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# NAALC: A Tex-Mex Requiem for Labor Protection

Mark J. Russo

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## ARTICLE

### NAALC: A TEX-MEX REQUIEM FOR LABOR PROTECTION

MARK J. RUSSO\*

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## I. INTRODUCTION

In May 1998, fourteen migrant workers filed an action against DeCoster Egg Farm in the State of Maine.<sup>1</sup> The Mexican government joined the action as *parens patriae* seeking declaratory and injunctive relief.<sup>2</sup> In August 1999, the Federal District

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1. Ramirez v. DeCoster, 194 F.R.D. 348 (D. Me. 2000). For a comprehensive analysis of this case see Mark J. Russo, *The Tension Between the Need and Exploitation of Migrant Workers: Using MSAWPA's Legislative Intent to Find a Balanced Remedy*, 7 MICH. J. RACE & L. 195 (2001).

2. Estados Unidos Mexicanos v. DeCoster, 59 F.Supp.2d 120, 121 (D. Me. 1999).

Court for the District of Maine dismissed Mexico for lack of standing.<sup>3</sup> On appeal, in September 2000, the First Circuit Court of Appeals affirmed the dismissal.<sup>4</sup> In doing so, it directed the government of Mexico to seek redress with the North American Agreement on Labor Cooperation (NAALC).<sup>5</sup> In a somewhat naive fashion, the court explained that the NAALC offered not only “top-level consultation between national labor law ministers of the respective member states,” but also “dispute resolution through binding arbitration.”<sup>6</sup> It failed, however, to mention that not one NAALC complaint has advanced beyond the consultation level.<sup>7</sup> Furthermore, after expressly recognizing that a racial question does not fall within the limited categories available for arbitration under the NAALC,<sup>8</sup> the court satisfied itself by telling Mexico that it “could still pursue [the] claims through the process of ministerial consultation.”<sup>9</sup>

In August 1998, the Confederation of Mexican Laborers (CTM)<sup>10</sup> had, in fact, submitted to the Mexican National Administrative Office (NAO) a complaint regarding the DeCoster violations.<sup>11</sup> A little over fifteen months later, in November 1999, the Mexican Labor Secretary, Palacios, asked for ministerial consultations with U.S. Labor Secretary, Alexis Herman.<sup>12</sup> The consultations resulted in an agreement signed not only by Mexico and the United States, but by Canada as well.<sup>13</sup> Among other things, the agreement established “a government-to-government meeting” in Washington D.C. followed by another meeting in Mexico City the next week.<sup>14</sup> In August 2001, the U.S. NAO opened a public forum under the title of “Promoting Dialogue Among Migrant Agricultural Workers, Growers and Government Officials” in Yakima, Washington, and the Secretariat pledged to develop a “tri-national

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3. *Id.*

4. *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 343 (1<sup>st</sup> Cir. 2000).

5. *Id.* at 342.

6. *Id.*

7. National Administrative Office reports, *available at* [www.naalc.org](http://www.naalc.org).

8. North American Agreement on Labor Cooperation, *opened for signature* Sept. 8, 1993, U.S.-Can.-Mex., art. 19, 29, 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC].

9. *DeCoster*, 229 F.3d at 342.

10. *Confederación de Trabajadores de México*.

11. THE COMMISSION FOR LABOR COOPERATION, MEXICAN NAO 9803 [hereinafter CLC], *available at* <http://www.naalc.org/english/publications/summarymexico.htm>.

12. *Id.*

13. *Id.*

14. *Id.*

guide on migrant workers.”<sup>15</sup> Almost a year after the First Circuit upheld the district court’s dismissal of Mexico, the governments of Mexico and the United States bowed out, paying lip service to their commitment to labor protection with reciprocal meetings, a forum, and a future set of guidelines – essentially a gentleman’s agreement to disagree. Only once in the last seven years has significant action been taken in response to a Mexican NAO complaint concerning U.S. labor violations, and that was reversed in the courts. The National Labor Relations Board ordered reinstatement and back pay for the challenging workers, only to have the D.C. Court of Appeals reverse the decision.<sup>16</sup> The question arises: Why?

To answer the question, this article works its way through a series of elements that constitute the labor environment. It searches to find those factors that the NAALC includes in its labor concerns and to expose them in order to understand what effect, if any, the NAALC has or could have in their development. Part II reviews the history of the NAALC starting with the conceptualization of the North American Free Trade Agreement (NAFTA). In reviewing the NAALC’s history, it unearths many of the predominant actors in the trade and labor arenas. Part III then unravels the terms of the NAALC. It describes the NAALC’s funnel-like quality that compresses the potential grounds for conflict as the challenge advances through the process. Part IV then looks to the respective laws of the United States and Mexico. It places an emphasis on Mexican law simply because it assumes the reader to be of U.S. legal background. It first presents the circumstances that created the tone of Mexican law and the role of both Mexican and U.S. unions in the law’s development. It travels through the Mexican Constitution into its codified version, the Federal Labor Law. It then looks to the labor laws of the United States and compares them with their Mexican counterparts. In analyzing these laws, the article uses the categories established in the NAALC.

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15. *Id.*

16. CLC, *supra* note 11; Mexican NAO 9501. In response to a complaint by the Sindicato de Telefonistas de la República Mexicana (Telephone Workers Union of the Republic of Mexico) that a California Sprint plant had been closed in reaction to the workers’ attempt to unionize, Secretary of Labor Robert Reich agreed to investigate and keep his Mexican counterpart, Santiago Oñate informed. *Id.* As a result, the National Labor Relations Board (NLRB) found that the closing was due to “anti-union animus” and ordered reinstatement with back pay. See 322 N.L.R.B. 137 (1996). Eleven months later the D.C. Court of Appeals reversed on grounds that the findings were “not supported by substantial evidence.” *LCF, Inc. v. N.L.R.B.*, 129 F.3d 1276, 1283 (D.C. Cir. 1997).

Part V studies a few cases involving both countries that were submitted under the NAALC mechanism. Finally, Part VI reviews several other means of resolving disputes between sovereign states. It takes a very close look at Chapter Nineteen of NAFTA, and a cursory look at a few other methods of resolution.

This article concludes that the labor laws of Mexico and the United States are comparable to each other and capable of adequately protecting labor interests. Indeed, Mexican laws may, to some extent, attribute their interpretation to the relationship of Mexican and U.S. unions, as well as the economic policies of the two countries. There are, however, serious questions of enforcement, which the NAALC has failed to effectively address. Consequently, labor forces are exhorted to lobby for an amendment or to find some replacement by looking to other means of dispute resolution. Comparing the alternatives to the NAALC's mechanism and considering its effectiveness, this article concludes that the NAALC, as a means to effectively and substantially actuate the protection of the labor class, needs to be buried once and for all. This recognition is necessary to activate those romantics who are procrastinating in the hope that a case might one day test the NAALC's arbitration mechanism. It is necessary to arouse sincere labor and human rights groups to start looking for something else, something with teeth, something that facilitates enforcement.

## II. HISTORY OF THE NAALC

Frustrated by the poor reception that Mexico received in February 1990, at the World Forum in Davos, Switzerland, Mexico's President, Carlos Salinas de Gortari, decided to lower his sights from courting international investments and focus upon Mexico's northern neighbors.<sup>17</sup> The *New York Times* reported that Salinas, who they routinely described as "a forty-one-year-old, Harvard-educated economist," had made a "break with the policy of economic nationalism" that has prevailed in Mexico since the 1910 revolution.<sup>18</sup> Thus, it was Mexico, while under the guidance of President Salinas, that took the first step to create a North American Trade Agreement.<sup>19</sup>

Since the administration of Luis Echeverría Alvarez (1970-

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17. MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA* 1-2 (2000).

18. *Id.* at 4.

19. *Id.* at 6; North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., ch. XIX, 32 I.L.M. 296 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

76), Mexico had been on a path towards trade liberalization. Discounting the nationalization of the banks on "Black Friday" in 1982,<sup>20</sup> the *Salinastroika* of President Salinas's administration was the result of a conscious effort on the part of Mexico's ruling party, the Institutional Revolutionary Party (PRI),<sup>21</sup> to attract foreign investment by liberalizing its trading habits.<sup>22</sup> President Salinas's predecessor, Miguel de la Madrid, committed his country without public consultation to the General Agreement of Tariffs and Trade (GATT) in 1986, beginning what some felt was a slow dismantlement of Article 27 of the 1917 Constitution: an article that guaranteed, among other things, the public's right to land.<sup>23</sup> Together with his Commerce Secretary, Jaime Serra, a forty year-old Yale educated economist, President Salinas would lead his handpicked entourage, known as the *camarilla*,<sup>24</sup> into new waters.

