 1993) (1987).

²⁸ Wheeler, *supra* note 27, at 66. While some services unions have experienced growth over the past 15 years as the number of services workers has increased, *id.*, the proportion of representation in the services sector has declined from its high in 1970, but leveled off after 1983. See WILLIAM FORM, *SEGMENTED LABOR, FRACTURED POLITICS* 44 (1995).

²⁹ Wheeler, *supra* note 27, at 67.

³⁰ See, e.g., FORM, *supra* note 28, at 306.

a. The Key Labor Issue

The root of the problem identified by U.S. labor leaders in the NAFTA debate was the disparity in the conditions of labor in the United States and Mexico.³¹ In the United States, workers are for the most part relatively highly paid, enjoy a comfortable standard of living, and expect a relatively high level of social support in the form of insured medical assistance, as well as paid vacations or leaves from work. Social services are provided in connection with the workplace, or by the federal and State governments that recycle tax revenues into social support programs. In Mexico, living standards are comparatively low and social services are likewise deficient.³² Faced with limited opportunities, workers accept low-wage employment with restricted or non-existent medical and related benefits. Given these factors, firms whose labor costs represent a significant factor of production would be expected — all other things being equal — to locate production facilities in Mexico rather than in the United States. While all other things are not usually equal with respect to decisions concerning the location of production facilities,³³ U.S. labor unions nonetheless were legitimately concerned over the potential impact of the NAFTA on the conditions of labor in the United States. The labor community perceived that the NAFTA could be used both as a vehicle

³¹ See, e.g., U.S. Congress, Office of Technology Assessment, *US-Mexico Trade: Pulling Together or Pulling Apart?* ITE-545 (1992) [hereinafter *OTA Study*].

³² See generally *OTA Study*, *supra* note 31 (providing detailed comparison of Mexican and U.S. labor conditions).

³³ Labor is a component of industrial and service production. It is one of many components of production, and the relative importance of labor to production will of course vary widely depending upon the characteristics of an industry. In labor-intensive industries such as textiles and assembly-line based industries, labor costs will be a very significant production factor and the acceptable skill level of labor may be very low. In other industries labor costs may be very low relative to the value of the final product such that the cost of labor is largely irrelevant, or labor costs may be very high and require highly educated and trained individuals. For example, in the automobile industry labor is a significant portion of the cost of production, but other factors like plant and equipment costs and infrastructure requirements are also extremely important. As a result, the cost of labor, though significant, is generally not the determinative factor in the process by which automotive businesses chose where to locate production.

It is important to note that the relative significance of labor costs to production varies widely in addressing the impact of liberal trade rules, such as those embodied in the NAFTA, on social welfare. Though certainly some businesses will locate their production facilities in countries with the lowest wage rates in order to lower their production costs, that is by no means a universal operating principal. In fact, one of the key factors in determining whether trade liberalizing agreements will result in shifts in production, and corresponding shifts in employment opportunity, is the proportion of labor costs to total production costs in the industries of parties to the agreement.

to move production facilities to Mexico, and as a bargaining lever by employers in future wage and benefit negotiations.

The 1992 Office of Technology Assessment Study (OTA Study) of the potential impact of the NAFTA³⁴ provided the intellectual foundation for the North American Agreement on Labor Cooperation (NAALC) and included a detailed description and analysis of labor conditions in the United States and Mexico. The NAALC and related domestic labor legislation embody only a limited part of the extensive domestic and continental agenda recommended by the OTA Study. The Study advocated more extensive worker training and skills certification programs in the United States, improvements in the U.S. health care system designed to reduce disincentives to hiring, and amendment of U.S. labor laws to encourage union representation. The study also discouraged state and local "bidding wars" to recruit new industries.³⁵ On the regional level, the recommendations included a trilateral Labor Commission to help negotiate minimum wage standards scaled to each country (or subnational regions) and a trinational dispute resolution mechanism that would decide cases brought by aggrieved workers or non-governmental organizations (NGOs).³⁶

b. The NAFTA Response

During the 1992 presidential election campaign, then-candidate Clinton made a concession to the organized labor vote by proposing to make changes to the NAFTA's treatment of labor through the creation of a vaguely defined labor commission.³⁷ Following his election, the NAALC and the North American Agreement on Environmental Cooperation (NAAEC) were negotiated with Canada and Mexico. These were approved by the Congress in conjunction with the NAFTA.³⁸

The NAALC did little to ameliorate labor's opposition to the NAFTA. Under the labor agreement, the NAFTA Secretariat is not empowered to investigate complaints over labor conditions brought

³⁴ OTA Study, *supra* note 31.

³⁵ *Id.*, 30-47.

³⁶ *Id.*, 47-54. The labor movement might also consider seeking removal of the NAFTA Implementation Act bar against bringing suit directly on the basis of the NAFTA or Labor Supplemental Agreement. See ABBOTT, *supra* note 21, at 116. If this bar were removed, labor groups might be able to more effectively assure that the United States was actively pursuing its rights *vis a vis* Mexico by challenging the decisions of the U.S. National Administrative Office (NAO) in the federal courts.

³⁷ See ABBOTT, *supra* note 21, at 22.

³⁸ *Id.* at 29.

by private parties or interest groups. The Secretariat under the NAAEC has the power to investigate private complaints. United States workers have recourse only to a national board (the National Administrative Office or NAO) in the United States, which may decide to request the Labor Secretary to pursue a complaint with Mexico.³⁹ The first year of the NAFTA's operation did little to change labor's view of the agreement, since the U.S. NAO under its limited mandate rendered two decisions adverse to organized labor. However, in 1995, both the U.S. and Mexican NAOs adopted separate reports that faulted the enforcement of labor laws by the other NAFTA Party.⁴⁰ The activities of the U.S. NAO further expanded in 1996.⁴¹

The most persuasive argument to the unions in favor of the NAFTA was in a negative form: the situation of the unions would not be improved in the absence of the NAFTA. Mexico is a sovereign nation that is entitled to lower its barriers to trade and investment with or without the cooperation or approval of the United States. If Mexico chose to provide all possible incentives to attract foreign direct investment from the United States and elsewhere, it could do so with significantly less serious restraints than it faces under the NAFTA system.⁴² In essence, the Mexican government could provide a greater level of incentives for U.S. businesses to move to Mexico than it did under the NAFTA. Without the NAFTA, if the labor unions wanted to prevent U.S. businesses from moving to Mexico or to prevent Mexico from exporting low-cost products to the United States, they would need to persuade the Congress to adopt investment restrictions enforceable against U.S. companies doing business abroad or to raise tariff and non-tariff barriers against all U.S. trading partners (because the U.S. faces a Most Favored Nation requirement in the WTO that prevents it from acting only against Mexico). The NAFTA provided a framework that is favorable to the unions because Mexico has accepted certain limitations on its ability to compete for

³⁹ See *id.*, at 113-15. There are similar NAOs in the other NAFTA Parties. *Id.*

⁴⁰ See *Mexico Union Registration Process Faulted in U.S. NAO Report on Sony*, 12 INT'L TR. REPTR. (BNA) 696 (Apr. 19, 1995) (including comments by labor organizations), and *U.S. Reviews Mexican NAO Request to Discuss Sprint Labor Practices*, 12 INT'L TR. REPTR. (BNA) 989 (June 7, 1995) (including comments by labor organizations).

⁴¹ The U.S. NAO agreed in 1996 to investigate allegations of several human rights and labor groups that Mexico failed effectively to enforce its labor laws and that Mexico's labor tribunals are unfair and inequitable. *Mexico Asked U.S. to Reject Complaint on Union Rights, but U.S. to Examine It*, 13 INT'L TR. REPTR. (BNA) 1350 (Aug. 21, 1996).

⁴² Mexico would of course not be acting without any constraints. It is a party, for example, to various environmental treaties that impose restrictions.

U.S. direct investment (for example, by agreeing in the Supplemental Agreement on Labor to maintain high levels of labor protection).

2. *Labor's Self-Interest in the FTAA*

United States labor union leaders face a choice with respect to the FTAA process. They can oppose the entire enterprise as antithetical to their members' interests, or they can seek to influence the negotiations so that the outcome is the most favorable to them. While these two objectives may be pursued concurrently, unions may not be welcome in the negotiating arena when they are seeking to undermine the process.

