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## Mexico's Dilemma: Workers' Rights or Workers' Comparative Advantage in the Age of Globalization?

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## Mexico's Dilemma: Workers' Rights or Workers' Comparative Advantage in the Age of Globalization?

*Ranko Shiraki Oliver\**

*Presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.*

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Presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.

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#### I. INTRODUCTION

I want to thank Professor Raquel E. Aldana of the University of the Pacific, McGeorge School of Law, and her colleagues at McGeorge School of Law, for inviting me to participate in the symposium entitled "The Global Impact and

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Implementation of Human Rights Norms,” held at McGeorge School of Law on March 11 and 12, 2011. The panel in which I was asked to speak, along with Professor Aldana and Professor Jorge Esquirol from Florida International University College of Law, was “Human Rights and Labor Law.” The discussion of the panel focused on the question of whether Latin American countries have reformed their labor laws in response to globalization and free trade agreements into which the United States and Latin American countries have entered since 1994, when the North American Free Trade Agreement (“NAFTA”) entered into force. This Article addresses the question discussed in that panel, with a focus on Mexico.

In this age of globalization, the economies of the world must become integrated with, and interdependent upon, one another to compete in an increasingly tough world market. In this environment, nation states, at times, must compromise their ability to control activities within their borders as trade, people, and money flow across borders. A corollary effect of globalization thus seems to be the decline of nations’ sovereignty by forces that, at times, are almost beyond their control. Nations must often make economic choices they might not make if they continued to have centralized economies. One of these difficult choices nations must make is whether to enact, enforce, or better enforce workers’ rights, or adopt economic policies that will permit them to become a participant in the race toward economic growth and economic competitiveness. This is the dilemma many countries, including Mexico, must face in this age of globalization. On the one hand, economic integration helps world economies stabilize and grow; on the other, it causes economic dislocations that severely and disproportionately affect workers throughout the world, but particularly workers in developing countries.

The issues addressed in the March 2011 panel, and in this article, are important to the 113 million people who live in Mexico,<sup>1</sup> and to the United States for a number of reasons. First, American businesses are becoming increasingly international in scope, and are moving investment and jobs to foreign countries, including Mexico. An examination of Mexican labor law and policy, therefore, is instructive in analyzing this important trend. Second, as the economies of the world continue to become increasingly interconnected through free trade agreements, it is important to understand the relationship between free trade and workers’ rights. Obviously, the effect of such agreements on workers is a major factor in assessing the wisdom of the agreements, particularly if competitive pressures may result in workers being forced to forfeit either their legal protections or their jobs. In this connection, it is important to evaluate the effectiveness of international agreements designed to protect the rights of

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1. Mexico’s estimated population in July 2011 was 113,724,226. *The World Factbook: Mexico*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> (last updated Feb. 10, 2012).

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workers, the first of which was the North American Agreement on Labor Cooperation, the labor side agreement to NAFTA.<sup>2</sup> Finally, whatever happens in Mexico—a large and comparatively poor country, with which the United States shares a 1,969-mile border<sup>3</sup>—is inherently important to the security of the United States.

Section II of this article discusses the constitutional origins of Mexican labor law, its codification as a body of federal law, and the role that “corporatism” has traditionally played in its enforcement. It then discusses the reforms that have been proposed and implemented as a result of the liberalization of the Mexican economy that began in the early 1980s,<sup>4</sup> reached unprecedented levels with the North American Free Trade Agreement in 1994,<sup>5</sup> and have continued since then. It closes with consideration of the strength that Mexican independent union federations have gained in the last few decades.

Section III discusses the North American Agreement on Labor Cooperation (“NAALC”),<sup>6</sup> which is the supplemental agreement to NAFTA concerning protection of workers in the three NAFTA countries (the United States, Canada, and Mexico). It is important to consider NAALC in discussing workers’ rights because the three countries undertook a treaty commitment through NAALC to enforce their domestic labor laws. This section discusses the goals of NAALC, the labor principles it protects, its enforcement mechanism, and the flaws of that mechanism.

Section IV discusses reasons for the dissonance between the strong protections given to Mexican workers by the Mexican Constitution of 1917, and the limited rights they in fact enjoy. I argue that even if Mexican policymakers were to act with the utmost concern for the welfare and interests of workers, because of the economic pressures facing Mexico, such policymakers would have to give priority to those economic pressures over workers’ rights. Like the rest of the world, Mexico is facing the effects of the global recession in many ways. One of those effects is unemployment, which, in Mexico’s case, is exacerbated by the influx of returning workers who have lost employment in the United States. This oversupply of low-skilled workers contributes to the steady growth of the informal sector, which has been a problem in Mexico for decades. Another problem is the decline in Mexico’s three largest sources of foreign

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2. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1499 (1993) [hereinafter NAALC] (entered into force Jan. 1, 1994).

3. See *The World Factbook: Mexico*, *supra* note 1.

4. Dan LaBotz & Robin Alexander, *The Escalating Struggles over Mexico’s Labor Law*, NACLA REP. ON AMERICAS, July-Aug. 2005, at 16.

5. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. NAFTA was approved by Congress by means of the North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3311 (2006). NAFTA became effective on January 1, 1994. Exec. Order No. 12,889, 58 Fed. Reg. 69,681 (Dec. 27, 1993); see generally LaBotz & Alexander, *supra* note 5, at 18.

6. NAALC, *supra* note 2.

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exchange: oil, remittances from Mexicans working abroad, and tourism. I argue that, under these challenging circumstances, Mexican officials are far more concerned about promoting foreign and domestic direct investments and job creation than expanding legal protections for workers, which makes Mexico less attractive to investors.

The question then arises as to whether protecting workers in Mexico from abusive labor practices is impossible. I answer that question by arguing that a two-front strategy *might* prove successful in highlighting the importance of workers' rights to the Mexican government. International pressure to enhance workers' rights through supranational norms or supranational enforcement mechanisms may be successful, though such pressure surely would be resisted by the Mexican government. I argue that, in addition to requiring that Mexico increase enforcement of its labor laws from "the outside" through international norms, grassroots labor rights advocates could also exert pressure on the Mexican government from within. If Mexican workers are to gain additional protections—a very large "if," in my view—it is more likely to come as a result of "bottom-up" action by workers and unions than from "top-down" action by the Mexican government.

## II. MEXICAN LABOR LAW

As with most contemporary economic and political problems, an understanding of Mexico's current labor practices requires some appreciation of the relevant history. Mexico's 1917 Constitution—responding to an extended period of economic growth achieved, in part, by repression of workers—provides extraordinarily detailed and extensive protection of workers' rights.<sup>7</sup> These constitutional protections are bolstered by labor decrees—particularly the Federal Labor Law of 1970—mandating procedures that, in theory, assure effective implementation of the rights granted by the Constitution.<sup>8</sup> However, as a result of Mexico's "corporatist" tradition, Mexico's most important labor unions were co-opted by the ruling party throughout the twentieth century.<sup>9</sup> The resulting system has not provided workers with the rights that a reading of the Constitution and decrees would lead one to expect.<sup>10</sup> In recent decades, Mexico's increased interaction with the international economy—of which NAFTA is the prime example—has resulted in new pressures pointing in opposite directions.<sup>11</sup> The need to compete has led the government, in some cases with the support of "official" unions, to favor increased flexibility for employers in utilizing their

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7. STEPHEN ZAMORA ET AL., MEXICAN LAW 415-16 (2004).

8. *Id.* at 419.

9. *Id.* at 417-18.

10. *Id.* at 416.

11. LaBotz & Alexander, *supra* note 4, at 17.

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workforce, thus decreasing worker protections.<sup>12</sup> This trend has been furthered by the defeat of the traditional ruling party in the past two presidential elections by candidates from a pro-business party.<sup>13</sup> On the other hand, the growing influence of international unions in Mexico has resulted in some elements of the Mexican labor force becoming more confrontational.<sup>14</sup>

### A. History of Mexican Labor Law

Prior to the Twentieth Century, Mexico did not have a body of specialized labor laws, and labor issues were resolved through the application of the Civil Code<sup>15</sup> to labor contracts.<sup>16</sup> In the mid-nineteenth century, some members of the Constituent Congress of 1857 were concerned about the dangers of empowering workers by including labor rights in the Constitution of 1857.<sup>17</sup> They argued that such inclusion would hinder or impede industrial development and movement of capital in Mexico.<sup>18</sup> However, labor conflicts resulting from abusive labor practices<sup>19</sup> during the presidency of Porfirio Diaz (1876-1910)<sup>20</sup>—a period of significant overall economic growth in Mexico, especially in the mining and

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12. *Id.* at 17-18.

13. *See id.* at 17-20.

14. *See id.* at 20-21.

15. Mexico's civil law system originated principally from civil law that can be traced back to Emperor Justinian I, who ruled from 527 to 565 A.D. *Roman Legal Tradition and the Compilation of Justinian*, U. CAL. BERKELEY, SCH. L., ROBBINS COLLECTION, <http://www.law.berkeley.edu/library/robbins/RomanLegalTradition.html>. The compilation of this civil law in codes and statutes of Roman law—*Corpus Iuris Civiles* (civil law code)—became the foundational source for Roman law in the Western tradition. Later systems of law in the Western world were significantly influenced by civil law, including the civil law systems of Western continental Europe. *Id.* Mexico inherited this civil law tradition through the Spanish Conquest of Mexico in 1519. Nancy Fitch, *The Conquest of Mexico: An Annotated Bibliography*, CAL. ST. U., FULLERTON, <http://faculty.fullerton.edu/nfitch/nehaha/conquestbib.htm> (last visited Feb. 23, 2012). After Mexico's independence from Spain in 1810, this tradition led to the codification of Mexican law, and the adoption and use of codes as the principal source of law. Jaime B. Berger Stender, *Mexican Legal System Overview*, MEXONLINE, <http://www.mexonline.com/lawreview.htm> (last visited Feb. 23, 2012); *Mexican Independence*, TEX. A&M U., <http://www.tamu.edu/faculty/cbn/dewitt/mexicanrev.htm> (last visited Feb. 23, 2012).

16. ZAMORA ET AL., *supra* note 7, at 415.

17. *Id.*

18. *Id.*

19. Before the Mexican Revolution of 1910 and the inclusion of labor rights in the Constitution of 1917, oppressive labor conditions were prevalent. Men were paid low salaries, which made it necessary for women and children to also work, and to do so in working conditions that were often worse than those of men. In some instances workdays exceeded fourteen hours. *Id.* Due to the lack of occupational health and safety standards, work-related injuries were frequent, and workers were uncompensated, because of the absence of a workers' compensation system. Instead of paying wages in cash, employers sometimes gave workers access to a store that he owned, or in which he had an interest ("*tienda de raya*"), and paid workers with goods from the store. Although workers are no longer paid with goods, low-skilled workers often still refer to their wages as "*raya*." Anna Torriente, *Minimum Employment Standards in Mexico*, NAT'L L. CENTER FOR INTER-AM. FREE TRADE (Sept. 1995), <http://www.natlaw.com/pubs/torrient.htm>.

20. *See infra* note 22 and accompanying text.

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agricultural industries—made it clear that worker protection laws were needed.<sup>21</sup> In particular, two significant and bloody labor conflicts in 1906 and 1907 were the catalysts that brought about intensified calls for labor laws.<sup>22</sup>

After years of debate and negotiation—and the bloody Revolution of 1910 that ended Porfirio Diaz’s three decades of rule—these calls for labor laws culminated in the compilation of strong workers’ rights in Articles 3, 4, 27, and 123 of the 1917 Constitution.<sup>23</sup> It is, therefore, fair to say that Mexico’s labor law was born as a result of labor disputes and labor demands as part of the upheaval of the Mexican Revolution (1910 to 1920), and that the comprehensive workers’ rights contained in the final draft of the Constitution of 1917 reflect the goals of the Revolution: achieving social justice and welfare.<sup>24</sup> The strength and breadth of workers’ rights contained in the 1917 Constitution earned it the name of a “social constitution,”<sup>25</sup> and present commentators regard it to be a remarkably progressive document containing the most advanced provisions in the world at the time to further the welfare of workers.<sup>26</sup>

Although Mexico’s labor law is federal law, the country’s first labor laws were enacted at the state level. For example, the State of Mexico enacted statutes protecting workers in 1904, Nuevo Leon in 1906, Coahuila in 1912, Veracruz in 1914, Yucatan in 1915, and Hidalgo and Zacatecas in 1916.<sup>27</sup> The need for the creation of federal law was discussed during the constitutional debates of 1916-1917, and in 1929 the Mexican Congress made the decision to end the system of

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21. ZAMORA ET AL., *supra* note 7, at 415.

22. *Id.* In 1906, miners working in the Cananea Copper Company in the Northern State of Sonora, Mexico, demanded better working conditions. When the employer did not comply with these demands, the workers organized a strike that became famous in Mexican history, and ended in a bloody massacre. The strike in 1907, which took place in the Gulf Coast State of Veracruz, involved workers in the textile industry, and also had a bloody end. *Id.* Both of these events took place during the long presidency of Porfirio Diaz, which is a period in Mexican history during which working conditions were abysmal, and unions and strikes by workers were sometimes suppressed with violence. Paulette L. Stenzel, *Mexican Law*, REFERENCE FOR BUS., <http://www.referenceforbusiness.com/encyclopedia/Man-Mix/Mexican-Law.html> (last visited Feb. 23, 2012). President Diaz ruled Mexico with an iron hand for 35 years (1876 to 1911), but his period of rule, known as “*El Porfiriato*,” resulted in great progress and modernization of Mexico, by, for example, the construction of thousands of miles of railway tracks to connect all the important cities and ports. The Mexican economy boomed under his leadership. President Diaz modernized the economy by allowing foreign investment to develop Mexico’s natural resources. As a result, mines, plantations, and factories were built with American and European investment and production levels reached unprecedented high levels. Yet, the benefits of this economic boom were not experienced by the majority of workers, whose wages and working conditions were terrible. *See generally Diaz and the Porfiriato 1876–1910*, MEXICANHISTORY.ORG, <http://mexicanhistory.org/Diaz.htm> (last visited Feb. 23, 2012); *see also generally Porfirio Díaz*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/161912/Porfirio-Diaz> (last visited Feb. 23, 2012); *see also generally Porfirio Díaz*, ROBINSON LIBR., <http://www.robinsonlibrary.com/america/mexico/history/diaz-p.htm> (last updated Apr. 20, 2011).

23. ZAMORA ET AL., *supra* note 7, at 415.

24. *See id.*

25. *Id.* at 416.

26. LaBotz & Alexander, *supra* note 4, at 16.

27. ZAMORA ET AL., *supra* note 7, at 415.



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“overlapping federal and state labour laws by replacing municipal and state labour laws with one federal law that would pre-empt state” labor laws.<sup>28</sup> In furtherance of this decision, and to comply with its constitutional mandate to adopt labor laws that provide workers the rights enumerated in the 1917 Constitution, the Mexican Congress enacted the first federal labor law in 1931.<sup>29</sup> In addition to the federal statute codifying constitutional worker protections, federal administrative regulations interpret and enforce constitutional and statutory provisions.<sup>30</sup> Thus, the primary source of labor law in Mexico is federal.<sup>31</sup> Essentially, no substantive labor laws exist at the state level in Mexico.<sup>32</sup> Neither the individual states nor the Federal District (Mexico City) presently have state labor laws.<sup>33</sup>

Article 123 of the 1917 Constitution, entitled “Labor and Social Security,” is the most important of Mexico’s labor laws.<sup>34</sup> It contains a detailed compilation of workers’ rights.<sup>35</sup> Moreover, to ensure that its social goals are achieved, Article 123 has been amended nine times since the time the 1917 Constitution entered into effect.<sup>36</sup> Article 123 was codified in 1931 as federal law, and a number of labor decrees (“*decretos*”) have supplemented and clarified the code’s provisions.<sup>37</sup> The most extensive of these *decretos* is the lengthy and detailed Mexican Federal Labor Law of 1970 (“*Ley Federal del Trabajo*”—LFT), which has been amended a number of times, but remains in force today.<sup>38</sup>

Article 123 is divided into Part A, addressing labor rights of workers in the private sector, and Part B, addressing the rights of government employees.<sup>39</sup> Article 123 contains relatively detailed labor rights in a broad spectrum of areas. Article 123 provides that the employment relationship is considered to be a contract, whether or not a written employment contract exists.<sup>40</sup> Workers have the right to permanent employment once they are hired, unless the employment contract specifies a period of time, or such an understanding by the parties is demonstrated.<sup>41</sup> An employer may terminate an employee if the employee

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28. *Id.* at 415-16.

29. Richard A. Posthuma et al., *Labor and Employment Laws in Mexico and the US: An International Comparison*, 51 LAB. L.J. 95, 97 (2000), available at [http://academics.utep.edu/LinkClick.aspx?link=mexico\\_labor\\_law.pdf&tabid=67019&mid=153056](http://academics.utep.edu/LinkClick.aspx?link=mexico_labor_law.pdf&tabid=67019&mid=153056).