NAFTA was so important to U.S. President Bush that he put the Uruguay Round of GATT on hold, despite the objections of his United States Trade Representative (U.S.T.R.), Carla Hills, who delegated the NAFTA negotiation to Julius Katz so she could continue with the negotiations of the Uruguay Round.<sup>25</sup> The objective

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20. *Id.* at 57.

21. *Partido Revolutionario Institucional*.

22. NORMAN CAULFIELD, *MEXICAN WORKERS AND THE STATE* 122 (1998).

23. CAMERON & TOMLIN, *supra* note 17, at 57-58. Article 27 expressly provides for an individual's right to own land. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 27 (amended 1963). Article 27 addresses ownership and transfer of lands. The public interest dictates how the possession and use of land will be regulated to the end of conserving and developing the national resources. Expropriations of land are only permitted as a means of indemnification or for the public interest. Foreigners may only acquire land or water rights in the territory that lies within a zone that is established one hundred kilometers inward from Mexico's national borders and fifty kilometers from its shores. To acquire land, the foreign entity must agree that it will be governed by the national laws of Mexico and will not be protected by the foreign entity's law. *Id.*

Section seven commits the government to protect communal lands, e.g., *ejidos* and the lands of the indigenous tribes (*comuneros*). Large plantations (*latifundios*) are prohibited. The government distributes land (*ejidos*) to those who cannot afford to purchase it. They have full property rights and may pass it on to members of their families. The Constitution provides that laws will govern how the land is to be managed and what is to be done with it when the land user (*ejidatario*) ceases to use it. *Id.*

24. The *camarilla* system is equivalent to the "Boss" system of patronage in exchange for loyalty and trust that was prevalent not too many years ago in the United States political arena. See CAMERON & TOMLIN, *supra* note 17, at 8. The Mexican chief negotiator who confronted Julius Katz of the United States was also a forty-year-old economist from the University of Chicago, Herminio Blanco Mendoza. *Id.* at 7-8.

25. CAMERON & TOMLIN, *supra* note 17, at 9.

was to come to an agreement, signed, sealed, and delivered before President Bush left office.

From the very beginning, however, the issues of labor and environment posed a potential obstacle to NAFTA.<sup>26</sup> House Ways and Means Committee Chair, Rostenkowski, and Senate Finance Chair, Bentsen, sent a letter to President Bush requiring an action plan with regard to resolving the “disparity between the two countries in the adequacy and enforcement of . . . health and safety standards and worker rights.”<sup>27</sup> On May 1, 1991, President Bush submitted his action plan that promised to include a program for dislocated U.S. workers and to exclude any immigration issues.<sup>28</sup> On August 20, 1991, the U.S. governors offered “qualified NAFTA support, with the expectation that there [would] be joint U.S.-Mexican environmental and labor efforts.”<sup>29</sup>

Despite these issues, the negotiations began. Presidents Bush and Salinas met privately at Camp David and told their negotiators to wrap things up as fast as they could.<sup>30</sup> Although not formally on the agenda, labor continued to play a role in the sense that the Mexican Coordinating Body of Foreign Trade Business Associations (COECE), an association representing Mexican big business, consciously and actively quashed any discussion of it.<sup>31</sup> Through a series of high-pressured meetings the Agreement was concluded August 12, 1992,<sup>32</sup> and signed by President Bush, Prime Minister Mulroney, and President Salinas in separate ceremonies on December 17, 1992.<sup>33</sup> It was not, however, a done-deal. Then Democratic candidate, Bill Clinton, was foot-stomping to the tune that he would not support NAFTA unless side agreements for both

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26. *Id.* at 73.

27. *Id.*

28. *Id.* at 75.

29. *Id.* Found under the heading of “NAFTA CHRONOLOGY” in the leading pages to the book.

30. *Id.* at 106.

31. Kristin Johnson Ceva, *Business-Government Relations in Mexico Since 1990: NAFTA, Economic Crisis, and the Reorganization of Business Interests, in MEXICO'S PRIVATE SECTOR: RECENT HISTORY, PRIVATE CHALLENGES* 125-161, 129 (Riordan Roett ed., 1998). The *Coordinadora de Organismos Empresariales de Comercio Exterior* (COECE) directed the Mexican government negotiators from the back room (*cuarto de junto*). *Id.* Their domination, however, did not inflame the ire of the Mexican unions who were convinced that NAFTA meant jobs, as much as it did the small to mid-size businesses (*pequeñas y medianas empresas* (PYMEs)) who felt out of the loop. *Id.* at 130.

32. CAMERON & TOMLIN, *supra* note 17, at 169-73.

33. *Id.* See under the heading of “NAFTA CHRONOLOGY” in the leading pages to the book.



labor and the environment were negotiated.<sup>34</sup>

Under the new Clinton administration, Jorge Perez-Lopez, director of the U.S. Labor Department's international affairs office, had alternative policies worked up with regard to what the objective should be for the labor negotiations.<sup>35</sup> There were three possibilities: (1) a commission that would act as a "front" for promoting a narrow range of labor rights through "weak moral suasion"; (2) an independent commission with a staff adequate to examine the relationship between wage and productivity and could reference the Mexican Constitution in an effort to address any equalities in labor rights; or (3) a combination of (1) & (2) with "trade sanctions or similar border measures" thrown in for enforcement.<sup>36</sup>

The negotiations began on March 17, 1993, in Washington, D.C., opened officially by Rufus Yerxa, the newly appointed U.S.T.R., John Weekes of Canada and Herminio Blanco of Mexico.<sup>37</sup> The obstacles were large and clear: what obligations and sanctions should be imposed?<sup>38</sup> Mexico had, in its mind, conceded enough in its NAFTA negotiations and was adamantly opposed to any "commissions or tribunals that might try to supersede [its] domestic laws."<sup>39</sup>

The original proposal resembled the second alternative provided by Jorge Perez-Lopez.<sup>40</sup> It required "NAFTA governments to commit themselves to internationally recognized standards and rights on a wide range of issues, including freedom of association and collective bargaining, forced labor and child labor, work hours, wages, health and safety conditions, and discrimination."<sup>41</sup> Through the third round in Ottawa and the fourth round in Washington, Mexico steadfastly refused to accept trade sanctions as a means of enforcement and proposed submissions of non-binding reports on labor conditions.<sup>42</sup> Nevertheless, the trio reached consensus at the sixth and final meeting.<sup>43</sup> Mexico persuaded the other two teams to agree to the mutually recognized standards

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34. *Id.* at 180.

35. *Id.* at 183-84.

36. *Id.* at 184.

37. *Id.* at 186.

38. *Id.* at 186-88.

39. *Id.* at 188.

40. CAMERON & TOMLIN, *supra* note 17, at 183-84; *see also supra* text accompanying notes 35-36.

41. CAMERON & TOMLIN, *supra* note 17, at 191.

42. *Id.* at 192-93.

43. *Id.* at 195-96.

and that labor standards with respect to child labor, collective bargaining, etc., would be “objectives” not “obligations.”<sup>44</sup> Mexico felt that a country should not be obligated to “harmonize their labor standards to [sic] those of another country,” rather it was necessary to maintain their own legislation to meet the unique needs of their “level and rhythm of development.”<sup>45</sup>

Finally, on August 8, 1993, Mexico agreed to trade sanctions in exchange for the United States dropping its demand that the agreement cover industrial relations.<sup>46</sup> Mexican labor was represented behind the scenes, and as steadfastly as the Mexican Confederation of the Workers of México (CTM)<sup>47</sup> worked with the negotiators to pull the teeth out of the agreement, just as determined was the AFL-CIO to ignore the negotiations altogether as a sign that they would not support the agreement no matter what the outcome.<sup>48</sup>

The North American Agreement on Labor Cooperation was signed on September 14, 1993; the entire NAFTA package was approved by the House of Representatives on November 17 and by the Senate on November 20, 1993.<sup>49</sup> On the day that NAFTA went into effect, January 1, 1994, the Zapatista National Liberation Army (EZLN), under the leadership of a charismatic and articulate Subcomandante Marcos, struck against armed federal forces in Chiapas, one of the southern-most states of Mexico, in protest against the neo-liberal policies of the Salinas administration.<sup>50</sup> It was one of the bloodiest encounters in recent Mexican history.<sup>51</sup>

44. *Id.*

45. *Id.* at 196.