Unions might well interpret the NAFTA congressional vote as a strong signal that they do not have the political power to kill the FTAA. If they lack such power, then common sense suggests that they should attempt to participate actively in the FTAA formation process so as to influence the outcome of the negotiations in their favor. There has already been a proposal from the Brazilian government that an FTAA labor agenda be pursued and that labor unions be invited to participate in the negotiations.⁴³ If the unions do choose to participate constructively in the FTAA negotiating process, it is important that they decide on their negotiating objectives. The unions might demand:

a. Wage Protection

In a best-case scenario from their own perspective, labor unions would obtain agreement on minimum wage levels across the FTAA at differential base levels depending on a country party's level of economic development and rising in step with productivity gains. This concept was floated by Democratic members of Congress during the NAFTA negotiations but dropped after heated opposition from the U.S. business community. A multicountry agreement on minimum wages at the outset of the FTAA would encounter similar opposition from U.S. businesses and, in view of the likely intensity of the opposition, seems no more likely to succeed in the FTAA context than it did in the NAFTA context. However, assuming that U.S. labor unions were seriously to consider pursuing this objective, they would first need to determine whether unions in other prospective FTAA countries share their agenda. If labor unions in other FTAA countries would oppose a minimum wage agreement, then pursuing the matter

⁴³ *Brazil Proposes Vice-Ministerial Debate of Labor Role in FTAA Process*, INSIDE NAFTA 1, 16 (Sept. 4, 1996).

might only antagonize potential allies. On the other hand, if non-U.S. unions could be persuaded to support such an initiative, it might at least be used as a bargaining chip with business groups during the course of negotiations.

b. Institution Building

A more realistic goal for U.S. labor unions would be an improved institutional and legal framework for the protection and promotion of workers' rights. Starting with the NAALC as a base, the unions might reasonably press for (1) converting the aspirational minimum labor standards principles embodied in the NAALC into legally enforceable rules; and (2) achieving at least parity with the terms of the NAAEC that permit private parties and groups to request "factual records" with respect to government failures to enforce legal standards. The NAALC might be taken even a step further by permitting private parties to challenge individual infractions of a core set of labor rules before an FTAA labor commission.

c. Transition Arrangements

In *The Wealth of Nations*, Adam Smith pointed out that liberalized trade rules would cause a reallocation of resources, affecting the distribution of jobs, and thus the security of workers.⁴⁴ Smith advocated, *inter alia*, changes to British labor rules restricting the free movement of workers in order to ameliorate the effects of liberalized trade rules. Liberal trade agreements such as the prospective FTAA can be designed to minimize effects on workers through the use of substantial transition periods. If liberalizing measures are phased in over a 10 or 15 year period, many workers who have spent their careers in a particular industry might be spared the need to seek new employment. Younger workers who would more likely be affected late in a transition cycle would have the benefit of advance notice and the opportunity to seek new employment. The attachment of the U.S. business community to short term profitability, however, will undoubtedly result in opposition to 10 to 15 year transition periods in the FTAA.

⁴⁴ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776), reprinted in *39 GREAT BOOKS OF THE WESTERN WORLD* 184 (Robert Maynard Hutchins et al. eds., Encyclopedia Britannica, Inc. 1952).

d. Transnational Organizing

The unions might concentrate on organizing across borders, an effort they are already undertaking to a certain extent.⁴⁵ United States labor unions have historically taken a nationally based approach to organizing. They might pay more attention to the fact that changes in the global labor marketplace have placed significant limitations on the progress they can achieve by a single market approach.

The strengthened process of cross-border organizing would also expose the U.S. labor unions to the diverse perspectives of union leaders in other prospective FTAA countries. If agreement can be reached as to common union goals, the chances will be greater that those goals will be achieved in the FTAA.

e. Trade Barriers

Trade barriers are a theoretical solution to solving the problem of wage competition that arises as a consequence of multilateral and regional economic integration. Trade barriers may be used to preserve jobs and wages in industries that are not internationally competitive. Such barriers operate at a cost both to the country that maintains them — in the form of transfer payments from competitive sectors to non-competitive sectors — and to the international economic system as a whole which, as a consequence, is less productive. The maintenance of trade barriers to protect inefficient domestic industry proved highly ineffective and counterproductive throughout Latin America in the 1960s through the 1980s. Selective trade protectionism proved more successful in some Asian countries in the 1970s and 1980s. However, trade protectionism in the Asian Tigers was not coupled with high wages and social welfare payments. Quite to the contrary, Asian trade protectionism was generally coupled with low wages/welfare payments and a very high rate of savings/investment that permitted Asian industries to compete on a global scale and, thereby, to stimulate economic growth.

There is little reason to believe that a nation with inefficient industries can use trade barriers to maintain high wage and welfare payments over an extended period. Industries become efficient, and maintain their efficiency, by investing in research and development and plant and equipment. If capital is overspent on social welfare pay-

⁴⁵ See Remarks of Lance Compa, *International Trade and Social Welfare: The New Agenda*, Meeting of the Section on International Law of the American Association of Law Schools (Jan. 7, 1995), in 17 *COMP. LAB. L.J.* 338, 372 (1996).

ments, the industrial base will necessarily suffer. The engine of job creation and growth will cease to function effectively. Trade barriers as a form of wage protection create an economic dilemma. Over the short term they may provide protection for workers in an inefficient sector. Over the longer term they drain the economy of its productive base. The selective use of trade barriers may, however, be successfully used in transition periods or in making temporary adjustments to changing conditions.

There is yet no clear answer to the problem of disparity in working conditions in the United States and Latin America, or among developed and developing countries in general.⁴⁶ Even at the ILO, the principal international organization responsible for the development of strategies to protect workers' rights, there is a recognition that the problems of inadequate job creation within the present structure of the workplace and global marketplace do not, so far, lend themselves to a solution and certainly not to a simple solution.⁴⁷ Governments throughout the European Union are struggling to maintain costly social programs that benefit their workers in the face of wage competition from Central and Eastern European and Asian industries. As a consequence, European Union economies are dramatically adjusting to become more efficient. Infrastructure industries such as telecommunications and air transport are being privatized, the government procurement sectors are opening to international competitive bidding, and some costly social welfare programs are being cut. Ultimately the more efficient Western European industries should be able to compete on a global scale based on technological and productivity advantages.

The position of organized labor is a very difficult one. The American multinational business community is entrenched in its opposition to the development of trade-enforceable labor standards. It appears that the corporate community perceives the interests of organized labor as a substantially greater threat to its profitability than the interests of the environmental community. Any gains that the unions are able to achieve in the FTAA will be hard won.

C. Environmental Interests

In 1994, a substantial Republican Party majority was elected to the U.S. Congress. Their agenda, embodied in a Contract with

⁴⁶ See generally *International Trade and Social Welfare*, *supra* note 45.

⁴⁷ See, e.g., Michel Hasenne (ILO Director General), *The New Path Towards Social Justice*, WORLD OF WORK, No. 8, June 1994, at 4.

America, included dramatic cutbacks in the level of federal environmental protection. The rejection of this plan by a broad cross-section of the public taught a very important lesson: Interest in environmental protection in the United States is not limited to liberal groups operating on the periphery of the public at large. Rather, protection of the environment is a core value held by a wide cross-section of the U.S. population.

There are a substantial number of relatively well-organized environmental interest groups in the United States, including the Sierra Club, the National Wildlife Federation, Greenpeace and Public Citizen. These interest groups play a very active role in the national political process, having demonstrated a considerable capability to lobby, to effectively use the media to influence public views, and to employ litigation to influence government decision-making. United States environmental interest groups have been successful in influencing the agenda of the GATT/WTO and have had at least moderate success in promoting changes to multilateral trade rules.

1. *Environmental Interest Groups and the NAFTA*

From the outset, environmental interest groups challenged the Bush Administration's vision of the NAFTA as a pure trade and investment vehicle. Their pressure resulted in a NAFTA text that included basic elements of environmental protection. In the 1992 presidential election campaign, then-candidate Clinton proposed additional negotiations with respect to the environment, including the establishment of a vaguely defined environmental commission. Following President Clinton's election, the North American Agreement on Environmental Cooperation (NAAEC) was negotiated with Canada and Mexico.