30. *Id.*

31. *Id.*

32. *Id.*

33. Torriente, *supra* note 19, at 1.

34. Stenzel, *supra* note 22.

35. ZAMORA ET AL., *supra* note 7, at 415-16.

36. *Id.* at 416.

37. Stenzel, *supra* note 22.

38. ZAMORA ET AL., *supra* note 7, at 416.

39. *See id.* at 416, 418.

40. Torriente, *supra* note 19, at 3.

41. *Id.* at 4.

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engages in specific acts (violent acts, working under the influence of alcohol, or intentional damage of equipment or machinery, for example).<sup>42</sup> However, if the employee is terminated without just cause, the employer may be subject to an action for unlawful discharge, which, if successful, could subject the employer to a large indemnity payment.<sup>43</sup> Generally, if an employee is laid off, he/she has the right to receive severance compensation.<sup>44</sup> If an employee leaves voluntarily, he/she is entitled to pro-rated vacation time and year-end bonus.<sup>45</sup> Employees also have the right to receive training related to their work.<sup>46</sup> Further, employers may not discriminate on the basis of race, sex, age, religious or political beliefs, or social standing.<sup>47</sup>

Article 123 also provides that employee privileges and benefits include the right to a job at a living wage; equal pay for equal work;<sup>48</sup> profit sharing; a Christmas bonus (“*Aguinaldo*”) equivalent to at least two weeks of pay; seven official, paid holidays per year; and vacation time calculated on the basis of seniority.<sup>49</sup> Workers enjoy automatic coverage by the public health care system of the Mexican Institute of Social Security (“*Instituto Mexicano del Seguro Social*”—“IMSS”).<sup>50</sup> A unique employment benefit is that of employee housing, which does not mean that employers must provide housing to their employees, but which requires employers to pay a fixed tax to finance a government fund for employee housing (“*Instituto del Fondo Nacional de la Vivienda para los Trabajadores*”—“INFONAVIT”).<sup>51</sup> Other benefits are retirement insurance to which employers pay a percentage of workers’ salaries, and mandatory childbirth and maternity leave.<sup>52</sup>

Article 123 also includes provisions addressing work schedules and the minimum working age. The maximum work schedules allowed by law are six eight-hour workdays per week for blue collar workers, and an average of forty hours per week for white collar workers, who have more flexible schedules.<sup>53</sup> Overtime in a week is paid at double the hourly wage for the first nine hours after forty-eight hours, or for working on a legal holiday, Saturday, or Sunday.<sup>54</sup>

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42. *Id.* at 16.

43. *Id.*

44. See *Mexico’s Labor Market and Laws: Mexico Business*, MEXCONNECT (Jan. 1, 2006), <http://www.mexconnect.com/articles/196-mexico-s-labor-market-and-laws>.

45. Torriente, *supra* note 19, at 7, 9.

46. *Id.* at 15.

47. See generally *Mexico’s Labor Market and Laws: Mexico Business*, *supra* note 45; David T. López, *Mexico Labor Laws and the Potential for Reform*, 70 TEX. B.J. 140, 140-42 (2007).

48. Torriente, *supra* note 19, at 8-9.

49. *Mexico’s Labor Market and Laws: Mexico Business*, *supra* note 45.

50. *Id.*

51. López, *supra* note 47, at 142.

52. *Id.*

53. *Mexico’s Labor Market and Laws: Mexico Business*, *supra* note 44.

54. *Id.*

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Triple-time is paid for overtime beyond nine hours.<sup>55</sup> Minors must be at least sixteen years old to work, and then only with permission of the child's parents and a permit from the Secretary of Labor and Social Welfare ("*Secretaria de Trabajo y Provision Social*"—"STPS").<sup>56</sup>

Employee safety is protected by requiring employers to provide (a) a safe workplace in compliance with occupational hazard regulations, (b) medical attention through the IMSS to an employee who is injured on the job, and (c) disability pay for work-related injuries, whether or not the injury was the result of the employee's negligence.<sup>57</sup> Pregnant women may not be assigned to positions that involve difficult or unhealthy work.<sup>58</sup>

Article 90 of the LFT defines the term "minimum wage" as the smallest cash payment a worker should receive for work he/she performs during a working day, which should represent the purchasing power for a basic standard of living.<sup>59</sup> This figure is set annually by the National Commission ("Commission"), taking into consideration various factors, such as the geographic region.<sup>60</sup> Article 94 of the LFT states that the Commission shall be comprised of representatives of workers, employers, and the government.<sup>61</sup> The Commission may consult with special commissions to fulfill its tasks.<sup>62</sup> In setting minimum wages, the Commission's technical department ("*Direccion Tecnica*") administers surveys and conducts studies about the general condition of the economy, for example inflation rates, anticipated average rate of productivity in the economy, and cost of living.<sup>63</sup> To this extent, therefore, it can be argued that Mexican labor laws are influenced by local interests.

This practice of setting the minimum wage annually on the basis of geographic location, among other factors, results in geographical disparities. Minimum wages in Mexico are affected by whether the work is performed in a rural or urban area.<sup>64</sup> To carry out the provisions of Article 96 of the LFT, the National Minimum Wage Commission ("*Comision Nacional de los Salarios Minimos*") divides Mexico into three geographic areas.<sup>65</sup> The daily minimum wage is highest in Zone A, which covers more developed urban areas, including, for example, Mexico City; the minimum wage is lowest in rural areas, which are

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55. *Id.*

56. *Id.*

57. *Id.*

58. López, *supra* note 47, at 142.

59. See Torriente, *supra* note 19, at 9-10; see also *Mexico's Labor Market and Laws*, *supra* note 44.

60. *Mexico's Labor Market and Laws: Mexico Business*, *supra* note 44.

61. Torriente, *supra* note 19, at 9.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 9-10.

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designated as Zone C; and Zone B areas are in between.<sup>66</sup> Thus, the minimum wage is affected by the geographic area in which the worker is located, and that minimum wage will apply to all workers in that area, regardless of their economic activity, profession, office, or specific work.<sup>67</sup> Certain regions of Mexico are thus burdened more than others under this system, not only in terms of the low minimum wage scales, but also because, understandably, workers tend to migrate towards areas where wages are higher.<sup>68</sup> Wages in Zones A and B, for example, are higher than in Zone C, which results in a significant number of workers moving to seek higher pay. This steady movement of workers seeking higher wages disproportionately burdens the workers in higher-paying areas by creating unemployment through the resulting oversupply of workers competing for a limited number of available jobs. The same movement of workers also disproportionately burdens employers in the lower-paying areas by decreasing the labor force in those communities.<sup>69</sup>

Federal and state (“local”) Conciliation and Arbitration Boards (“*Junta de Conciliación y Arbitraje*”—“JCA”) enforce federal labor law.<sup>70</sup> Complaints of individual workers and unions are handled by JCAs.<sup>71</sup> Federal JCAs fall under the jurisdiction of the federal government and the local boards under the jurisdiction of state governments.<sup>72</sup> To ensure that all interests are represented, the government, employers, and workers are represented in all boards.<sup>73</sup> In an effort to make the enforcement process more accessible to workers, the Mexican government established local boards in large urban cities in eleven states in 1997, and in 1998 it opened four additional offices of the STPS.<sup>74</sup> Parties to a labor dispute are encouraged to enter into negotiations to reach a settlement before

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66. Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me . . . What, Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration to the United States*, 10 HARV. LATINO L. REV. 53, 94 n.206 (2007) (citing *Mexico’s Minimum Wage the Most Eroded in Latin America*, 11 MEXICAN LAB. NEWS & ANALYSIS (Feb. 2006), [http://www.ueinternational.org/MLNA/mlna\\_articles.php?id=98#530](http://www.ueinternational.org/MLNA/mlna_articles.php?id=98#530)).

67. Torriente, *supra* note 19, at 9.

68. *Id.* at 10.

69. This same quest for better wages and better jobs has led thousands of Mexican workers throughout history, particularly low-skilled workers, to immigrate to the United States. For the effects of NAFTA on Mexican employment in the manufacturing, agricultural, and service sectors between 1994 and 2006, see Oliver, *supra* note 66, at 79-92. Labor-supply shocks substantially contributed to Mexican emigration between 1960 and 2000. In fact, two fifths of Mexican immigration flows to the United States from 1977 to 1997 are attributed to labor-supply changes. Gordon H. Hanson & Craig McIntosh, *The Great Mexican Emigration*, 92 REV. ECON. & STAT. 798, 798 (2010). Because labor supply has grown in Mexico relative to the United States, wages have decreased, and immigration to the United States is an attractive option. *Id.*

70. Posthuma et al., *supra* note 29, at 105.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* (citing U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 33 (2000)).

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formal proceedings begin.<sup>75</sup> If a settlement is not reached, a formal evidentiary hearing is conducted, and at least two of the three JCA board members that hear the case must agree on a ruling.<sup>76</sup> JCA boards' decisions are final, but a party may file a separate cause of action if he/she wishes to argue that his/her constitutional rights have been violated by a government official, including a judge.<sup>77</sup> If the JCA board determines that the employer has violated a provision of the LFT, the board will impose fines on the employer based on the minimum wage applicable to the particular job the aggrieved employee holds.<sup>78</sup> These fines range from 15 to 315 times the daily minimum wage of the employee whose rights were violated by the employer.<sup>79</sup>

The extensive rights detailed above are those of individual workers. Notably, however, Article 123, through the LFT, also provides collective rights, explicitly recognizing the rights to organize unions, bargain collectively, and organize strikes.<sup>80</sup>

*B. Constitutionally Guaranteed Worker Rights in the Context of the "Corporatist" System of Government in Mexico*

In contrast to the impressive array of formal legal rights contained in Article 123 stands a considerably less pro-worker reality. To understand the under- or un-enforcement of labor law in Mexico, it is important to understand the significant influence of the corporatist, single-party system in which Mexican labor law developed. "Corporatism" is the term used to describe "a system of government in which the society is organized into industrial, social, and professional [entities or] organizations. . . ."<sup>81</sup> The theory is that these entities/organizations are the vehicles of political representation. In fact, however, these entities become the vehicles through which the government controls the activities of persons under those constituencies' jurisdictions.<sup>82</sup> The fundamental philosophy of "corporatism"<sup>83</sup> is that the "society and economy of a

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 105-06.

80. *Id.* at 107.

81. ZAMORA ET AL., *supra* note 7, at 417.

82. *Id.*

83. The term "corporatism" is also known as "corporativism," and refers to a system of economical, political, or social organization that involves the division of the people in a society into "corporate" groups, such as agricultural, business, ethnic, labor, military, and scientific affiliations, on the basis of common interests. *Id.* The term "corporatism" does not relate to the concept of a business corporation, but the origin of both terms is the Latin word "*corpus*," which means body. Thayer Watkins, *The Economic System of Corporatism*, SAN JOSE ST. U. DEP'T ECONOMICS, <http://www.sjsu.edu/faculty/watkins/corporatism.htm> (last visited Mar. 2, 2012).

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country should be organized into major interest groups . . . and representatives of those interest groups settle any problems through negotiation and joint agreement.”<sup>84</sup> Thus, a corporate economy is supposed to work through collective bargaining.<sup>85</sup> In theory, the labor force and management in an industry belong to an industrial organization or “corporation,” and they are to settle wage and other labor-related issues through collective negotiation.<sup>86</sup> In practice, however, corporatist states are largely ruled by a dominant leader<sup>87</sup> or governing group, such as a political party. Generally speaking, “corporatism” is a system that emphasizes the positive role of the state in guaranteeing social justice and averting the social chaos that results when individual members of society pursue their individual self-interests.<sup>88</sup> “The state in the corporatist tradition is thus clearly interventionist and powerful.”<sup>89</sup>

During its long period of government control (1930-2000),<sup>90</sup> the Institutional Revolutionary Party (“*Partido Revolucionario Institucional*”—“PRI”) followed this corporatist system of government in Mexico, heavily relying on three important groups to control politics: workers, rural peasants (“*campesinos*”), and the “popular sector.”<sup>91</sup> The labor group was particularly important in ensuring the PRI’s control of society. It became the institution through which benefits were distributed to groups and individuals, and also proved very effective in controlling opposition to the government.<sup>92</sup> This corporatist model created an authoritarian and paternalistic system of government, but was relatively effective in governing the country.<sup>93</sup>

Against this background, it may be easier to understand the paradoxical situation that, although workers’ rights in Mexico are extensive and are constitutionally guaranteed, Mexican workers have not fully benefitted from the rights. In large part, this is due to the Mexican government’s control of worker unions. During the seventy years of the PRI’s government control, the strongest and largest unions were closely associated with the PRI.<sup>94</sup> This association

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84. Watkins, *supra* note 83, at 2.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 3.

89. *Id.* at 6 (quoting SYLVIA ANN HEWLETT, *THE CRUEL DILEMMAS OF DEVELOPMENT: TWENTIETH-CENTURY BRAZIL* (1980)). “The central core of the corporatist vision is thus not the individual but the political community whose perfection allows the individual members to fulfill themselves and find happiness.” *Id.*

90. John Bailey & Tonatiuh Guillén-López, *Process Management in the U.S.-Mexico Bilateral Relationship* 9 (Ctr. for U.S.-Mexican Studies, Working Paper No. 10-01, 2009).

91. ZAMORA ET AL., *supra* note 7, at 417. The term “popular sector” generally refers to the lower classes in society. Philip Oxhorn, *The Popular Sector Response to an Authoritarian Regime: Shantytown Organizations Since the Military Coup*, 18 *LATIN AM. PERSP.*, Jan. 1991, at 66, 66, available at <http://www.jstor.org/stable/2633730> (last visited July 2, 2011).

92. ZAMORA ET AL., *supra* note 7, at 417.

93. *Id.*

94. See LaBotz & Alexander, *supra* note 4, at 18.

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permitted the government to exert significant influence over unions' policies through control of both the labor authorities and the labor unions.<sup>95</sup> This close relationship between government and unions was a symbiotic one, however, because unions also benefitted, and they actually had considerable influence over labor and economic policies.<sup>96</sup> But even where unions and their officials benefitted, such benefits may not have been realized by the individual workers supposedly represented by the unions.

The PRI and the PRI-controlled "official" unions—the most important of which was the Confederation of Mexican Workers ("*Confederacion de Trabajadores Mexicanos*"—"CTM")—which, in turn, controlled the Federal Board of Conciliation and Arbitration ("*Junta Federal de Conciliacion y Arbitraje*"—"JFCA").<sup>97</sup> The JFCA and local JFCA boards regulated union recognition, collective bargaining, and the legality of strikes.<sup>98</sup> By the 1940s, the PRI, the CTM, and the JFCA comprised the conservative "corporatist system" under which workers—despite their extensive legal rights—actually had very little protection.<sup>99</sup>

#### *C. Labor Law Reforms*

In view of the practical control over workers' rights exercised by the PRI and labor leaders under Mexico's corporatist system of government, repeated calls for reform that have been made over the years, up to the present time, are not surprising. Labor law reform has been proposed and enacted, but it has not enhanced workers' rights.<sup>100</sup> Thoughtful debate over labor law reform intensified in the early 1980s, when the PRI's economic policies of neo-liberalism<sup>101</sup> began

95. *Id.*

96. López, *supra* note 47, at 142.

97. LaBotz & Alexander, *supra* note 4, at 17. The CTM was founded in 1936 and by the 1950s it had become the largest labor federation in Mexico. ZAMORA ET AL., *supra* note 7, at 419. Other important "official" unions include the Federation of Unions of Workers at the Service of the State ("*Federacion de Sindicatos de Trabajadores del Estado*"—"FSTE") and National Peasant Confederation ("*Confederacion Nacional de Campesinos*"—"CNC"). LaBotz & Alexander, *supra* note 4, at 17.

98. LaBotz & Alexander, *supra* note 4, at 17.

99. See generally ZAMORA ET AL., *supra* note 7. The foundation of the classic model of corporatist organizations—an official link between the organizations (in this case the unions) and the government—can be traced to the Federal Labor Law of 1931. This first codification of Article 123 stipulated that unions were permitted to form federations and confederations, and that the Secretariat of Industry, Commerce, and Labor ("*Secretaria de Industria, Comercio, y Trabajo*"—"SICT") (an important federal administrative agency) was charged with the registration and accreditation of those organizations. These labor organizations were critical actors in organizing worker demands, but also in controlling labor opposition. As a result, the leaders of these union federations were important advocates for the workers that they represented, but also important backers of the PRI's political and economic agendas. *Id.* at 418-19.