46. *Id.* at 197. This conciliation apparently obviated a discussion of the effects of the Law of Amparo (*Ley de Amparo*), a Mexican Constitutional provision that permits a person, physical or fictional, to bring action against government authorities on grounds that the authority deprived the individual of or violated their guaranteed rights. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 107 (amended 1963). Article 103 of the Constitution provides the federal courts jurisdiction to hear any claim that an authority has violated a person's rights as guaranteed in the first twenty-nine articles of the Constitution. *Id.* art. 103.

47. *Confederación de Trabajadores de México.*

48. CAMERON & TOMLIN, *supra* note 17, at 199.

49. *Id.* at 204.

50. *Id.* at 211-12.

51. *Id.* The EZLN is the self-proclaimed representative of the Mexican indigenous population that, although found everywhere in Mexico, is heavily concentrated in Mexico's southern states. Michael E. Conroy & Sarah Elizabeth West, *The Impact of NAFTA and the WTO on Chiapas and Southern Mexico: Hypothesis and Preliminary Evidence*, in POVERTY OR DEVELOPMENT 42-43 (Richard Tardanico & Mark B. Rosenberg eds., 2000). The South is comprised of seven states: Campeche, Chiapas, Oaxaca, Quintana Roo, Tabasco, Veracruz, and Yucatán. These states make up 75%

### III. NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC)

#### A. Objectives and Principles

The preamble of the NAALC begins by elaborating on the

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of Mexico's very diverse indigenous peoples. Oaxaca and Chiapas are amongst the poorest states. *Id.*

Agriculture and extractive production, such as petroleum and lumber, are the basic industries in the South. *Id.* at 42-44. A comprehensive impoverishment index (indice de marginalización) assembled by the Mexican National Council on Population (CONAPO) testifies to the fact that these southern states have been severely marginalized. *Id.* at 45. The index incorporates nine indicators: illiteracy; percent of homes without septic or sewer systems; percent of homes without electricity; percent of homes without piped water; percent of homes deemed "overcrowded"; percent of homes with dirt floors; percent of population in localities of less than 5000; and percent of labor force earning less than twice the minimum wage. *Id.*

Recognizing that this extreme marginalization threatened not only Mexican political stability, but, more importantly, its tendency to discourage foreign investment, the Salinas administration set up Mexico's National Solidarity Program (PRONASOL), a Municipal Funds program that purported to pump capital into the infrastructure of needy states thereby improving the standard of living. *Id.* at 46. It was to accomplish this through funneling the funds through the "municipal and community level." Jonathan A. Fox & Josefina Aranda, *Politics of Decentralized Rural Poverty Program: Local Government and Community Participation in Oaxaca*, in POVERTY OR DEVELOPMENT 183 (Richard Tardanico & Mark B. Rosenberg eds., 2000). The program provided that the state and federal governments jointly allocate money to the municipality. The mayor (*alcalde*) and town council (*cabildo*) hold a hearing at which they request proposals from the localities. *Id.* Under the guidance of a state representative a "solidarity council" is created. *Id.* "Local village delegates, or *agencias municipales* . . . the municipal treasurer, the municipal counselor for public works," etc., make up the council. *Id.* Unfortunately, the capital flowed chiefly to the less needy regions. Conroy, *supra*, at 46. When it did find its way to the impoverished areas its effect was dampened by the inherent preferences of the municipal leadership, which often does not reflect the needs of its citizenry. Fox, *supra*, at 187. In any event, some commentators point to the fact that "globalization" has provided the marginalized people of Mexico a much larger audience and subsequently much greater leverage in advancing their interests. José L. García-Aguilar, *The Autonomy and Democracy of Indigenous Peoples in Canada and Mexico*, 565 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 87 (1999). With this in mind a business planning to establish a presence in Mexico should also study the unwritten laws of the local people. See generally Olga Lazcano & Gustavo Barrientos, *Ritual and Community Networks Among Laborer Groups in Mexico*, 565 ANNALS AM. ACAD. POL. & SOC. SCI. 207 (1999). These unwritten laws are manifested in the local rituals whether Christian or Indian. *Id.* Besides the mandatory federal holidays in some regions, employees may take part in as many as fourteen festivals per year. *Id.* at 209. This poses both safety problems as well as production problems. *Id.* Nevertheless, they express a sense of identity of the local people with their "roots" and should not be ignored if the business wants to develop a long term, healthy, and productive enterprise. *Id.* at 211-212. In reviewing the terms of the NAALC, consideration should also be given as to the inclusion of this unique and marginalized sector of the labor pool.

motives of NAFTA.<sup>52</sup> It essentially subsumes the creation of employment opportunities, the improvement of working conditions and living standards, and the protection, enhancement and enforcement of workers' rights that, though unexpressed, underlie the objectives of NAFTA.<sup>53</sup> It does so cautiously by emphasizing that the sovereign laws and constitutions of the Parties should be respected.<sup>54</sup> It then expressly recognizes that the "protect[ion of] basic workers' rights will encourage firms [not sovereign states] to adopt high-productivity competitive strategies."<sup>55</sup> To realize this protection and subsequent enhanced competitive edge, the preamble presents a litany of resolutions intended to balance the interests of workers with those of their employers.<sup>56</sup>

On the one hand, the Agreement promotes the interests and rights of workers through continuous education in the workplace, development of referral centers; and higher living standards in proportion to any gains in productivity.<sup>57</sup> The Agreement, however, also seeks closer, more cooperative relationships between employer and worker organizations through dialogue as a presumed method of "foster[ing] creativity and productivity in the workplace." Furthermore, it encourages "consultation and dialogue between labor, business and government" within the borders of each country.

Importantly, investments are not to cause detriment or disregard of labor laws and principles.<sup>58</sup> Everyone is to comply with the labor laws of each country in which it invests in order to "maintain[] a progressive, fair, safe and healthy working environment."<sup>59</sup> Finally, the preamble maintains that the NAALC is to be realized by "building on existing institutions and mechanisms" available to each of the Parties.<sup>60</sup>

Article 1 states the seven objectives of the Agreement: (1) "to improve working conditions and living standards"; (2) to

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52. NAALC, *supra* note 8, pmbl.

53. *Id.* The concept that labor rights are integrally woven with the free flow of commerce is expressed in unequivocal terms in the U.S. Trade Act of 1974, 19 U.S.C. § 2171 et seq. (2000). The Act includes a "persistent pattern" of the denial of "workers rights" in its definition of "unreasonable" restriction of U.S. commerce. *Id.* § 2411(d)(3)(B)(iii).

54. NAALC, *supra* note 8, pmbl.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

“encourage cooperation” between the Parties to increase creativity, productivity, and quality; (3) to encourage efforts on the part of each Party to educate the other Parties of its laws and institutions governing labor; (4) to pursue joint “labor-related activities” for the Parties’ mutual benefit; (5) to “promote compliance with, and effective enforcement by each Party of, its labor law”; and (6) to develop “transparency in the administration of labor law.”<sup>61</sup> Finally, the Article commits the Parties to “promote, to the maximum extent possible,” the principles set out in Annex 1.<sup>62</sup>

Annex 1 lays out certain guiding principles for the Parties in their effort to promote the objectives of the Agreement.<sup>63</sup> There are eleven principles including freedom of association, the right to collective bargaining, the right to strike, protections for children, equal pay for women and men, prevention of and compensation for occupational injuries, and protection of migrant workers.<sup>64</sup> These principles are not designed to be minimum standards for a Party’s labor law.<sup>65</sup>

### *B. Duties*

Part Two of the NAALC presents the obligations of the Parties.<sup>66</sup> Although each Party has recognized a right to change, add or delete its own labor laws, the Party must “provide for high labor standards” and continuously work to improve them.<sup>67</sup> With regard to enforcement, the Parties are to implement procedures to insure compliance with its labor law.<sup>68</sup> These include setting up a system of inspection and encouraging employer involvement through voluntary creation of “worker-management committees” for the purpose of self-policing the employer’s worksite.<sup>69</sup> Two very important requirements are that the Party provide or encourage the implementation of a system of mediation, conciliation and arbitration, and that the Party must provide punishments or remedies for violations of its labor law.<sup>70</sup> Additionally, each Party is required to insure that its labor officials respond appropriately to

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61. *Id.* art. 1.

62. *Id.*

63. *Id.* Annex 1.

64. *Id.*

65. *Id.*

66. *Id.* arts. 2-7.

67. *Id.* art. 2.

68. *Id.* art. 3.