Though the environmental interest group community remained divided over the wisdom of approving the NAFTA, many environmental NGOs that initially opposed the agreement were ultimately persuaded that the NAFTA's approach, including the NAAEC, was an improvement over the GATT (and thus gap-filling) approach.⁴⁸ The NAAEC Commission, *inter alia*, is competent to oversee inter-governmental dispute settlement proceedings concerning allegations

⁴⁸ See generally Frederick M. Abbott, *The NAFTA Environmental Dispute Settlement System as Prototype for Regional Integration Arrangements*, 4 Y.B. INT'L ENVTL. L. 3, 10-11 (1994), and Frederick M. Abbott, *From Theory to Practice: The Second Phase of the NAFTA Environmental Regime*, in ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS? 451 (Rüdiger Wolfrum ed., 1996).

of persistent failure to enforce environmental laws. The NAAEC Secretariat also can examine the conduct of NAFTA governments with respect to environmental enforcement matters at the request of private parties, and produce and publish so-called "factual records." The NAAEC Commission and its Secretariat have established an ambitious working program that includes detailed studies of the North American environment. United States environmental interest groups have been very active in pursuing claims before the NAAEC Commission and its Secretariat.⁴⁹ Several complaints have involved the joint participation of Mexican and Canadian environmental interest groups. While the environmental NGOs may not be entirely satisfied with the NAFTA, they are actively working within the environmental protection system that the NAFTA has created.⁵⁰

2. *Environmental Perspectives on the FTAA*

The Republican majority in Congress has refused to extend fast-track negotiating authority to the Clinton Administration for accession of Chile to the NAFTA so long as the Clinton Administration intends to require Chile's accession to the NAAEC and NAALC.⁵¹ This is a strong signal of domestic political resistance to extending the NAFTA's environmental provisions to the FTAA. Many Latin American governments were reluctant to include environmental protection on the agenda for the Summit of the Americas, arguing that trade issues and environmental issues should be segregated.⁵² The environmental interest groups face a fight to incorporate even NAFTA-comparable provisions in the FTAA.

Improvements could certainly be envisaged to the environmental system of the NAFTA. However, the most immediate agenda for the environmental interest groups is to assure that the FTAA does not represent a backsliding from the standards established in the NAFTA. To this end, a two-pronged strategy would appear appropriate. First, the environmental interest groups must lobby the Congress as they did during the NAFTA negotiating process. This time, the groups

⁴⁹ The first NAFTA Effects Working Papers have been prepared and released by the NACEC Secretariat. See, e.g., John Kirton and Julie Soloway, *Assessing NAFTA's Environmental Effects: Dimensions of a Framework and the NAFTA Regime*, NAFTA Effects Working Paper Series No. 1, April 1996. Requests for the preparation for factual records by the NACEC, responses and related documents can be found at the NACEC Internet site, <http://www.cec.com>.

⁵⁰ Abbott, *From Theory to Practice*, *supra* note 48.

⁵¹ Regarding this long-running saga, see, e.g., *Chile, Canada Gear Up for Talks this Month on 'Bridge' Pact to NAFTA*, INSIDE NAFTA, JAN. 10, 1996, at 1-3.

⁵² See, e.g., *Officials Laud U.S. Strategy for Achieving Trade Objectives at Summit*, INSIDE NAFTA, Dec. 14, 1994, at 1, 14.

might highlight the lessons of the Republican Revolution, publicizing the record of those members of Congress who oppose including environmental protections in the FTAA.

Second, the environmental interest groups in the United States should continue to build common ground with environmental interest groups in Canada, Mexico and other Latin American countries so that broad-based pressure can be exerted on governments.

Though the business community historically stood behind governmental efforts to avoid including environmental measures in trade agreements, there has been a considerable evolution in the attitude of the business community in this regard over the past five years.⁵³ At least some business groups appear now to accept that a liberal trade agenda and measures to protect the environment are not mutually exclusive. Business opposition to trade-enforceable minimum international labor standards is a quantum leap more intense than its opposition to trade-enforceable environmental standards.

D. The Public at Large

Individuals in the United States may be members of interest groups, such as industry associations, labor unions or environmental interest groups, that form specific opinions concerning trade policy issues. Individuals who are active members of such interest groups may be expected to take into account the views of the leadership of these groups in terms of forming their opinions and expressing them, for example, in the voting context. Many individuals, however, do not participate in a group that develops a defined position in relation to trade policy, or are not sufficiently tied to the perspective of such a group so that their opinion is significantly influenced by its leadership. The diffuse group of individuals who fall outside of the influence of a particular interest group leadership is the "public at large" or "general public."⁵⁴

Both Haas and Lasswell have suggested that the public at large will not provide leadership in the formation of trade policy.⁵⁵ Nevertheless, political leaders who formulate and execute trade policy are

⁵³ See, e.g., Remarks of Abraham Katz, U.S. Council for International Business, TRADE AND THE ENVIRONMENT: CHALLENGES FOR 1996, Summary of Conference Sponsored by The Global Environment & Trade Study and New York University Law School 9-11 (Jan. 19, 1996) (unpublished summary on file with author).

⁵⁴ Lasswell and Kaplan state, "[a] *public* consists of the persons in the group who have or expect to have an opinion. *Public opinion* is the distribution of opinion in a public." LASSWELL AND KAPLAN, *supra* note 16, at 39.

⁵⁵ See discussion, *supra* notes 15-19.

dependent on the goodwill of the public at large, and cannot afford to implement policy to which the general public is hostile. For political leaders, it is not so much a question whether the general public supports a particular trade policy as one of assuring that the general public does not oppose it.

1. *The Public and the NAFTA*

The NAFTA was promoted to the general public by the Bush and Clinton Administrations largely as a means to increase U.S. exports to Mexico and thereby to create high-paying jobs in the United States and as a bulwark against illegal immigration.⁵⁶ It was, however, well recognized that the NAFTA's short term effects on trade flows and jobs were exceedingly difficult to predict and that these effects were not in any event likely to be significant from a U.S. perspective. Even if it were well managed, the U.S. job creation effect of the NAFTA was not likely to be dramatic over the near term.⁵⁷ There are not sufficient savings or earnings in Mexico to act as a major stimulant to the U.S. economy. If the NAFTA were poorly managed, the short term

⁵⁶ The Bush and Clinton Administrations prepared many reports, working papers and press releases regarding the NAFTA. Executive Branch officials testified at length before various congressional committees, and appeared in other public and private fora. The promotional perspective of the Executive Branch is encapsulated in Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments (Sept. 18, 1992) (copy of the report on file with author). The heading of the Executive Summary at the front of the report states: "NAFTA WILL SPUR GROWTH, GENERATE JOBS, AND PROTECT THE ENVIRONMENT" (*id.* at i). The first section of the Executive Summary outline is headed: "EXPORTS GENERATE JOBS" (*id.* at ii). Subheadings under this heading state:

Mexico is our fastest-growing major export market, our second-largest market for manufactured goods, and our third-largest agricultural market;

NAFTA will create even more opportunities for U.S. growth;

Overwhelming evidence indicates that NAFTA will increase U.S. jobs, wages and growth (*id.*) [original text all in capital letters].