100. See generally LaBotz & Alexander, *supra* note 4; see also generally López, *supra* note 47.

101. The term "neo-liberalism" refers to a market-driven approach to economic and social policy based on economic theory that stresses the efficiency of private enterprise, liberalized trade, and a relatively open market. It seeks to maximize the role of the private sector in determining the political and economic priorities of

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to transform Mexico's economy from a nationalistic and protectionist model to one of open markets, free trade, privatization, and fiscal restraint.<sup>102</sup> The PRI viewed the solution to Mexico's economic problems to rest on policies designed to stimulate foreign direct investment and promote "maquiladoras,"<sup>103</sup> and began to recognize that the corporatist system of government was not consistent with its new economic policies.<sup>104</sup>

In this period, a "New Labor Culture," which sought higher productivity by giving employers more flexibility, began to be promoted by the PRI, employers' associations, and even some union leaders who endorsed the idea of reform.<sup>105</sup> The goal of the New Labor Culture of stimulating the economy by attracting foreign investment could be accomplished more easily with low wages, low union density,<sup>106</sup> "weaker unions, less restrictive labor union agreements, and more contingent and part-time employment," all of which would give employers increased control over labor relations.<sup>107</sup>

In the late 1980s, then-Director of the Mexican Employers' Association, Carlos Abascal, introduced the most comprehensive labor law reform up to that time, containing labor reforms consistent with the theme of flexibilization<sup>108</sup> of laws sought by employers.<sup>109</sup> The plan failed then, but Mr. Abascal persisted in introducing labor law reform plans with the same underlying theme of

a country. See generally Dag Einar Thorsen & Amund Lie, *What is Neoliberalism?* (Univ. of Oslo, Working Paper, 2009), available at <http://folk.uio.no/daget/What%20is%20Neo-Liberalism%20FINAL.pdf>.

102. LaBotz & Alexander, *supra* note 4, at 17.

103. *Maquiladoras* are export assembly plants located in Mexico, primarily along the U.S. border. In 1965, the United States and Mexico created the *maquiladora* program to allow tariff-free imports of materials and components into Mexico for assembly and re-export to the United States. This program focuses on auto parts, electronics, and apparel. JOHN J. AUDLEY ET AL., *NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE* 14-15 (2004), available at <http://www.carnegieendowment.org/files/nafta1.pdf>.

104. LaBotz & Alexander, *supra* note 4, at 17.

105. *Id.*

106. Union density is a "measure of the membership of trade unions, calculated as the number [of workers] enrolled as members [of unions at a particular time] as a proportion of all those employees potentially eligible to be members." POLITY BOOKS, GLOSSARY 557 (2011), available at <http://www.polity.co.uk/cbs3/PDF/Glos.pdf>. Beginning in 1984, union density in Mexico began to decline for the labor force as a whole and across a wide spectrum of industries and occupations. Only a small proportion of the decline was caused by changes in industry, occupation, and demographic factors. Most of the decline is attributable to structural and institutional changes, which could include, for example, changes in government policies and increased employer resistance to unions. David Fairris & Edward Levine, *Declining Union Density in Mexico, 1984-2000*, 127 MONTHLY LAB. REV., Sept. 2004, at 10, 11, 14, 16. Union density in Mexico between 1984 and 1989 ranged between 22% and 25%, but declined in the early 1990s. It has ranged between 15% and 16% since 1995, and was 15.7% in 2000. COMM'N FOR LABOR COOPERATION, BRIEFING NOTE: RECENT TRENDS IN UNION DENSITY IN NORTH AMERICA 2 (2003).

107. LaBotz & Alexander, *supra* note 4, at 17.

108. "Flexibilization refers to the changing work practices by which firms no longer use internal labour markets or implicitly promise employees lifetime job security, but instead seek flexible employment relations that permit them to increase or diminish their workforce and reassign and redeploy employees with ease." Katherine V. W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time*, 44 OSGOODE HALL L.J. 77, 78 (2006).

109. LaBotz & Alexander, *supra* note 4, at 17.



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flexibilization, which he consistently advocated as the key component for economic reform.<sup>110</sup>

President Vicente Fox, who in 2000 became the first non-PRI president since 1930, made significant efforts to bring about labor law reform through a comprehensive bill referred to as the “Abascal Project,” named after the same Carlos Abascal, who had become Fox’s Secretary of Labor.<sup>111</sup> The Abascal Project advocated limited worker rights in order to promote foreign investment in Mexico, and, once again, was not enacted.<sup>112</sup> Although the Abascal Project failed, Mr. Abascal successfully negotiated and signed an agreement with the CTM, entitled “Toward a New Labor Culture,” in 1995.<sup>113</sup> This agreement pledged higher productivity with the cooperation of unions, which thus represented a step toward achieving one of the goals of flexibilization, as Abascal had sought in the late 1980s.<sup>114</sup> Mr. Abascal would not have succeeded in negotiating this agreement without the continued loyalty of official unions.<sup>115</sup>

Pro-employer proposals for labor law reform have continued to the present. On March 10, 2011, the PRI (not the ruling party since 2000)<sup>116</sup> introduced a labor reform bill in the Mexican Congress.<sup>117</sup> The reform proposes to (1) adhere to the principles of Article 123 “and the fundamental rights of workers in Mexico;” (2) “regulate the concept of ‘outsourcing’ or [sic] companies providing personnel services;” (3) “integrate important changes in the hiring process, such as trial periods, initial training agreements, and temporary workers;” (4) harmonize various provisions “referring to employers’ obligations to provide training to employees on a permanent basis,” and thereby extend “the obligation to provide such training to employees;” (5) “strengthen a key factor in labor law suits, which is the conciliation efforts of the parties at any stage in the litigation process;” (6) “contemplate a regulation concerning digital documents, electronic signatures or passwords;” and (7) “establish a summary proceeding to handle conflicts arising from Mexican Social Security fees, housing fees, and

110. *Id.*

111. Nik Steinberg, *The Monster and Monterrey: The Politics and Cartels of Mexico’s Drug War*, THE NATION (May 25, 2011), <http://www.thenation.com/article/160945/monster-and-monterrey-politics-and-cartels-mexicos-drug-war>; López, *supra* note 48, at 142; LaBotz & Alexander, *supra* note 4, at 18.

112. López, *supra* note 47, at 142; LaBotz & Alexander, *supra* note 4, at 18.

113. LaBotz & Alexander, *supra* note 4, at 18.

114. *Id.* at 17-18.

115. *See generally id.* at 18.

116. The PRI has been out of power since 2000, when President Fox of the pro-business National Action Party (“*Partido Accion Nacional*”—PAN) was elected. Mexico’s current president, Felipe Calderon, elected in 2006 and whose term will end December 1, 2012, is also a PAN member. *National Action Party (PAN)*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/404268/National-Action-Party-PAN> (last visited Mar. 2, 2012).

117. *Mexico: Labor Legislation Reform Without Consultation*, SOLIDARITY CENTER (Apr. 6, 2011), <http://www.solidaritycenter.org/content.asp?contentid=1189>.

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contributions to workers' retirement funds."<sup>118</sup> The proposed reform is supported by the current ruling party (PAN) and the business community.<sup>119</sup>

Acting through Mexican affiliates, international unions—which come from a tradition of confrontation rather than the “corporatist” tradition of Mexico’s “official” unions—have opposed many of the pro-employer reform proposals.<sup>120</sup> For example, the International Metalworkers’ Federation (“IMF”) strongly opposes the reform proposed in March 2011, and is consulting with all trade union partners in Mexico on a concerted action to be taken in opposition to the bill.<sup>121</sup> The IMF argues that the reform will severely erode workers’ rights in Mexico.<sup>122</sup> It characterizes the fundamental effects of the proposed reform to Mexico’s labor law to be “to lower the cost of labour, maintain widespread corporate control of labour relations [and] and destroy job security.” It also argues that adoption would “increase poverty and violate worker and human rights in Mexico.”<sup>123</sup> The IMF asserts that the proposed reform “will severely undermine the establishment of democratic unions,” but will strengthen “corporate control over workers.”<sup>124</sup> For example, by placing additional requirements on workers “when demanding a collective agreement or when taking strike action,” the IMF argues that the PRI proposal will further expose workers to retaliation before the legitimacy of their representative can be established.<sup>125</sup>

118. *Federal Labor Law Reform Initiative Presented by Institutional Revolutionary Party (PRI)*, CCN MEX. REP., <http://mexicoreport.com/en/2011/04/Federal-Labor-Law-Reform-Initiative-Presented-by-Institutional-Revolutionary-Party-PRI-?aid=1083> (last visited Mar. 2, 2012); Patrick Del Duca et al., *Mexico*, 45 INT’L LAW. 555, 559-60.

119. Anita Gardner, *Mexican Parliament Considers Regressive Labour Law Reforms*, INT’L METALWORKERS’ FED’N – IMF (Mar. 21, 2011), <http://www.imfmetal.org/index.cfm?c=26016>.

120. See LaBotz & Alexander, *supra* note 4, at 17-18; see also *UE & Mexican FAT Federation Organize Mutual Support*, UE INT’L, [http://www.ueinternational.org/Mexico\\_info/fat.php](http://www.ueinternational.org/Mexico_info/fat.php) (last visited Mar. 2, 2012); see also Lisa Glynn, *Union Bargaining Power in Mexico and NAFTA*, U. TORONTO (Feb. 2, 2011), <http://homes.chass.utoronto.ca/~pitchik/4060/10LisaGlynnLitRev.pdf>. See generally Gardner, *supra* note 119.

121. Gardner, *supra* note 119.

122. *Id.*

123. *Id.*

124. *Id.*

125. For a statement of the IMF position, see *id.* Some of the features of the proposed reform, as characterized by Ms. Gardner, are:

- Giving preference in law to an employer’s right to enter into individual contracts with workers over collective or union contracts,
- Reducing the burden and costs on the employer in the case of unfair dismissals for instance by limiting the payment of loss of wages to no more than 12 months, when currently the delay of Labour Boards hearing cases is frequently up to four or five years,
- Giving extensive and unilateral rights for the outsourcing and subcontracting of work with no protection for workers. The proposals on subcontracting will enable employers to hide and evade their responsibilities, preventing workers from employment security, the right to join a union, the possibility to negotiate fair wages and access to social security provisions, . . .

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The defeated 2006 presidential candidate of the leftist Party of the Democratic Revolution (“*Partido de la Revolucion Democratica*”—“PRD”), Manuel Lopez Obrador, who lost the election to President Calderon, has stated that the proposed March 2011 “[l]abor law reform will only benefit the country’s oligarchs,” and that, “[a]t the same time, the fight against inequality and poverty is not on the national agenda.”<sup>126</sup> The reaction of the head of the miners’ union to the proposed reform is that Mexico’s long-time governing party, the PRI, “which lost control of the presidency in 2000, ‘is trying to assure its return by making this gift to big business, putting an end to labor rights.’”<sup>127</sup>

This recent history suggests that Mexican politics in the area of labor relations is taking on a character more similar to that of the United States or Western Europe. The Mexican tradition has been to provide workers and unions extensive legal rights that are then ignored.<sup>128</sup> Employers are now pushing to restrict such rights while unions are defending them.<sup>129</sup> This activity suggests that all parties to the struggle may view the legal framework now to be more important than it has been in the past.

#### *D. Mexican Workers are Unprotected Because Mexican Labor Law is Under-enforced*

Much has been written, and deep disagreements have surfaced, about the value or harm of Mexico’s highly worker-protective labor law when it is under-enforced or unenforced.<sup>130</sup> The dissonance between the existence of strong workers’ rights and the poor working conditions and low wages of Mexican

- 
- Directly violating the right to freedom of association by establishing in law the principle of enterprise-only based unions by cancelling the legal existence of cross-sectoral affiliations to national union structures, which contravenes international labour rights conventions and the Mexican constitution,
  - Allowing for unilateral setting of wages to the detriment of workers, including effectively abolishing the concept of a minimum wage and allowing for the employer to impose work conditions with no possibility for review,
  - Freedom to adjust working hours, regardless of whether stipulated in a contract, enabling employers to make changes daily based on the needs of production, and
  - Removing from the labour code to a purely administrative classification the right to access social security on the basis of ill-health or permanent injury at work.

*Id.*

126. David Bacon, *Labor Law Reform—A Key Battle for Mexican Unions Today*, UE INT’L (May 26, 2011), [http://www.ueinternational.org/MLNA/mlna\\_articles.php?id=187#1283](http://www.ueinternational.org/MLNA/mlna_articles.php?id=187#1283).

127. *Id.*

128. LaBotz & Alexander, *supra* note 4, at 17; Stenzel, *supra* note 22. *See generally* Bacon, *supra* note 126.

129. Gardner, *supra* note 119. *See generally* Bacon, *supra* note 126.

130. Gardner, *supra* note 119; LaBotz & Alexander, *supra* note 4; Stenzel, *supra* note 22. *See generally* Bacon, *supra* note 126.

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workers<sup>131</sup> is, indeed, puzzling. On the one hand, Article 123 of the Mexican Constitution of 1917 spells out extensive rights for workers.<sup>132</sup> On the other hand, Mexican workers do not currently have (and have never had) the protection that the drafters of Article 123 envisioned.<sup>133</sup>

This inconsistency has fueled strong debate for decades about what to do to improve labor rights for Mexican workers.<sup>134</sup> As would be expected, the participants in the debate represent liberal groups and unions on one side, and conservative groups and businesses on the other, as well as international organizations.<sup>135</sup> As indicated earlier, the struggle has traditionally taken place in the context of Mexico's "corporatist" tradition, in which informal political accommodation has been more important than formal law.<sup>136</sup>

The liberal group (unions and other worker advocates) argues that something must be done to create a culture that adopts, respects, and values the social goal of extending to Mexican workers the protection to which they are constitutionally entitled.<sup>137</sup> Concern for Mexican workers is certainly justified and amply

131. See generally Bacon, *supra* note 126.

132. See ZAMORA ET AL., *supra* note 7, at 420.

133. Stenzel, *supra* note 22. While, undoubtedly, under-enforcement of labor rights in Mexico is a problem that must be addressed, it is important to note that a study of the global state of workers' rights placed Mexico in the group of countries that are "partly free" in terms of the freedom of its trade unions. The other groups in which countries are classified are "very repressive," "repressive," "mostly free," and "free." By comparison, the United States placed in the "mostly free" category and the United Kingdom in the "free" category. ARCH PUDDINGTON ET AL., *THE GLOBAL STATE OF WORKERS' RIGHTS: FREE LABOR IN A HOSTILE WORLD* 51 (2010).

134. LaBotz & Alexander, *supra* note 4, at 17.

135. International organizations calling for increased labor rights are international labor unions, such as the International Metalworkers Federation (see *supra* notes 119-26 and accompanying text) and the United Electrical, Radio & Machine Workers of America ("UE") (see *infra* note 146 and accompanying text). Those calling for increased employer flexibility are the International Monetary Fund and the World Bank. For example, in May 2001, "the World Bank presented [President Vicente] Fox with a list of specific recommendations" regarding Mexico's labor policies. "The [World] Bank called for greater labor flexibility to attract foreign investment, and specifically cited collective bargaining [agreements], severance pay, benefits, company-sponsored training programs, and company payments to Social Security and housing plans as policy measures that ought to be eliminated or reduced." LaBotz & Alexander, *supra* note 4, at 18.

136. See *supra* note 83 and accompanying text explaining the concept of "corporatism."

137. LaBotz & Alexander, *supra* note 4, at 20. Concern for the vulnerability of workers in this age of globalization is not just for Mexican workers. Concern for workers in the United States has been significant. For example, the White House announced on June 28, 2011 that it had reached an agreement with Congress that would permit the process for the authorization of free trade agreements between the United States and South Korea, Colombia, and Panama to move forward after months of inaction. This inaction was caused because Democrats were concerned about the impact of competition on workers in the United States, while Republicans were "eager to increase foreign trade" but did not want to increase federal spending to institute another aid program (for workers in the United States). After months of negotiations, the agreement reached between the two parties calls for a program of Trade Adjustment Assistance to ensure that workers in the United States are not adversely affected as a result of the new free trade agreements. Democrats and the White House (strong worker advocates) are pleased, but Republicans have said that they will challenge the benefits program. "Senator Orrin Hatch, the ranking Republican on the Finance Committee, said that the White House's strategy risks support for this critical job-creating trade pact in the name of a welfare program of questionable benefit at a time when our nation is broke." Binyamin Appelbaum, *White House and Congress Clear Trade Deal Hurdle*,

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supported by economic indicators reflecting the adverse effects on Mexican workers (often devastating effects, as in the case of agricultural workers) of a number of economic policies, certainly including forty years of neo-liberal economic policies.<sup>138</sup>

The conservative, pro-business group, on the other hand, argues that under the neo-liberal economic model adopted by Mexico in the early 1970s Mexico's economy has gained many benefits, and that continuing to promote those policies will be in the best interest of the country, including workers.<sup>139</sup> The social and economic values of this group are reflected in the March 2011 labor reform proposed in the Mexican Congress by the PRI.<sup>140</sup>

*E. Activism of Mexican Independent Unions and Independent Union Federations*

Moving toward enhanced enforcement of Mexico's labor laws might be possible through the increasing presence and strength of independent labor unions, notwithstanding the low union density Mexico has experienced in recent years.<sup>141</sup> Mexican workers are not passive and, according to some commentators, are more willing to organize work stoppages and protests than workers in the United States.<sup>142</sup> Labor unions ("*sindicatos*") are an important and politicized component of the labor market in Mexico, and are particularly strong within the public and industrial sectors.<sup>143</sup> Increased discontent among workers, particularly in view of the labor law reform proposed by the PRI in March 2011, forecasts increased labor union activity.<sup>144</sup>

Notwithstanding many obstacles Mexican workers have had to face in achieving this goal, in the last few decades they have successfully organized independent unions to secure rights and to slowly build an independent and progressive component of Mexican labor. The Authentic Labor Front ("*Frente Autentico de Trabajo*"—"FAT"), the Coalition for Justice in the Maquiladoras ("*Coalicion para Justicia en las Maquiladoras*"—"CJM"), the Border Committee of Women Workers ("*Comite Fronterizo de Obrer@s*"—"CFO"), Enlace, and the Workers Support Committee ("*Comite de Ayuda a los*

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N.Y. TIMES (June 28, 2011), [http://www.nytimes.com/2011/06/29/business/29trade.html?\\_r=1](http://www.nytimes.com/2011/06/29/business/29trade.html?_r=1). For an excellent discussion of the conceptual link between free trade agreements, workers rights, and human rights, see HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi Bonanomi eds., 2005).