69. *Id.*

70. *Id.*

allegations of violations regardless of the status of the party presenting them.<sup>71</sup>

Articles Four through Seven require that the Parties provide relatively simple procedural access to their "administrative, quasi-judicial, judicial or labor tribunals" that are available to persons for the enforcement of the law. These proceedings are required to be in public fora where all interested persons can present their case. The final decisions must be in writing, and the laws and procedures must be published to the public in a manner that "promotes public awareness of its labor law," whether it is in the enforcement of occupational safety and health or collective agreements.<sup>72</sup>

### C. *Organizational Structure*

Part Three of the NAALC establishes a formal mechanism to oversee the implementation of the Agreement.<sup>73</sup> The Agreement creates a Commission for Labor Cooperation (Commission) made up of a Ministerial Council (Council) and Secretariat.<sup>74</sup> The labor ministers of each Party or their representatives make up the Council,<sup>75</sup> which meets at least once a year,<sup>76</sup> and the regular annual sessions are chaired successively by each Party.<sup>77</sup> Although the Council can create working groups and consult independent experts, the survival of its decisions depends upon consensus.<sup>78</sup> As the governing body of the Commission, it primarily supervises the implementation of decisions, assigns the work to the Secretariat, approves the annual plan of activities and budget of the Commission, promotes the dissemination of labor information, approves any and all publications, and facilitates Party-to-Party consultations.<sup>79</sup> In essence, it works as a liaison between the Parties and attempts to have the Parties work together to develop common standards, but always with "due regard for the economic, social, cultural and legislative differences between them."<sup>80</sup>

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71. *Id.*

72. *Id.* arts. 4-7.

73. *Id.* arts. 8-26.

74. *Id.* art. 8.

75. *Id.* art. 9.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* art. 10.

80. *Id.* art. 11.

An Executive Director, chosen for a renewable three-year term, leads the Secretariat.<sup>81</sup> The Parties alternately hold the position and it may be terminated by the Council "solely for cause."<sup>82</sup> The Executive Director is charged with creating and overseeing a staff comprised of "an equitable proportion of the professional staff from among the nationals of each Party."<sup>83</sup> Parties are also asked to "respect the international character" of the Executive Director's duties.<sup>84</sup>

The position is accountable to the Council in all respects.<sup>85</sup> It develops the annual plan of activities and budget and presents it for the Council's approval.<sup>86</sup> It tracks and publishes a list of the results of any attempts to resolve disputes through consultations and any subsequent requests for an Evaluation Committee of Experts (ECE).<sup>87</sup> Finally, the Secretariat is charged with periodically publishing Party-provided background information concerning the Party's labor law and market conditions.<sup>88</sup>

Each Party, at its own expense, sets up a National Administrative Office (NAO) with a designated Secretary.<sup>89</sup> The NAO is the point of contact for all concerned agencies, other NAOs, and the Secretariat.<sup>90</sup> The NAO Secretary must supply upon demand any publicly available information requested by the Secretariat.<sup>91</sup> The NAO is the Secretariat's source for labor background statistics and other information.<sup>92</sup> Furthermore, the Parties may create National Advisory Committees or Governmental Committees to advise them on how to implement and elaborate on the Agreement.<sup>93</sup>

#### D. *Dispute Resolution System*

Parts Four and Five of the Agreement provide a bi-level sys-

81. *Id.* art.12.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* For an explanation of the ECE see the discussion *infra* notes 101-103, 108-116 and accompanying text.

88. *Id.*

89. *Id.* art. 15.

90. *Id.* art. 16.

91. *Id.*

92. *Id.*

93. *Id.* arts. 17-18.

tem of dispute resolution.<sup>94</sup> The parties are exhorted to make every effort to cooperate “to resolve any matter that might affect [their] operation[s].”<sup>95</sup> One NAO may request consultation with any other NAO as long as it notifies the other Parties and the Secretariat of its request.<sup>96</sup> Once the consultation is established, the NAO from whom information is requested must promptly provide it.<sup>97</sup> The NAO is only required to provide “publicly available data or information” concerning such things as “laws, regulations, procedures . . . [or] changes.”<sup>98</sup> Other Parties may also participate after giving notice.<sup>99</sup>

In the same manner provided for requesting consultation with another Party, “[a]ny Party may request in writing consultations with another Party at the ministerial level.”<sup>100</sup> If nothing comes of the ministerial consultation, the Party may request in writing the creation of an ECE.<sup>101</sup> The ECE is charged with evaluating “in a non-adversarial manner, patterns of practice by each Party . . . of its occupational safety and health or other technical labor standards as they apply to the particular matter” at hand.<sup>102</sup> “Technical labor standards” are defined as “laws and regulations, or specific provisions thereof, that are directly related to . . . prohibition of forced labor; labor protections for children and young persons; minimum employment standards . . . ; elimination of employment discrimination on the basis of . . . race, religion, age, sex, or other grounds as determined by each Party’s domestic laws; equal pay for men and women; prevention of and compensation for occupational injuries; and the protection of migrant workers.”<sup>103</sup>

### *E. Initial Determination*

The Council will choose an independent expert to determine whether the matter is: (1) trade-related; or (2) covered by mutually recognized labor laws.<sup>104</sup> “Trade-related” is defined as related to circumstances that involve worksites or companies that “pro-

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94. *Id.* arts. 20-41, Annexes 23, 39, 41A & 41B.

95. *Id.* art. 20.

96. *Id.* art. 21.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* art. 22.

101. *Id.* art. 23.

102. *Id.*

103. *Id.* art. 49.

104. *Id.* Annex 23.



duce goods or provide services: (1) traded between the territories of the Parties; or (2) 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."<sup>105</sup> "Labor Law" is defined as "laws and regulations, or provisions thereof, that are directly related to" all of the eight categories enumerated under the definition of "technical labor standards" as well as the following three: "(1) freedom of association and protection of the right to organize; (2) the right to bargain collectively; [and] (3) the right to strike."<sup>106</sup> "Mutually recognized labor laws" are defined as "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."<sup>107</sup>

#### *F. Evaluation Committee of Experts*

The expert must rule within fifteen days after being chosen.<sup>108</sup> If the matter is trade-related or covered by mutually recognized labor laws, the matter is referred to an ECE pursuant to the rules of procedure established by the Council.<sup>109</sup> The ECE is to be made up of three members, and the Council chooses its chairperson.<sup>110</sup> The members of the ECE are to be objectively chosen based upon their experience in labor matters; are to be independent of any Party; and are to comply with a code of conduct established by the Council.<sup>111</sup> The ECE may request written submissions of whom-ever it deems appropriate and consider them accordingly in making the decision.<sup>112</sup> All Parties are to be allowed "reasonable opportunity to review and comment" on the information received by the ECE.<sup>113</sup> Within approximately four months after it is created, the ECE is to submit a draft report to Council detailing its assessment, conclusions, and recommendations to which the Parties may respond in writing.<sup>114</sup> Within approximately two months after the filing of the draft report, the ECE must file a final report

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105. *Id.* art. 49.

106. *Id.*

107. *Id.*

108. *Id.* Annex 23.

109. *Id.* art. 24.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* art. 25.

that is published approximately one month after filing.<sup>115</sup> The Parties then have approximately three months to respond to the recommendations.<sup>116</sup> Consequently, it is possible that a year may pass from the initial ECE investigation before a Party will be able to decide how to proceed.

### G. *Ability to Request Consultations*

If the technical standards concern “occupational safety and health, child labor or minimum wage . . . any Party may request . . . consultations . . . regarding whether there has been a persistent pattern of failure . . . to effectively enforce” the standard in question.<sup>117</sup> A “persistent pattern” is any “sustained or recurring pattern of practice.”<sup>118</sup> Again, third Parties may participate but all Parties are urged to resolve the matter through consultation.<sup>119</sup> If they cannot resolve the issue within approximately two months, “any . . . Party may request in writing a special session of the Council.”<sup>120</sup> Within approximately three weeks, Council must convene and may take advantage of whatever it feels appropriate, e.g., good offices, conciliation, etc., and make recommendations it feels may help the Parties come to a resolution.<sup>121</sup>

### H. *Arbitral Panel*

If the matter is still not resolved after approximately two months from the time Council convened and the matter concerns “occupational safety and health, child related or minimum wage technical standards” that are both “trade-related” and “covered by mutually recognized labor laws . . . any Party, [with] a two-thirds vote [of Council],” can set up an arbitral panel.<sup>122</sup>

Article 49, on the other hand, cautions that

[A] Party has *not* failed to “effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards” . . . in a particular case where the action or inaction by agencies or officials of that Party: (a) reflects a *reasonable exercise* of the agency’s or the offi-

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115. *Id.*

116. *Id.*

117. *Id.* art. 27.

118. *Id.* art. 49.

119. *Id.* art. 27.

120. *Id.* art. 28.