The NAFTA was also promoted to advance several secondary goals, such as reducing Mexican emigration incentives, but the appeal to the general public was largely framed as above. *Id.*

⁵⁷ Among the better studies of the potential economic impact of the NAFTA see US International Trade Commission, *The Likely Impact on the United States of a Free Trade Agreement with Mexico*, USITC Pub. No. 2353, Feb. 1991; *Potential Impact on the U.S. Economy and Selected Industries of the North American Free-Trade Agreement*, USITC Pub. No. 2596, Jan. 1993; U.S. Congress, Office of Technology Assessment, *US-Mexico Trade: Pulling Together or Pulling Apart*, ITE-545 (Washington, D.C.: U.S. Government Printing Office, Oct. 1992); GARY CLYDE HUFBAUER AND JEFFREY J. SCHOTT, *NORTH AMERICAN FREE TRADE, ISSUES AND RECOMMENDATIONS* 58-59 (1992) (referencing various private sector and academic institution studies); C.A. Primo Braga, Raed Safadi and Alexander Yeats, *Implications of NAFTA for East Asian Exports*, draft by members of International Economics Department, The World Bank (1994) (copy of draft on file with author) (including detailed summary and analysis of various economic studies of the NAFTA's impact on third country trade) [hereinafter Primo Braga et al.].

impact on U.S. trade flows and jobs would be negative. While predicting favorable short-term trade creation and job growth may have been politically expedient, and perhaps necessary as a response to certain extreme claims by some NAFTA opponents, it was a high-risk strategy that played into the hands of the opponents of integration when the peso crisis resulted in short-run terms of trade unfavorable to the United States. An appreciation of the value of integration entails the consideration of a variety of complex factors and a certain willingness to maintain a broad long-term value orientation.

2. *The Public and the FTAA*

As trade policy planners in the United States begin to build political support for the FTAA, the focus in public presentation should be shifted from the short term trade benefits and domestic job creation that were used to promote the NAFTA to more diffuse public policy objectives. The general public should be urged to view the FTAA as a long-term economic and strategic imperative of the United States. The values of integration should be highlighted: (1) enhancing economic welfare with proper public choice; (2) cooperating on important issues of regional concern; (3) promoting the rule of law; (4) improving U.S. bargaining power *vis a vis* other regions; (5) extending democracy and commitments to human rights; and (6) facilitating cultural understanding. These are shared values that support the FTAA in a long-term context.

A short-term perspective on job creation and export growth is a dangerous selling point for any international economic program because of the relatively high level of short-term risk inherent in the international economic system. There will be unanticipated setbacks to any integration program brought about by unforeseen events. Highlighting short-term job creation benefits enhances the likelihood that a skilled and hostile politician will be able to derail the integration process during a politically vulnerable period, such as a presidential election campaign.

III. HEMISPHERIC INTEGRATION AND THE FEDERAL GOVERNMENT

In 1936, Lasswell made this observation concerning political power in the United States:

The looser structure of government in the United States [in comparison to the Soviet Union] none the less confers special influence upon the Supreme Court of nine, the Presidency of one, and the Congress of a few hundred. Although any bright and talkative lad in the United States may be told that one day he may be president, only eight boys made it in the

last generation. The potent American Senate, though comparatively large, would provide a place for only 480 Senators each generation were none reelected. Deference pyramids, in form and fact, are steep.⁵⁸

A. The U.S. Congress

The attitudes and actions of members of the U.S. Congress are critical to the long-term success of the NAFTA and FTAA. The U.S. Congress must ultimately be asked to approve the FTAA agreement, and will continue to exercise close supervision over implementation of the NAFTA. The question arises whether giving the Congress a more active role in the formulation and implementation of integration policy would appreciably increase the likelihood that the FTAA will be approved, or that implementation of the NAFTA will be facilitated.

1. Congressional Interests

Political leaders are individuals who have sought after power.⁵⁹ An individual in a position of political power obtains personal satisfaction though exercising control over the opinions and behavior of others.⁶⁰ High political office in the United States is rarely achieved by a simple stroke of good fortune. It is achieved, rather, by an individual's dedicated pursuit to political fund-raising and campaigning. Campaigning in the present day includes certainty of media inquiry into the private life of the individual, and attacks by rivals on the individual's personality. Individuals are unlikely to expose themselves to such inquiry and attacks absent a strong psychological motivation.

Whether or not the leaders of the U.S. Congress support the process of hemispheric integration may well depend upon whether the process is perceived as enhancing or diminishing the power of the

⁵⁸ LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW*, *supra* note 16, at 4.

⁵⁹ Lasswell and Kaplan observe: "A person whose conduct is politicized to a high degree is a *politician*. The term has reference, therefore, not merely to the holding or striving for political office, but to the tendency to consider always the effect on influence or power position of projected lines of conduct." LASSWELL AND KAPLAN, *supra* note 16, at 146. In *WHO GETS WHAT, WHEN, HOW*, Lasswell writes: "Whatever the special form of political expression, the common trait of the political personality type is emphatic demand for deference. When such a motive is associated with skill in manipulation, and with timely circumstances, an effective politician is the result. The fully developed political type works out his destiny in the world of public objects in the name of public good. He displaces private motives on public objects in the name of collective advantage." LASSWELL, *supra* note 16, at 16.

⁶⁰ That an individual obtains personal satisfaction through exercising political power is not a value judgment — power may be exercised well or poorly. It rather identifies the source of the individual's motivation.

Congress and its members.⁶¹ Congress possesses the power to approve or reject economic integration arrangements, so members of Congress already possess a form of quasi-absolute power over the hemispheric integration process.⁶² However, this power is presently exercised more or less as an on/off switch. While Congress is consulted during the negotiation of the integration agreement, it is largely negotiated by the Executive Branch.⁶³ Once the agreement is approved, the Executive Branch is almost wholly responsible for its implementation. To the extent that the integration process is increasingly important to economic life in the United States and abroad — that is, to the extent that global and regional economic affairs become more important relative to domestic economic affairs — one might view congressional approval of integration agreements as the delegation of increasing

⁶¹ In some "foreign policy" endeavors involving the conduct of political relations and military affairs, the President may, on a constitutionally sound basis, act without the support of the Congress. But it is pointless, and probably counter-productive, for the President to invest the political capital of the United States in a major trade agreement negotiation absent a reasonable expectation that the Congress ultimately will approve the results of the negotiations. The Constitution requires that the Congress, or two-thirds of the Senate, approve the ratification of a major trade agreement. U.S. Const. art. II, § 2, cl. 2. See also Stefan A. Riesenfeld and Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, in *PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY* 261 (Stefan A. Riesenfeld and Frederick M. Abbott eds., 1994).

⁶² The U.S. Constitution expressly grants to the Congress the power to regulate commerce with foreign nations. U.S. Const. art. I, § 8, cl. 3. The primacy of the Congress in the field of international trade is well accepted. While Congress generally delegates broad authority to the President to negotiate trade agreements and to carry out trade policy, the President acts in this field only pursuant to congressional authorization. International trade agreements are treaties and their ratification also may be approved by two-thirds of the Senate. For example, The Friendship, Commerce and Navigation (FCN) treaties entered into by the United States with many of its major trading partners, which establish the ground rules for economic cooperation, were entered into with the advise and consent of the Senate. See Frederick M. Abbott, *NAFTA and the Future of United States-European Community Trade Relations: The Consequences of Asymmetry in an Emerging Era of Regionalism*, 16 *HASTINGS INT'L & COMP. L. REV.* 489, 496 n.27 (1993) (discussing relevant treaties).

⁶³ The fast-track legislative process has come to be used for the negotiation and approval of major trade agreements. For statutory references and timetables of the fast-track approval process see ABBOTT, *supra* note 21, at 21. When Congress grants the President fast-track negotiating authority, the President commits to consult actively with the Congress during the agreement negotiation phase, in exchange for congressional commitment expeditiously to consider and vote on approval of the agreement that is negotiated, without proposal for amendment. A majority of each house of Congress must vote in favor of the agreement. One of the primary objectives of the fast-track legislation is to assure that Congress is adequately apprised of trade agreement negotiations. This should both provide adequate opportunity for congressional input into the agreement, and assure that there are few major surprises in the text ultimately transmitted to Congress by the President. Yet the congressional role in the fast-track process is nevertheless a relatively passive one. Proposals for trade agreements arise in the Executive Branch, and negotiations are carried out by the Executive Branch. This practice is generally reflected in constitutional democracies of the western world. See generally Riesenfeld and Abbott, *supra* note 61.

power to the Executive Branch of government, at least theoretically at the expense of congressional power. Though it seems doubtful that members of Congress would express themselves in these terms, they may object to the pursuit of integration agreements because the agreements diminish their power relative to the Executive Branch.