138. See Thorsen & Lie, *supra* note 101 and accompanying text for a description of neo-liberal policies.

139. See *National Action Party (PAN)*, *supra* note 116 and accompanying text.

140. See *id.*

141. See Fairris & Levine, *supra* note 106, at 10, 11, 14, 16; COMM'N FOR LABOR COOPERATION, *supra* note 106.

142. See generally Bacon, *supra* note 126.

143. Stenzel, *supra* note 22, at 4.

144. Gardner, *supra* note 119; Bacon, *supra* note 126.

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*Trabajadores*”—“CAT”) have been instrumental in giving workers a voice to challenge the system.<sup>145</sup> Of these independent unions, the FAT may be the strongest and most active.<sup>146</sup> In fact, with the assistance of the FAT, some of these unions have won union contracts.<sup>147</sup> “The FAT and the National Union of Workers [(“*Sindicato Nacional de Trabajadores*”—“SNT”)], to which [the FAT] belongs, have made their own proposals for labor law reform.”<sup>148</sup>

The FAT, formed in 1960, has led the fight for workers’ rights, union democracy, and political reform.<sup>149</sup> In the 1960s and 1970s, the FAT and other advocates of union reform raised the idea of labor law reform and democratic reform within the unions (to permit them “to conduct democratic elections in their own unions, form independent unions, freely bargain” for collective bargaining agreements, and strike) as part of an overall effort to end the one-party system of government in Mexico.<sup>150</sup> Although the one-party system did not end until 2000,<sup>151</sup> the FAT should be regarded as perhaps the strongest independent federation of labor unions.

Since the 1990s, representatives of newer unions, sometimes termed the “independent”<sup>152</sup> and the “democratic”<sup>153</sup> union movement, have gained a position in the ongoing debate about workers’ rights, have succeeded in changing the terms of public discourse, and have even been part of the working sessions that Mr. Abascal convened to discuss his proposal of 1995 for labor law reform.<sup>154</sup> In view of this increasing presence, activism, and power of independent labor unions and independent federations of labor unions in Mexico headed by the FAT, it is reasonable to anticipate that they will continue to strongly oppose the labor law reform proposed by the PRI in March 2011.

In this connection, it is important to note that the economic interdependence shared by the United States, Canada, and Mexico through NAFTA has also permitted the creation of transnational union alliances that have the common mission of improving workers’ rights, and which help increase the power that

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145. Bacon, *supra* note 126.

146. *UE & Mexican FAT Federation Organize Mutual Support*, *supra* note 121. The FAT “is an independent federation of labor unions, worker owned cooperatives, and farmworker and community organizations.” *Id.* A women’s network operates in all of the FAT’s sectors and in its leadership. *Id.* The FAT “represents workers in over half the states in Mexico in manufacturing industries such as textiles and auto-parts.” *Id.* It also “represents workers in the transportation industry” nationwide, “and service workers in Mexico City.” *Id.*

147. Bacon, *supra* note 126.

148. *Id.*

149. *UE & Mexican FAT Federation Organize Mutual Support*, *supra* note 120.

150. LaBotz & Alexander, *supra* note 4, at 19.

151. *See id.*

152. An “independent union” is to be distinguished from an “official union” operating in the Mexican corporatist tradition. *See supra* notes 95-99 and accompanying text.

153. A “democratic union” is one whose leadership and goals are determined by its members. *See supra* text accompanying note 149.

154. *See supra* note 97 and accompanying text.

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local unions may be gaining in their respective countries.<sup>155</sup> For example, the FAT is allied with the United Electrical, Radio & Machine Workers of America (“UE”), and that alliance has undoubtedly helped the FAT gain strength in Mexico.<sup>156</sup> A UE member explained in 2001 that the goal of transnational union alliances is to identify locations in Mexico where jobs formerly held by workers in the United States have gone, and target workers in that location to promote union organization.<sup>157</sup> Although the UE recognizes that those jobs will not return to the United States, it tries to address what it views as exploitation in the United States by coordinating campaigns to improve wages and working conditions of Mexican workers.<sup>158</sup> It is also reasonable to assume that an additional goal of American unions is to warn American businesses considering relocation in pursuit of reduced labor costs that unions and higher labor costs may follow them. A recent example of the strength of transnational union alliances is the rapid mobilization of the International Metalworkers Federation in response to, and opposition to, the labor law reform proposed by the PRI in March 2011.<sup>159</sup>

In summary, Mexico’s labor laws and labor practices present an interesting paradox. On paper, the Mexican Constitution provides extensive and extraordinarily detailed worker protections, which are bolstered by decrees that provide procedures to implement the constitutional rights. In practice, however, Mexico’s corporatist tradition has generally subordinated workers’ rights to broader governmental goals. Mexico’s increasing interaction with the world, and NAFTA specifically, have led the government to embrace more flexibility for employers in the name of competitive efficiency; at the same time, the growing influence of domestic and international trade unions in Mexico suggests a future in which organized labor will be less complacent than was the case during the seven decades of PRI rule.

### III. THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION OF 1994 (“NAALC”)

NAALC<sup>160</sup> is the supplemental agreement appended to NAFTA<sup>161</sup> that was created to protect the rights of workers<sup>162</sup> in the three NAFTA countries (the

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155. *UE & Mexican FAT Federation Organize Mutual Support*, *supra* note 120.

156. *Id.*

157. Glynn, *supra* note 120, at slide 14.2.

158. *See id.*; *see also UE & Mexican FAT Federation Organize Mutual Support*, *supra* note 120.

159. *See supra* notes 119, 125, 135, and 146 and accompanying text.

160. NAALC, *supra* note 2.

161. NAFTA, *supra* note 5. The Trilateral Alliance comprised of the NAFTA members drafted the NAALC and appended it to the NAFTA on August 13, 1993. John P. Isa, *Testing the NAALC's Dispute Resolution System: A Case Study*, 7 J. GENDER SOC. POL'Y & L. 179, 181 n.17 (1999).

162. Much has been written about the effects of NAFTA on workers' rights. *See, e.g.*, John Cavanagh & Sarah Anderson, *Happily Ever NAFTA?*, FOREIGN POL'Y, Sept. 1, 2002, at 58; Timothy A. Wise & Kevin P. Gallagher, *NAFTA: A Cautionary Tale*, GLOBAL POL'Y F. (Oct. 24, 2004), <http://www.globalpolicy.org/>

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United States, Canada, and Mexico)<sup>163</sup> by providing a process through which NAFTA members are expected to enforce their domestic labor laws. NAALC is an important document because it is the first labor agreement ever appended to a free trade agreement (“FTA”),<sup>164</sup> and its existence reflects that considerations about worker rights, for the first time, are officially linked to a trade agreement.<sup>165</sup> In fact, the North American Free Trade Agreement Implementation Act made entry into NAALC a condition of participation by the United States in NAFTA.<sup>166</sup> Since 1994, when both NAFTA and NAALC became effective, the United States has entered into eight FTAs with other nations,<sup>167</sup> and concern for workers’ rights

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soecon/ffd/2002/1024caution.htm; TIMOTHY A. WISE, AMERICAS PROGRAM INTERHEMISPHERIC RESOURCE CENTER, NAFTA’S UNTOLD STORIES: MEXICO’S GRASSROOTS RESPONSES TO NORTH AMERICAN INTEGRATION (June 2003), available at <http://ase.tufts.edu/gdae/Pubs/rp/NAFTAsUntoldStoriesJune03TW.pdf>; Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 918-19 (1994); Shellyn G. McCaffrey, *North American Free Trade and Labor Issues: Accomplishments and Challenges*, 10 HOFSTRA LAB. & EMP. L.J. 449, 452 (1993). See generally CONFRONTING GLOBALIZATION: ECONOMIC INTEGRATION AND POPULAR RESISTANCE IN MEXICO (Timothy A. Wise et al. eds., 2003). The negative effects of free trade on workers, particularly those in developing countries, are said to rise to the level of human rights violations. See generally HUMAN RIGHTS AND INTERNATIONAL TRADE 313-16 (Thomas Cottier et al. eds., 2006).

163. While this Article discusses only the NAALC, three supplemental agreements were appended to NAFTA: NAALC, the North American Agreement on Environmental Cooperation, and the North American Agreement on Import Surges. On December 1, 1993, Congress authorized the participation of the United States in these three agreements as part of the implementing legislation for NAFTA. Jacqueline McFadyen, *NAFTA Supplemental Agreements: Four Year Review 1* (Inst. for Int’l Econ., Working Paper), available at <http://www.iie.com/publications/wp/print.cfm?researchid=145&doc=pub> (last visited Feb. 26, 2012).

164. The United States had entered into trade agreements before that unilaterally imposed labor standards on its trading partners, but it had never before entered into a mutual trade agreement with a major labor component attached. MARY JANE BOLLE, CONG. RESEARCH SERV., 97-861, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 1 (Oct. 9, 2001). Other agreements (enacted during the administrations of President Reagan and the first President Bush) involving trade in which provisions for the protection of workers were included are: The Caribbean Basin Initiative, the Generalized System of Preferences, the Reauthorized Overseas Private Investment Corporation Act, and the Omnibus Trade and Competitiveness Act of 1988, all of which linked the receipt of U.S. trade benefits to the trading partners’ adherence to worker rights. Betty Southard Murphy, *Commentary: NAFTA at 15: What About Worker Rights?*, 38 LAB. & EMP. L., Fall 2009, at 4, 4.

165. BOLLE, *supra* note 164. Although NAALC represents the first time that workers’ rights were directly tied to a FTA, concern for workers’ rights in the context of the relationship of labor rights and international commerce has existed for many years. For example, during the New Deal era, the United States advocated for enhanced international labor engagement, and the U.S. International Labor Relations Act (“ILRA”) of 1934 (a treaty, not a statute) was implemented. It contains obligations binding the United States, and thus became a tool through which international labor rights were protected. In 1935, the United States joined the International Labour Organization (“ILO”) (whose provisions were drafted in 1919 with the participation of U.S. officials), and its rules were incorporated into the ILRA. Finally, the origin of some of the labor obligations found in FTAs is the ILRA, which supports the proposition that, although not directly tied to FTAs, policy makers historically have been concerned about the potential adverse effects of international commerce on workers’ rights. Steve Charnovitz, *The U.S. International Labor Relations Act*, 26 ABA J. LAB. & EMP. L., Winter 2011, at 311, 312.

166. Jorge F. Perez-Lopez & Eric Griego, *The Labor Dimension of the NAFTA: Reflections on the First Year*, 12 ARIZ. J. INT’L & COMP. L. 473, 491 (1995).

167. *Id.*; *North American Free Trade Agreement (NAFTA)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last



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has been an important factor in the negotiations that preceded the implementation of those FTAs.<sup>168</sup> However, the highest protection given to workers in the context of FTAs is reflected in the most recently implemented FTA, the United States-Peru Trade Promotion Agreement of 2006,<sup>169</sup> which addresses workers' rights more specifically and thoroughly than any other FTA.<sup>170</sup>

### A. *The Birth of NAALC and Its Important Connection to NAFTA*

The primary opposition to NAFTA related to concerns arising from Mexico's low wages and low level of worker protection, as compared to the United States and Canada. In particular, NAFTA opponents asserted that, if the treaty were approved, competitive pressures would cost some American and Canadian workers their jobs, and would force down the overall level of protections enjoyed by workers in the developed NAFTA countries.<sup>171</sup> NAALC is best understood as a political response to this concern, and only secondarily as an economic and policy response.

#### 1. *Opposition to NAFTA*

To understand why NAALC was created as one of NAFTA's side accords, one must understand the importance of NAFTA and the significant debate that preceded its implementation in 1994. NAFTA was an unprecedented agreement of regional economic integration between two fully developed economic powers—one of them the largest economy in the world—and the economy of a “developing country.” Although Mexico has the fourteenth largest economy in the world and the second largest in Latin America,<sup>172</sup> at the time of the NAFTA

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visited Mar. 2, 2012). The nations include Australia; Bahrain; Chile; Jordan; Morocco; Oman; Singapore; and, through the U.S.-Central America-Dominican Republic Free Trade Agreement (“DR-CAFTA”), Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic. *Free Trade Agreements*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Mar. 2, 2012); *CAFTA-DR (Dominican Republic-Central America FTA)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Mar. 2, 2012).

168. See, e.g., *supra* note 137 (discussion regarding concern for workers in the United States in the negotiations for proposed free trade agreements with South Korea, Colombia, and Panama).

169. Charnovitz, *supra* note 165; *U.S.-Peru Trade Promotion Agreement of 2006*, OFF. U.S. TRADE REPRESENTATIVE, [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset\\_upload\\_file73\\_9496.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file73_9496.pdf) (last visited Mar. 2, 2012).

170. Charnovitz, *supra* note 165, at 318-19.

171. McCaffrey, *supra* note 162, at 465.

172. *The Mexican Economy at a Glance*, SECRETARIAT FOREIGN REL., <http://www.sre.gob.mx/index.php/the-mexican-economy-at-a-glance> (last visited Mar. 2, 2012) (citing a 2010 report from the International Monetary Fund).

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debates, Mexico was, and remains, a developing country.<sup>173</sup> In comparison to its NAFTA partners, Mexico's weak economy and low wages were the most significant factors that created much opposition to NAFTA in the United States.<sup>174</sup>

As its name implies, NAFTA was designed to establish a North American free trade zone, which made it the largest free trade zone in the world, covering at that time a population of over 384 million people.<sup>175</sup> While transnational investment and technology are important components of globalization, FTAs embody the terms under which globalization is to be accomplished.<sup>176</sup> Therefore, NAFTA's importance cannot be underestimated. NAFTA was important to the United States because of its expected impact on the U.S. economy, and because it was to be the model for subsequent FTAs between the United States and other nations in the Western Hemisphere.<sup>177</sup> Equally important, however, the United States viewed NAFTA as important for reasons beyond its direct economic impact on the United States. Americans have long felt comfortable about a close relationship with Canada, which is a country closely comparable to the United States in terms of culture, language, economic development, and political stability and freedom,<sup>178</sup> but the same cannot be said about a close relationship with Mexico. Therefore, having Mexico as a partner in this proposed regional economic integration, and the effect that Mexico's inclusion in NAFTA would have on the United States, was of tremendous importance to the United States.<sup>179</sup>

Membership in NAFTA was extremely important for Mexico as well. Domestically, NAFTA represented the culmination of a process of liberalization of the Mexican economy, which had started in the early 1980s.<sup>180</sup> Internationally, NAFTA increased Mexico's prestige because its membership in NAFTA represented recognition that Mexico's socioeconomic and political posture were

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173. *The World Factbook, Appendix B: International Organizations and Groups*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html#D> (last visited Mar. 2, 2012).

174. McCaffrey, *supra* note 162, at 465.

175. The combined population of the United States, Canada, and Mexico in 1994 was 383,824,529 million people. (U.S., 263,125,821; Canada, 29,330,812; and Mexico, 91,337,896). *International Programs*, U.S. CENSUS BUREAU, <http://www.census.gov/ipc/www/idbprint.html> (last visited Mar. 2, 2012).

176. See Ewell E. Murphy, Jr., *Charting the Transnational Dimension of Law: U.S. Free Trade Agreements as Benchmarks of Globalization*, 27 Hous. J. INT'L L. 47, 49-50, 57 (2004).