121. *Id.* (the recommendation may be offered to the public upon a two-thirds vote of Council).

122. *Id.* art. 29.

cial's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities.<sup>123</sup>

The panelists are selected from a roster of as many as forty-five people who are appointed by the Council to renewable three-year terms.<sup>124</sup> To qualify as a panelist, one must be experienced in labor law, resolution of international disputes, or some other relevant scientific, technical or professional field.<sup>125</sup> The panelist must be objective in his/her determinations; independent of any Party; and comply with a code of conduct.<sup>126</sup>

Five panelists make up the Panel.<sup>127</sup> First, they are to determine the chair of the panel within fifteen days of convening.<sup>128</sup> If the Parties cannot agree within five days, a Party chosen by lot will select a chairperson who is not a citizen of that Party.<sup>129</sup> Second, the Parties are each to select two panelists from the citizenry of the other Party.<sup>130</sup> Again, if there is a failure to arrive at consensus, the panelist may be chosen by lot.<sup>131</sup>

According to the Model Rules of Procedure to be set up by the Council, there is to be "(a) . . . at least one hearing before the panel; (b) the opportunity to make initial and rebuttal written submissions;" and (c) a secret panelist vote.<sup>132</sup> Within twenty days after the panel is convened, it is to determine whether there has been a "persistent pattern of failure" on the part of the challenged Party "to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards," and it is to "make findings, determinations and recommendations."<sup>133</sup> There is ample opportunity for appeal by the challenged Party, and generally, deference and consideration is given to the challenged Party's ability to enforce its legal system.

Within approximately six months after the panel is created it is to issue an initial report to the Parties laying out its findings of

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123. *Id.* art. 49 (emphasis added).

124. *Id.* art. 30.

125. *Id.*

126. *Id.*

127. *Id.* art. 32.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* art. 33.

133. *Id.*

fact, its determinations and, if there was a violation, its recommendations.<sup>134</sup> The challenged Party has the opportunity to respond within approximately one month after receiving the report and the panel may, *sua sponte* or at the request of the challenged Party, reconsider and re-examine the situation.<sup>135</sup> Finally, within approximately two months of its initial report or a bit over two years from the ECE investigation, the panel submits the final report to the Parties who, in turn, are to present the report along with their comments to the Council.<sup>136</sup> The comments are to be held in strict confidence.<sup>137</sup>

### *I. Implementation of an Action Plan*

If the panel finds a violation of the agreement, the Parties are to come up with a “mutually satisfactory action plan” based upon the recommendations of the panel.<sup>138</sup> If, after no more than approximately four months, the Parties have not agreed on an action plan, a Party may ask the panel to reconvene.<sup>139</sup> The panel has the authority to implement the last action plan submitted by the challenged Party within approximately two months of the final report.<sup>140</sup> In addition, where there is a question of whether the challenged Party is implementing an action plan as agreed, a Party may ask the panel to reconvene, but it may do so no earlier than approximately six months after the action plan has been established either by consensus or imposition by the panel.<sup>141</sup>

If the panel convenes and finds that the challenged Party either has submitted an insufficient action plan or has not implemented the one accepted, it may assess a fine.<sup>142</sup> In establishing the amount of the fine, the panel is to consider such factors as length and extent of the failure to enforce; the realistic ability of the challenged Party to enforce its laws to the level required given its resource constraints; and attempts to remedy the problems.<sup>143</sup> A fine is not to be any “greater than 0.007% of total trade in goods between the Parties during the most recent year for which data

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134. *Id.* art. 36.

135. *Id.*

136. *Id.* art. 37.

137. *Id.*

138. *Id.* art. 38.

139. *Id.* art. 39.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* Annex 39.

are available.”<sup>144</sup> Fines are paid into a general fund to be used by the Council to “improve or enhance the labor law enforcement” of the challenged Party.<sup>145</sup>

The challenging Party, approximately six months after a panel fines the challenged Party for failure to implement the action plan, may request that the panel reconvene again.<sup>146</sup> If determination is made against the challenged Party, the challenging Party or Parties may suspend NAFTA benefits in the form of increased tariffs against the challenged Party to the extent that the amount effected not exceed the fine assessed.<sup>147</sup> It is preferred that the duty be applied to the same sector or sectors in which the failure of enforcement occurred.<sup>148</sup> If the challenging Party feels this is not an option, it may suspend benefits in other sectors.<sup>149</sup>

The Agreement makes clear that it does not endorse the meddling of one Party’s authorities with the labor law enforcement in another Party’s territory.<sup>150</sup> The Agreement also denies a private right of action under the domestic law of one Party to be used against another Party for failure to comply with the Agreement.<sup>151</sup> Consequently, after more than two-and-one-half years, the aggrieved Party may find some satisfaction.

At first glance, it would seem that the strength of the NAALC is the ability of the parties to request the establishment of an arbitration panel for failure to “effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards.”<sup>152</sup> Under the glass, however, it is apparent that as long as a party has systems in place to effectively enforce existing laws and spends time and money to maintain the system, the ability to actually enforce a law evaporates. Nevertheless, the NAALC emphasizes that there must exist mutually recognized labor laws and that every attempt is to be made to enforce them.

An analysis of the labor laws of the United States and Mexico will show that both parties, although weaker than the other in some areas and stronger in others, have well established laws and adequate systems of enforcement. To place the comparison of

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144. *Id.*

145. *Id.*

146. *Id.* art. 40.

147. *Id.* art. 41.

148. *Id.* Annex 41B.

149. *Id.*

150. *Id.* art. 42.

151. *Id.* art. 43.

152. *Id.* art. 29.

United States and Mexican labor laws within the context of the NAALC, this article has categorized the laws according to the eleven principles promoted in Annex 1 of the NAALC under two headings: (1) Labor Negotiation Rights that include freedom of association, the right to collectively bargain, and the right to strike, and (2) Technical Labor Standards that include protection against servitude, protection against discrimination, health protection/compensation, and the protection of migrant workers. The questions that remain after the comparison are whether the NAALC provides a realistic and operative funnel for effective enforcement of those systems and, if not, what would?

#### IV. MUTUALLY RECOGNIZED LABOR LAWS

##### A. *Constitutional Sources for Mexican Labor Law*

###### 1. Introduction

At least one commentator has articulated that on its face, Mexican labor law is much “more protective of workers than U.S. law.”<sup>153</sup> To understand why this is true it is necessary to review the origins and underlying objectives of Mexican labor law. To say that it is the product of the 1917 Mexican Constitution is not enough. It must be understood that the Constitution itself was a reaction against a savage “laissez-faire tradition” with regard to the working and agricultural class in Mexico.<sup>154</sup> The 1917 Mexican Constitution was the national political recognition of “the existence of class conflict and inequality,”<sup>155</sup> and to the extent that it does so, it is unique.<sup>156</sup> Article 123 is devoted to defining the rights of labor.<sup>157</sup> Notwithstanding, however, that Article 123 expresses the fruition of a uniquely Mexican experience, it owes its creation and subsequent evolution, in large part, to an unusual dance involving United States and Mexican labor organizations and unions.

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153. Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the Nafta Treaty Debate: A Comparative Analysis of Labor Employment Law in Mexico and the United States*, 17 COMP. LAB. L.J. 269, 271 (1996).

154. *Id.* at 272.

155. *Id.*

156. *Id.*

157. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 123.

## 2. The Interrelationship Between Mexican and U.S. Unions: A Case of "Meddling"

Although the revolution of 1910 gave birth to contemporary Mexican labor rights and the 1917 Constitution<sup>158</sup> that legitimized it, it was conceived by Mexican and Mexican-American intellectuals who came together on February 5, 1901, in Teatro de Paz in San Luis Potosí, to create a plan to oppose and oust Porfirio Díaz, then President of Mexico.<sup>159</sup> The result was the creation of the Mexican Liberal Party (PLM).<sup>160</sup> It brought together two groups that would come to form a persistent political tension in Mexican labor policy, wealthy elite reformists and radical reformists.<sup>161</sup> The energy of the PLM leadership, however, was concentrated in Ricardo Flores Magón, a lawyer of working class origins.<sup>162</sup>

In 1914, the year the Clayton Act<sup>163</sup> was enacted, Magón issued his "Manifiesto to the Workers of the World."<sup>164</sup> The Manifesto rejected the elitists' notion of a national reform and promoted the Mexican Revolution as part of a universal economic struggle between labor and capital.<sup>165</sup> In Cassandra-like fashion,<sup>166</sup> he warned that if they lost the revolution, Mexico would become a haven for U.S. industries seeking low wage labor.<sup>167</sup>

Consequently, within the PLM, the moderate nationalist *maderistas*<sup>168</sup> were in constant conflict with the *magonistas*, supporters of Flores Magón.<sup>169</sup> This conflict manifested itself in the

158. *Id.*

159. Teresa Palomo Acosta, *Partido Liberal Mexicano*, The Hand Book of Texas Online, at <http://www.tsha.utexas.edu/handbook/online/articles/view/PP/wap4.html> (Mar. 12, 2002).