Identifying this political power dilemma suggests that the self-interest of members of Congress could be addressed if the hemispheric integration process were not viewed as diminishing their political power and might be enhanced if it were perceived as increasing their political power. Both of these objectives are achievable within the limits of the Constitution.⁶⁴ The important corollary question is, of course, at what benefit or cost to the structure and operation of the integration process itself?

B. Two Alternatives to Enhancing the Power of Congress

There are a variety of ways in which the power of Congress relative to the regional integration process could be enhanced. These include expanding congressional involvement in the proposal and negotiation phases and expanding congressional involvement in the implementation phase of an agreement. There follow two proposals. The first is a proposal designed to enhance the role of the Congress in the agreement formation phase through the establishment of a Joint Congressional Committee on Integration Policy and Planning. The second is a proposal designed to expand the role of Congress through the establishment of an inter-governmental/regional parliamentary assembly in the NAFTA/FTAA. Either of these proposals might be pursued independently. For reasons discussed below, the author suggests that only the second proposal should be pursued in the near to medium term. However, the first proposal is outlined as an alternative for longer term consideration.

1. *The Joint Congressional Committee*

Although it would seem likely that enhancing the role of the Congress in the negotiation phase of the FTAA would be beneficial at the approval juncture, there is good reason to be hesitant to grant a more substantive role to the Congress.⁶⁵ If a more active role for the Con-

⁶⁴ On the U.S. constitutional implications of western hemispheric integration, see generally Frederick M. Abbott, *The Maastricht Judgment, the Democracy Principle and US Participation in Western Hemispheric Integration*, 37 GERMAN Y.B. INT'L L. 137 (1994).

⁶⁵ Historically, parliaments and legislatures have tended to act as a conservative brake on, rather than as an initiator of, foreign policy initiatives. Over the past two or three decades, as

gress were deemed desirable, *then* this result could be achieved by the creation of a Joint Committee on Integration Policy and Planning. However, the following proposal for a Joint Committee is not a recommendation for its creation. This proposal is instead discussed in the context of its potential positives and negatives. For the time being, the creation of a more powerful Integration Committee may not be a wise idea. There is a continuing tendency of the Congress to act more conservatively, and with less appreciation of consequences on the international plane, than the Executive Branch. However, as the Congress assumes an increasingly important role in international economic affairs and as the consequences of congressional action in this field are more carefully considered, the balance of considerations may weigh in favor of the creation of such a Joint Committee.

At present, a substantial number of Senate and House Committees consider NAFTA and FTAA-related matters under their jurisdiction. The House Ways and Means and International Relations Committees and the Senate Finance and Foreign Relations Committees, have been very active in considering NAFTA-related issues.⁶⁶ A Joint Committee on Integration Policy and Planning may have several responsibilities, such as (1) primary oversight of the NAFTA and other regional integration arrangements to which the United States is or becomes a party; (2) formal communication with the Executive Branch (*see* discussion regarding Executive Branch reorganization, *infra*); (3) review of and reporting on legislative proposals regarding the NAFTA, FTAA and comparable arrangements;⁶⁷ and (4) formulation of congressional policy with respect to the NAFTA, FTAA, and comparable arrangements.

The Senate and House of Representatives might each appoint members to the Joint Committee from the majority and minority chairs of existing Committees and Subcommittees (Foreign Relations and International Relations, Finance and Ways and Means, Labor and

global integration has become manifest and as the importance of treaty commitments has become clear, parliaments have demanded and obtained a generally greater role in treaty-making and foreign affairs. However, executives remain reluctant to include parliaments in the details of foreign policy, and prefer at most to seek guidance on broad negotiating principles. *See* Remarks of Thomas Cottier, *in* Riesenfeld and Abbott, *supra* note 61, at 535-37.

⁶⁶ The NAFTA Implementation Act requires the Executive to conduct limited consultations with the House Ways and Means Committee and the Senate Finance Committee over proclamations made and regulations issued pursuant to the NAFTA. The North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3311, et seq. (1994)) [hereinafter NAFTA Implementation Act], at 19 U.S.C. § 3313.

⁶⁷ Matters might be referred by the Joint Committee for concurrent review by other relevant Senate and House committees as appropriate.

Human Resources and Economic and Educational Opportunities, and so forth). Members of the Joint Committee might also be appointed from the Senate and House membership at large. The number of seats on the Committee should be great enough to assure that an adequate cross section of interests and perspectives are represented, but small enough to permit a work program to be carried out effectively. For example, twelve members from each house, for a total of 24, could provide a balance of representation of interests without being too unwieldy in size.⁶⁸

There are numerous ways to vary the Joint Committee proposal. For example, the Committee's responsibilities could be reduced to only an oversight and reporting function, as opposed to performing a more direct role in the legislative process. Each house of Congress might also create its own integration committee or subcommittee whose members would meet in conference as appropriate.

An historical precedent for a relatively powerful Joint Committee can be found in the Joint Committee on Atomic Energy,⁶⁹ established in 1946, which is discussed further below. There are several Joint Congressional Committees presently in operation, though with less comprehensive charters than that of my proposal for a Joint Committee on Integration Policy and Planning. For example, there is a 20 Member Joint Economic Committee, with ten members from each house, that studies annual economic reports submitted by the President and makes recommendations it considers appropriate to the Senate and House.⁷⁰

The historical record suggests that the establishment of a Joint Committee with a significant role in the legislative process is constitutionally permissible. There might, however, need to be some specific limits on the authority of the Committee. For example, Article I, Sec-

⁶⁸ The specific number of representatives is not for present purposes a critical issue, or one which could be settled by an objective formula.

⁶⁹ See generally ALFRED C. AMAN, JR., *ENERGY AND NATURAL RESOURCES LAW* 7-1 to 7-9 (1983).

⁷⁰ 15 U.S.C. sec. 1024 (1994). See also Joint Committee on the Library, 2 U.S.C. § 132b (1994), and Joint Committee on Taxation, 26 U.S.C. § 8002 (1994). For reference to Joint Committee on the Conduct of the War, dating to 1861, see CONGRESSIONAL QUARTERLY INC., *HOW CONGRESS WORKS* 30 (1983).

Other possible models for a parliamentary review structure include the Committee of the U.K. House of Commons and the Select Committee of the House of Lords, which consider proposed European Union legislation, review proposals from the government with respect to the European Union, and generate their own proposals. Similar review committees exist in other EU parliaments. See Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI-KENT L. REV. 459, 476-80 (1991).

tion 7 of the U.S. Constitution limits revenue bills to initiation in the House. So the Committee might be restricted in this respect. The powers of the Joint Committee would therefore have to be limited as required by the Constitution. The specific structure and powers would not be of so great a concern as the fact of its establishment in some form that reasonably demonstrated the commitment of the Congress to the integration process. A more powerful committee would reflect a greater commitment than a less powerful committee. It would, however, be important to avoid an extended battle over the constitutionality of the committee and its prerogatives. Such a battle would itself reflect division over the value of the integration process.

The Congressional Joint Committee on Atomic Energy, established in 1946, consisted of eighteen members, nine from each house of Congress, and had jurisdiction over all bills, resolutions, and other matters relating to the Atomic Energy Commission and the development, use and control of atomic energy.⁷¹ This Committee was established in the immediate post-World War II period, when development and control of atomic power was considered an essential national security and welfare objective. There was a widely perceived need to assure that the government maintained direct control over potential military applications of the atom and also to assure the aggressive pursuit of what was then perceived as a potentially cheap and unlimited source of energy for the public at large.⁷² Although the results of the U.S. atomic energy program did not meet the visions of the 1940s and 1950s, the Joint Committee on Atomic Energy is recognized to have played an important role in encouraging the Atomic Energy Commission to pursue the creation of a competitive commercial nuclear power industry.⁷³ In establishing the Joint Committee, Congress stressed the importance of the particular subject matter, and the need to attend to an action program.

The formation of a Joint Congressional Committee on Integration Policy and Planning would signal an important shift in congressional attitudes toward the NAFTA and FTAA. A permanent committee would signal a long term commitment and a seriousness of purpose. This should influence internal congressional psychology, as well as external perceptions. The Joint Committee might also serve to insulate congressional representatives at large from public pressures. As with the ordinary legislative process, non-members of the Joint

⁷¹ AMAN, *supra* note 69, at 7-2.