177. See *id.* at 64.

178. See IAN F. FERGUSSON, CONG. RESEARCH SERV., RL 33087, UNITED STATES-CANADA TRADE AND ECONOMIC RELATIONSHIP: PROSPECTS AND CHALLENGES (Jan. 29, 2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL33087.pdf>.

179. See M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RL 32934, U.S.-MEXICO ECONOMIC RELATIONS: TRENDS, ISSUES, AND IMPLICATIONS (Feb. 24, 2011), available at <http://www.fas.org/sgp/crs/row/RL32934.pdf>.

180. LaBotz & Alexander, *supra* note 4, at 17.

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sufficiently stable, and perhaps even sufficiently strong, to be worthy of such an important integration.<sup>181</sup>

Although some endorsed the prospect of an integrated regional economy, opposition to NAFTA was significant in the United States.<sup>182</sup> Generally speaking, conservatives (economists and business interests) strongly endorsed NAFTA because they viewed it as economically beneficial to all three nations.<sup>183</sup> By contrast, the left of the political spectrum, notably labor groups, as well as segments of the agriculture and manufacturing sectors whose business interests were threatened, strongly opposed NAFTA.<sup>184</sup> Opponents argued that linking the United States to Mexico would harm the United States because of Mexico's relatively low level of economic development, and that economic pressures would tend to force all three countries to the "lowest common denominator."<sup>185</sup> For example, it was urged that lesser governmental protection of workers' rights in Mexico would result in reduced rights of workers in the United States as well.<sup>186</sup> Concern over the adverse effects of NAFTA on workers' rights in the United States focused, principally, on two factors: loss of jobs and decline in wages.<sup>187</sup> The argument was that Mexico's poor working conditions, low wages, and lack of enforcement of labor laws would attract investment to Mexico, which would take jobs away from the United States and drive down wages in the United States.<sup>188</sup>

Concern for job losses in the United States as a result of NAFTA was significant. Opponents argued that just as labor is most valuable where capital is plentiful—which explains much of the differential between wage rates in poor and rich countries—so is capital most valuable where labor is abundant.<sup>189</sup> Thus, free trade and free movement of capital could be expected to lead owners of capital to move investments to countries where labor is plentiful and cheap, which NAFTA opponents saw reflected in the increasing tendency of American companies to "export jobs" to the Third World beginning in the mid-1980s.<sup>190</sup> Thus, opponents feared that NAFTA would encourage employers to move (or establish) their operations in Mexico, which would result in loss of American

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181. Oliver, *supra* note 66, at 64.

182. David Rosenbaum, *THE NATION*; *Good Economics Meet Protective Politics*, N.Y. TIMES, Sept. 19, 1993, at D5, available at <http://www.nytimes.com/1993/09/19/weekinreview/the-nation-good-economics-meet-protective-politics.html?pagewanted=all&src=pm>.

183. Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 939 (1994) (citing Rosenbaum, *supra* note 182) (noting that 300 economists had signed a letter to President Clinton in which they expressed their support for NAFTA).

184. *Id.*

185. Oliver, *supra* note 66, at 67 n.66.

186. See, e.g., McCaffrey, *supra* note 162, at 449, 465; see also Hagen, *supra* note 162.

187. McCaffrey, *supra* note 162, at 449, 465 (1993).

188. *Id.* at 449, 465.

189. Oliver, *supra* note 66, at 67

190. *Id.*

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jobs.<sup>191</sup> Opponents also argued that workers in the agricultural and manufacturing sectors in the U.S. economy would also lose their jobs because the United States would be flooded with foreign agricultural products and manufactured goods.<sup>192</sup>

As would be expected, politicians also participated in the debate about NAFTA. Then-candidate Bill Clinton and the Republican leadership supported NAFTA, but many others opposed it.<sup>193</sup> For example, presidential candidate Ross Perot argued that the United States would not benefit from entering into a free trade agreement with Mexico because “people who don’t have anything can’t buy anything.”<sup>194</sup> Regarding job losses, specifically, during a presidential debate in 1992, Perot warned of a “giant sucking sound” that would be heard in America, a metaphor he used to describe the significant number of jobs that he feared would be lost to Mexico under NAFTA.<sup>195</sup>

The effect that NAFTA would have on wages of workers in the United States also fueled opposition. Opponents argued that Mexico’s low wages would limit productivity in the three countries.<sup>196</sup> Specifically, they argued that economic theory supported the proposition that free-trade ideologies were directly related to low-wage strategies, which would lead to lower wages in the United States and Canada, thereby stifling productivity and income levels.<sup>197</sup>

## 2. *Creation and Inclusion of NAALC as NAFTA’s Side Agreement in Response to Concerns about NAFTA*

In a campaign speech in 1992, then-Arkansas governor and presidential candidate Bill Clinton announced his support for NAFTA, and stated that he was committed to the improvement of labor rights in Mexico, stressing the need for supplemental agreements on environmental and labor issues.<sup>198</sup> He stated that his vision of a trade policy for the twenty-first century was to maintain U.S. competitiveness and preserve the interests of workers, who inevitably are adversely affected by free trade.<sup>199</sup> Future-President Clinton envisioned a labor supplemental agreement that would create a labor commission to encourage high

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191. *Id.*

192. *See generally* Hagen, *supra* note 162, at 917-20.

193. Rosenbaum, *supra* note 182.

194. Christian Stracke, *Mexico—The Sick Man of NAFTA*, 20 *WORLD POL’Y J.* 29, 29 (2003), available at <http://www.worldpolicy.newschool.edu/journal/articles/wpj03-2/stracke.pdf> (quoting *Gore, Perot Challenge Each Other on NAFTA Money, Facts*, BLOOMBERG NEWS WIRE, Nov. 19, 1993).

195. Johnson, *supra* note 183, at 951 n.55 (citing ROSS PEROT & PAT CHOATE, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED NOW!* 41 (1993)).

196. Oliver, *supra* note 66, at 67.

197. F. Ray Marshall, *The Implications of the North American Free Trade Agreement for Workers*, CENTER FOR IMMIGR. STUD. (Feb. 1993), <http://www.cis.org/articles/1993/back293.html>.

198. Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord After Five Years of Operation and Suggested Improvements*, 16 *LAB. LAW.* 319, 319 (2001); McFadyen, *supra* note 163, at 1.

199. LaSala, *supra* note 198; McFadyen, *supra* note 163, at 1.

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worker standards, worker safety, education and training programs, and develop minimum standards for the region.<sup>200</sup> He also stated that the supplemental labor agreement should require each country to enforce its own labor standards and provide forums for resolving labor disputes caused by lax administration or enforcement of national laws.<sup>201</sup> As part of the dispute resolution process, those “forums would recommend remedies, including fines, in cases of noncompliance.”<sup>202</sup>

After President Clinton’s inauguration in January 1993, his trade representatives negotiated NAALC with their counterparts in the Canadian and Mexican governments.<sup>203</sup> NAALC allowed President Clinton to follow through with his stated support of NAFTA and his vision of free trade, while addressing opposition to NAFTA from labor constituencies in the United States.<sup>204</sup> NAALC may also have been necessary to secure Congressional approval of NAFTA.

#### *B. Goals of NAALC*

In essence, NAALC has the goals of mediating labor disputes and improving working conditions in the three NAFTA countries through a process of cooperation among them, and the creation of a labor commission comprised of each country’s representatives.<sup>205</sup> More specifically, NAALC’s goals were to create new employment opportunities and improve both “working conditions and workers’ living standards” in the United States, Canada, and Mexico; “to protect, enhance and enforce basic workers’ rights”;<sup>206</sup> and for each NAFTA member to promote compliance and effective enforcement of its own labor laws.<sup>207</sup> Thus, through NAALC, each signatory committed to promote and enforce its own labor laws and standards, in part by accepting the duty to cooperate, exchange information, and establish and enforce domestic labor laws.<sup>208</sup> The goals and the

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200. LaSala, *supra* note 198; McFadyen, *supra* note 163, at 1.

201. LaSala, *supra* note 198; McFadyen, *supra* note 163, at 1.

202. McFadyen, *supra* note 163, at 1 (summarizing a presentation given by then-Governor Bill Clinton at North Carolina State University on October 5, 1992, entitled “Expanding Trade and Creating American Jobs”).

203. Additional demands from the United States put Mexican officials in a difficult position because they had used all their bargaining power in negotiating NAFTA, and they viewed NAALC as evidence of American politicians catering to the pressure exerted by labor interests. Mexican negotiators viewed the inclusion of NAALC as a side agreement to NAFTA as an act of disrespect to Mexico’s national sovereignty but realized that they had no choice but to give in. Suzanne Simon, *Framing the Nation: Law and the Cultivation of National Character Stereotypes in the NAFTA Debate and Beyond*, 30 POL’Y & L. ANTHROPOLOGY REV. 22, 28 (2007).

204. *Id.*

205. *See generally* NAALC, *supra* note 2.

206. *Id.*

207. LaSala, *supra* note 198, at 319.

208. Teresa R. Favilla-Solano, Comment, *Legal Mechanisms for Enforcing Labor Rights Under NAFTA*, 18 U. HAW. L. REV. 293, 316-17 (1996).

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structure of NAALC closely follow the vision President Clinton had for the labor supplemental agreement, about which he spoke in his speech on free trade and labor conditions in 1992.<sup>209</sup>

*C. Administrative Structure, Rights Protected, and Enforcement Mechanism*

NAALC provides a detailed outline of the labor rights it protects, as well as of the administrative structure and procedures that are to protect those rights.<sup>210</sup> NAALC protects both rights that are collective in nature (the rights to organize and to strike, for example) and those that are individual (the rights to safe working conditions, and to minimum wage and workers' compensation protections, for example).<sup>211</sup> Significantly, NAALC provides different procedures and enforcement mechanisms according to the right being protected, with the lowest level of enforcement mechanisms afforded the labor rights that are collective in nature.<sup>212</sup>

*1. Administrative Structure*

NAALC divides its administrative bodies into two groups. One group, the Permanent Administrative Structure, is comprised of the Commission for Labor Cooperation ("CLC"), which is made up of a Ministerial Council of Labor Ministers of the three NAFTA countries, plus a Secretariat, a fifteen-member support staff for the Ministerial Council.<sup>213</sup> NAALC requires each NAFTA government to establish a National Administrative Office ("NAO") headed by a Secretary within its Labor Department or Ministry, and each NAO has a National Advisory Committee and a Government Committee.<sup>214</sup> NAOs are components of the Permanent Administrative Structure, and serve as liaisons between the domestic government agencies involved in the process, the NAOs of the other NAFTA countries, and the Secretariat.<sup>215</sup> NAOs respond to public requests regarding labor matters in the other NAFTA countries and help the Commission fulfill its cooperative tasks.<sup>216</sup>

The other group is that comprised of Temporary Bodies, which are the Evaluation Committee of Experts ("ECE") and the Arbitral Panel ("AP"). These are the principal administrative bodies in charge of enforcement.<sup>217</sup>

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209. See *supra* notes 198-202 and accompanying text.

210. See generally BOLLE, *supra* note 164.

211. *Id.* at 4.

212. See *id.*

213. *Id.* at 7.

214. *Id.*

215. *Id.*

216. See generally *id.*; McFadyen, *supra* note 163, at 6.

217. BOLLE, *supra* note 164, at 5.

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### 2. Rights Protected by NAALC

To fulfill its stated goals, NAALC includes eleven "Labor Principles," which the three signatories commit to promote through enforcement of their own labor laws: (1) freedom of association and protection of the right to organize, (2) right to bargain collectively, (3) right to strike, (4) abolition of forced labor, (5) abolition of child labor, (6) minimum wage, hours of work, and other labor standards, (7) non-discrimination, (8) equal pay for equal work, (9) occupational safety and health, (10) workers' compensation, and (11) migrant worker protection.<sup>218</sup> Each NAALC country committed to "effectively enforce its own domestic labor laws related to these eleven labor principles, and agreed to be subject to critical reviews of its performance and progress by the other two countries."<sup>219</sup>

### 3. NAALC's Enforcement Procedures

Complaints of violations of labor principles (referred to as "submissions") are resolved through three different enforcement procedures. The least punitive enforcement procedure calls for the NAOs, the Secretariat, and the Ministerial Council to engage in "discussion" to enforce labor principles. The next enforcing mechanism starts with "discussion" among the NAOs, the Secretariat, and the Ministerial Council. If that discussion does not result in compliance, "evaluation" by an ECE is the next step. The most punitive form of enforcement involves "discussion" and "evaluation" as above, and sanctions determined by the Arbitral Panel, if the first two steps did not result in compliance.<sup>220</sup>

The eleven labor principles contained in NAALC are enforced through one of the three enforcement procedures described above.<sup>221</sup> Importantly, however, sanctions can be imposed for violations of only three of the eleven principles.<sup>222</sup> Submissions for violations of labor principles regarding (1) the freedom of association and protection of the right to organize, (2) the right to bargain collectively, and (3) the right to strike are addressed by following the least punitive enforcement procedure, which is "discussion" of the submission by the NAOs, Secretariat, and Ministerial Council.<sup>223</sup>

Submissions for violations of (1) the prohibition of forced labor, (2) minimum employment standards pertaining to overtime pay, (3) elimination of nondiscrimination, (4) equal pay for women and men, (5) compensation in cases

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218. Lance A. Compa, *NAFTA's Labour Side Agreement and International Labour Solidarity*, in *PLACE, SPACE AND THE NEW LABOUR INTERNATIONALISMS* (P. Waterman & J. Wills eds., 2001).

219. *Id.* at 3.

220. BOLLE, *supra* note 164, at 7.

221. *Id.*

222. Compa, *supra* note 218, at 3.

223. BOLLE, *supra* note 164, at 4, 7.

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of occupational injuries and illnesses, and (6) protection of migrant workers are enforced through the middle form of enforcement, which is “discussion” among the NAOs, Secretariat, and Ministerial Council, plus “evaluation” by an ECE, if “discussion” does not lead to resolution of the submission.<sup>224</sup>

Finally, submissions for violations of (1) labor protections for children and young persons, (2) minimum employment standards pertaining to minimum wage, and (3) prevention of occupational injuries and illnesses are the only violations that could result in sanctions being imposed by the AP, but they first have to go through “discussion” and “evaluation.”<sup>225</sup> If an independent AP does become involved, it will (or, at least, is supposed to) fine an offending government for a persistent failure to effectively enforce its domestic labor laws.<sup>226</sup> The panel can apply trade sanctions on the firm, industry, or sector that has engaged in a persistent pattern of violations of workers’ rights,<sup>227</sup> but the process that may result in sanctions against a country that does not enforce its labor laws can take more than two years.<sup>228</sup>

The process of evaluation begins by reviewing a submission of complaint to the NAO in Mexico and Canada or the Department of Labor’s Office of Trade and Labor Affairs (“OTLA”) in the United States.<sup>229</sup>

If the complaint is accepted, the next steps include, if needed: ministerial consultations, establishment of an independent Evaluation Committee of Experts, a report submitted to the Commission for Labor Cooperation, and the establishment of an Arbitral Panel. If the country does not follow the action plan developed by the Arbitral Panel, the Panel can impose a fine or sanctions.<sup>230</sup>

Submissions for violations of any of the labor principles are filed and processed through the multi-level administrative mechanism described above.<sup>231</sup> These administrative bodies preside over public hearings, issue written reports, participate in government-to-government consultations, conduct independent evaluations, and issue nonbinding recommendations.<sup>232</sup>

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224. *Id.*

225. *Id.*

226. *Id.* at 7.

227. *Id.* at 4, 7. For a detailed explanation of the intricate enforcement and dispute resolution process, see *id.* at 4-7; LaSala, *supra* note 198, at 321-26; Favilla-Solano, *supra* note 208, at 316-22.

228. BOLLE, *supra* note 164, at 5.

229. *Labor, Immigration, and the North American Free Trade Agreement (NAFTA)*, USLEAP, [http://www.usleap.org/files/NAFTA%20Fact%20Sheet\\_Jan%202011.pdf](http://www.usleap.org/files/NAFTA%20Fact%20Sheet_Jan%202011.pdf) (last visited Mar. 2, 2012).

230. *Id.*

231. BOLLE, *supra* note 164, at 4, 7.

232. Compa, *supra* note 218, at 3.



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### D. Assessment of NAALC

NAALC has undoubtedly helped bring workers' rights to the attention of government officials, policy-makers, multi-national corporations, domestic businesses, and, certainly, workers in the three member countries, and it has done so by establishing a system of communication and cooperation among the three countries.<sup>233</sup> Although implementation of the NAALC was a significant development in the history of trade agreements, it has not been altogether satisfactory. NAALC has accomplished much by promoting the goal of international engagement and concern for workers' rights, and by acknowledging the relationship between international trade and the need for respect for labor rights. In Professor Compa's view, "NAFTA's labor side agreement has given rise to a varied, rich experience of international labor rights advocacy."<sup>234</sup> Notwithstanding these accomplishments, criticism of NAALC is voiced both by workers' rights advocates and by those opposed to heightened worker protection.

