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Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws

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I. INTRODUCTION

On January 1, 1994, after more than two years of negotiations[1] and intense national debate, the North American Free Trade Agreement (NAFTA) entered into force.[2] NAFTA's primary aim is to promote economic development in the United States, Mexico, and Canada through the establishment of a unified market.[3] When fully implemented, NAFTA will eliminate impediments to the flow of goods, services, and capital throughout the North American continent.[4] The agreement will form one of the world's largest and most lucrative markets, comprising 360 million consumers and generating $6.4 trillion in output of goods and services.[5] In endorsing NAFTA, each signatory country resolved to create

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1. The NAFTA negotiations formally began in June 1991 and proceeded under the fast track authority extended by the U.S. Congress to President George Bush. Jima Ikegawa, Comment, *NAFTA: How Will It Affect U.S. Environmental Regulations?*, 6 TRANSNAT'L LAW. 225, 228 (1993). Under fast track procedure, the President had authority to negotiate a trade agreement and submit it to Congress for approval without amendment. *Id.* Negotiations were concluded in September 1993 upon finalization of the supplemental agreements on Labor Cooperation, Environmental Cooperation, and Emergency Action. North American Agreement on Labor Cooperation, Sept. 13, 1993, *available in* LEXIS, Nsamer Library, NAFTA File [hereinafter Supplemental Agreement]; North American Agreement on Environmental Cooperation, Sept. 13, 1993, *available in* LEXIS, Nsamer Library, NAFTA File; Understanding Between the Parties to the North American Free Trade Agreement Concerning Chapter Eight, EMERGENCY ACTION, Sept. 13, 1993, *available in* LEXIS, Nsamer Library, NAFTA File. Note that all references to the Supplemental Agreement are to the September 13, 1993 draft.

2. On November 17, 1993, NAFTA and its supplemental agreements were passed by the House of Representatives by a vote of 234 to 200, a wider margin than expected. *Lively NAFTA Debate Leads to Free Trade Victory* (CNN news broadcast, Nov. 18, 1993), *available in* LEXIS, News Library, CNN File. Passage through the Senate was secured on November 20, 1993 by a vote of 61 to 38. James Gerstenzang, *Senate Approves NAFTA on 61-38 Vote*, L.A. TIMES, Nov. 21, 1993, at A18. On December 8, 1993, President Bill Clinton signed the NAFTA implementing legislation passed by Congress. Deputy Assistant U.S. Trade Representative for North American Affairs David Weiss, Address at the Canadian-American Business Council Luncheon (Feb. 16, 1994), *available in* LEXIS, News Library, NAFTA File. The three governments exchanged diplomatic notes on December 30, 1993 to implement NAFTA and the supplemental agreements. *Id.*

3. *See* North American Free Trade Agreement, pmbl. [hereinafter NAFTA]. All references to NAFTA are to the December 17, 1992 draft.

4. *See* NAFTA, *supra* note 3, art. 102 (setting forth the agreement's objectives).

5. Shellyn G. McCaffrey, *North American Free Trade and Labor Issues: Accomplishments and Challenges*, 10 HOFSTRA LAB. L.J. 449, 451 (1993).

new employment opportunities, enforce basic workers' rights, and improve working conditions and living standards in its territory.[6]

Despite this mutual resolution, NAFTA's main text is devoid of any provisions designed to mandate improvements in labor matters.[7] This omission generated heated debate, and NAFTA's opponents[8] demanded negotiation of a new agreement.[9] Detractors maintained that, despite stringent labor laws, the Mexican government does not adequately enforce workers' rights, but instead colludes with labor union leaders to suppress and control the labor force.[10] Detractors argued that the United States must not enter a trade agreement with a country that fails to protect the rights of its workers.[11]

During his presidential campaign, President Bill Clinton shared these concerns, and vowed to include supplemental legislation aimed at exposing and improving inadequate enforcement of Mexican labor laws.[12] The North American Agreement on Labor Cooperation,[13] signed on September 13, 1993, pledges each country to enforce its domestic labor laws and establishes a trinational commission to engage in collaboration, information exchange, and dispute resolution.[14]

By establishing a forum for the exchange of ideas and information, the North American Agreement on Labor Cooperation provides a new mechanism for

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6. NAFTA, *supra* note 3, pmbl.

7. NAFTA's only labor-related provisions seek to avoid job losses by encouraging gradual and orderly adjustment to increased trade flows. *See* NAFTA, *supra* note 3, art. 302 & ch. 4 (setting forth the transition requirement and rules of origin); *infra* notes 28-53 and accompanying text (discussing the treatment of labor-related matters in NAFTA).

8. To generalize, NAFTA's opponents included U.S. labor organizations, human and civil rights activists, and some Mexican workers. *See* Peter Behr, *What NAFTA Is About*, WASH. POST, Nov. 10, 1993, at A6 (explaining concerns of U.S. labor organizations that U.S. companies would move to Mexico to capitalize on its cheap workforce); Juanita Darling, *Mexico's Angst Over NAFTA*, L.A. TIMES, Oct. 17, 1993, at D1 [hereinafter *Mexico's Angst*] (reporting that many rank and file Mexican workers fear that NAFTA, in opening Mexican markets to foreign competition, will threaten their jobs); *see also On the Other Side of the Mexican Border Free Trade Might Not Be Much of a Bargain*, 24 NAT'L J. 506 (1992) (describing the lives of *maquiladora* workers who believe that free trade will worsen their squalid living conditions).

9. *See generally* Dedra L. Wilburn, *The North American Free Trade Agreement: Sending U.S. Jobs South of the Border*, 17 N.C. J. INT'L L. & COM. REG. 489, 507 (1992) (arguing that NAFTA must not be passed unless safeguards are drafted to guarantee higher labor standards); Stanley M. Spracker & Gregory J. Mertz, *Labor Issues Under the NAFTA: Options in the Wake of the Agreement*, 27 INT'L. LAW. 737, 744-50 (1993) (suggesting options to enhance NAFTA's labor protections).

10. *See infra* notes 104-38 and accompanying text (documenting nonenforcement of Mexican labor laws and explaining the close alliance between the ruling political party and the largest federation of Mexican labor unions).

11. *See generally* Wilburn, *supra* note 9, at 489 (demanding that NAFTA include stronger labor protections).

12. Spracker & Mertz, *supra* note 9, at 738; *Sand in the Wheels of Trade*, ECONOMIST, Apr. 10, 1993, at 25. The President also promised supplemental agreements addressing environmental concerns and potential import surges. *Id.* This comment addresses only labor issues under NAFTA and the North American Agreement on Labor Cooperation.

13. Supplemental Agreement, *supra* note 1.

14. *Id.*

analyzing and influencing Mexican labor relations policies.[15] Because it represents a compromise between three sovereign nations, however, it is not the final solution to inadequate enforcement of Mexican labor laws.[16] Rather than be considered a failure for neglecting to address every conceivable problem, the North American Agreement on Labor Cooperation should be regarded as a first step toward the ultimate goal of protecting workers' rights throughout the North American continent.

This comment analyzes the North American Agreement on Labor Cooperation (Supplemental Agreement) and attempts to ascertain whether it will improve enforcement of Mexican labor laws. The focus is on current working conditions in Mexico, and the potential ways in which NAFTA and the Supplemental Agreement may affect the Mexican workforce. Part II sets forth background information necessary to understand why NAFTA was submitted together with the Supplemental Agreement.[17] This section documents the Mexican government's failure to adequately enforce its labor laws, and describes the debate that this nonenforcement generated in the United States. Part III details the purposes and provisions of the Supplemental Agreement, highlighting its weaknesses.[18] Part IV discusses the significance of the Supplemental Agreement's shortcomings in light of the purposes of a free trade agreement.[19] Additionally, this section suggests other possibilities, aside from the Supplemental Agreement, that may compel improvements in Mexican labor law enforcement. Finally, part V concludes by speculating about the signatory governments' motives for signing the Supplemental Agreement.[20] An understanding of their motives is crucial in predicting whether the Supplemental Agreement will have its intended beneficial effect on Mexican labor relations policies.

II. BACKGROUND

In the mid-1980s, Mexico began to reform its economic policy to reduce the government's role in the economy and to allow market forces freer reign.[21] Reduced tariffs, coupled with reductions in nontariff barriers which restricted

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15. *See NAFTA's Effect on Labor Issues: Hearing of the Employment and Housing Subcomm. of the House Government Operations Comm.*, Oct. 7, 1993, *available in* LEXIS, News Library, NAFTA File [hereinafter *Hearing on NAFTA's Effect*] (Deputy U.S. Trade Representative Rufus Yerxa stating that the Supplemental Agreement provides a mechanism for exposing labor problems that did not previously exist between the United States and Mexico).

16. *See infra* notes 38-53 and accompanying text (explaining that sovereignty concerns prevent NAFTA and the Supplemental Agreement from interfering excessively with each country's domestic policies).

17. *See infra* notes 21-140 and accompanying text.

18. *See infra* notes 141-231 and accompanying text.

19. *See infra* notes 232-50 and accompanying text.

20. *See infra* part V.

21. McCaffrey, *supra* note 5, at 458.

imports,[22] have transformed Mexico's economy from one of the world's most protected to an economy that is relatively open and free.[23] Mexico is now one of the world's fastest growing economies, and Mexicans are buying an increasing amount of American goods.[24] Since 1986, U.S. exports to Mexico have increased more than threefold, from $12.6 billion to $45 billion,[25] and the U.S. trade balance with Mexico has swung from a $5.7 billion deficit to a $5.4 billion surplus.[26] NAFTA seeks to promote further growth and to create new trade opportunities by gradually phasing out the remaining tariffs and other barriers mutually imposed by the United States, Canada, and Mexico.[27]

A. *NAFTA's Treatment of Labor Issues*

The preamble to NAFTA addresses labor-related matters: "The governments of Canada, Mexico and the United States resolved to: . . . create new employment opportunities and improve working conditions and living standards in their respective territories; . . . [and] protect, enhance and enforce basic workers' rights . . . ."[28] Due primarily to concerns about sovereignty, however, NAFTA contains no mechanisms to implement or enforce these goals.[29] As a result, the Supplemental Agreement was drafted to address disparities in working conditions and in labor law enforcement between the United States and Mexico.[30]

1. *Provisions Relevant to Labor*

While NAFTA does not include specific provisions to improve working or living conditions, or to protect workers' rights, labor concerns were a driving force behind parts of the agreement.[31] These provisions are designed to avert job losses by promoting gradual adjustment to changes in the flow of trade and investment.[32] For instance, to allow industries on both sides of the border to adapt to increased competition, NAFTA establishes a transition period during

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22. Examples of nontariff barriers include import quotas, licensing regulations, and minimum local content requirements. *Id.* at 452, 459.