⁷² *Id.*

⁷³ *Id.* at 7-6.

Committee would not be primary targets of public (and lobbyist) attention during the early phases of legislative initiation and would be subjected to more intense pressures only after a proposal is voted out of the Committee. A referral from the Committee would act as a buffer against public pressures. In addition, the Joint Committee would be able to devote more systematic attention to problems associated with the NAFTA, FTAA and other integration efforts than could the current, diffuse system of multiple House and Senate committees and subcommittees. In other words, better policy decisions might result. Finally, the creation of the Joint Committee would send a strong signal to U.S. integration partners regarding the seriousness of U.S. commitment to these endeavors, stimulating a reciprocal commitments on other sides.

There are, of course, obstacles and potential drawbacks to this proposal. As with any such proposal, a major obstacle is persuading the Congress to take the step. Although Congress possesses the primary foreign commerce power, it has historically delegated the preponderance of the policy-formation role to the Executive. In an era in which international economic relations are increasingly vital to the U.S. and foreign economies, a perception that the power of the Congress and its members would be enhanced by the creation and operation of the Joint Committee might incline them to take this step.

The most significant potential drawback of this proposal is that the Joint Committee may adopt an isolationist or obstructionist role with respect to the widening or deepening of the integration process. If a majority of members of Congress are hostile to a progressive integration policy, might not investing a Committee with more effective power over policy formation in fact impede progress? Members of the Committee may be reluctant to accept responsibility for policy initiatives. Interest groups may find it easier to exert pressure on members of the Committee than on the USTR.

There is no simple response to the foregoing critique. Historically, the U.S. Congress has tended to act as a brake on foreign policy initiative, as opposed to a driving force. However, the following points appear relevant. First, a small and powerful Committee of congressional leaders may be more likely to take an active role in initiating policy than the diffuse congressional membership as a whole. Leaders should be more inclined to seek credit for the creation of new policy initiatives than to play the role of spoilers. Second, Congress must in the final analysis approve integration proposals from the Executive

and must in any event be brought around to the Executive view.⁷⁴ The Executive's ultimate persuasion of committees of the Congress, and of a majority of the Congress as a whole, cannot be avoided. In the final analysis, the question is one of the setting for the persuasion.

Congress approved the NAFTA and Uruguay Round Agreements after extensive debate of both. This demonstrated responsible congressional leadership. Yet the Republican-led Congress has refused to grant President Clinton authority to negotiate Chile's accession to the NAFTA so long as the Executive Branch intends to seek extension of the NAFTA's environmental and labor Supplemental Agreements. These Supplemental Agreements are at the heart of the socially progressive elements of the NAFTA. The Republican leadership of the Congress also initiated the Helms-Burton legislation which was all but designed to infuriate U.S. trading partners in Europe and Latin America. Congress may well be more likely to approve the FTAA if it plays a more active role in its creation. However, conservative congressional tendencies might lead to an agreement that is less than desirable from a social welfare standpoint.

On the whole, the risk of creating a Joint Congressional Committee at present appears to outweigh the gains from facilitating approval of the FTAA because of the continuing conservative attitudes of many members of Congress. In another decade, the balance of consideration may have changed.

2. *The Inter-governmental Parliamentary Committee*

The President and Executive Branch require the ongoing cooperation of the Congress across the entire legislative agenda (including the passage of the federal budget), so that as a general proposition the Executive Branch does not ignore the views of the Congress with respect to the implementation of the NAFTA or other international programs.⁷⁵

The NAFTA establishes no parliamentary body of its own. That is, there is no provision for the public election of members of a

⁷⁴ The fast-track legislative mechanism recently used for the approval of trade agreements takes cognizance of this fact by providing for continuous consultation between the two branches. See Riesenfeld and Abbott, *supra* note 61, at 261, 302. If the congressional side of the fast-track equation is more highly concentrated, the Executive's task of persuasion may be simplified.

⁷⁵ The NAFTA Implementation Act includes limited provision for the layover of implementing measures with congressional committees. 19 U.S.C. § 3133(a). These provisions do not materially affect the power of the Executive Branch to implement the agreement. *Id.* There are also provisions regarding consultation with State government officials when measures will directly relate to or have a direct impact on the States. 19 U.S.C. § 3132(b).

NAFTA body with the power to adopt or to participate in the adoption of legislative measures. Furthermore, there is no provision in the NAFTA for the participation of members of the national parliaments of the respective Parties in the formulation of NAFTA policy, except as those parliaments are generally empowered by the national constitutions of the Parties to act with respect to general legislation and treaties.⁷⁶ In this respect the NAFTA may be contrasted with the European Union, which includes a parliament of representatives directly elected by the public in the Member States. The powers of the EU Parliament to influence EU legislation, while not comparable to that of most national parliaments, has gradually increased since the creation of the EC/Union.

The power of members of the U.S. Congress to influence the formation and implementation of hemispheric integration policy could be enhanced through the creation of an inter-parliamentary body at the regional level. Since the NAFTA regional institutions — and presumably the FTAA regional institutions — have very limited power to adopt secondary legislation, the powers of an inter-parliamentary body would likewise be limited. However, a variety of important purposes could be served by the creation of such a body.

First, regular meetings among parliamentarians of the different member countries of the NAFTA and/or FTAA would expose these members to perspectives that they are unlikely to hear in their own national capitols. This may increase the openness of members of national parliaments to proposals that do not directly implicate their own constituencies.

Second, members of national parliaments could be more directly exposed to and consulted about the programs of the various regional working groups. The work of these groups may eventually require national parliamentary approval, and the groundwork for such approval could be laid at regional parliamentary meetings.

Third, an inter-parliamentary body could contribute to the formulation of future work programs with proposals of its own. Such activity would more directly connect parliamentarians to the decision structure of the integration program, and thereby invest the parliamentarians with a more direct interest in outcomes.

⁷⁶ Thus, for example, the NAFTA acknowledges that the adherence of new Parties will take place “following approval in accordance with the applicable procedures of each country” (NAFTA art. 2204:1), and that the parliaments of the Parties must approve changes to national legislation regarding technical standards. *See, e.g.,* NAFTA Annex 913.5a-3, para. 4 (adoption of automotive standards).

Fourth, the participation of national parliamentarians would increase the number of elected officials directly involved in the hemispheric integration process, enhancing its democratic character. This may have the very favorable long term effect of increasing the perception on the part of members of the public at large that they have a voice in the integration process.

In terms of institutional structure, and taking the NAFTA as an example, key members of the national parliaments of each of the Parties could meet together on an annual basis or at other regular intervals. These meetings could be rotated among national capitols. At these meetings, parliamentarians could review proposals from the NAFTA Free Trade Commission and other NAFTA committees which might entail the adoption of legislation in their respective countries. Parliamentarians could present their perspectives on work programs to the Commission and to each other. Parliamentarians could attempt to formulate a joint proposal for a work program by the Commission and relevant NAFTA committees.

At about the same time as the first draft of this article was being written, the countries of the Mercosur were creating an inter-parliamentary body along the lines suggested here.⁷⁷ The Joint Parliamentary Commission of the Mercosur is given advisory powers that are consistent with the powers that might be accorded to a NAFTA or FTAA parliamentary body.⁷⁸ If the powers of such a body were to be more than advisory, there would need to be significant structural changes taking into account the relative populations of the Parties and

⁷⁷ The creation of the Mercosur institutional structure through the adoption of the Common Market Treaty of Asunción of 1991 (Argentina-Brazil-Paraguay-Uruguay: Treaty Establishing a Common Market [Done at Asunción, March 26, 1991], 30 I.L.M. 1041 (1991)), the Brasília Protocol on Dispute Settlement, also of 1991, (Protocolo de Brasília para a Solução de Controvérsias (MercosurCMC/Dec. No. 1/1991), Boletim de Integração Latino-Americana/Edição Especial - MRE/SGIE/NAT 195) and the adoption of the Protocol of Ouro Preto on the Institutional Structure of the Mercosur of December 1994 (Argentina-Brazil-Paraguay-Uruguay: Additional Protocol to the Treaty of Asunción on the Institutional Structure of the Mercosur ("Protocol of Ouro Preto") [done at Ouro Preto, Brazil, December 17, 1994], 34 I.L.M. 1244 (1995), are among the most interesting development in the field of regional integration in the past decade. The Mercosur institutional structure contains a number of innovative features that deserve close attention both from NAFTA planners and from the architects of the FTAA. These include a consensus-based decisional structure that incorporates the power to adopt rules binding on States Parties, 30 I.L.M. 1054-59 (Annex 11), a dispute resolution system that mandates compliance, *id.* at 1059 (Annex III), as well as the novel inter-parliamentary consultation arrangement designed to facilitate the implementation of decisions and enhance parliamentary input into the integration process. 34 I.L.M. at 1253 (Section IV).