#### 1. Criticisms of NAALC by Pro-Worker Advocates

Workers' rights advocates argue that the NAALC does not go far enough in attempting to fulfill its intended goal of protecting the rights of workers in the three member countries, for several important reasons. First, it is weak and non-invasive because it does not require its members to adopt any new worker laws or conform to international standards to be followed by all members; NAALC only requires that each country enforce its own labor laws. Therefore, NAALC protects the sovereignty of each of the member countries more than workers' rights.<sup>235</sup>

Second, NAALC is said to be ineffective because it purports to protect workers' rights only through a system of mutual obligation and mutual responsibility, whose most powerful tool is "cooperative consultation."<sup>236</sup>

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233. *Id.*

234. *Id.* at 4.

235. While this may, indeed, be an important weakness of NAALC, it is likely that neither NAFTA nor NAALC would have been implemented if their signatory countries had been required to adopt, implement, and enforce a uniform labor law applicable to the three countries. See Simon, *supra* note 203, at 28 regarding the reaction of Mexican trade negotiators to the demand for a labor rights agreement.

236. BOLLE, *supra* note 164, at 7. Although the system of "cooperative consultation" among the three countries is not as effective as other mechanisms could be, it is important to note that thirty-eight submissions were filed under NAALC between 1994 and 2006. Two of these submissions were against Canada, eleven against the United States, and twenty-four against Mexico. Thirty-two of the thirty-eight submissions went through all the levels of evaluation for which they were eligible, and twenty-two of those were accepted for review. Of these twenty-two cases that reached Ministerial Consultations, nine resulted in no further action, three in outreach, six in policy change, and four in firm levels of redress. No case has ever passed beyond Ministerial Consultations. No submissions were filed between 2006 and 2009, and in January 2010 one complaint against Mexico was filed. See generally *Labor, Immigration, and the North American Free Trade Agreement (NAFTA)*, *supra* note 229 (citing Kimberly A. Nolan García, *The Evolution of US-Mexico Labor*

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Third, NAALC is only a *supplemental* agreement to NAFTA, rather than being *part of* NAFTA and enforceable *under* NAFTA.<sup>237</sup>

Fourth, enforcement procedures are slow and cumbersome. As noted above, the multi-step set of procedures contemplates “submissions,” “discussions” at various levels, “evaluations,” and, critics argue, long-delayed and ineffectual real action.

Fifth, critics argue that, by its terms, NAALC cannot forcefully address many serious problems. Of the eleven labor principles, sanctions can be imposed for violations of only three, and then only in the case of “persistent patterns” of violations.<sup>238</sup> Obviously, sanctions will not often be imposed.<sup>239</sup> Importantly, what might be viewed as the three most basic of all labor rights (the rights to organize, bargain collectively, and strike) are the least enforceable of the eleven labor principles, because they are subject only to “discussion” among the NAOs, the Secretariat, and the Ministerial Council.<sup>240</sup>

Finally, NAALC does not go far enough, critics assert, because the maximum disciplinary measure for a *persistent pattern of violations* is only suspension of a portion of NAFTA benefits for one year.<sup>241</sup> And, of course, such a sanction may be only theoretical; it has never been imposed.<sup>242</sup>

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*Cooperation (1994-2009): Achievements and Challenges*, 39 POL. & POL'Y 91 (2010)).

237. Compa, *supra* note 218, at 3.

238. Frank H. Bieszcza, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHL-KENT L. REV. 1387, 1393 (2008), available at <http://www.cklawreview.com/wp-content/uploads/vol83no3/Bieszcza.pdf>.

239. See generally *Labor, Immigration, and the North American Free Trade Agreement (NAFTA)*, *supra* note 229 (citing Kimberly A. Nolan García, *The Evolution of United States-Mexico Labor Cooperation (1994-2009): Achievements and Challenges*, 39 POL. & POL'Y 91 (2010) (stating that no case has ever passed beyond Ministerial Consultation)).

240. BOLLE, *supra* note 164, at 9. Although attempting to settle a labor dispute by “discussion” among the administrative actors of NAALC may not be thought to be sufficiently effective, referring to NAALC, a Mexican worker, member of the strong, Mexican independent union FAT (*see supra* notes 146-51 and accompanying text) has stated: “‘Now, when we have a submission someone in the Mexican government will call and want to know why this, why that. They don’t ignore it anymore, and this didn’t exist before. We spoke but they didn’t listen, we existed but they didn’t see us. I think now that they listen, and they listen because what we do hurts them. And what we do is within the law.’” Benedicto Martinez, FAT, 7/27/99.” Glynn, *supra* note 120, at 9. Further, those submissions that reached Ministerial Consultations highlighted the controversial labor issues presented in those submissions, and resulted in pressuring the governments and corporations involved into resolving the issues. *Id.*

241. BOLLE, *supra* note 164, at 8. “The maximum penalty that may be imposed for any violation is .007% of the total goods traded between the parties for the previous year.” Cody Jacobs, Note, *Trade We Can Believe In: Renegotiating NAFTA’s Labor Provisions to Create More Equitable Growth in North America*, 17 GEO. J. ON POV. L. & POL'Y 127, 131-32 (2010).

242. See *supra* note 239.

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### 2. Criticisms of NAALC by Business

An initial criticism of NAALC from business groups is that the scope of the rights it protects is too broad.<sup>243</sup> Pro-business critics argue that the NAALC goes too far because it includes not only the five worker rights incorporated into U.S. trade laws<sup>244</sup> and the six worker rights identified as core labor standards by the International Labour Organization (“ILO”),<sup>245</sup> but also workers’ compensation and migrant worker protection.<sup>246</sup>

Remaining pro-business criticisms of NAALC are, essentially, that improved worker protections will increase the cost of doing business.<sup>247</sup> First, NAALC prevents businesses from producing and selling their goods at low prices because compliance with the labor principles of NAALC results in higher wages and, therefore, higher production costs.<sup>248</sup> Second, consumers will be harmed by the resulting higher prices if they pay them, and businesses will lose sales if they do not.<sup>249</sup>

The final argument is that NAALC actually harms the workers it is supposed to protect because it deprives them of their comparative advantage. Workers in developing countries should not advocate for increased labor rights, these critics assert, because workers around the world are all converging in a common labor pool—more protection for workers in a given country, such as Mexico, discourages potential investors, who instead locate their production operations in another country.<sup>250</sup> According to this argument, the primary losers from an effective NAALC would be Mexican workers.

## IV. PROSPECTS FOR BETTER ENFORCEMENT OF WORKERS’ RIGHTS IN MEXICO

Article 123 of Mexico’s Constitution and the LFT give Mexican workers and their unions substantial rights.<sup>251</sup> These rights were to be further protected by

243. See generally BOLLE, *supra* note 164.

244. The five basic worker rights included in U.S. trade laws are defined as internationally recognized worker rights in Section 502(a)(4) of the Trade Act of 1974, and are: 1) the right of association; 2) the right to organize and bargain collectively; 3) prohibition of forced or compulsory labor; 4) a minimum age for employment of children; and 5) acceptable conditions of worker rights regarding minimum wages, hours of work, and occupational safety and health. *Id.* at 3.

245. The six core ILO labor standards are: 1) and 2) the right to organize and bargain collectively (with an implied right to strike), 3) prohibition of forced labor, 4) minimum age for employment, 5) equal pay for men and women, and 6) freedom from employment discrimination. *Id.*

246. *Id.*; Compa, *supra* note 218, at 2-3.

247. BOLLE, *supra* note 164, at 8.

248. See generally *id.*

249. See generally *id.*

250. See *id.* at 2, 15.

251. See Torriente, *supra* note 19, (Guarantees under Article 123); see also Posthuma et al., *supra* note 29, at 106 (discussing role of labor unions).

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NAALC, which binds Mexico to enforce its labor laws and provides for potential international sanctions if it fails to do so.<sup>252</sup>

The reality, however, is quite different. Mexico's labor laws have never been enforced as effectively as the drafters of Article 123 contemplated, due to a variety of reasons, including the traditional weakness of Mexican unions and the nature of the average Mexican worker.<sup>253</sup> As discussed above, most unions have been "official" unions co-opted by Mexico's traditional "corporatist" system, particularly during the seventy years of PRI dominance (1930-2000).<sup>254</sup> Even unions that do not fall in this category continue to be weak and ineffective, and vulnerable to being influenced by the government to a lesser or greater degree.<sup>255</sup> In addition, the nature of the average Mexican worker may not be conducive to aggressive assertion of workers' rights. The average Mexican worker simply is not aware of the labor laws that protect him/her, and does not, therefore, challenge the poor, and often dangerous, conditions in which he/she works or the low wages he/she is paid.<sup>256</sup> Workers' ignorance about their rights is particularly prevalent in the population of low-skilled workers, who have a low level of formal education.<sup>257</sup> Moreover, most Mexican workers have been socially and economically disadvantaged from birth, and do not know how to assert their rights, including labor rights.<sup>258</sup> Finally, workers' ignorance about their rights, perhaps coupled with understandable cynicism about the political and judicial systems, leads them to resign themselves to the status quo, and generally stay away from any group that may want to advocate for worker rights.<sup>259</sup> Workers who are uninformed about the laws that protect them, or who doubt that these laws would be enforced, fear that participating in meetings organized by worker advocacy groups will lead their employer to terminate them, so they do not get involved.<sup>260</sup>

NAALC has also proven to be ineffective in fulfilling its goal of protecting the rights of workers in Mexico (and the United States and Canada). Although twenty-four complaints have been filed with NAOs against Mexico, NAALC has

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252. See Appelbaum, *supra* note 137.

253. See Torriente, *supra* note 19, (Guarantees under Article 123); see also Posthuma et al., *supra* note 29, at 106 (discussing role of labor unions).

254. See ZAMORA ET AL., *supra* note 7, at 417.

255. For example, in June 2000, in Rio Bravo, a city in the northern State of Tamaulipas across the border from McAllen, Texas, female employees who demonstrated in favor of forming an independent union were reportedly beaten by police. Ultimately, by this account, the employees did not vote for the union because they were denied a secret ballot and forced to vote openly in the presence of management officials. Cavanagh & Anderson, *supra* note 162, at 58-59.

256. See *id.*

257. See *id.*

258. See *id.* See generally WISE, *supra* note 162 (discussing ineffectiveness of NAFTA).

259. See Cavanagh & Anderson, *supra* note 162, at 58-59.

260. See *id.*

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not significantly increased protection of workers in Mexico.<sup>261</sup> NAALC's ineffectiveness in fulfilling its purpose is caused by its enforcement procedures, which are slow and cumbersome.<sup>262</sup> In addition, NAALC fails to impose effective sanctions against a government that does not live up to its treaty obligation to enforce its own labor laws.<sup>263</sup>

Workers' rights in Mexico have further eroded over the past thirty years as the government, and even some unions, have moved toward a pro-employer policy of "flexibilization."<sup>264</sup> This policy reflects the Mexican government's decision to seek economic integration with the world (through FTAs and otherwise) with the goal of encouraging foreign and domestic direct investment by offering a low-cost labor environment.<sup>265</sup>

Thus, Mexican workers face a depressing reality. One's initial reaction to this disheartening situation is to conclude that the priorities of the Mexican government are misplaced, that its insensitivity toward the plight of workers must stop, and that the government must be pressured to better enforce the constitutional guarantees that would improve the conditions of Mexican workers. Upon careful consideration, however, one might conclude that better enforcement of labor laws at this time, or in the near future, will be difficult to accomplish. Three important questions must be asked to objectively evaluate the prospects for better enforcement of workers' rights in Mexico. First, whether, taking into consideration the significant economic and social problems Mexico has faced in the last decade, and will likely face for the foreseeable future, one can realistically expect that better enforcement of workers' rights will be a priority of Mexican policymakers.<sup>266</sup> Second, whether, in view of the strong interdependence of the economies of the United States and Mexico, as well as considerations of Mexico's sovereignty, one can realistically expect that better enforcement of workers' rights will be achieved with stronger sanctions through NAFTA and/or NAALC. And, third, whether a "bottom up" approach<sup>267</sup> to create

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261. *Labor, Immigration, and the North American Free Trade Agreement (NAFTA)*, *supra* note 229.

262. *See generally* BOLLE, *supra* note 164 (discussing effect of NAFTA); Garcia, *supra* note 236 (discussing inadequacy of NAFTA enforcement and protections).

263. *See* BOLLE, *supra* note 164; *see generally* *Labor, Immigration, and the North American Free Trade Agreement (NAFTA)*, *supra* note 229 (citing Kimberly A. Nolan Garcia, *The Evolution of US-Mexico Labor Cooperation (1994-2009): Achievements and Challenges*, 39 POL. & POL'Y 91 (2010)).

264. *See* Stone, *supra* note 108.

265. *See id.* at 79-86.

266. A simple analogy might be my approach to exercise. I might think about exercising only after I have taken care of time-sensitive professional and personal obligations I face daily. Because it is difficult to get caught up on *all* issues that seem more pressing than exercise, exercising does not ever make it to my radar screen.

267. "Bottom-up" approach is a term used in administrative law to refer to rules issued by administrative agencies that are initiated by recommendations made by the agency staff. WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES* 49-50 (4th ed. 2010). Staff members may suggest that a rule is necessary when they identify problems that the agency should address. *Id.*

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pressure from within Mexico<sup>268</sup> by labor grassroots movements, demonstrations, strikes, etc., might prove to be a better strategy to bring about better enforcement of labor rights than the “top down” approach<sup>269</sup> of imposing stronger trade sanctions and/or conditions on Mexico through international, external mechanisms embodied in NAFTA and/or NAALC or other supranational procedures.

For reasons explained in this section, a possibility exists that better enforcement of workers’ rights in Mexico may result from supranational norms and enforcement mechanisms coupled with well-organized and well-funded “bottom-up” calls from Mexican workers for better enforcement of labor rights.

*A. Better Enforcement of Workers’ Rights is Unlikely in the Foreseeable Future Because of Economic and Social Concerns to Which the Mexican Government Gives Priority*

Why is improvement of workers’ rights unlikely? In essence, the problem is, principally, one of money. It is doubtful that, if Mexico were as wealthy as the United States or Canada, its government officials’ deliberate policy would be to under-enforce Mexican workers’ constitutionally guaranteed labor rights. Rather, Mexican policymakers for many years have adopted pragmatic economic policies to help Mexico’s economy stabilize, and, hopefully, grow. Policymakers may reason that, once the economy improves, workers’ conditions will improve as well.

The best example of this reasoning was Mexico’s strong desire to become a member of NAFTA. Domestically, membership in NAFTA was significant for Mexico because it represented the culmination of a process of liberalization of the Mexican economy that started in the early- to mid-1980s.<sup>270</sup> Internationally, membership in NAFTA was also important because that membership reflected international recognition that Mexico’s socioeconomic and political postures were sufficiently stable to be worthy of such an important, and unprecedented, economic integration.<sup>271</sup> The Mexican government had anticipated and expected economic shocks from the effects of NAFTA to be felt in the labor and other sectors (although no one seems to have anticipated the devastating impact on the agricultural sector), but it felt that its membership in NAFTA was the right economic decision in the long term, even if in the short term some sectors of the

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268. Analogously, if I have been diagnosed with diabetes as a result of not exercising for decades, I will pay much more attention to exercise and give it high priority along with the other issues I must address every day.

269. “Top-down” approach refers to proposals/requests made to administrative agencies to issue rules from “top” external sources. In the context of U.S. federal administrative law, for example, the two “top” external sources are the White House and Congress. FUNK ET AL., *supra* note 267, at 50.

270. Trade Policy Review Body Report, *Trade Policy Review: Mexico*, WT/TPR/G/97 (Mar. 15, 2002).

271. Oliver, *supra* note 66, at 62-63.

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economy would be adversely affected.<sup>272</sup> Mexico's membership in NAFTA solidified its commitment to trade and investment.<sup>273</sup> Thus, for practical economic reasons, Mexican policymakers have opted to implement economic policies that adversely affect the labor sector directly or indirectly, and will probably continue to do so.

Possible explanations for under-enforcement of Mexican labor law are not limited to recent economic strategic policies. Serious economic and social concerns that Mexico has faced for decades have significantly contributed to the relatively low importance that the Mexican government has given to the issue of workers' rights.