23. *Id.* at 458.

24. John E. Pepper, *NAFTA Adds Jobs: It's in the Chips*, USA TODAY, Nov. 3, 1993, at 11A.

25. Patrick McCartney, *NAFTA Expected to Increase County Jobs*, L.A. TIMES, Nov. 20, 1993, at B1.

26. *See Press Conference on the Topic of the North American Free Trade Agreement*, Fed. News Serv., Aug. 13, 1993, *available in* LEXIS, News Library, NAFTA File [hereinafter *NAFTA Press Conference*] (announcing the drafting of the supplemental agreements and discussing NAFTA's benefits).

27. Behr, *supra* note 8, at A6.

28. NAFTA, *supra* note 3, pmbl.

29. Spracker & Mertz, *supra* note 9, at 737.

30. *See infra* notes 70-85, 104-38 and accompanying text (discussing concerns of NAFTA's opponents and documenting labor law violations in Mexico).

31. *See* NAFTA, *supra* note 3, art. 302 & ch. 4 (setting forth the transition requirements and rules of origin).

32. McCaffrey, *supra* note 5, at 466.

which duties will be phased out.[33] In addition, NAFTA contains strict rules of origin to ensure that products meet minimal North American content standards to qualify for preferential treatment.[34] The rules are designed to prevent foreign companies from manufacturing or assembling their products in one of the NAFTA countries just to export them cheaply into another NAFTA market.[35] Without such regulations, an influx of imports into a NAFTA country would harm industries and workers that produce similar products.[36] While these safeguards should prevent job losses, NAFTA does not address improvement of labor policies in areas such as minimum wages, the rights of workers to organize trade unions, or the right to call a strike.[37]

2. *Protection of "Free" Trade and National Sovereignty*

The NAFTA negotiators had compelling reasons for limiting the content of the agreement.[38] Of primary importance is that NAFTA is a free trade agreement, not a treaty of association such as the one that binds members of the European Union.[39] As such, it cannot cover all social and economic issues or attempt to resolve all bilateral problems.[40] An overly restrictive agreement would only impose further barriers to trade, thereby defeating the purpose of a free trade agreement.[41] Yet pressures to address disparities in wages, labor law enforcement, and the standard of living persisted between the United States and Mexico.[42] Chief among those exerting pressure were opponents reluctant to

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33. NAFTA, *supra* note 3, art. 302; McCaffrey, *supra* note 5, at 467.

34. McCaffrey, *supra* note 5, at 463; *see* NAFTA, *supra* note 3, ch. 4 (detailing the rules of origin provisions).

35. *See* McCaffrey, *supra* note 5, at 463, 468 (describing the reasons for including rules of origin in NAFTA).

36. *Id.* at 463.

37. *See* Spracker & Mertz, *supra* note 9, at 737 (noting the absence of provisions designed to improve working conditions or to enhance workers' rights).

38. *See infra* notes 39-53 and accompanying text (discussing the nature of a free trade agreement and sovereignty concerns).

39. McCaffrey, *supra* note 5, at 472. NAFTA's goals—the free movement of goods, services, and investment—are much more modest than those pursued by the European Union, which is taking form after nearly 40 years of discussions, agreements, and negotiations, as well as billions of dollars of transfers to lower income member states. *Id.* at 473. In contrast to NAFTA, the European Union is scheduled to have a single, integrated market and a common currency, as well as a social charter to harmonize workplace standards and minimum wage levels. *Id.*; Jerome I. Levinson, *The Labor Side Accord to the North American Free Trade Agreement: An Endorsement of Abuse of Worker Rights in Mexico*, ECON. POL'Y INST. BRIEFING PAPER (Econ. Pol'y Inst., Wash., D.C.), Sept. 1993, at 15-16. *But see id.* at 16 (arguing that NAFTA is more than a trade agreement, and must therefore make a greater effort to harmonize disparate labor policies and conditions).

40. McCaffrey, *supra* note 5, at 472.

41. *Id.*

42. *See* Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391, 418 (1993) (describing the pressure on the Clinton administration to demonstrate that enough progress had been made on labor issues to justify forming a free trade agreement with Mexico).

support an agreement with Mexico due to widespread nonenforcement of its labor laws.[43]

As a result of these competing concerns, the Bush administration, in negotiating NAFTA, dealt with labor issues on a parallel track rather than directly in NAFTA.[44] To ensure NAFTA's passage by Congress, as well as to fulfill his campaign promises to the American public, President Clinton was required to offer assurances of Mexico's commitment to uphold and improve its labor laws and policies.[45] The Clinton administration utilized a parallel track similar to the approach taken by the Bush administration in negotiating a labor supplemental agreement to be implemented simultaneously with NAFTA.[46]

Respect for national sovereignty and for each country's cultural and political identity were important issues in negotiating the Supplemental Agreement.[47] In particular, U.S. sovereignty prevented NAFTA from delegating too much power to an international labor commission.[48] A supplemental agreement could not usurp the U.S. government's ability to develop labor relations policy, nor to enforce its labor laws.[49] The Mexican government's position was that the side agreement must not purport to modify Mexican domestic policy, which necessarily includes government-union relations and workplace regulation.[50] Indeed, a free trade agreement such as NAFTA could not legitimately be used to force social change on another country by imposing U.S. labor law as the standard.[51] Through the Supplemental Agreement, each country pledges to enforce its own

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43. *See* McCaffrey, *supra* note 5, at 461-62 (noting concerns of U.S. labor organizations that lax enforcement of labor rights and standards in Mexico will lead to a flight of U.S. investors seeking to capitalize on low production costs); *infra* notes 70-85, 104-38 and accompanying text (describing arguments against NAFTA and documenting Mexican labor law violations).

44. McCaffrey, *supra* note 5, at 472. In May 1991, President Bush committed his administration to pursuing a bilateral cooperation program on labor issues with Mexico. *Id.* at 474. The U.S. Department of Labor and the Mexican Secretariat of Labor and Social Welfare signed a Memorandum of Understanding (MOU) providing a framework for mutual cooperation in the areas of health and safety, general working conditions, labor standards and their enforcement, and procedures for resolving labor conflicts. *Id.* at 471. The principal activities during the operation of the MOU were the development of comparative studies, information exchange, and education and training of representatives of government, labor, and management. *Id.* at 478-86.

45. Zamora, *supra* note 42, at 417-18.

46. *See infra* notes 145-235 and accompanying text (outlining the purposes and provisions of the Supplemental Agreement).

47. *Hearing on NAFTA's Effect*, *supra* note 15 (statement of Deputy U.S. Trade Representative Rufus Yerxa); *Canada Opposes Use of Trade Sanctions*, 142 Lab. Rel. Rep. (BNA) 367, 368 (March 29, 1993) (News & Background Info.).

48. *Hearing on NAFTA's Effect*, *supra* note 15 (statement of Deputy U.S. Trade Representative Rufus Yerxa).

49. *Id.*

50. James Zimmerman, *Laboring Under No Illusions*, RECORDER, July 30, 1993, at 6; *see* Zamora, *supra* note 42, at 432 (explaining that the U.S. government should use caution in trying to influence Mexican labor policy because of the vital role it plays in the Mexican political and legal systems).

51. *See* Zamora, *supra* note 42, at 433 (advising that the United States should not dictate the timing or content of Mexican labor reforms).

domestic labor laws.[52] This commitment is enforced through a policy of collaboration, cooperation, and information exchange among the three countries.[53]

B. NAFTA: Arguments Pro and Con

Free trade is regarded by many as having numerous beneficial effects. But because NAFTA links two economically strong countries with a substantially less developed country, the agreement has generated heated debate.[54] Much of the debate focuses on NAFTA's potential effects on Mexico and its labor force.[55] NAFTA's proponents argue that the Mexican economy will grow tremendously as a result of increased foreign investment and access to foreign products.[56] On the other hand, opponents contend that repressive labor relations policies and extremely low wages will provide an incentive for U.S. companies to migrate to Mexico to exploit its cheap, oppressed labor force.[57]

1. Arguments in Support of NAFTA

NAFTA proponents predict benefits for Mexico and Mexican workers.[58] In particular, foreign investment in Mexico should increase markedly as a result of NAFTA.[59] Foreign investment will spur growth in the Mexican economy by increasing productivity, generating exports, creating jobs and higher wages, and upgrading technology.[60] To foster this projected increase in investment, a new Mexican foreign investment law was enacted on December 27, 1993.[61] Designed to bring Mexican legislation into compliance with NAFTA's investment

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52. *See* Supplemental Agreement, *supra* note 1, art. 1 (outlining the Supplemental Agreement's objectives).

53. *See id.* (outlining the Supplemental Agreement's objectives); *infra* notes 152-55 and accompanying text (enunciating the Supplemental Agreement's purposes).

54. *See infra* notes 58-85 and accompanying text (enunciating supporting and opposing arguments).

55. *See infra* notes 58-85 and accompanying text (enunciating supporting and opposing arguments).

56. *See infra* notes 58-69 and accompanying text (discussing the arguments in support of NAFTA).

57. *See infra* notes 70-85 and accompanying text (setting forth the arguments against NAFTA).

58. *See* Miguel Noyola, *United States/Mexican/Canadian View of Agreement Benefits and Drawbacks*, 7 FLA. J. INT'L. L. 55, 56-57 (1992) (describing the benefits that Mexico and its citizens will potentially gain from NAFTA).

59. *See* Behr, *supra* note 8, at A6 (describing NAFTA's likely effects); *see also* Juanita Darling, *Ford to Create 850 Jobs in North America*, L.A. TIMES, Dec. 17, 1993, at D1 [hereinafter *850 Jobs*] (describing an investment by Ford Motor Co.). In the first major investment by a large manufacturer since the passage of NAFTA, Ford Motor Co. announced its plan to spend $200 million, mostly in Mexico, to boost automotive production. *Id.* In response, Harley Shaiken, U.C. Berkeley professor of labor and technology, predicted Ford's investment to be the first of many significant investments that Mexico can expect as a result of NAFTA. *Id.*

60. Juanita Darling, *Salinas Pushes Bill to Encourage Foreign Investment in Mexico*, L.A. TIMES, Nov. 26, 1993, at D1 [hereinafter *Salinas Pushes Bill*].