160. *Id.*

161. *Id.* It should also be noted that the Mexican workers had already been courted by the Western Federation of Miners (WFM), an independent U.S. mining union that was organized on both sides of the border. CAULFIELD, *supra* note 22, at 15.

162. Acosta, *supra* note 159.

163. See *infra* notes 410-414 and accompanying text.

164. CAULFIELD, *supra* note 22, at 1.

165. *Id.*

166. Cassandra was the daughter of Priam, king of Troy and father of Paris. Apollo had given her the power of prophecy but later condemned her to a fate of having no one believe her. After the Trojan War, Agamemnon brought her home to Greece with him and upon entering his palace, she predicted both their deaths. EDITH HAMILTON, *MYTHOLOGY* 292, 355-56 (1942).

167. CAULFIELD, *supra* note 22, at 1.

168. "Maderistas" were followers of President Francisco Madero who was subsequently arrested and assassinated in 1913. JUAN KATTAN-IBARRA, *PERSPECTIVAS CULTURALES DE HISPANOAMERICA* 120 (2d ed. 1995).

169. CAULFIELD, *supra* note 22, at 2.

political battle between Constitutionalist and Anarchosindicalists.<sup>170</sup> The 1917 Constitution was an attempt to form a coalition between the two classes by creating Articles 27 and 123 to “reflect[] the political strength of working-class nationalism, . . . ‘Mexico for the Mexicans.’”<sup>171</sup>

After the adoption of the 1917 Constitution, the government’s first response to this labor/capital conflict was to lend support to the Regional Confederation of Mexican Labor (CROM),<sup>172</sup> an organization that promoted labor resolutions as a means to maintain national stability.<sup>173</sup> That is, it viewed itself as an advocate for the workers to the extent that it furthered the welfare of the State.<sup>174</sup> Samuel Gompers, President of the American Federation of Labor (AFL), endorsed the relationship between CROM and the Mexican government and equated the Mexican concept of “business unionism” as equivalent to “trade unionism.”<sup>175</sup> Because the AFL maintained the same type of nationalist rationale as its Mexican counterpart, CROM, it never involved itself actively in Mexican labor activity, preferring to instead influence it from the sidelines.<sup>176</sup> In contrast, another U.S. labor organization, the Industrial Workers of the World (IWW),<sup>177</sup> created in Chicago in 1905 by “radicals and dissident elements in the labor movement,”<sup>178</sup> threw its weight behind the anarchosindicalist groups.<sup>179</sup>

The IWW had been active in the Mexican labor movement prior to the 1910 Revolution and continued to be until its dissolution in the mid-1920s.<sup>180</sup> By supporting such Mexican radical groups as the General Confederation of Workers (CGT),<sup>181</sup> it

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170. *Id.*

171. *Id.* at 3.

172. *Confederación Regional Obrera Mexicana.*

173. CAULFIELD, *supra* note 22, at 4.

174. *Id.*

175. *Id.* In 1919, Luis Morones, President of CROM, on the government’s tab “attended the AFL convention in the United States.” *Id.* at 39.

176. *Id.* at 4.

177. Sometimes referred to as the “Wobblies,” who like the Mexican anarchosindicalists advocated “abolition of the wage system.” MELVYN DUBOVSKY & FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* 196 (6th ed. 1999).

178. *Id.*

179. CAULFIELD, *supra* note 22, at 5. Anarchosindicalists advocated sharing the capital that resulted from labor and the concentration of political strength in those who worked in the plants. *Id.* at 13.

180. *Id.* at 5; *see also* DUBOVSKY & DULLES, *supra* note 177, at 195-209 (describing the glory days of the Wobblies). The IWW published and distributed labor newspapers and literature in Spanish such as the *La Unión Industrial* and *Huelga General*. CAULFIELD, *supra* note 22, at 23.

181. *Confederación General de Trabajadores.*



placed itself in direct opposition to the AFL/CROM harmonization philosophy of a "fair day's wage for a fair day's work."<sup>182</sup> IWW/CGT effort, however, was doomed to fail because it was no match for the strengthening alliance between the Mexican government and CROM.<sup>183</sup> Besides, in the 1920s, general strikes among the Mexican mining and oil workers employed by U.S. companies in the Mexican region of Tampico were prompting U.S. businesses to lobby the U.S. government to intervene.<sup>184</sup> President Obregón had little choice but to try to "exploit CROM's relationship with the AFL to convince Washington that his government did not jeopardize U.S. economic interests."<sup>185</sup>

In 1931, the enactment of the Federal Labor Code (FLC),<sup>186</sup> which codified Article 123 of the Constitution, granted the government the power to "recognize unions, legitimate strikes and intervene in labor conflicts," further strengthening the government/union relationship.<sup>187</sup> The FLC laid the groundwork for the state/union partnership formed between the government<sup>188</sup> and the CTM.<sup>189</sup> The CTM gained political support as early as the 1920s and continued its strength through the Lázaro Cárdenas administration (1934-40).<sup>190</sup> Originally, the CTM also had AFL support, but, after Cárdenas expropriated the oil fields to assert the image of nationalism so popular with both Mexican classes, the AFL, under the leadership of William Green, withdrew its endorsement.<sup>191</sup> Consequently, the CTM turned to John L. Lewis, President of the Congress of Industrial Organizations (CIO), who

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182. DUBOVSKY & DULLES, *supra* note 177, at 196.

183. CAULFIELD, *supra* note 22, at 5.

184. *Id.* at 43.

185. *Id.* at 48. President Obregón even contracted with the International Association of Machinists (IAM) to exclusively purchase American goods carrying the AFL union label. *Id.* at 49.

186. *La Ley Federal de Trabajo*. Prior to the enactment of the FLC, enforcement of Article 123 of the Constitution was left to the various states and consequently poorly enforced. CAULFIELD, *supra* note 22, at 41-42. Today there are thirty-one states plus the Federal District.

187. CAULFIELD, *supra* note 22, at 7.

188. The Partido Nacional Revolucionario (PNR) the precursor of today's Partido Revolucionario Institucional (PRI) ruled the government at that time. CAULFIELD, *supra* note 22, at 61.

189. "U.S. investment in Mexico had grown from \$185 million in 1900 to over \$695 million in 1931, while overall foreign investment had reached \$2.18 billion." CAULFIELD, *supra* note 22, at 59.

190. CAULFIELD, *supra* note 22, at 55.

191. *Id.* at 71-72.

“favored industrial unionism in all of Latin America.”<sup>192</sup>

Cárdenas, however, introduced a tactic that would prove to be useful to many Mexican political leaders. On the one hand, he was able to suppress labor work stoppages (*paros*) through his influence with the Conciliation and Arbitration Board (CAB), which is a tripartite panel formed by representatives of labor, employer, and government,<sup>193</sup> by having them label politically incorrect strikes as “illegal.”<sup>194</sup> On the other hand, he was able to increase popularity by expropriation of foreign investments under the banner of “national interests.”<sup>195</sup>

Through an unwritten but widely recognized “Good Ole’ Boy” system (*dedazo*), Cárdenas was able to hand the gauntlet to his Minister of Defense, Manuel Avila Camacho, who continued to employ conservative measures when addressing labor disputes.<sup>196</sup> During the administrations of Manuel Avila Camacho (1940-46) and Miguel Alemán (1946-52), however, the national welfare rationale of the CTM, then labeled as *charrismo*,<sup>197</sup> was countered by the purified unions (*depuradas*) who demanded higher wages, union autonomy, and protection of those rights guaranteed by the Constitution.<sup>198</sup>

The Suárez-Tellez Agreement between the United States and Mexico that committed the United States to buy “at least \$1 million worth of Mexican metals at high prices” was achieved in exchange for a promise from the Mexican government to control its workers.<sup>199</sup> So great was the dependency of Mexico upon U.S. investment that in September 1945, the CTM and the National Chamber of Commerce (CONCAMIN)<sup>200</sup> formed a “Committee to

192. *Id.* The CTM and CIO jointly published the Mexican Labor News (*Noticiero Obrero Mexicano*) in Spanish. *Id.*

193. In Spanish, the CAB is called *La Junta de Conciliación y Arbitraje* and its decision is called *el laudo*.

194. CAULFIELD, *supra* note 22, at 79.

195. *Id.*

196. *Id.* at 75.