### *1. Economic Concerns*

#### *a. Concern About Securing Comparative Advantage of Mexican Workers Over Other Workers in Developing Countries*

The classic economic theory of "comparative advantage" underlies free trade, FTAs, and, in general, globalization. Comparative advantage argues that two nations can improve joint production and consumption through specialization, even when one of them is more efficient than the other in all lines of production.<sup>274</sup> For example, it may be that a physician can draw blood from a patient faster and better than a licensed practical nurse ("LPN"). Even so, it is more efficient for the LPN to draw patients' blood because the wage/salary of the LPN is much lower than that of the physician. Thus, the LPN would "specialize" in drawing patients' blood and the physician would perform surgeries. When applied to international economies at significantly different levels of development, such as the economies of the United States and Mexico, this theory of comparative advantage suggests that in the context of competitive markets, trade encourages specialization, and thereby produces mutually beneficial outcomes.<sup>275</sup>

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272. *Id.* Experts writing about NAFTA's effects believed that economic conditions in Mexico would get worse before they got better. They argued that as Mexico industrialized and modernized its agriculture, poor economic conditions, increased inequalities, and more migration would be seen in the short run. Many experts argued, however, that divergence in development patterns was a prelude to the convergence in development of the three signatories of NAFTA that would ultimately follow. *See, e.g.,* James F. Hollifield & Thomas Osang, *Trade and Migration in North America: The Role of NAFTA*, 11 L. & BUS. REV. AM. 327, 340 (2005).

273. ZAMORA ET AL., *supra* note 7, at 38.

274. N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 50-57 (3d ed. 2004).

275. Even within a country, the theory of comparative advantage would lead us to expect the creation of productive clusters in local communities and regions. ALEJANDRO FOXLEY, *MARKET VERSUS STATE: POSTCRISIS ECONOMICS IN LATIN AMERICA* 26 (2010). Based on an assessment of their strengths and weaknesses, regions can identify areas in the international economy in which they can specialize more efficiently and compete more successfully. *Id.* Joint funding from public and private entities of each region can be used to design a plan that is suited for the region's comparative advantages to improve the qualifications of its workforce. *Id.*

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Thus, for example, low-skilled, low-wage workers in Mexico might benefit by specializing in the manufacture of spare parts in an assembly line. Even if more highly paid American workers could perform such routine work faster and better, the lower wages paid to Mexican workers might give them a comparative advantage.

Mexican economic policymakers want to secure this comparative advantage that Mexican workers have, in order to attract and stimulate foreign and domestic direct investment in Mexico. This comparative advantage leads to a competitive advantage, which is what businesses seek, and what Mexico wants to offer.

Essentially, therefore, Mexico is pursuing a low-wage strategy, at least in the short run.<sup>276</sup> A policy of heightened workers' rights competes with this goal and other macroeconomic policies of neo-liberalism that seek to stimulate the Mexican economy. If Mexican labor law were to require these investors to pay higher wages, build safer plants, have limited working schedules, and, in general, comply with the strong and broad constitutional provisions of Article 123, many investors would not establish their operations in Mexico, or would relocate them elsewhere. Decreased foreign and domestic direct investment would significantly hurt the Mexican economy as a whole, and individual workers as well, because jobs that might otherwise be available as a result of direct investment projects would have moved to another country with lower production and labor costs. This approach can be viewed as beneficial to Mexican workers, on the assumption that most would prefer to have a job, even if it pays low wages and requires working in unsafe plants, than to be protected by strictly enforced labor laws and have no job at all.<sup>277</sup>

As the theory of comparative advantage would suggest, benefits from offering *relatively* low wages can be seen from the effects of Mexico's stagnant wages as compared to the growing wages paid Chinese workers. Average Chinese manufacturing wages at close to \$2.00 per hour in September 2010 were only fourteen percent less than manufacturing wages in Mexico at the same time.<sup>278</sup> In dollar terms, Chinese manufacturing salaries "jumped 2.6 times from

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276. Policymakers have an important role to play in creating incentives to attract foreign (and domestic) direct investment in nontraditional categories that create opportunities for new technological developments, permit workers to learn new skills, and open new markets. *Id.*

277. It is argued, however, that little evidence exists to support the argument that improved working conditions lead to job losses or to relocation of companies. JODY HEYMANN & ALISON EARLE, *RAISING THE GLOBAL FLOOR: DISMANTLING THE MYTH THAT WE CAN'T AFFORD GOOD WORKING CONDITIONS FOR EVERYONE* 14 (2010). The authors conclude that good workplace policies are not linked to higher national unemployment rates, but that, to the contrary, strong worker rights markedly enhance the quality of work and improve working adults' ability to keep their jobs while meeting their own needs and those of their families. *Id.* at 14-15. The authors also challenge the proposition that better working conditions are inconsistent with competitive advantage, and assert that no evidence supports this proposition. To the contrary, they argue that workplace benefits are only a small fraction of the costs of production, costs of better working conditions are small relative to wages and wage differentials, and that increased productivity due to better working conditions can quickly offset minor costs incurred in implementing worker benefits. *Id.* at 15.

278. Thomas Black & Carlos Manuel Rodriguez, *Mexico Beats China as U.S. Firms Seek Labor*, ARK.



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2002 to 2008, while Mexican wages rose only 7.5 percent in dollars from 2002 to 2009.”<sup>279</sup> Mexico is thus regaining some of the manufacturing jobs it lost to China in the last decade, in large part because China increased its wage rates.<sup>280</sup>

Low wages are not the only factor, of course. For example, U.S. businesses are attracted to relocating their operations to Mexico because it is cheaper to bring manufactured goods from Mexico to the United States than from China.<sup>281</sup> In addition to Mexico's geographic proximity, American manufacturing companies like the fact that Mexico presents relatively few labor problems, such as strikes.<sup>282</sup> Mexican policymakers may view the present period as a critical moment for Mexico to attempt to recapture the jobs it has lost to China, and to continue to strive to have a comparative advantage over workers throughout the world who are competing for manufacturing jobs. In comparison with such goals, policymakers are unlikely to place great importance on enforcing the labor rights specified in the Mexican Constitution.

*b. Concern About Potential High Rates of Under- or Unemployment in Mexico*

Although unemployment rates in Mexico have remained relatively low from an international perspective in recent years,<sup>283</sup> these figures are likely to increase, not only because of economic dislocations caused by the worldwide recession, but also because a number of Mexican workers who have been living in the

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DEMOCRAT GAZETTE, Sept. 12, 2010, at G-1; *see also* Will Weissert, *Jobs Are Returning to Mexican Border*, ARK. DEMOCRAT GAZETTE, Jan. 23, 2011, at G-1 (reporting that American companies are leaving China and are returning to Mexico to set up their manufacturing operations, which has increased employment significantly in Ciudad Juarez).

279. Black & Rodriguez, *supra* note 278.

280. *See* Weissert, *supra* note 278.

281. For example, when Cessna Aircraft Co. (based in Wichita, Kansas) was looking for a low-wage country in 2006 where it could manufacture airplane parts, it thought of going to China. However, the difficulty in shipping supplies to China in less than a month led Cessna to establish its plants in Mexico. *Id.* Cessna's Chief Executive Officer has said that shipping to and from Mexico is easier and faster because it is all done over land rather than sea, which gives Cessna a way to become more competitive. *Id.*

282. *Id.* at G-2.

283. Unemployment rates in Mexico in the last four years have been as follows: 2007, 3.4% of the total labor force. *Data: Unemployment, Total (% of Total Labor Force)*, WORLD BANK, <http://data.worldbank.org/indicator/SL.UEM.TOTL.ZS> (last visited Mar. 2, 2012). 2008, 3.5% of the total labor force. *Id.* 2009, 5.2% of the total labor force. *Id.* Another source puts Mexico's estimated 2009 unemployment rate at 5.5%. *The World Factbook: North America: Mexico*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> (last updated Feb. 21, 2012). And 2010, estimated 5.4%. *Id.* Unemployment was expected to decline to 4.5% in 2011. *Employment Outlook 2010—How Does Mexico Compare?*, OECD 2 (2010), [www.oecd.org/dataoecd/13/39/45604035.pdf](http://www.oecd.org/dataoecd/13/39/45604035.pdf) [hereinafter *Employment Outlook 2010*]. Mexico's unemployment rates are deceptively low because those figures include a large number of individuals who work in the informal economy, who have unstable, marginal jobs, such as street vending or non-remunerated work in family businesses in which they may work only a few hours per day or per week. Susan Fleck & Constance Sorrentino, *Employment and Unemployment in Mexico's Labor Force*, MONTHLY LAB. REV., Nov. 1994, at 3-4. *See infra* notes 296-301 and accompanying text (for a discussion of informal economy).

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United States are returning home.<sup>284</sup> Two important factors have influenced this repatriation. The first factor is that the worldwide recession has decreased the demand for low-skill labor performed by Mexican workers in the United States.<sup>285</sup> In U.S. industries that have declined, notably the construction<sup>286</sup> and service industries, employment of Mexican workers has declined significantly as well.<sup>287</sup> Because these individuals have relatively few skills, when they lose their jobs they do not have many options for alternative employment.<sup>288</sup>

The second factor is increased immigration control in the United States at the border by the Border and Customs Protection Bureau of the U.S. Department of Homeland Security (“DHS”), in the interior by the Immigration and Customs Enforcement Bureau of the DHS,<sup>289</sup> and by the wave of state and local initiatives and legislation to control undocumented immigration,<sup>290</sup> and even by private enforcement of immigration laws.<sup>291</sup> Because the Mexican undocumented population accounts for about sixty percent of all undocumented immigrants

284. Julia Preston, *Mexican Data Show Migration to U.S. in Decline*, N.Y. TIMES, May 15, 2009, at A1.

285. *Id.*

286. It is interesting to note that the decline in the construction industry as a result of the global recession that began in 2008, especially in Europe and the United States, placed the Mexican company CEMEX (“*Cementos Mexicanos*”) in a precarious posture, because it is a large supplier of cement to the construction industries in Europe and Mexico. *The Effect of Recession on the Construction Industry*, THE TIMES 100 (Jan. 7, 2009), <http://blog.businesscasestudies.co.uk/118/the-effect-of-recession-on-the-construction-industry/>. CEMEX lost \$431 million dollars at the end of the fourth quarter of 2008, 30% in profits, and 23% in sales. *Id.*

287. Jennifer Ludden, *Report Shows Unauthorized Immigrants Leaving U.S.*, NPR (Sept. 1, 2010), <http://www.npr.org/templates/story/story.php?storyId=129578179> (reporting that although a study from the Pew Hispanic Center does not look at the reasons why immigrants are leaving the United States, evidence pointed to the economic downturn as one reason; the study of the Pew Hispanic Center found that the unemployment rate for unauthorized foreign workers in the United States had risen to 10.4%); Preston, *supra* note 284.

288. Preston, *supra* note 284.

289. *Id.*; Ludden, *supra* note 287.

290. See generally Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579 (2009); Huyen Pham, *Problems Facing the First Generation of Local Immigration Laws*, 36 HOFSTRA L. REV. 1303 (2008); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008). The government of Mexico is seriously concerned about the emergence of the number of state and local government initiatives that significantly restrict the ability of Mexican émigrés in the United States to work, rent an apartment or a house, drive a car, and, in general, to live freely. In fact, on June 22, 2010, the Mexican Embassy in Washington, D.C., issued a communiqué stating that the Government of Mexico had filed an *amicus curiae* brief in the U.S. District Court of Arizona in which the Mexican Government requested that Arizona’s Senate Bill 1070 be declared unconstitutional. El Gobierno de México presentó escrito como “Amigo de la Corte” ante una Corte Federal en Phoenix, Arizona, para ratificar su rechazo a la Ley SB1070 [The Government of Mexico Submitted Written As “Friend of the Court”], SECRETARÍA DE RELACIONES EXTERIORES (June 22, 2010), [http://www.sre.gob.mx/csocal\\_viejo/contenido/comunicados/2010/jun/cp\\_191.html](http://www.sre.gob.mx/csocal_viejo/contenido/comunicados/2010/jun/cp_191.html). See also *Mexico Acknowledges the Ruling of the U.S. District Court of Arizona to Grant a Preliminary Injunction of Certain Sections of SB 1070*, SECRETARÍA DE RELACIONES EXTERIORES, [portal.sre.gob.mx/usa/popups/newswindow.php?id=307](http://portal.sre.gob.mx/usa/popups/newswindow.php?id=307) (last visited Mar. 2, 2012).

291. See generally Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008).

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living in the United States,<sup>292</sup> these measures for enhanced immigration enforcement directly affect Mexican citizens. Therefore, Mexican workers are either returning home, or they have become reluctant to cross the border illegally.<sup>293</sup>

These developments have the real potential of creating an unanticipated oversupply of workers, thus increasing the numbers of under- or unemployed, low-skilled workers in Mexico. These individuals returning to Mexico from the United States will be competing for jobs—jobs that the Mexican economy will not be able to create quickly enough to meet the demand for them. In assessing the economic impact on Mexico created by the return of these workers, it is important to note that these unemployed workers do not receive any government aid because Mexico does not have an unemployment compensation program.<sup>294</sup>

Moreover, because these individuals do not have many skills and thus have few choices in earning a living, they are vulnerable to being conscripted by drug cartels, becoming some other type of criminal, or joining the informal economy.<sup>295</sup>

*c. Concern About the Adverse Effects of the Growth of the Informal Economy*

In 2010, more than half of the Mexican labor force was employed in the unregulated informal economy,<sup>296</sup> which indicates that the informal economy has absorbed the millions of unskilled or low-skilled workers that were displaced by

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292. Julia Preston, *Number of Illegal Immigrants in U.S. Fell, Study Says*, N.Y. TIMES, Sept. 2, 2010, at A20.

293. *But see id.*

294. *Employment Outlook 2010*, *supra* note 283, at 2. Although no unemployment compensation system exists in Mexico, unemployed workers receive some assistance from the government through two public works programs, which provide temporary income support to unemployed individuals through participation in public works projects. *Id.* One program is the Program of Temporary Employment (“*Programa de Empleo Temporal*”—“PET”) and the other is Opportunities (“*Oportunidades*”). *Id.*

295. See Grant Laten, *Brookings Event: “Beyond the Crisis? Thinking Strategically About Mexico’s Economic Future”*, CENTER FOR STRATEGIC & INT’L STUD. (June 29, 2010), <http://csis.org/blog/event-recap-beyond-crisis-thinking-strategically-about-mexicos-economic-future>. The informal sector or informal economy is comprised of workers who are self-employed and work in small firms. They face considerable job instability, and, unlike those in the formal sector, are effectively excluded from social security benefits. The informal economy includes low-skilled individuals who earn a living as street vendors, domestic servants, construction workers, car washers, and the like. MEXICO: A COUNTRY STUDY 77, 101 (Tim L. Merrill & Ramón Miró eds., 4th ed. 1997).

296. KORNELIA KRAJNYAK ET AL., INT’L MONETARY FUND MEXICO 13 (2010), *available at* <http://www.banxico.org.mx/publicaciones-y-discursos/publicaciones/imf-article-iv/%7B42528D64-1514-04E3-9547-D9669C5DEEBD%7D.PDF>. Estimated value of the size of the informal economy in Mexico for the year 2000 was \$168.5 billion, and the average size of the informal economy, as a percent of the official Gross National Income for the same year was 30.1%. Friedrich Schnieder, *Size and Measurements of the Informal Economy in 110 Countries Around the World 11* (July 17, 2002) (unpublished manuscript), *available at* [http://www.amnet.co.il/attachments/informal\\_economy110.pdf](http://www.amnet.co.il/attachments/informal_economy110.pdf).

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the economic shocks Mexico experienced after NAFTA became effective, though not necessarily *because of* NAFTA.<sup>297</sup> Low-skilled workers who have become unemployed as a result of the recent economic crisis have also joined the informal sector of the economy.<sup>298</sup> The steady growth of the informal economy has both good and bad features for Mexico. It is a good outcome from unanticipated worker displacement, because “it is encouraging that displaced workers have found a way to make at least a marginal living.”<sup>299</sup> However, it is also bad because the low-skilled jobs available in the informal economy are low value-added work that does not increase productivity rates.<sup>300</sup> Low productivity rates, in turn, tend to keep wages down.<sup>301</sup> From a labor rights perspective, the growth of the informal economy is undesirable because these workers do not enjoy even the limited protections provided to workers in the formal economy.<sup>302</sup>

*d. Concern About a Decreased Availability of Foreign Exchange*

Mexico’s three principal sources of foreign exchange are oil, remittances, and tourism.<sup>303</sup> Due to a number of factors, revenues from each of these sources have decreased significantly in the last few years.

*2. Decrease in Oil Revenues*

“Oil and gas revenues provide more than one third of Mexico’s foreign exchange, and are the country’s largest source of foreign revenues. In 2009, Mexico was the world’s seventh-largest producer of crude oil, and the second-largest supplier of oil to the [United States].”<sup>304</sup> Because oil and gas revenues represent more than one third of all foreign exchange,<sup>305</sup> lower global oil prices and declining production of oil have hurt Mexico’s economy. Through constitutional mandate, *Petroleos Mexicanos* (“PEMEX”) has a monopoly on the

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297. A skilled worker is one who has thirteen or more years of formal education. An unskilled worker is one who has up to twelve years of formal education. AUDLEY ET AL., *supra* note 103, at 11, 36 n.12.