61. Ley Para Promover La Inversión Mexicana y Regular La Inversión Extranjero [Law to Promote Mexican Investment and Regulate Foreign Investment], D.O., Dec. 27, 1993, *translated in* TAX LAWS OF THE WORLD: MEXICO, bk. 3, at 8 (Foreign Tax Law Publishers, Inc. trans., 1994).

provisions, the law will provide prospective foreign investors with greater opportunities to channel investment into the nation's economic sectors.[62]

Proponents also point out that Mexico is a larger consumer market than generally realized.[63] The ability of Mexican citizens to purchase products imported from the United States will benefit both the Mexican people and its economy.[64] Since 1986, U.S. exports to Mexico have increased dramatically.[65] With NAFTA further reducing tariffs and barriers, prices will decrease, leading to even more importation of U.S. goods.[66] Not only is this growth good for U.S. businesses, but economists predict it will boost the Mexican economy and result in job creation and higher wages in Mexico.[67] As their purchasing power grows, the standard of living for all Mexicans will rise.[68] Ultimately, proponents believe liberalization of Mexican trade policies will lead to positive development throughout Mexico.[69]

2. *Arguments Against NAFTA*

NAFTA opponents point to the *maquiladora* region as a small-scale example of what will happen under NAFTA. *Maquiladoras* are export-oriented, typically foreign-owned industries located along the northern border of Mexico.[70] *Maquiladora* facilities import raw materials and components to be processed or

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62. *Salinas Pushes Bill*, *supra* note 60, at D1. Among other provisions, the proposed law will allow Mexican subsidiaries of foreign corporations and Mexican companies with foreign investors to buy certain previously restricted land, will permit foreigners to make portfolio investments in companies whose ownership was restricted to Mexican citizens, will remove export requirements previously imposed on foreign owned companies, and will remove minimum domestic content requirements. *Id.*

63. *Experts Disagree Over Effects on Jobs, Growth*, USA TODAY, Nov. 12, 1993, at 4B [hereinafter *Experts Disagree*].

64. *See* Noyola, *supra* note 60, at 56-57 (describing how NAFTA will benefit Mexico).

65. For example, since 1986, the U.S. corporation 3M has increased its exports to Mexico nine-fold, and Proctor & Gamble has doubled its exports to Mexico. McCartney, *supra* note 25, at B1. Furthermore, in 1992, Sears' business in Mexico rose 27%, and 25% of what the company sold in Mexico was made in the United States; six or seven years ago, virtually nothing sold in the Mexican stores was made in the United States. *Experts Disagree*, *supra* note 63, at 4B; *see also supra* note 25 and accompanying text (noting that U.S. exports to Mexico have increased from $12.6 billion in 1986 to $45 billion in 1993).

66. *Experts Disagree*, *supra* note 63, at 4B.

67. Abelardo L. Valdez, *NAFTA: A Boon for the Entire Hemisphere*, LEGAL TIMES, July 19, 1993, at 25; *see* Noyola, *supra* note 58, at 56-57 (describing how NAFTA will benefit Mexico); *see also* McCartney, *supra* note 25, at B1 (predicting job creation in all three countries).

68. Noyola, *supra* note 58, at 56-57.

69. *See* Valdez, *supra*, note 67 at 25 (predicting that NAFTA will foster development in Mexican health, social, and education systems).

70. *E.g.*, Gary Gereffi, *Mexico's Maquiladora Industries and North American Integration*, *in* NORTH AMERICA WITHOUT BORDERS? INTEGRATING CANADA, THE UNITED STATES, AND MEXICO 135, 135-38 (Stephen J. Randall et al. eds., 1992); Susanna Peters, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226, 228-33 (1990). There are approximately 2200 *maquiladoras* that employ nearly 600,000 Mexican laborers. Patrick Lee & Chris Kraul, *Impact of NAFTA Victory; Uniqueness of Maquiladora Could Fade*, L.A. TIMES, Nov. 19, 1993, at D1.

assembled in Mexico.[71] These materials and the equipment necessary for their assembly are imported duty free, provided that at least fifty percent[72] of the finished products are shipped for sale outside of Mexico.[73] Finished products shipped into the United States are subject to a U.S. duty only on the value added in Mexico.[74] The *maquiladora* program appeals to U.S. companies because of the duty free import and tax privileges, Mexico's proximity to the United States, and the abundance of cheap labor in Mexico.[75] For these reasons, Mexico has become the most important location for U.S. assembly activities abroad.[76]

NAFTA's detractors point out that Mexico's dependence on the *maquiladoras* sector as a source of revenue serves to discourage enforcement of labor laws in the *maquiladoras*.[77] They assert that the Mexican government works with labor union leaders to maintain a cheap, submissive labor force to attract foreign manufacturers.[78] As a result, the rights of Mexican workers to organize independent unions and to strike are not adequately protected.[79]

Further, while proponents expect increased purchasing power from higher wages as a result of free trade, practices in the *maquiladora* region illustrate that foreign investment in Mexico to date has not led to increased wages or to better working conditions.[80] In fact, wages and benefits for Mexican workers have declined thirty-two percent since a surge of U.S. plants began relocating to Mexican border towns in 1980.[81] Opponents question how consumption of U.S. goods can increase when Mexican workers earn barely enough to support themselves.[82]

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71. *E.g.*, Gereffi, *supra* note 70, at 135-38; Peters, *supra* note 70, at 228-33.

72. Lee & Kraul, *supra* note 70, at D1.

73. *E.g.*, Gereffi, *supra* note 70, at 135-38; Peters, *supra* note 70, at 228-33.

74. *E.g.*, Gereffi, *supra* note 70, at 135-38; Peters, *supra* note 70, at 231-33. When a product is imported into the United States under Tariff Item 807.00, the value of that portion of the product made of American components is duty free. *Id.* at 231-32. The remainder, or value added in Mexico, is subject to a duty. *Id.*

75. Congressman Esteban Torres, The Proposed North American Free Trade Agreement and the Implications for U.S.-Mexico Relations, Speech Before the Latino Leader's Conference (Oct. 12, 1991), *in* 12 CHICANO-LATINO L. REV. 101, 106 (1992); *see* Stephen Lerner, Comment, *The Maquiladoras and Hazardous Waste: The Effects Under NAFTA*, 6 TRANSNAT'L LAW. 255, 257 (1993) (explaining that the majority of *maquiladora* plants are U.S.-owned or -controlled).

76. Peters, *supra* note 70, at 233.

77. *See* Peters, *supra* note 70, at 233-35 (reporting that the *maquiladoras* have become Mexico's second largest industry).

78. *Hearing Explores Mexico's Worker-Rights Record*, 143 Lab. Rel. Rep. (BNA) 407 (July 26, 1993) (News & Background Info.) [hereinafter *Mexico's Worker-Rights Record*]; *see infra* notes 108-15 and accompanying text (describing the alliance between Mexico's ruling political party and labor union leaders).

79. *See infra* notes 104-30 and accompanying text (documenting the nonenforcement of Mexican laws protecting the right to establish trade unions and the right to strike).

80. Torres, *supra* note 75, at 106.

81. Levinson, *supra* note 39, at 6. *But see Labor Delegation Tours Mexican Facilities*, 144 Lab. Rel. Rep. (BNA) 22 (Sept. 6, 1993) (News & Background Info.) [hereinafter *Labor Delegation*] (stating that since 1986, real wages of Mexican workers have declined 60%).

82. *Labor Delegation*, *supra* note 81, at 23. As of August 1, 1993, the average daily minimum wage in Mexico, converted to U.S. dollars, was $4.62, while the average daily cost of basic goods was $9.85. *Mexico's Angst*, *supra* note 8, at D1.

The Supplemental Agreement is designed to answer these objections.[83] It attempts to ensure enforcement of domestic labor laws in such areas as minimum wage and hour levels, freedom of association, the right to organize, and the right to strike.[84] Although strict Mexican labor laws cover these areas, the problem has traditionally been one of enforcement.[85]

C. *Current State of Labor Law in Mexico*

Contrary to the opinion shared by many in the United States that Mexico's labor legislation is inadequate, Mexican labor laws provide extensive protection for workers. These laws reflect a desire to place workers and employers on an equal bargaining level.[86] Article 123 of the Mexican Constitution of 1917 ensures workers a wide range of protected rights, and provides constitutional authority for the 1970 Federal Labor Law.[87] The 1970 Federal Labor Law expands upon the basic rights contained in the constitution, covering virtually every aspect of the employment relationship.[88]

Despite theoretically stringent protections, Mexican labor law is not adequately enforced.[89] Common transgressions include: workers earn less than subsistence wages, their health and safety is at risk, freedom of association and the right to strike are denied, unions and employers collude to suppress workers, and violence is perpetrated against workers.[90] The Supplemental Agreement is designed to improve such conditions by encouraging each country to enforce its domestic labor laws.[91]

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83. *See infra* notes 145-235 and accompanying text (outlining the Supplemental Agreement's purposes and provisions).

84. *See* Supplemental Agreement, *supra* note 1, art. 1, annex 1 (detailing the Supplemental Agreement's objectives and the labor principles that the countries are committed to promote).

85. Thomas Gibbons, *Tough Trade-Offs*, 19 HUM. RTS. 26 (1992).

86. Ann M. Bartow, *The Rights of Workers in Mexico*, 11 COMP. LAB. L.J. 182, 188-89 (1990).

87. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 123 (Mex.), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 88 (Albert P. Blaustein & Gisbert H. Flanz trans., 1982) [hereinafter MEX. CONST.]. Article 123 states:

> Every person is entitled to suitable work that is socially useful. Toward this end, the creation of jobs and social organization for labor shall be promoted in conformance with the law. The Congress of the Union, without contravening the following basic principles, shall enact labor laws which shall apply to workers, day laborers, domestic servants, artisans and in a general way to all labor contracts . . . and to the branches of the Union, the government of the Federal District and their workers.

Id. art. 123.