197. The charro is an outfit consisting of tight pants, short jacket and wide-brimmed sombrero worn by Mexican cowboys and was the favorite mode of dress for Díaz de León, Miguel Alemán’s closest advisor who actively supported the CTM and tried to undermine the more radical Latin American Confederation of Workers (CTAL) or *Confederación Trabajadores de América Latina*. CAULFIELD, *supra* note 22, at 96.

198. CAULFIELD, *supra* note 22, at 8.

199. *Id.* at 81.

200. *Confederación de las Cámaras Industriales de los Estados Unidos Mexicanos*.

Prevent Strikes," to ensure labor peace.<sup>201</sup> Also, after WWII, the CIO and AFL closed ranks and worked together to implement a plan that involved "cultivat[ing] elements within the Latin American labor movement that were sympathetic to U.S. interests."<sup>202</sup> In contrast, the radical Latin American Confederation of Workers (CTAL) attacked a U.S. plan promoting lower tariffs for U.S. products and free investment by foreign capital in Mexico.<sup>203</sup> George Meany of the AFL responded that the CTAL tactics were "dictatorial" and "undemocratic" and that the CTAL should be broken up.<sup>204</sup>

In 1951 the AFL was instrumental in creating the Intra-American Regional Organization of Workers (ORIT).<sup>205</sup> ORIT joined CTM to facilitate a labor-oriented "cultural exchange" program whereby Mexican union leaders were instructed in both the English language and recent industrial relations developments.<sup>206</sup>

The Mexican government's subsequent "suppression" of anti-*charrismo* rebellions within the labor rank-and-file<sup>207</sup> and its willingness to resort to violence against dissident factions, as demonstrated by the Tlalteloco student massacre of 1968,<sup>208</sup> attest to its tendency to pay lip service to the Constitution while stroking the back of capital, domestic or foreign. Nevertheless, the tug-of-war continues in Mexico between the institutionalized unions who cooperate with the state and independent unions such as the National Union of Workers (UNT)<sup>209</sup> who promote rewriting the FLC and freeing the unions from political and governmental control.<sup>210</sup> Groups such as the Authentic Labor Front<sup>211</sup> continue to support complete worker autonomy and the development of "an international alliance of labor unions."<sup>212</sup>

Some would argue that union movements on both sides of the border have all to gain and nothing to lose by coordinating their efforts to collectively establish and protect the interests of their

201. CAULFIELD, *supra* note 22, at 83. It was called The 1945 Labor-Industry Pact. *Id.*

202. *Id.* at 88.

203. *Id.*

204. *Id.* at 90.

205. *Organización Regional Intra-Americana de Trabajadores.*

206. CAULFIELD, *supra* note 22, at 105.

207. *Id.* at 10.

208. KATTAN-IBARRA, *supra* note 168, at 123.

209. *Unión Nacional de Trabajadores.*

210. CAULFIELD, *supra* note 22, at 133-34.

211. *Frente Auténtica del Trabajo*

212. CAULFIELD, *supra* note 22, at 134.

constituents.<sup>213</sup> On the one hand, globalization, downsizing, and the increased use of temporary labor have led to a mass exodus from U.S. unions in the last eighteen years.<sup>214</sup> On the other hand, wage-fixing, “liquidations, restructurings, and privatizations [have] spelled . . . negative impacts upon workers and organized labor” in Mexico since the Miguel de la Madrid administration began implementing them in 1982.<sup>215</sup> By 2005, the Mexican labor force is anticipated to have increased its 1990 level by 50%.<sup>216</sup> Bi-national labor rights groups do exist to attempt to equitably represent this growing force but receive little to no governmental support.<sup>217</sup>

Although U.S. unions mouth empathy for the plight of Mexican workers, fear of domestic job loss and an inherent racism muffles any action.<sup>218</sup> In contrast, Mexican unions have been either in bed with the government or victims of its repression.<sup>219</sup> Since the 1990s, Mexican labor unions have moved with the political flow of government economic policy.<sup>220</sup>

The nationalist character of the major unions in both countries also inhibits open dialogue.<sup>221</sup> For example, such Mexican labor leaders as Fidel Velásquez, who ruled the CTM for longer than the PRI ruled Mexico, looked at U.S. trade activity in Mexico as “imperialistic muscle flexing” and wanted nothing to do with the “gringos.”<sup>222</sup> This nationalistic focus tends to subordinate the rights of the Mexican workers as a class – rights guaranteed by the Constitution and codified in its Federal Labor Law.<sup>223</sup>

### 3. Constitución Política de los Estados Unidos Mexicanos: Article 123

A large portion of the Mexican Constitution is dedicated to

213. Edward J. Williams, *Discord in U.S. – Mexican Labor Relations and the North American Agreement on Labor Cooperation*, in BRIDGING THE BORDER 161-181, 162 (Rodolfo O. de la Garza & Jesús Velasco eds., 1997).

214. *Id.* at 163.

215. *Id.* at 163-64.

216. *Id.* at 164. The labor force in Mexico increases by approximately one million laborers a year. *Id.*

217. *Id.* at 166.

218. *Id.* at 167-68.

219. *Id.* at 168. From the de la Madrid administration of the 1980s through the Salinas administration in the 1990s, cantankerous labor leaders were effectively removed. *Id.*

220. *Id.* at 169.

221. *Id.*

222. *Id.*

223. Befort & Cornett, *supra* note 153, at 274.

guarantees of social and economic rights in addition to political rights. Articles One through Twenty-nine of the Mexican Constitution enumerate four categories of rights: liberty,<sup>224</sup> equality,<sup>225</sup> due process,<sup>226</sup> and property.<sup>227</sup> Article 103 provides a cause of action for any deprivation of these enumerated rights.<sup>228</sup> A unique judicial process called *Amparo*<sup>229</sup> is established in Article 107 to enable an individual to access the courts and seek remedy for the deprivation of these guaranteed rights.<sup>230</sup>

Title Six of the Mexican Constitution provides rights with regard to labor and social security.<sup>231</sup> Basically, the rights restrain the freedom of contract; strengthen the bargaining power of the worker; and create rebuttable presumptions in favor of the worker.<sup>232</sup> These rights are separated into two categories: the rights of the general working populace, and the rights of public employees.<sup>233</sup>

Chapter A contains thirty-one sections enumerating, defining, and elaborating on the rights of workers, day laborers, domestic workers, artisans and qualifying labor contracts in general.<sup>234</sup> It sets the day work shift at a maximum of eight hours<sup>235</sup> and the night shift at seven hours.<sup>236</sup> Children under sixteen years of age are prohibited from working beyond ten o'clock at night, from

224. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS arts. 5, 6, 8, 9, 10, 11, 16, 24, 28.

225. *Id.* arts. 1, 2, 4, 12, 13.

226. *Id.* arts. 14, 16, 17, 18, 19, 20, 21, 22, 23.

227. *Id.* arts. 25-27.

228. *Id.* art. 103.

229. One translation of *Amparo* is "shelter."

230. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 107.

231. *Id.* art. 123.

232. Befort & Cornett, *supra* note 153, at 275.

233. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 123. For the purposes of this Article, the rights of both the private and public sector will be treated as a unit. The guarantees for Public employees in section B are similar to those of general employees with some noticeable differences. For one, public employees are entitled to three weeks vacation a year. *Id.* art. 123, ch. B, § III. The other is that the government is only prohibited from discriminating on the basis of sex. *Id.* art. 123, ch. B, § V. From which it may be implied that they may discriminate on the basis of nationality as is prohibited in the case of private employers. *Id.* art. 123, ch. A § VII. When President José López Portillo expropriated the banks in 1982, he essentially transformed section A employees into section B employees. BALTASAR CAVAZOS FLORES, *HACIA UN NUEVO DERECHO LABORAL 75* (Editorial Trillas, 3<sup>o</sup> ed., 1997). Then when Carlos Salinas de Gortari privatized the Banks in 1989, their employees returned to section A status. *Id.*

234. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 123, ch. A.

235. *Id.* art. 123, ch. A, § I.