298. *Employment Outlook 2010*, *supra* note 283, at 2.

299. Oliver, *supra* note 66, at 90.

300. *Id.*

301. *Id.*

302. Sudharshan Canagarajah & S.V. Sethuraman, *Social Protection and the Informal Sector in Developing Countries: Challenges and Opportunities* 4 (Soc. Prot. Discussion Paper Series, No. 0130, 2001), available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0130.pdf>.

303. Gonzalo del Rio et al., *MEXICO: Leading Opportunity in Latin America*, OUR WORLD, July 14, 2011, at 2.

304. *Background Note: Mexico*, U.S. DEP’T STATE (Nov. 16, 2011), <http://www.state.gov/r/pa/ei/bgn/35749.htm> [hereinafter *Background Note*].

305. *Id.*

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exploration, production, transportation, and marketing of Mexico's oil.<sup>306</sup> Mexico's participation in the oil industry is only as an exporter of crude oil because it does not have the necessary technology and infrastructure to process oil, so a decline in oil prices will significantly affect Mexico's economy.<sup>307</sup>

#### *3. Decrease in Remittances Revenues*

Since the mid-1990s, when the World Bank began to track international transfers of money, remittances to Mexico by Mexican émigrés living in the United States have been the second highest source of foreign exchange.<sup>308</sup> This source of foreign exchange has also been negatively affected by the worldwide recession, as many Mexican workers in the United States have become underemployed or unemployed. Remittances to Mexico from Mexicans living abroad fell from \$26 billion in 2007 to \$25 billion in 2008,<sup>309</sup> and to \$21.2 billion in 2009.<sup>310</sup> Most remittances are used for immediate consumption by the senders' relatives in Mexico to help with expenses related to food, housing, health care, and education.<sup>311</sup> However, some collective remittances sent to Mexico from the United States by communities of immigrants to the villages or cities where their relatives live are used for shared projects with municipal governments to fund infrastructure improvements.<sup>312</sup> This decline in remittances, therefore, significantly affects the Mexican economy.

#### *4. Decrease in Tourism Revenues*

Tourism is Mexico's third source of foreign exchange, and it too has declined significantly.<sup>313</sup> The elective nature of tourism spending has made it particularly susceptible to concerns for personal safety. One concern was the outbreak of the H1N1 "swine flu" in April 2009, which required that restaurants, bars, hotels, shops, and schools close for almost two weeks, and resulted in a fifty percent drop in tourism revenues.<sup>314</sup> Figures released by the Mexican Government estimated the loss from tourism to be around \$300 million dollars as of 2009.<sup>315</sup>

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306. *Id.*

307. *Mexico OKs Limited Access for Oil Firms*, ARK. DEMOCRAT GAZETTE, Oct. 29, 2008, at 5A; Arthur Brice, *Mexico's Economy Taking Hits from All Directions*, CNN (Aug. 22, 2009), [http://articles.cnn.com/2009-08-22/world/mexico.economy\\_1\\_cantarell-oil-production-mexican-economy?\\_s=PM:WORLD](http://articles.cnn.com/2009-08-22/world/mexico.economy_1_cantarell-oil-production-mexican-economy?_s=PM:WORLD).

308. *Background Note*, *supra* note 304, at 4.

309. Brice, *supra* note 307.

310. del Rio et al., *supra* note 303, at 2.

311. *Background Note*, *supra* note 304, at 4.

312. *Id.*

313. Brice, *supra* note 307.

314. del Rio et al., *supra* note 303, at 2.

315. Brice, *supra* note 307.

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Over a long period, potential tourists have also been deterred by a perception that Mexico poses risks to their safety. Above all, tourists are concerned about the well-publicized violence of the drug war, which has crippled tourism.<sup>316</sup> Published figures estimating that 11,000 people have been killed since 2006 justifiably makes tourists concerned for their safety, even if relatively few tourists have been harmed.<sup>317</sup>

5. *Social Concerns*

In addition to economic considerations that might lead Mexican policymakers to conclude that increased protection of workers' rights might be adverse to Mexican interests, including even the interests of Mexican workers, a myriad of social problems are likely to make those policymakers view workers' rights as relatively unimportant by comparison. These problems include the ongoing drug war, which has many adverse effects beyond the harm it does to tourism, and could be viewed as a civil war.<sup>318</sup> While not gaining the headlines of the drug war, ordinary crime, especially the destabilizing crime of kidnapping, has risen to troubling levels in recent years.<sup>319</sup> And President Calderon has launched a major offensive against corruption, a debilitating problem that has plagued Mexico since colonial times.<sup>320</sup> Even if the Mexican Government were committed to the value of enhanced protection of workers' rights, therefore, it might simply feel that other problems are more important and more pressing.

*B. Better Enforcement of Workers' Rights May be Possible Through Simultaneous "Top-Down" and "Bottom-Up" Efforts*

The previous section discussed serious economic and social problems that the Mexican government faces, and argued that, in view of these pressing problems, it is unlikely that better enforcement of labor rights will be a priority for Mexican policymakers in the foreseeable future. And, for the reasons stated in that section, enhanced enforcement may actually work against the interests of Mexican workers, by depriving them of their competitive advantage. However, while continued lax enforcement of Mexican labor law may very well be the ultimate outcome, a possibility exists that, through simultaneous efforts created by supranational norms and supranational enforcement mechanisms (top-down

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316. *Id.*

317. *Id.*

318. See Robert Beckhusen, *Mexican Cartel Snuffs Social Media Star as Violence Nears 'Civil War' Proportions*, WIRED (Sept. 28, 2011, 9:20 AM), <http://www.wired.com/dangerroom/2011/09/cartels-snuff-social-media/>.

319. Oliver, *supra* note 66, at 110-11.

320. Bonnie J. Palifka, *Trade Liberalization and Bribes* 11 (U. Tex., Working Paper, 1997), available at <http://homepages.mty.itesm.mx/bpalifka/customs.pdf>.

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approach)<sup>321</sup> and mobilization of grassroots labor rights advocates within Mexico (bottom-up approach), Mexico will institute procedures to more effectively enforce workers' rights.

### *1. External Pressure*

The first step to create external pressure on Mexico might be to propose to the U.S. Trade Representative for Labor of the Office of the United States Trade Representative that NAFTA and NAALC be revised to make them consistent with labor protections contained in FTAs into which the United States has entered since 2002.

Through the Trade Act of 2002, Congress formally established a framework for U.S. trade negotiations as part of Bipartisan Trade Promotion Authority ("TPA").<sup>322</sup> The TPA includes provisions in the trade-negotiating objectives for trade agreements, including FTAs.<sup>323</sup> "Core Labor Standards" are the same workers' rights contained in the United States-Jordan FTA ("Jordan FTA").<sup>324</sup> Beginning with the Jordan FTA in 2001, all subsequent FTAs have included labor (and environment) provisions *in the main body of the agreement*, in contrast to NAFTA, which relies on a side agreement (NAALC).<sup>325</sup> "The labor provisions of FTAs help ensure that the benefits of trade are widely shared, that worker rights are not denied in order to gain a trade advantage or attract investment, and consequently that U.S. businesses and workers compete on a level playing field globally."<sup>326</sup>

The language used in the Jordan FTA and others regarding signatory countries' commitment to enforce their domestic labor laws is important to note. The labor chapter of the Jordan FTA consists of six paragraphs and states that each party "shall strive to ensure" that its labor principles "are protected by

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321. In this connection, it is important to anticipate that Mexican trade representatives will resist accepting this pressure through supranational norms, because they may perceive this approach as an encroachment of Mexico's sovereignty. In fact, Mexico's trade representatives were reluctant to sign NAALC because they viewed it as an attempt by the United States and Canada to strip Mexico of its sovereignty by imposing this international mechanism to exert undue influence on Mexico to respect workers' rights. See Simon, *supra* note 203. It has been argued that traditional "nation states" may be losing their competence and ability to control activities within their boundaries as ideas, trade, people, drugs, and money flow across borders. CHARLOTTE C. ANDERSON & JAMES H. LANDMAN, *GLOBALIZATION AND BORDER CROSSINGS: EXAMINING ISSUES OF NATIONAL IDENTITY, CITIZENSHIP, AND CIVIL EDUCATION* (2003).

322. 19 U.S.C. §§ 3801-3813 (2006) (cited in Robert A. Rogowsky & Eric Chyn, *U.S. Trade Law and FTAs: A Survey of Labor Requirements*, J. INT'L COM. & ECON., July 2007, at 1, 7, available at [http://www.usitc.gov/publications/332/journals/trade\\_law\\_ftas.pdf](http://www.usitc.gov/publications/332/journals/trade_law_ftas.pdf)).

323. 19 U.S.C. §§ 3801-3813.

324. *Id.*

325. *Id.*

326. *Free Trade Agreements (FTAs): How FTAs Involve Labor Rights*, U.S. DEP'T LAB. <http://www.dol.gov/ILAB/programs/otla/freetradeagreement.htm> (last visited Mar. 2, 2012).

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domestic law and are not weakened to encourage trade.”<sup>327</sup> Post-2001 FTAs that the United States has concluded—such as those with Singapore, Chile, Australia, Bahrain, and Oman—also include language that, as “shall strive to ensure” does, places heavier emphasis on enforcing a country’s own labor laws.<sup>328</sup> Specifically, the language in these various agreements requires signatory countries to “not fail to effectively enforce its labor laws.”<sup>329</sup> By contrast, NAFTA’s language requires each member country only to “effectively enforce its labor law.”<sup>330</sup> It is argued that this different wording places greater emphasis on a signatory’s treaty obligations.<sup>331</sup>

Since the enactment of TPA, the United States has entered into FTAs that contain *within the agreement itself* workers’ rights provisions with the following countries: Singapore, Chile, Australia, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua (CAFTA-DR), Bahrain, and Oman.<sup>332</sup> As of September 2011, FTAs with Colombia, Panama, and South Korea are still being negotiated.<sup>333</sup>

In view of the heightened attention given to workers’ rights since NAFTA and NAALC became effective, those two agreements should be revised. NAFTA should include labor obligations in the body of the primary trade agreements, not merely in a side accord. This change may serve to highlight several desirable goals. First, such a step may emphasize the social dimension of globalization, which envisions that all workers share in the benefits of trade liberalization.<sup>334</sup> Second, FTAs, including NAFTA, should seek to protect workers who are denied fundamental rights.<sup>335</sup> Third, FTAs, including NAFTA, should further a multilateral consensus through adherence to the ILO Declaration of Fundamental Principles and Rights at Work.<sup>336</sup> And, finally, including labor provisions in the

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327. See Rogowsky & Chyn, *supra* note 322, at 9.

328. *Id.* at 7-14.

329. Jennifer Baumert et al., *International Cooperation on Trade and Labor Issues*, 22 n.80 (Off. of Indus., Working Paper No. ID-17, 2008), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1488&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1488&context=key_workplace).

330. *Id.*

331. See *id.*

332. *Id.* at 21. Complete texts of these FTAs may be obtained from *Free Trade Agreements*, OFF. U.S. TRADE REPRESENTATIVE, [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html) (last visited Mar. 2, 2012).

333. Appelbaum, *supra* note 137.

334. Lewis Karesh, *Assistant U.S. Trade Representative for Labor*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/biographies-key-officials/lewis-karesh-austr> (last visited Mar. 2, 2012).

335. *Id.*

336. *Id.* For example, the Peru FTA enhances the legalization of the ILO declaration by specifically committing both parties to adhere to it and by supporting that commitment with trade sanctions or monetary fines. The Peru FTA reflects greater authority and a clearer intention to enforce labor rights. Charnovitz, *supra* note 165, at 318-19.



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body of FTAs, including NAFTA, promotes respect for workers' rights consistent with ILO core principles.<sup>337</sup>

Even more important than the labor protections being placed in the main agreement would be steps to make those protections more potent than those found in the present NAALC. Enforcement mechanisms should be considerably more streamlined and robust than at present. In particular, violations of basic collective rights, such as the rights to organize and strike, should be enforced by mechanisms considerably stronger than mere "discussion."

### *2. Pressure from Within*

Increasingly, Mexican citizens have shown the ability to plan, organize, and carry out major demonstrations to let the government know that they are not happy with the status quo. For example, recent years have seen several large demonstrations demanding better security in view of the violence reflected in the actions of the drug cartels, kidnappers, and common criminals.<sup>338</sup> Also, following the disputed presidential election of 2006, massive protests staged by supporters of one of the defeated candidates paralyzed for days major portions of Mexico City.<sup>339</sup> A final example is the teacher strike in the State of Oaxaca, which resulted in schools being closed for months.<sup>340</sup>

Mexican workers could coordinate the same kind of unified cry for better enforcement of labor rights. To this end, members of independent Mexican labor unions, such as the FAT, and their counterparts in international unions could collaborate to advocate for their rights. The Mexican National Commission on Human Rights as well as international human rights and international labor rights organizations could be invited to participate.

Well-planned, well-coordinated, and well-funded demonstrations demanding better enforcement of workers' rights may get the attention of the Mexican government, particularly if they are timed to coincide with negotiations concerning revisions of NAFTA and NAALC.

## V. CONCLUSION

By all measures, Mexico has strong and comprehensive, perhaps even progressive, labor laws that are constitutionally guaranteed. Yet, workers in Mexico are paid low wages, they work in poor and dangerous conditions, millions of them are unemployed and receive no unemployment compensation

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337. *Id.*

338. *Noticiero con Joaquín López-Dóriga* (Galavision/Univision television broadcast June 28, 2004).

339. Richard Boudreaux, *Mexico's Runner-Up Remains Unbowed*, L.A. TIMES, July 9, 2006, at A1.

340. James C. McKinley, Jr., *Teacher Strike May Influence Mexican Vote*, N.Y. TIMES (June 22, 2006), <http://www.nytimes.com/2006/06/22/world/americas/22mexico.html?scp=1&sq=teacher%20strike%20may%20influence%20mexican%20vote&st=cse>.

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benefits, they work long hours, and they have limited job security. The inconsistency between strong labor laws and their under-enforcement is difficult to understand, but historical, economic, political, social, and cultural factors might, at least in part, explain this dissonance.

The historical context in which Mexico's labor laws were born is helpful in understanding this dissonance. Mexico's labor law was created in the midst of, and as a result of, the Mexican Revolution of 1910 to 1920, one of the most important revolutionary periods in Latin America. Liberal thinkers and politicians saw the opportunity to promote philosophies of a social welfare state that would provide and protect the poor and the under-represented. The revolutionary foundation of Mexican labor law clearly reflects a reaction to thirty years of the dictatorial and oppressive rule of General Porfirio Diaz.

Notwithstanding these laudable social welfare goals, entrenched cultural and political characteristics of Mexican society prevented these strong worker protections from ever being realized by workers in Mexico. Political corruption, which has gone hand-in-hand with the corporatist form of government, has historically permeated both Mexican culture and Mexicans' lives. Therefore, it has been difficult for workers to challenge abusive labor practices and assert their constitutionally protected rights, because the established governmental structures to which they would bring their complaints may be receiving bribes from the very employers in question. In addition, even if corrupt relationships did not preclude the objective assessment of a worker's claim, inefficient bureaucratic practices of the federal, state, and administrative systems in Mexico result in years, sometimes decades, going by before administrative or judicial adjudication of claims can be expected. This significant problem, of course, creates another disincentive on workers in Mexico from filing a claim against their employer.

Finally, the economic integration of the world, and Mexico's economic decision to liberalize its economy in the mid-1980s, have further complicated the possibility that workers' rights will be better enforced than they have been. Mexican policymakers have adopted economic policies to promote the Mexican economy and join the international economies of the world, policies that are inconsistent with enforcing the strong labor laws that protect workers in Mexico. Although many debate the proposition that strong worker rights are inconsistent with economic progress, most economists adhere to the proposition that, to promote foreign and domestic direct investment and create jobs, the basic economic theory of comparative advantage, at least for today's Mexico, envisions workers who can work for relatively low wages.

Legislation was introduced in the Mexican Congress in March 2011 proposing labor law reforms. However, the proposed reform appears to be one that seeks greater flexibilization favorable to employers rather than greater enforcement of workers' rights. So, Mexico *is* in the process of reforming its labor laws in response to globalization and FTAs, but those reforms are perceived to not protect workers.

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Notwithstanding the difficulties in enhancing enforcement of Mexican labor laws, it *may* be possible to bring attention to workers' rights through a combination of two strategies: outside pressure on the Mexican government through supranational labor norms and supranational enforcement mechanisms of FTAs and accompanying worker protection provisions, *and* internal pressure from independent labor unions, grassroots labor advocates, international labor organizations, and international and national human rights organizations.

If such strategies prove successful, effects on workers likely would be mixed, because some investment and jobs might be relocated away from Mexico. And, even if either or both of these strategies were to prove at least partially successful, a difficult task for workers' advocates will be to keep the Mexican government committed to view workers' rights as one of the many top priorities it must address.