88. *See* Ley Federal del Trabajo [Federal Labor Law], D.O., *translated in* COMMERCIAL LAWS OF THE WORLD; MEXICO: LABOR LAWS 1 (Foreign Tax Law Publishers, Inc. trans., 1993) [hereinafter 1970 Federal Labor Law].

89. Gibbons, *supra* note 85, at 26; Zamora, *supra* note 42, at 431.

90. Zamora, *supra* note 42, at 431; *see infra* notes 104-38 and accompanying text (describing the nonenforcement of Mexican labor laws).

91. *See* Supplemental Agreement, *supra* note 1, art. 1 (setting forth the Supplemental Agreement's objectives).

1. Stringent Labor Laws

On paper, Mexico's labor laws resemble, and in some instances surpass, those established in the United States.[92] The Mexican Constitution of 1917, article 123, contains numerous labor-related protections.[93] For example, the constitution protects the right to form unions and join professional associations; provides for the right to strike; prohibits anti-union discrimination; establishes minimum wages, an eight-hour work day, and a maximum work week of six days; and provides for overtime pay and maternity leave.[94]

Additionally, the 1970 Federal Labor Law expands the basic protections contained in the constitution and places extensive restrictions and obligations on Mexican employers.[95] For instance, the 1970 Federal Labor Law regulates labor contracts, minimum wages and hours, year-end bonuses and profit sharing, workers and employers' rights and obligations, employment of women and minors, collective labor relations, and strike procedures.[96] In certain areas, Mexican labor law provides guarantees that are not included in U.S. law.[97] Specifically, employees are entitled to share in profits equal to ten percent[98] of the employer's pretax income,[99] and workers can only be dismissed for

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92. Zamora, *supra* note 42, at 430-31.

93. *See* MEX. CONST., *supra* note 87, art. 123 (setting forth labor protections).

94. *Id.* The minimum wage provision of the constitution provides in part:

> The minimum wage to be received by a worker shall be general or according to occupation. The former shall govern in one or more economic zones; the latter shall be applicable to specified branches of industry or commerce or to special occupations, trades, or labor.
>
> The general minimum wage must be sufficient to satisfy the normal material, social, and cultural needs of the head of a family and to provide for the mandatory education of his children. The minimum occupational wage shall be fixed by also taking into consideration the conditions of different industrial and commercial activities.

Id. art. 123, pt. VI. In providing workers and employers with the right to form unions and to strike, the constitution specifies: "Both employers and workers shall have the right to organize for the defense of their respective interests, by forming unions, professional associations, etc." *Id.* art. 123, pt. XVI.

> Strikes shall be lawful when they have as their purpose the attaining of an equilibrium among the various factors of production, by harmonizing the rights of labor with those of capital. In public services it shall be mandatory for workers to give notice ten days in advance to the Conciliation and Arbitration Board as to the date agreed upon for the suspension of work.

Id. art. 123, pt. XVIII. "Differences or disputes between capital and labor shall be subject to the decisions of a Conciliation and Arbitration Board, consisting of an equal number of representatives of workmen and employers, with one from the Government." *Id.* art. 123, pt. XX.

95. *See* 1970 Federal Labor Law, *supra* note 88 (detailing Mexican labor regulations).

96. *See id.* (detailing Mexican labor regulations).

97. Zamora, *supra* note 42, at 431.

98. *Id.*

99. 1970 Federal Labor Law, *supra* note 88, paras. 117-31. The law also provides, however, that "the worker's right to share in profits shall not imply any right to intervene in the management or administration of the undertaking." *Id.* para. 131.

cause.[100] Mexican law establishes federal and state conciliation and arbitration boards to mediate alleged violations of labor law or collective bargaining agreements. These boards also preside over conciliations in case of a strike.[101] These boards consist of an equal number of representatives of employees and employers, with one representative from government.[102] The conciliation and arbitration boards hear cases falling primarily into three categories: complaints from individual workers that their statutory or contractual rights were violated, collective disputes in which a union claims that collective legal or economic rights are jeopardized, and issues arising out of actual or potential strikes.[103]

2. *Nonenforcement of Labor Laws*

When U.S. manufacturing facilities began relocating to Mexico, the Mexican government regarded the *maquiladora* operations as a source of employment for Mexican citizens, a vehicle for technology transfer, a way to train Mexican workers, and a means of generating foreign exchange.[104] In order to gain these benefits and to prevent adverse effects on foreign investment, the Mexican government adopted a hands-off approach to enforcing labor regulations.[105] Despite laws regulating freedom of association, collective bargaining, and minimum wages, workers in *maquiladora* industries in practice do not enjoy the right to strike or to organize unions, and often wages barely reach subsistence levels.[106] The government has maintained control over the labor force through close cooperation between labor union leaders and the dominant political party,

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100. *Id.* paras. 46-48. Where an employee is terminated without cause, the employer may be compelled to reinstate the employee in the position he occupied, or pay indemnification equal to three months' salary, whichever the employee prefers. *Id.* para. 48.

101. *See* MEX. CONST., *supra* note 87, art. 123, pt. XX. Labor law enforcement is the exclusive jurisdiction of the federal authorities in matters relating to textiles, electricity, motion pictures, rubber, sugar, mining, petrochemicals, metals and steel, hydrocarbons, cement, automobiles and parts, pharmaceuticals and medicines, wood pulp and paper, vegetable oils and fats, food packaging and canning, bottled beverages, railroads, lumber, glass and glass containers, and tobacco. *Id.* art. 123, pt. XXXI. State conciliation and arbitration boards are to settle all labor disputes that do not fall within the jurisdiction of the federal boards. 1970 Federal Labor Law, *supra* note 88, para. 621.

102. MEX. CONST., *supra* note 87, art. 123, pt. XX.

103. Bartow, *supra* note 86, at 199.

104. Peters, *supra* note 70, at 227.

105. *See id.* at 227, 234-35 (discussing how tremendous growth in *maquiladora* operations has discouraged governmental regulation of the *maquiladoras*).

106. *See Mexico's Worker-Rights Record*, *supra* note 78, at 407 (reporting that the fundamental rights of workers are persistently violated). While such violations occur throughout Mexico, the *maquiladora* plants are used as an illustration of nonenforcement of Mexican labor laws. *See* Zamora, *supra* note 42, at 431-32 (describing inadequate enforcement throughout Mexico).

the Institutional Revolutionary Party (*Partido Revolucionario Institucional*, or PRI).[107]

a. Right to Establish Trade Unions

Both the Mexican Constitution and the 1970 Federal Labor Law grant workers and employers freedom of association and the right to establish trade unions.[108] Most Mexican unions are affiliated with regional or national federations, and Mexico's largest labor federation, the Mexican Workers Confederation (*Confederación de Trabajadores Mexicanos*, or CTM), includes up to seventy percent of all union members.[109] Through its close alliance with the CTM, the PRI maintains control over labor unions and the labor force.[110] The PRI offers CTM leaders important government positions, in exchange for which the CTM generates labor support for party policy.[111] Although the 1970 Federal Labor Law defines trade unions as "association[s] of workers or employers set up for the study, aim and defense of their respective interests,"[112] the cooperation between the PRI and the CTM harms workers' interests.[113] Union leaders with concerns more akin to management and government are more loyal to the ruling party and to its desire to appease foreign manufacturers than to the workers whom they are supposed to protect.[114] Furthermore, union leaders who hold government positions spend little or no time in the plants themselves, which diminishes responsiveness to workers' concerns.[115]

In contrast to official unions, which are affiliated with the PRI, independent labor unions are more forceful in their demands of government and management.[116] Independent unions, however, are disadvantaged because they are

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107. *See* Bartow, *supra* note 86, at 192-93 (describing the interdependence between the PRI and the CTM, Mexico's largest federation of labor unions); *see also* Amy H. Goldin, *Collective Bargaining in Mexico: Stifled by the Lack of Democracy in Trade Unions*, 11 COMP. LAB. L.J. 203 (1990) (explaining that due to continued support from unions, the PRI has controlled the Mexican government since 1928).

108. MEX. CONST., *supra* note 87, art. 123, pt. XVI; 1970 Federal Labor Law, *supra* note 88, paras. 354, 357-58.

109. Bartow, *supra* note 86, at 192.

110. *Id.*

111. *Id.* at 192-93. The policy of offering public positions to union leaders who cooperate with the party is known as "co-optation." Goldin, *supra* note 107, at 209. Top leaders of the CTM regularly hold seats in the federal legislature, enjoy salaried positions in local and state governments, serve as labor representatives to government agencies, and hold positions on regional committees and arbitration boards. *Id.*

112. 1970 Federal Labor Law, *supra* note 88, para. 356.

113. Bartow, *supra* note 86, at 193.

114. Goldin, *supra* note 107, at 203. *But see id.* at 211-12 (pointing out that Fidel Velazquez, the leader of the CTM for the past five decades, has usually supported PRI policy, but has nevertheless secured significant benefits for Mexican laborers).

115. *Id.* at 209.

116. *Id.* at 210.

usually not recognized by the Ministry of Labor,[117] and are frequently harassed by the state due to their open opposition to PRI policies.[118] Indeed, attempts by workers to organize independent unions have been met with discharge, blacklisting, or murder.[119]

b. Right to Strike

Although the Mexican Constitution defends the right to strike, the 1970 Federal Labor Law sets forth a series of notification procedures and conciliation attempts that must be followed prior to striking.[120] Furthermore, for a strike to be legal, its objectives must be permissible,[121] and the suspension of work must be approved by a majority of the target's employees.[122] If these conditions are not fulfilled, the Conciliation and Arbitration Board may declare the strike legally nonexistent.[123] In such a case, if the striking workers do not return to work in twenty-four hours, the employer has the absolute right to terminate any worker and hire new employees without fear of liability.[124]

The requirements necessary to initiate a lawful strike are restrictive.[125] In 1991, the government approved only 136 strikes out of 7000 strike petitions.[126] This indicates that the right to strike may not be as vigorously protected as the Mexican labor law suggests.

In addition to the legal procedures limiting strikes, the government and employers often work in conjunction with the CTM to suppress and control

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117. *Id.* at 211. Article 365 of the 1970 Federal Labor Law requires trade unions to register with the Ministry of Labor in order to exist lawfully. 1970 Federal Labor Law, *supra* note 88, para. 365. Since labor contracts and the conciliation and arbitration boards are directed by the PRI's bureaucracy, if the Ministry of Labor refuses to recognize a union, its leaders may not enter arbitration hearings on behalf of its members, negotiate labor contracts, or hold positions on the government commissions on wages. Goldin, *supra* note 107, at 211.