⁷⁸ The powers of the Mercosur regional institutions are more extensive than those of the NAFTA regional institutions, and might more forcefully suggest the need for a parliamentary balance.

other factors. The operative provisions of the Protocol of Ouro Preto, relating to the inter-parliamentary body, are useful in illustrating this concept:

The Joint Parliamentary Commission

Article 22

The Joint Parliamentary Commission is the organ representing the parliaments of the States Parties within the Mercosur.

Article 23

The Joint Parliamentary commission shall consist of equal numbers of members of parliament representing the States Parties.

Article 24

The members of the Joint Parliamentary Commission shall be appointed by the respective national parliaments, in accordance with their internal procedures.

Article 25

The Joint Parliamentary Commission shall endeavour to speed up the corresponding internal procedures in the States Parties in order to ensure the prompt entry into force of the decisions taken by the Mercosur organs provided for in Article 2 of this Protocol. Similarly, it shall assist with the harmonization of legislations [sic], as required to advance the integration process. When necessary, the Council shall request the Joint Parliamentary Commission to examine priority issues.

Article 26

The Joint Parliamentary Commission shall submit Recommendations to the Council of the Common Market through the Common Market Group.

Article 27

Joint Parliamentary Commission shall adopt its rules of procedure.

The creation of an inter-parliamentary body in the NAFTA/FTAA context would enhance the visible role of members of the U.S. Congress in the integration process. This would appear to enhance the power of such members in the international arena. As such, the creation of such a body should be in the self-interest of congressional members. The proposed role is advisory and only an incremental step.⁷⁹ For the near term such an incremental step may be more desirable, for reasons set out above, than substantially enhancing the direct role of the Congress in integration planning and implementation.

⁷⁹ Because of the suggested advisory role of the inter-parliamentary body, it should not raise constitutional issues in the United States. An inter-parliamentary body with more extensive powers could at least raise such issues. See generally Abbott, *supra* note 64, at 156-57.

C. The President and the Executive Branch

1. *Presidential Interests*

Among the branches of the federal government, the Executive Branch plays the most direct role in the formulation and implementation of hemispheric integration policy. The Executive Branch during the Bush Administration proposed the NAFTA and was largely responsible for its drafting. The effective power of the Executive Branch is considerable in respect to the hemispheric integration process, both in relation to the Congress and the Judiciary and in relation to foreign governments. The President proposes, negotiates, signs and (subject to congressional approval) ratifies integration agreements. The President is largely responsible for their execution. The President of the United States is at the peak of the political pyramid of the single largest national economy in the world and, as such, possesses great power relative to the heads of state of other national governments.

The President and Vice President are the sole elected officials in the Executive Branch. The President is an individual who has sought after political power and has succeeded in obtaining it. To the extent that hemispheric economic relations are important and to the extent that the President controls such relations, the President has a self interest in continuing (and even enhancing) the role ascribed to him or her. An increase in the power of Congress may decrease the relative power of the President both in the domestic and hemispheric/international arenas. Nevertheless, the President is dependent upon the Congress for approval of hemispheric integration programs, and must compromise his/her own desire to exercise power with that of Members of Congress. Whether a President is willing to effect such a compromise will depend on his/her evaluation of whether his/her program can be accomplished without such compromise. During the NAFTA negotiations, for example, the Bush Administration was forced to compromise its position on environmental matters at the insistence of Democratic members of Congress in order to achieve an agreement that would secure passage.

A President must, of course, also look to the prospects for his or her election and reelection. Since the Democratic Party historically has enjoyed the political support of labor unions, the Clinton Administration may have perceived an interest in slowing down the FTAA negotiations in 1996 in order to avoid alienating labor union support during the reelection process. The Clinton Administration appears committed to implementing the NAFTA and pursuing the FTAA over the longer term, though there remains reason to question whether a

Democratic administration will actively promote liberal trade agreements in the face of labor union opposition. Both the NAFTA and the Uruguay Round Agreements were initiated by Republican Administrations.

The best case scenario from the perspective of a Democratic administration will be to obtain some measure of labor union support, or at least tolerance, of the integration agenda. Specific program features that might appeal to the unions have already been discussed. How the labor unions will perceive their self interest in the hemispheric integration agenda remains to some extent an open question. However, in order to encourage labor union support (or tolerance), the Executive Branch should at least treat labor representatives with the same level of interest and respect that it treats business lobbyists. Organized labor must be convinced that the government will be responsive to its perspective.

2. Institutional Improvement

The hemispheric integration process is not the central concern of any significant U.S. government entity. The U.S. agency principally responsible for coordinating and supervising NAFTA-related matters and the FTAA negotiations is the Office of the U.S. Trade Representative.⁸⁰ The entire staff of the USTR, including administrative staff, is approximately 200 individuals. This group is responsible for virtually all ongoing U.S. trade negotiations, including those involving the WTO, the European Union, Japan, the PRC, ASEAN, and so forth.⁸¹ The office is often in a state of crisis management, and it does an excellent job in this respect.⁸² It would be unrealistic, however, to suggest that the USTR's Office is engaged in ongoing NAFTA and FTAA supervision and policy analysis as its central focus. In addition to the USTR, NAFTA-related and FTAA functions are spread throughout the federal government, including the EPA, the International Trade

⁸⁰ See generally JOHN JACKSON ET AL., *INTERNATIONAL ECONOMIC RELATIONS* 149-51 (3d ed. 1995).

⁸¹ See generally, STEVEN DRYDEN, *TRADE WARRIORS: USTR AND THE AMERICAN CRUSADE FOR FREE TRADE* (1995). The Commerce Department actively supports export efforts by U.S.-based enterprises, and Commerce activities include negotiating with foreign governments. These are largely transaction-based activities as opposed to inter-governmental negotiations regarding trade agreements. The allocation of negotiating responsibilities as between federal agencies is somewhat fluid, and over the course of the past several decades there have been a number of turf battles concerning such negotiations. *Id.*

⁸² The USTR is granted specific authority to coordinate implementation of the NAFTA under both its general legislative mandate, 5 U.S.C. § 903 (1994), and specific provisions of the NAFTA implementing legislation. 19 U.S.C. §§ 3312-17.

Commission, and the Commerce, Treasury, State, and Labor Departments. Each of these agencies takes responsibility for hemispheric integration-related matters within its own field of expertise, though generally under the coordinating eye of the USTR's Office.⁸³

The hemispheric integration process might be treated differently. An Office of Integration Policy and Planning (OIPP) could be established within the federal government. It might be headed by a Cabinet-level individual who is U.S. representative to the NAFTA Free Trade Commission. That person may be the USTR or a newly appointed Director-General of the OIPP. The OIPP would include a staff of professional technical experts who will be responsible for reviewing implementation of the NAFTA by the United States, Mexico and Canada, and for coordinating the FTAA negotiations. The OIPP should be responsible for initiating, conducting and reviewing studies with respect to the NAFTA and FTAA. The OIPP should be authorized to obtain the cooperation of other federal agencies in the pursuit of its mission. The OIPP should be as large, but need not be larger than, the present Office of the USTR (150 professionals, 50 staff). Its staff can be drawn from the USTR, Commerce, EPA, Treasury, Labor, ITC and so forth.⁸⁴ All Executive Branch hemispheric integration proposals to the Congress should flow from the OIPP, even if not initiated there.