118. Goldin, *supra* note 107, at 211.

119. *See Mexico's Worker-Rights Record*, *supra* note 78, at 407 (describing testimony before Congress of two ex-employees who lost their jobs as a result of union organizing activities). *See generally* Charles W. Nugent, *A Comparison of the Right to Organize and Bargain Collectively in the United States and Mexico: NAFTA's Side Accords and Prospects for Reform*, 7 TRANSNAT'L LAW. 197 (1994) (discussing the right to organize and bargain collectively in Mexico).

120. *See* 1970 Federal Labor Law, *supra* note 88, paras. 450-51, 459, 920-38 (setting forth strike procedures); Bartow, *supra* note 86, at 199-201 (outlining the procedures that the Conciliation and Arbitration Board, employers, and employees must follow in resolving labor disputes).

121. *See* 1970 Federal Labor Law, *supra* note 88, paras. 450, 459. Permissible objectives of a justified strike include: forcing an employer to enter into a collective bargaining agreement or to renew an expired one, compelling the fulfillment of a collective or some other binding agreement, and demanding compliance with statutory profit sharing or bonus provisions. *Id.* para. 450.

122. *Id.* paras. 451, 459.

123. *Id.* para. 459.

124. *Id.* para. 932.

125. *See id.* paras. 450-51, 459, 920-38 (setting forth strike procedures).

126. *American Enterprise Institute North American Free Trade Agreement (NAFTA) Debate*, Fed. News Serv., Nov. 9, 1993, *available in* LEXIS, News Library, NAFTA File.

discontented workers.[127] In one instance at the Ford Motor Company plant in Cuautitlan in 1990, CTM hired strikebreakers to attack union workers who walked off their jobs, resulting in severe injuries and one death.[128] In 1992, after management at the Volkswagen plant in Puebla lowered wages and revised work rules with the cooperation of the union leadership, workers went on strike and demanded an independent union.[129] After two weeks of striking, however, Mexican President Carlos Salinas de Gortari intervened on behalf of Volkswagen, allowing it to terminate its employment contracts, fire all of its workers, and rehire them under a new contract.[130] If the Mexican government is able to quell strikes by beating workers into submission or by unilaterally abrogating their contracts, the constitutional right of Mexican workers to strike is apparently meaningless.

c. Minimum Wage Guarantees

The Mexican Constitution provides that minimum wages must be set at a level capable of sustaining the material, cultural, and social needs of a laborer and the laborer's family.[131] Mexican minimum wages vary according to the location and type of work done[132] and are legally binding on all employers.[133] In reality, however, employers do not always comply with the laws, and union leaders do not enforce them.[134] Critics contend that the Mexican government promotes nonenforcement in order to attract foreign investors with cheap labor.[135] Moreover, *maquiladora* workers are doubly disadvantaged, for they earn less than their counterparts in Mexican-owned companies, despite being equally productive.[136] For instance, employees of Pillsbury's Green Giant frozen food processing plant in Irapuato earn the equivalent of only $3.70 per day.[137]

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127. *See* Goldin, *supra* note 107, at 213-14 (stating that using repressive techniques serves the PRI by keeping potential dissidents in order); *see also* Gibbons, *supra* note 85, at 28 (recounting instances of abuse of Mexican workers).

128. Levinson, *supra* note 39, at 10.

129. *Id.* at 9.

130. *Id.*

131. *See supra* note 94 (setting forth the constitution's minimum wage provision).

132. Goldin, *supra* note 107, at 219. There are 264 minimum wages in Mexico. Anthony DePalma, *Vague Mexico Wage Pledge Clouds Free Trade Accord*, N.Y. TIMES, Sept. 29, 1993, at A1. Wages vary according to 88 different categories of work, and there are three levels of wages for each category depending on the location of the job. *Id.* For example, as of September 1993, the minimum wage for an eight-hour day as a general laborer, converted to U.S. dollars, was $4.60 in very urban areas, $4.27 in somewhat urban areas, and $3.88 in rural areas. *Id.*

133. Goldin, *supra* note 107, at 220.

134. *Id.*

135. *Mexico's Worker-Rights Record*, *supra* note 78, at 407; *see Labor Delegation*, *supra* note 81, at 23 (arguing that the purpose of such policies is to lay out a "welcome mat" to foreign investors).

136. Torres, *supra* note 75, at 102.

137. *Id.* at 106.

Although workers receiving such low wages are desperate, they are unable to protest because the government and most trade unions cooperate to keep wages low, and efforts to start independent unions are quelled.[138]

d. *Reasons for Nonenforcement of Laws*

Some commentators contend that enforcement problems result from inadequate capital resources.[139] They argue that the prosperity generated by NAFTA could be used to improve the situation of workers.[140] At the same time, the Mexican government asserts that its objective has been to decrease inflation through temporary price and wage controls.[141] The government maintains that it will increase wages after the inflation rate is in line with that of its NAFTA partners.[142] On the other hand, critics of Mexican labor policy argue that the government suppresses discontented workers and keeps wages low in order to attract foreign investment, a goal it accomplishes easily through its control over labor unions.[143]

Whatever the reasons for lax enforcement of labor laws, free trade between the United States and Mexico and its concomitant economic development should generate pressure on the Mexican government to honor the rights of its workers. The Supplemental Agreement is designed to promote enforcement through a policy of collaboration, exposure of problems, and imposition of sanctions for persistent violations.[144]

III. THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

The North American Agreement on Labor Cooperation was implemented simultaneously with NAFTA to satisfy concerns about the Mexican government's failure to enforce its labor laws and to protect workers' rights.[145] It establishes

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138. *See supra* notes 108-19 and accompanying text (discussing the inadequate enforcement of Mexican laws protecting the right to establish trade unions).

139. McCaffrey, *supra* note 5, at 469.

140. *Id.*

141. Zimmerman, *supra* note 50, at 6. In December 1987, the Mexican government enacted the Economic Solidarity Pact, which imposed wage freezes designed to lower inflation. Goldin, *supra* note 107, at 223. The Pact has been periodically renewed since its enactment. *18-Month Forecasts of Fiscal and Monetary Expansion*, Pol. Risk Servs., Aug. 1, 1993, *available in* LEXIS, Nsamer Library, Mexico File. While this program proved successful in decreasing inflation from 114% in 1988 to 15.5% in 1992, it decreased workers' buying power. Goldin, *supra* note 107, at 223.

142. Alina A.C.E. Adalpe, *The Marketing of an Agreement; Misinformation and Misunderstanding Plague the Harmonious Implementation of NAFTA*, RECORDER, July 21, 1993, at 8.

143. *Mexico's Worker-Rights Record*, *supra* note 78, at 407.

144. *See infra* notes 152-235 and accompanying text (detailing the Supplemental Agreement's purposes and provisions).

145. *See supra* notes 70-82 and accompanying text (enunciating concerns of NAFTA's opponents caused by the nonenforcement of labor laws).

a trinational commission to organize cooperative activities, to oversee dispute resolution, and, if warranted, to impose fines or penalties for persistent labor law violations.[146]

To the disappointment of some, the Supplemental Agreement is not a complete solution to inadequate enforcement of Mexican labor laws.[147] For instance, a lengthy complaint process ensures that sanctions will be a last resort.[148] In addition, violations of certain labor laws are not subject to penalties, and information exchange, by itself, has minimal deterrent value.[149] Detractors must remember, however, that the Supplemental Agreement, as part of a free trade agreement between sovereign nations, cannot satisfy all expectations.[150] Despite its weaknesses, the Supplemental Agreement provides a new mechanism by which to address differences and expose problems.[151] It should be regarded as a first step toward realizing the ultimate goal—that all NAFTA countries honor and protect the rights of their workers.

A. Purposes

The primary purpose of the Supplemental Agreement is to encourage each country to enforce its domestic labor laws by utilizing a policy of information exchange, cooperation, and collaboration.[152] To this end, the parties have committed to promote enforcement in many areas, including freedom of association, the right to organize, the right to bargain collectively, the right to strike, and ensuring minimum wages.[153] Further, each party pledges to abide by procedural guarantees to ensure fair and equitable proceedings for the enforcement of its

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146. *See infra* notes 156-231 and accompanying text (describing the commission's structure, the complaint process, and the potential penalties under the Supplemental Agreement).

147. *See, e.g.*, Levinson, *supra* note 39 (arguing that the Supplemental Agreement is not an effective remedy for abusive labor practices); *Hearing on NAFTA's Effect*, *supra* note 15 (Rep. Collin C. Peterson, Democrat from Minnesota, maintaining that the Supplemental Agreement fails to address the most fundamental rights of workers).

148. *See infra* notes 172-208 and accompanying text (detailing each step of the complaint process).

149. *See infra* notes 152-235 and accompanying text (setting forth the Supplemental Agreement's provisions and commentary relating thereto).

150. *See supra* notes 38-53 and accompanying text (explaining why labor issues were excluded from NAFTA's main text).

151. *See infra* notes 152-231 and accompanying text (highlighting the Supplemental Agreement's purposes, structure for cooperation, and method of resolving disputes).

152. Supplemental Agreement, *supra* note 1, arts. 1, 3. Suggested action for accomplishing this goal includes appointing and training inspectors; monitoring compliance and investigating suspected violations; encouraging voluntary compliance; requiring record keeping and reporting; establishing worker-management committees to address regulation of the workplace; encouraging mediation, conciliation, and arbitration services; and initiating proceedings to seek sanctions or remedies for violations of labor laws. *Id.* art. 3.

153. *Id.* annex 1.

labor laws.[154] Each party will also promote public awareness of its labor laws by making information available to the public and by promoting education.[155]

B. Structure for Cooperation

1. Commission for Labor Cooperation

The Supplemental Agreement establishes the Commission for Labor Cooperation, which is comprised of a ministerial council and a secretariat.[156] The council is the governing body of the Commission and consists of labor ministers of each of the three nations.[157] The council convenes at least once per year in regular session, and its duties include directing the activities of the secretariat and of any committees or working groups convened by the council; establishing priorities for cooperative action and developing technical assistance programs; facilitating consultations and information exchange between the parties; and promoting the collection and publication of data on enforcement, labor standards, and labor market indicators.[158]

The secretariat consists of an executive director and a fifteen member staff.[159] The secretariat will periodically prepare background reports on labor law and its enforcement, labor market conditions, and human resource development.[160] In addition, the secretariat will prepare a study on any matter that the council may request.[161] In doing so, it may consider any relevant information, including that supplied by independent experts, and it may include proposals on the matter.[162]

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154. *Id.* art. 5. Such guarantees include, among others, public hearings, except where the administration of justice otherwise requires; the opportunity for the parties to be heard; a ban on unreasonable charges, time limits, or unwarranted delays; the right, in accordance with each country's law, to seek review of proceedings; impartial tribunals; written judgments made available to the parties without undue delay; and the availability of remedies, including orders, compliance agreements, fines, penalties, imprisonment, injunctions, and emergency workplace closures. *Id.*

155. *Id.* art. 7.

156. *Id.* art. 8.

157. *Id.* arts. 9, 10.

158. *Id.* The council is required to promote cooperative action among the parties in areas such as occupational safety and health, child labor, work benefits, labor-management relations and collective bargaining procedures, laws relating to the formation and operation of unions and labor dispute resolution, and equality of women and men in the workplace. *Id.* art. 11. The parties may cooperate through seminars, training sessions, working groups, conferences, joint research projects, and technical assistance. *Id.*

159. *Id.* art. 12.

160. *Id.* art. 14.

161. *Id.*

162. *Id.*

2. National Administrative Offices

The Commission for Labor Cooperation is assisted by a National Administrative Office (NAO) for each party, the purpose of which is to bring labor complaints to the attention of the Commission for resolution or dispute settlement.[163] Established by and in each country, it is a point of contact with governmental agencies of that party, NAOs of other parties, and the secretariat.[164] Each NAO is to provide publicly available information requested by the secretariat for background reports or studies, another party's NAO, or an Evaluation Committee of Experts.[165]

Under this structure, each government voluntarily contributes and exchanges information relating to its labor policies and standards.[166] The Supplemental Agreement does not, however, contain any timetables or guidelines regulating such dialogue, nor does it set forth potential penalties for failing to engage in such cooperative activities.[167] Without any mechanism to guarantee cooperation or information exchange, the Commission is without power to promote labor law enforcement.

C. Resolution of Disputes

1. Private Right of Action

The Supplemental Agreement commits each party to ensure that "persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of [its] labor law."[168] Such persons are given the right to seek enforcement of occupational safety and health standards, employment standards, industrial relations laws, and collective agreements.[169]

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163. *Id.* arts. 15, 16, 21, 24.

164. *Id.* art. 16.

165. *Id.*; *see infra* notes 178-83 and accompanying text (describing the duties of an Evaluation Committee of Experts).

166. Supplemental Agreement, *supra* note 1, arts. 1, 10, 11, 14, 16; *see supra* notes 152, 156-62 and accompanying text (explaining that information exchange is one of the primary functions of the Commission for Labor Cooperation).

167. The Supplemental Agreement's timing and penalty provisions govern only the resolution of allegations of labor law violations. *See* Supplemental Agreement, *supra* note 1, arts. 20-41 (outlining the Supplemental Agreement's dispute resolution process from the initial NAO consultations to the suspension of benefits); *infra* notes 172-208 and accompanying text (detailing the dispute resolution procedures and explaining the types of alleged violations that can be challenged).

168. Supplemental Agreement, *supra* note 1, art. 4.

169. *Id.* Industrial relations laws include freedom of association, the right to organize, the right to bargain collectively, and the right to strike. *Hearing on NAFTA's Effect*, *supra* note 15 (statement of Deputy U.S. Trade Representative Rufus Yerxa).

However, under the Supplemental Agreement's complaint process, only governments, and not private parties, have power to initiate the various procedures necessary to determine whether alleged labor law violations are sufficiently grave to warrant fines or penalties.[170] Further, under the terms of the Supplemental Agreement, no government may provide for a right of action under its domestic law against any other government for violation of the Supplemental Agreement.[171] Even though the countries commit to ensure that individuals have a private right of action, the Supplemental Agreement provides no mechanism by which to enforce such a right. In order for sanctions to be a significant deterrent, the governments of each country must be serious about enforcing the Supplemental Agreement and calling attention to labor violations.

2. *Complaint Process*

Cooperation underlies each step of the complaint process and it is the primary method by which the parties address differences and resolve disputes.[172] Indeed, under the terms of the Supplemental Agreement, the parties commit to "make every attempt through cooperation and consultations to resolve any matter" brought to their attention.[173]

Any interested entity, such as an individual, labor union, or employer, may bring a complaint to an NAO.[174] The three NAOs collectively will examine the labor law applicable to the situation.[175] Following the initial complaint and NAO consultations, any party may request a meeting with another party at the ministerial level regarding any matter within the scope of the Supplemental Agreement.[176] The three council members are to make every attempt to resolve the matter through consultations and the exchange of publicly held information.[177]

If a matter has not been resolved after ministerial consultations, any consulting party may request the establishment of an Evaluation Committee of Experts (ECE).[178] The council will form an ECE if the matter is determined to

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170. *See infra* notes 176-205 and accompanying text (pointing out that at each stage of the complaint process only a government can request that the matter proceed to the next level).

171. Supplemental Agreement, *supra* note 1, art. 43.

172. *Id.* art. 20.

173. *Id.*

174. Levinson, *supra* note 39, at 4.

175. *See* Supplemental Agreement, *supra* note 1, art. 21 (detailing the guidelines for NAO consultations).

176. *Id.* art. 22.

177. *Id.*

178. *Id.* art. 23. After the formation of an Evaluation Committee of Experts (ECE) has been requested, any other party may request that the council select an independent expert to make a ruling on whether the matter is trade related or covered by mutually recognized labor laws. *Id.* annex 23. Affirmative rulings on these matters are a prerequisite to the formation of an ECE. *Id.* art. 23.

be trade related[179] and is covered by mutually recognized labor laws.[180] The ECE analyzes patterns of practice in the enforcement of each party's occupational safety and health standards, or other technical labor standards,[181] as they apply to the particular matter considered during ministerial consultations.[182] The ECE presents to the council a final evaluation report assessing the party's occupational safety and health, child labor, minimum wage, and other technical labor standards; its conclusions; and practical recommendations.[183]

Under the terms of the Supplemental Agreement, alleged violations of industrial relations matters—freedom of association, collective bargaining, and the rights to organize unions and to strike—are reviewed by the NAOs and the ministerial council.[184] Complaints involving these rights are not, however, subject to analysis by an ECE or arbitral panel.[185] As a result, the Supplemental Agreement provides no authority to develop a remedial action plan or to impose penalties for violations of industrial relations matters.[186]

U.S. Trade Representative Mickey Kantor has said that industrial relations matters were omitted from the investigation and sanctioning processes to avoid

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179. "Trade related" is defined:

> [R]elated to a situation involving workplaces, firms, companies, or sectors that produce goods or provide services: (a) traded between the territories of the parties; or (b) that compete in the territory of the party whose labor law was the subject of ministerial consultations . . . with goods or services produced or provided by persons of another party.

Id. art. 49.

180. *Id.* art. 23. "Mutually recognized labor laws" means "laws of both a requesting party and the party whose laws were the subject of ministerial consultations . . . that address the same general subject matter in a manner that provides enforceable rights, protections or standards." *Id.* art. 49. An ECE is to consist of three members with experience in the relevant labor matters, and it may consider written submissions and information from the parties; the secretariat; the NAOs; organizations, institutions, and persons with relevant expertise; and the public. *Id.* art. 24.

181. "Technical labor standards" means laws and regulations that are directly related to the prohibition of forced labor; labor protections for children and young people; minimum employment standards, such as minimum wages and overtime pay; elimination of employment discrimination on the basis of race, religion, age, sex, or other grounds; equal pay for men and women; prevention of occupational injuries and illnesses; compensation in cases of such injuries and illnesses; and protection of migrant workers. *Id.* art. 49. It is important to note that industrial relations matters—freedom of association, the right to organize, the right to bargain collectively, and the right to strike—are not included in this definition and are thus not subject to ECE evaluation. *Id.*

182. *Id.* art. 23.

183. *Id.* arts. 25, 26. The final report and the parties' written responses are then tabled for consideration at the next regular session of the council. *Id.* art. 26.

184. *See supra* notes 174-77 and accompanying text (discussing NAO and ministerial consultations).

185. *See supra* notes 178-83 and accompanying text (pointing out that an ECE can only analyze the enforcement of technical labor standards, the definition of which excludes industrial relations matters); *infra* notes 198-202 and accompanying text (outlining arbitral panel functions).

186. *See infra* notes 198-202, 209-31 and accompanying text (discussing arbitral panels, action plans, monetary penalties, and suspension of benefits).

excessive interference with negotiations between labor and management.[187] Critics, however, argue that the signatory countries, by insulating such matters from scrutiny, have endorsed the abusive practices inherent in the Mexican labor relations system.[188] They believe that the Supplemental Agreement permits the Mexican government to continue restricting workers' bargaining strength.[189] Further, at best, the three labor ministers will engage in consultations about industrial relations matters.[190] Detractors contend that without any enforcement mechanism, nonbinding consultations will not result in any major policy changes.[191]

Following presentation to the council of an ECE final report, any party may request consultations with any other party regarding whether there has been a "persistent pattern[192] of failure by that other party to effectively enforce such standards" addressed in the report.[193] Again, the consulting parties are to "make every attempt to arrive at a mutually satisfactory resolution of the matter through consultations."[194]

If the parties fail to resolve the matter through consultations, any consulting party may request a special session of the council.[195] Unless the council decides that a matter is properly covered by another agreement or arrangement of the parties, the council will attempt to resolve the dispute promptly.[196] It may call on technical advisors, create working groups or expert groups, or make recommendations to assist the parties in reaching a satisfactory resolution.[197]

If the dispute has not been resolved after the council has convened, the council will, on request by a party and by a two-thirds vote, form an arbitral panel to consider the matter.[198] Unless the disputing parties otherwise agree, the standard applied is "whether there has been a persistent pattern of failure by the [p]arty complained against to effectively enforce its occupational safety and

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187. *See NAFTA Press Conference*, *supra* note 26 (announcing NAFTA's supplemental agreements on labor and the environment). *But see* Levinson, *supra* note 39, at 5 (arguing that such an explanation is unconvincing).