The essential justification for the creation of this office is that the NAFTA and FTAA programs should not be treated as other federal programs. These are arrangements that will broadly and deeply affect the lives of individuals throughout this hemisphere and the world. They should be approached with the best public policy planning mechanisms we can devise.

IV. NEO-FUNCTIONAL CONVERGENCE

A. Convergence and Conflict

The basic lesson of neo-functionalism must be stressed. Regional integration in the western hemisphere will not succeed simply because there is a convergence of interests among U.S. groups that most strongly influence the process. Regional integration *may* succeed *if* there is a confluence of interests among the powerful interest groups in the various countries of the region that will lead the process — the

⁸³ Coordination of Trade Policy is also undertaken at the National Security Council level. Author's discussions with USTR officials.

⁸⁴ If for no other reason than to avoid present restrictions on new federal government hiring.

United States, Argentina, Brazil, Chile, Colombia, Mexico and Venezuela, among the major hemispheric economies. For example:

Business Groups. Business groups are powerful not only in the United States. They play a leading role throughout the hemisphere. The interests of the leaders of U.S.-based businesses and the interests of Brazilian-based businesses are not necessarily the same.

Labor Unions. Labor unions may be more powerful in countries outside the United States than within it. Argentina's history has been shaped by a powerful labor movement. The interests of labor unions in the various countries of the hemisphere are likely to differ.

Environmental Groups. Environmental interest groups in developing countries may not prioritize their interests in the same way as U.S. environmental interest groups.

Political leaders throughout the hemisphere function in decidedly diverse contexts. Few of the countries of the western hemisphere have enjoyed the political stability and democratic tradition of the United States. Many have endured decades of authoritarian/military rule. Some cannot be considered stable today. There is a wide disparity in the level of economic development that separates nations of the western hemisphere, and there are many cultural differences to overcome. Additionally, anti-U.S. sentiment has pervaded the political processes of some countries throughout the second half of this century.

While any competent trade negotiator might be able to draft an FTAA in a matter of weeks, the drafting of such an agreement will not create a regional integration arrangement. Trade negotiators must first seek to identify the interests of the various actors and groups throughout the region that will play important roles in the process by which the agreement is approved and implemented, and seek to channel those interests into an arrangement that accommodates them.

B. Convergence and Institutions

Haas stressed the importance of incorporating institutions with effective decision-making power at the regional level in regional arrangements to promote the *spillover effect*, and thereby to accelerate the integration process. The scope of the FTAA and the wide disparity in interests and power among its prospective members make it unlikely that any strong regional institutions will be included in its initial framework. However, the NAFTA experience has suggested a few ideas for the FTAA institutional structure that might function as a base point for effective regional institutions that would evolve over a period of decades.

1. *The FTAA Director-General*

The NAFTA's Free Trade Commission meets only sporadically.⁸⁵ The day-to-day coordination of inter-governmental relations is done through the NAFTA Secretariat. However, the term "Secretariat" is rather deceptive in the NAFTA context because there is no single entity comprising a Secretariat, nor is there a single Secretary-General. Rather, each Party maintains its own national NAFTA Secretariat office.⁸⁶ All of the various NAFTA committees and working groups are expected to function under the coordination of these national Secretariat offices.⁸⁷ In the U.S. NAFTA administration system, the U.S. Secretariat is not expected to play an independent policy formation role, but rather to implement decisions by the USTR and other federal agencies.⁸⁸ The NAFTA *qua* NAFTA has no Director-General. There is no one charged with identifying and articulating the problems the Parties face collectively.

FTAA planners might consider establishing the office of Director-General to give personality to the arrangement, and to facilitate the identification of issues that transcend individual nation-state interests.

2. *Regional Committees*

a. Fiscal and Monetary Concerns

The peso crisis highlighted the need to include a Committee on Fiscal and Monetary Transparency in the FTAA framework. European Union policy planners have long recognized the importance of fiscal and monetary policy cooperation among the Member States,

⁸⁵ The Free Trade Commission is composed of cabinet level representatives of the Parties. It acts by consensus. It acts primarily to coordinate the activities of the Parties. It is obligated to meet once per year. See ABBOTT, *supra* note 21, at 28-29.

⁸⁶ Pursuant to the NAFTA Implementation Act, 19 U.S.C. § 3315, the U.S. Section of the NAFTA Secretariat may be established within any department or agency of the U.S. government, but shall operate under the supervision of the Interagency Group. 19 U.S.C. § 3432. The Interagency Group is chaired by the USTR and will consist of such officers of the U.S. government that the USTR considers appropriate. *Id.*, § 3432(c)(2)(A).

⁸⁷ The institutional arrangements established under the Supplemental Agreements on the Environment and Labor are important exceptions to this general situation. The North American Agreement on Environmental Cooperation (NAAEC) provides for the creation of a North American Commission for Environmental Cooperation (NACAC), which includes, *inter alia*, a permanent Secretariat with a single Executive Director. The NAAEC Council is charged with making recommendations to the Parties on environmental matters. See Abbott, *supra* note 21, at 109-10; Abbott, *From Theory to Practice: The Second Phase of the NAFTA Environmental Regime*, *supra* note 48.

⁸⁸ Confirmed in author's conversations with USTR officials.

even if they have not always been successful in achieving their desired aims.⁸⁹ There is no present basis for discussion of coordinated fiscal policy among western hemispheric governments. There may well be substantial obstacles to the creation of an effective regional exchange rate policy. Rate bands and pegs may be difficult to defend in an era of speculation and volatility in financial markets.⁹⁰ In the short to medium term, central bank and treasury transparency, discussion and co-operation may represent the outer limit of a viable policy on fiscal and monetary matters. The Committee on Fiscal and Monetary Policy might have as its members the senior financial managers of the Party governments. These members might exchange information and consult on desirable changes in fiscal and monetary policy.⁹¹

b. Infrastructure

A Committee on Infrastructure Development might be established in the FTAA framework. The Committee on Infrastructure Development could provide a forum for technical assistance to FTAA public works officials. It could be used to plan and propose infrastructure projects. The Committee might include representatives from the public and private sectors, as well as NGOs. It could play an active role in pursuing project funding from international institutions and the private sector, in addition to making recommendations to the Party governments for public funding.

None of the foregoing suggestions represents a dramatic departure from the existing NAFTA structure in the sense of empowering central regional institutions to undertake decisions on behalf of the Parties. Even from a medium-term perspective, such a development appears politically infeasible both in the NAFTA and FTAA context. The gradual building-up of hemispheric institutions may pave the way for the establishment of such institutions. In the long term, collective decision-making may appear both desirable and politically feasible.

⁸⁹ See, e.g., MONETARY COMMITTEE OF THE EUROPEAN ECONOMIC COMMUNITY, *THE INSTRUMENTS OF MONETARY POLICY IN THE COUNTRIES OF THE EUROPEAN ECONOMIC COMMUNITY* (1962), and MONETARY COMMITTEE OF THE EUROPEAN COMMUNITIES, *MONETARY POLICY IN THE COUNTRIES OF THE EUROPEAN ECONOMIC COMMUNITY* (1972).

⁹⁰ The difficulties inherent in establishing and defending rate pegs were alluded to by Robert Hormats, speech to the Commerce Department/GW Conference on the GATT Uruguay Round, Washington, D.C., Feb. 23, 1995. Hormats recommended increased transparency and efforts to strengthen international arrangements under the IMF and Group of Seven.

⁹¹ Of course, adequate protection of confidential information would be required.

C. Conclusions

The nations of the western hemisphere have agreed to complete negotiation of an FTAA by 2005, and to make concrete progress toward the attainment of that objective by the year 2000. The drafting of an FTAA legal text is important, as are decisions concerning the various components of its institutional structure. Nevertheless, the key to the success or failure of the FTAA enterprise is likely to be a political one. At the end of the negotiating process, will there be sufficient political support in the capitols of the member nations to bring the agreement into force?

Today this question cannot be answered with any assurance. It seems clear, however, that if there is to be adequate political support for the FTAA, the interests of key actors and groups throughout the region will need to be satisfactorily addressed. No one actor or group will have all of its interests satisfied. Ultimately, achieving a successful outcome will require striking the appropriate balance among parties whose interests both converge and conflict.