188. Levinson, *supra* note 39, at 11.

189. *See id.* (declaring that the Supplemental Agreement's message is that abusive labor practices in Mexico do not concern the United States).

190. *See supra* notes 176-77 and accompanying text (discussing ministerial consultations).

191. Levinson, *supra* note 39, at 11.

192. "Persistent pattern" means "a sustained or recurring pattern of practice." Supplemental Agreement, *supra* note 1, art. 49.

193. *Id.* art. 27.

194. *Id.*

195. *Id.* art. 28.

196. *Id.*

197. *Id.*

198. *Id.* art. 29. Note again that the alleged persistent pattern of failure to effectively enforce occupational safety and health, child labor, minimum wage, or other technical labor standards must be trade related and covered by mutually recognized labor laws. *Id.* An arbitral panel is to comprise five members. *Id.* art. 32. Panelists must have expertise or experience in labor law or its enforcement, in the resolution of disputes arising under international agreements, or other relevant expertise or experience. *Id.* art. 30.

health, child labor or minimum wage technical labor standards."[199] The Supplemental Agreement provides that a party has effectively enforced such standards when the party's actions reflect a "reasonable exercise of discretion" in regulating or investigating labor matters, or result from "bona fide decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities."[200]

The panel shall present to the disputing parties a report of its determination as to whether there has been a persistent pattern of failure to effectively enforce the relevant labor standards, and, if the determination is affirmative, its recommendations for the resolution of the dispute.[201] The report will normally recommend implementation of an action plan mutually satisfactory to the disputing parties and sufficient to remedy the pattern of nonenforcement.[202]

As detailed above, before any penalties for labor law violations can be imposed, a convoluted and time consuming complaint process must be followed. Specifically, a challenge must proceed through numerous attempts to arrive at a mutually satisfactory resolution.[203] Stated briefly, the claim must proceed through NAO and ministerial consultations, an ECE assessment, party consultations, a special session of the council, and an arbitral panel determination as to the existence of a persistent pattern of failure to enforce the relevant labor standards.[204] This lengthy and bureaucratic process ensures that sanctions will rarely, if ever, be imposed.[205]

Of great significance to some critics is the "escape hatch" contained in the Supplemental Agreement's definition of effective enforcement.[206] Under this definition, a government can defend its inaction when the inaction reflects a reasonable exercise of discretion or results from decisions to allocate enforcement resources to violations having higher priorities.[207] In the words of one critic, the exception "is so broad it virtually guarantees that sanctions can never be

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199. *Id.* art. 33; *see supra* note 181 (defining "technical labor standards").

200. Supplemental Agreement, *supra* note 1, art. 49.

201. *Id.* arts. 36, 37.

202. *Id.* arts. 36-38.

203. *See id.* arts. 20, 22, 27-28 (declaring that the parties must at all times endeavor to reach mutually satisfactory solutions through cooperation and consultations).

204. *See supra* notes 172-202 and accompanying text (setting forth each step of the complaint process).

205. *NAFTA's Labor Supplemental Agreement Provides Mechanism to Expose Labor Law Problems*, 144 Lab. Rel. Rep. (BNA) 521, 525 (Dec. 27, 1993) (News & Background Info.); *see* Levinson, *supra* note 39, at 13 (describing statements made by the Mexican Secretary of Commerce to Mexican legislators that the Supplemental Agreement's lengthy and complex process makes the imposition of penalties very improbable). According to a summary released by U.S. Trade Representative Mickey Kantor's office, trade sanctions are truly a last resort, since the intent is to encourage parties to enforce their law, not to erect new trade barriers. *NAFTA Tests Clinton's Relationship with Unions*, 144 Lab. Rel. Rep. (BNA) 16, 17 (Sept. 6, 1993) (News & Background Info.) [hereinafter *Clinton's Relationship with Unions*].

206. *See* Levinson, *supra* note 39, at 12 (stating that, due to this clause, the prospect of imposing trade sanctions for failure to enforce labor laws is remote); *supra* text at note 200 (defining effective enforcement).

207. Supplemental Agreement, *supra* note 1, art. 49.

invoked."[208] Indeed, if faced with potential trade sanctions, a country may argue that it exercised "reasonable discretion" or that its limited resources were expended in another labor area—both of which are virtually standardless exceptions.

D. Penalties

1. Monetary Enforcement Assessments

The Supplemental Agreement authorizes fines if the parties fail to develop or implement an action plan.[209] To clarify, if the disputing parties have not agreed on a mutually satisfactory action plan within the allotted time, the panel will reconvene to establish a sufficient plan.[210] At this point, the arbitral panel may impose a fine.[211] If the disputing parties cannot agree as to whether a party has fully implemented a previously established action plan, the panel will reconvene.[212] If the panel determines that the party has not implemented the action plan, the panel will then impose a fine.[213]

From January 1, 1994 to December 31, 1994, the maximum monetary penalty is $20 million or its equivalent in the currency of the party complained against.[214] Thereafter, fines may not exceed 0.007 percent of total trade in goods between the parties during the most recent year for which data is available.[215] Although the Supplemental Agreement sets a maximum amount, the arbitral panel has great discretion in determining the actual fine.[216]

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208. Levinson, *supra* note 39, at 12.

209. *See* Supplemental Agreement, *supra* note 1, art. 39 (discussing the imposition of fines for failure to implement an action plan).

210. *Id.* No party may make a request to reconvene the arbitral panel for failure of the disputing parties to agree on an action plan earlier than 60 days, or later than 120 days, after the issuance of the panel's final report. *Id.* If the disputing parties have not agreed to an action plan, but no request is made to reconvene the arbitral panel, the last action plan submitted by the party complained against will be deemed to have been established by the panel. *Id.* If the arbitral panel is reconvened, it will establish a plan of its own design consistent with the law of the party complained against. *Id.*

211. *Id.*

212. *Id.* No request to reconvene an arbitral panel for the failure of the disputing parties to agree on whether the party complained against has fully implemented an action plan may be made earlier than 180 days after an action plan has been established, and requests may only be made during the term of any such action plan. *Id.*

213. *Id.*

214. *Id.* annex 39.

215. *Id.*

216. *See id.* In determining the amount of the assessment, the panel shall take into account:

> (1) [T]he pervasiveness and duration of the party's persistent pattern of failure to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards; (2) the level of enforcement that could reasonably be expected of a party given its resource constraints; (3) the reasons, if any, provided by the party for not fully implementing an action plan; (4) efforts made by the party to begin remedying the pattern of nonenforcement after the final report of the panel; and (5) any other relevant factors.

2. Suspension of Benefits

When a party fails to pay a fine, the complaining party may suspend the other party's NAFTA tariff benefits by increasing the duties on goods originating in the other country.[217] Such an increase may be applied only for as long as necessary to collect, through the duty increase, the amount of the fine.[218] When the panel determines that the penalty has been paid, or that the party is fully implementing the action plan, the tariff benefits will be restored.[219]

As indicated above, the Supplemental Agreement allows only limited sanctions against those who violate workers' rights.[220] Opponents point to the absence of provisions authorizing, for example: compensatory and punitive damages for workers or unions whose rights are violated; on-site investigations or the targeting of specific companies; or criminal prosecutions for willful violators.[221] The Supplemental Agreement permits only fines or the removal of NAFTA benefits up to the amount of the assessment—benefits that would not otherwise exist without NAFTA.[222] The penalties seem lenient because once the fines are paid, or the government implements an action plan, NAFTA benefits will be reinstated, regardless of the violations' flagrancy.[223]

It is difficult to predict the deterrent value of the monetary penalties. While the Supplemental Agreement authorizes a $20 million maximum for the first year,[224] the imposition of a fine during this year is extremely unlikely. By the end of the year, the Commission for Labor Cooperation and its component parts will be newly formed, and will just have begun to collaborate and exchange information.[225] The likelihood of a complaint citing a persistent pattern of nonenforcement of labor laws seems remote. Even if a complaint is filed, the

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Id.

217. *Id.* art. 41, annex 41B. In suspending NAFTA tariff benefits, the party may increase the rates of duty to levels not to exceed the lesser of: (1) the rate applicable to those goods immediately prior to January 1, 1994, and (2) the most-favored-nation rate applicable to those goods on the date the party suspends such benefits. *Id.* annex 41B. In considering what benefits to suspend, a party should first seek to suspend benefits in the same sector or sectors in which there was a persistent pattern of failure to enforce the relevant labor standards. *Id.* If it is not practicable or effective to do so, the party may suspend benefits in other sectors. *Id.*

218. *Id.* annex 41B.

219. *Id.* art. 41.

220. *See Clinton's Relationship with Unions*, *supra* note 205, at 17 (recommending a wider range of sanctions); *supra* notes 209-19 and accompanying text (describing fines and suspended benefits).

221. *Clinton's Relationship with Unions*, *supra* note 205, at 17; *NAFTA to Raise Labor Standards in Mexico*, 144 Lab. Rel. Rep. (BNA) 97 (Sept. 27, 1993) (News & Background Info.).

222. *See supra* notes 209-19 and accompanying text (discussing fines and suspended benefits).

223. *See supra* notes 217-19 and accompanying text (discussing the duration for which NAFTA benefits are to be suspended).

224. Supplemental Agreement, *supra* note 1, annex 39; *see supra* notes 214-15 and accompanying text (noting the maximum amounts at which fines may be set).

225. *See supra* notes 156-62 and accompanying text (outlining the duties of the Commission for Labor Cooperation).

entire dispute resolution process must be exhausted before fines can be imposed.[226] This includes various consultations, the drafting of reports, the determination of a persistent pattern of nonenforcement of labor standards, and the development and implementation of an action plan.[227] Completion of these steps will undoubtedly take more than one year. Thus, since it is unlikely that fines will be imposed during the first year, the authorized maximum of $20 million is insignificant.

Moreover, while a maximum of 0.007 percent of the total trade in goods is authorized for each subsequent year,[228] the panel enjoys substantial discretion in determining the amount of the assessment actually imposed.[229] It must consider, among other factors, the level of enforcement that could reasonably be expected of a party given its resource constraints.[230] This factor might be used to justify lenient fines on Mexico, a lesser developed country.[231] For these reasons, it is impossible to ascertain the amount of fines that would actually be imposed, making it difficult to foresee whether fines will have any deterrent value.

E. Withdrawal

Article 54 of the Supplemental Agreement states that "[a] [p]arty may withdraw from this Agreement six months after it provides written notice of withdrawal to the other [p]arties. If a [p]arty withdraws, the Agreement shall remain in force for the remaining [p]arties."[232] This clause is potentially troublesome. It allows any of the signatory countries to unilaterally withdraw from the Supplemental Agreement, but to continue as a party to NAFTA without suffering any adverse consequences.[233] When a country is faced with fines or penalties for persistent violations of its labor laws, article 54 permits withdrawal, thereby condoning the continued violation of workers' rights.[234]

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226. *See supra* notes 172-208 and accompanying text (describing the procedural steps required before sanctions can be imposed).

227. *Id.*

228. Supplemental Agreement, *supra* note 1, annex 39; *see supra* notes 214-15 and accompanying text (discussing the maximum amounts at which fines may be set).

229. Supplemental Agreement, *supra* note 1, annex 39; *see supra* note 216 and accompanying text (outlining the factors the arbitral panel will consider in determining the amount of the assessment).

230. Supplemental Agreement, *supra* note 1, annex 39.

231. This is not to suggest that the United States and Canada will never violate their labor laws. It is just a response to the concern expressed by many regarding the persistent nonenforcement of Mexico's labor laws.

232. Supplemental Agreement, *supra* note 1, art. 54.

233. *Id.*

234. *Id.*

On the other hand, the signatory countries' adoption of the Supplemental Agreement was a prerequisite to NAFTA's formation.[235] As a result, withdrawal from the Supplemental Agreement could lead to NAFTA's disintegration, or at least to the exclusion of the withdrawing country from NAFTA. Because Mexico stands to benefit from NAFTA, its government may be reluctant to withdraw from the Supplemental Agreement.

IV. DISCUSSION

A. The Supplemental Agreement in Context

Upon initial examination, the Supplemental Agreement appears somewhat toothless. It makes no provision for enforcement of a private right of action, it sets up a protracted complaint process, the imposition of sanctions is a last resort, and violations of the rights to strike and organize are not subject to fines or suspension of benefits.[236] Although these features suggest that Mexico is purposely retaining control over labor unions and employees to prevent any real improvement in labor standards or enforcement, consideration of the purposes of a free trade agreement and a closer examination of the Supplemental Agreement suggest a contrary conclusion.

In negotiating an international treaty, governments must compromise in order to accommodate their various interests and concerns. NAFTA is a free trade agreement among sovereign nations and must therefore respect each country's laws.[237] Thus, the Supplemental Agreement commits each country to enforce its own national labor laws.[238] Indeed, it would not have been feasible nor appropriate for the United States to have unilaterally demanded compliance with its notion of the proper labor relations structure. The Supplemental Agreement does not purport to create supranational harmony of laws modeled on U.S. policies, for a free trade agreement cannot force social change upon one of its signatory countries.[239]

Moreover, the rights to organize, bargain collectively, and strike are subject to the Supplemental Agreement's general obligations regarding effective enforcement of national laws, information exchange and collaboration, and review

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235. *See supra* notes 44-46 and accompanying text (discussing why President Clinton conditioned NAFTA on implementation of the Supplemental Agreement).

236. *See supra* notes 168-235 and accompanying text (outlining the Supplemental Agreement's provisions and weaknesses).

237. *See supra* notes 38-53 and accompanying text (discussing the importance of sovereignty in negotiating a free trade agreement).

238. Supplemental Agreement, *supra* note 1, arts. 1-2, annex 1.

239. *Hearing on NAFTA's Effect*, *supra* note 15 (statement of Deputy U.S. Trade Representative Rufus Yerxa).

by the national administrative offices and the ministerial council.[240] These provisions do not provide any mechanism for enforcement, but they establish a new means by which to expose industrial relations problems and to address differences between the parties.[241] Labor law violations occur under practices adopted before NAFTA passed. The Supplemental Agreement, by providing a forum for exposing and discussing problems, is the first step in reforming these abusive labor policies.

B. *Other Possibilities*

1. *Reduced Incentive to Violate Labor Laws*

The adoption of a free trade policy may, in itself, reduce the impetus for the Mexican government to maintain repressive labor relations policies.[242] Reduction in tariffs and other trade barriers, coupled with Mexico's growing consumer market, should provide sufficient incentives for increased foreign investment in Mexico.[243] This stimulus may reduce the pressure on the government to attract investors by controlling labor unions, suppressing workers, and maintaining low wages.[244]

2. *Pledge to Increase Minimum Wages as Productivity Increases*

Critics point out that, although the Supplemental Agreement facilitates discussion and collaboration designed to improve Mexican labor law enforcement, it does not include a provision for narrowing the disparity between Mexican and U.S. minimum wages.[245] In answer to NAFTA's opponents who fear that U.S. industry will migrate to Mexico to take advantage of lower wages, Mexican President Salinas has pledged to link minimum wages to growth in productivity and economic development.[246] The pledge provides some hope that the Mexican

240. Supplemental Agreement, *supra* note 1, arts. 1-22.

241. *Hearing on NAFTA's Effect*, *supra* note 15 (statement of Deputy U.S. Trade Representative Rufus Yerxa). *But see* Levinson, *supra* note 39, at 11 (maintaining that sunshine alone is not enough to compel Mexico to discontinue its abusive practices).

242. *See supra* notes 104-43 and accompanying text (describing Mexican labor law violations).

243. *See supra* notes 58-69 and accompanying text (discussing arguments in support of NAFTA).

244. *Mexico's Worker-Rights Record*, *supra* note 78, at 407; *see supra* notes 104-43 and accompanying text (documenting the nonenforcement of Mexican labor laws).

245. Levinson, *supra* note 39, at 14. As of September 1993, the minimum wage for a general laborer in Mexico, depending on the location of the work, was between $4.60 and $3.88 for an eight-hour day. *Supra* note 132. By way of contrast, the federal minimum wage in the U.S. was $34.00 for an eight-hour day. DePalma, *supra* note 132, at A1; *see generally supra* note 132.

246. *See* DePalma, *supra* note 132, at A1 (discussing President Salinas' minimum-wage pledge).

government will work toward ensuring living wages for its workers.[247] The pledge was so vague, however, and measuring productivity so troublesome, that a concrete plan must be developed before it can be considered meaningful.[248]

3. Super 301 Revival?

In its draft recommendations for NAFTA implementing legislation, the Senate Finance Committee attached a revival of the Super 301 Amendment to section 301 of the Trade Act of 1984.[249] In effect from 1988 to 1990, Super 301 required that tariffs and other trade sanctions be imposed on countries maintaining significant trade barriers with the United States.[250] In connection with NAFTA, violations of Mexican laws regarding freedom of association and the right to strike could be considered significant trade barriers, leading to Super 301 trade sanctions.[251] Due to concerns about the necessity of the measure, however, the House of Representatives excluded it from its draft of implementing legislation.[252] Consequently, the Clinton administration did not submit NAFTA with Super 301, but has indicated its support for revival of the measure and its willingness to work with Congress to reenact it in 1994.[253]

If attached to NAFTA in the future, Super 301 could authorize sanctions for persistent violations of industrial relations provisions. This would satisfy concerns caused by the Supplemental Agreement's exclusion of industrial relations matters from its sanctioning process.[254]

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247. *See id.* (noting that if an accurate and reliable format is used to link wages to productivity, the standard of living for Mexican workers could improve significantly).

248. *Id.*; *see* Levinson, *supra* note 39, at 14 (asserting that the pledge is meaningless because it can be reversed by President Salinas or a future Mexican president without violating any written agreement).

249. 19 U.S.C. § 2411 (1993); *Finance Committee Attaches 301 to NAFTA*, 144 Lab. Rel. Rep. (BNA) 270 (Nov. 1, 1993) (News & Background Info.) [hereinafter *Finance Committee*]; Keith Bradsher, *Traveler Fees May Rise to Pay for Trade Accord*, N.Y. TIMES, Oct. 9, 1993, at 10.

250. *Finance Committee*, *supra* note 249, at 270. Congressional Democrats intended the law to be a weapon against what they perceived as Japanese trade barriers. Bradsher, *supra* note 249, at 10.

251. *Hearing of the House Merchant Marine and Fisheries Committee*, Nov. 10, 1993, *available in* LEXIS, News Library, NAFTA File (statement of U.S. Trade Representative Mickey Kantor).

252. *Press Conference with U.S. Trade Representative Mickey Kantor*, Fed. News Serv., Nov. 3, 1993, *available in* LEXIS, News Library, NAFTA File [hereinafter *Kantor Press Conference*]; *see Finance Committee*, *supra* note 249, at 271 (explaining that amendments to NAFTA must be "necessary or appropriate" to the pact's implementation).

253. *Kantor Press Conference*, *supra* note 252; *Finance Committee*, *supra* note 249, at 271.

254. *See supra* notes 184-86 and accompanying text (pointing out that industrial relations matters are not covered by investigation or sanctioning processes).

V. CONCLUSION

The North American Agreement on Labor Cooperation is not the final solution to inadequate enforcement of Mexican labor laws, nor does it purport to be. As illustrated by its emphasis on cooperation and its requirement that labor law violations be persistent before sanctions are authorized, its aim is not to impose severe punishment for each transgression. Rather, its primary purpose is to encourage enforcement of domestic labor laws through exposing problems and exchanging information. In this regard, the Supplemental Agreement establishes a new forum in which the United States and Mexico together can analyze and improve labor policies and working conditions.

While the creation of a mechanism for United States-Mexico discourse is valuable, it is difficult to predict the actual effect the Supplemental Agreement will have. If the signatory governments genuinely desire to improve labor law enforcement in Mexico, they will cooperate fully with the trinational commission, compelling it aggressively to pursue the Supplemental Agreement's goals. If, however, the Supplemental Agreement was drafted simply to appease the U.S. public, without a true desire to improve labor law enforcement, the Supplemental Agreement will not generate significant change. Now that the machinery is in place, the success of the Supplemental Agreement depends on the commitment of each country to use it.

In evaluating the Supplemental Agreement, it must be remembered that the United States, Mexico, and Canada have agreed to open their doors to one another's products, services, and capital. A free trade agreement does not give the United States authority to impose its domestic labor policies on Mexico. While many people are eager to encourage improvement of Mexican labor law enforcement, for reform to be meaningful, the United States must allow it to come from within Mexico.

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