236. *Id.* art. 123, ch. A, § II.

working industrial night shifts, or from working in dangerous or unhealthy jobs.<sup>237</sup> Children less than fourteen years of age may not work and those children between the age of fourteen and sixteen may work no more than six-hour shifts.<sup>238</sup> Employees are guaranteed at least one day of rest per week.<sup>239</sup>

*a. Social Rights*

Pregnant women are not to be required to perform physically demanding work or work that may affect the life of the fetus.<sup>240</sup> They are required to take off work for six paid weeks before and six paid weeks after their due date and are guaranteed reinstatement at their original level of seniority and status when they return to work.<sup>241</sup> When they do return, they are to be afforded two one-half hour periods for the purpose of lactation.<sup>242</sup>

*b. Economic Rights*

Article 123 provides for two methods of determining minimum wages: according to whether the worker is (1) a general laborer or (2) a professional.<sup>243</sup> The minimum wage for the former is to be determined by the geographical area in which they work,<sup>244</sup> and for the latter, it is determined by their particular profession or by the economic circumstances surrounding the profession.<sup>245</sup> The Article creates a national commission charged with establishing the minimum rate.<sup>246</sup> This commission may create auxiliary working groups or committees for the purpose of assisting in gathering information and generally performing its functions.<sup>247</sup> The Article prohibits salary discrimination based upon sex or nationality.<sup>248</sup> Furthermore, it prohibits an employer from discounting or offsetting an employee's minimum wage.<sup>249</sup>

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237. *Id.*

238. *Id.* art. 123, ch. A, § III.

239. *Id.* art. 123, ch. A, § IV.

240. *Id.* art. 123, ch. A, § V.

241. *Id.*

242. *Id.*

243. *Id.* art. 123, ch. A, § VI.

244. There are 111 economic zones. CAVAZOS FLORES, *supra* note 233, at 91.

245. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 123, ch. A, § VI.

246. *Id.*

247. *Id.*

248. *Id.* art. 123, ch. A, § VII.

249. *Id.* art. 123, ch. A, § VIII.

Employees are also guaranteed a right to "profit-sharing."<sup>250</sup> A national commission, comprised of representatives of the employee, employer, and government, determines the percentage to be shared.<sup>251</sup> The national commission conducts investigations and studies deemed necessary and appropriate for understanding the economic temper.<sup>252</sup> It must consider such factors as the necessity to promote economic development; the reasonable interest the capital is capable of yielding; and the necessity to reinvest the capital back into the industry.<sup>253</sup> The commission is also responsible for adjusting the fixed percentage to accommodate for changed circumstances.<sup>254</sup>

All overtime pay is to be compensated with double-pay for the hours in excess of the normal shift.<sup>255</sup> The overtime is not to exceed three hours a day or three consecutive days.<sup>256</sup> Minors (under sixteen years of age) are not permitted to work overtime.<sup>257</sup> All types of operations, whether agricultural, industrial, or resource extraction, are obligated to provide comfortable housing and sanitation facilities as regulatory laws require.<sup>258</sup> An employer can comply with the foregoing requirement by contributing to a national housing fund that offers workers cheap credit for the purpose of supporting adequate housing.<sup>259</sup> The Constitution provides for the establishment of a tripartite mechanism composed of representatives of the government, labor and employers to administer the resources of the national housing fund.<sup>260</sup>

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250. *Id.* art. 123, ch. A, § IX.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* The Commission computes the profit using the taxable income base as measured by Income Tax Law (*Ley del Impuesto sobre la Renta*). *Id.* art. 123, ch. A, § IX, cl. e. Workers have the right to address the method of calculation with the appropriate department of the Secretary of the Treasury (*Secretaría de Hacienda y Crédito Público*). *Id.* The right to share in profits does not imply a right to share in the management and administration of the operation of the business. *Id.* art. 123, ch. A, § IX, cl. f. Payment in legal tender is the only permissible method of compensation, i.e., barter is not permitted. *Id.* art. 123, ch. A, § X.

On the other hand, the Constitution exempts within fixed temporal limits three areas of industry and commerce from the obligation to share profits: start-up industries, explorative operations, and activities that by their nature and unique character could not be able to comply. *Id.* art. 123, ch. A, § IX, cl. d.

255. *Id.* art. 123, ch. A, § XI.

256. *Id.*

257. *Id.*

258. *Id.* art. 123, ch. A, § XII.

259. *Id.*

260. *Id.*

*c. Social Obligations of Employers*

Those businesses that lie outside regular communities are obligated to provide schools, clinics and other vital services.<sup>261</sup> In these cases, moreover, when the employee base exceeds two hundred, the employer must also provide for public markets and municipal and recreation centers.<sup>262</sup> Company creation of bars or "houses of chance"<sup>263</sup> are, however, prohibited.

In a manner prescribed by regulatory law, businesses are to provide their employees with means for developing and maintaining their skill levels.<sup>264</sup> Employers are responsible for any accidents or injuries incurred by their employees while performing their work.<sup>265</sup> Employers must indemnify the employee for death, injury, or loss of work regardless of whether the employer contracts with a labor provider service to supply their workforce.<sup>266</sup> Furthermore, the business is to be proactive in setting up procedures designed to prevent accidents and injuries for both workers and the unborn fetus of pregnant workers.<sup>267</sup>

*d. Collective Bargaining*

Both employers and employees have the right to assemble, form associations and unions for the purpose of collectively representing their interest.<sup>268</sup> Strikes and shutouts are guaranteed rights.<sup>269</sup> The Constitution distinguishes between legal and illegal strikes.<sup>270</sup> The strike is deemed legal if it is for the purpose of achieving a balance between the right to work and the right to earn capital.<sup>271</sup> A strike is illegal if the majority of the strikers engage in violent acts against persons or property.<sup>272</sup> In time of war, if the operation is servicing the government, no strike against that operation is legal.<sup>273</sup> Shutouts are only legal if excess inventory causes a necessity to suspend production in order to maintain reasonable prices, and then only with the approval of

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261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* art. 123, ch. A, § XIII.

265. *Id.* art. 123, ch. A, § XIV.

266. *Id.*

267. *Id.* art. 123, ch. A, § XV.

268. *Id.* art. 123, ch. A, § XVI.

269. *Id.* art. 123, ch. A, § XVII.

270. *Id.* art. 123, ch. A, § XVIII.

271. *Id.*

272. *Id.*

273. *Id.*



the CAB.<sup>274</sup>

All differences and conflicts between employees and employers are to be subjected to the decision of the CAB.<sup>275</sup> In the event that the employer refuses to submit the dispute to the CAB or to accept the subsequent judgment of the CAB, they will be held in breach of contract and obligated to indemnify their employees for three months' wages in addition to any damages incurred as a result of the conflict.<sup>276</sup> If the employees refuse to submit the dispute to the CAB, they also will be considered in breach of contract.<sup>277</sup>

An employer who dismisses an employee without just cause or for having joined a union or participating in a legal strike, must, at the election of the employee, either reinstate the employee or indemnify him for three months' wages.<sup>278</sup> The employer is also obligated to indemnify an employee who quits due to improprieties or mistreatment on the part of the employer or an agent of the employer.<sup>279</sup>

*e. Economic Obligations for State and Employer  
Toward Workers*

The employee has creditor preference over all other creditors of the business with regard to his/her wage or indemnification due from the employer.<sup>280</sup> The employer is forbidden from attempting to hold anyone other than the employee responsible for any debts he/she might have accrued while employed and may not, in any event, exact or demand payment of a debt in excess of one month's wage.<sup>281</sup> Employment services are gratuitous for the employees and preference in hiring is to be given, all other things being equal, to the applicant who is the sole provider for his/her family.<sup>282</sup>

The Constitution establishes that the Social Security Law will provide for disability, old age, illnesses or injuries occurring outside the workplace. Likewise, it provides for cooperative

274. *Id.* art. 123, ch. A, § XIX

275. *Id.* art. 123, ch. A, § XX.

276. *Id.* art. 123, ch. A, § XXI.

277. *Id.*

278. *Id.* art. 123, ch. A, § XXII.

279. *Id.*

280. *Id.* art. 123, ch. A, § XXIII.

281. *Id.* art. 123, ch. A, § XXIV.

282. *Id.* art. 123, ch. A, § XXV.

associations that build cheap and sanitary housing at set terms.<sup>283</sup>

All foreign employers must register with the appropriate municipal authority and have obtained the appropriate visas at no cost to the employee.<sup>284</sup> The employee to be responsible for repatriation expenses.<sup>285</sup> Employment contracts may be invalidated and unenforceable if deemed injurious to the worker.<sup>286</sup>

In 1931, Article 123 was codified in even more detail in what is labeled the Mexican Federal Labor Law.

### B. Mexican Federal Labor Laws

Mexico employs a civil code system of law whereby the legislature, not jurisprudence, dictates the law.<sup>287</sup> The Federal Labor Law of 1972 (*Ley Federal del Trabajo*) executes the precepts set out in Article 123 of the Mexican Constitution.<sup>288</sup> It contains 1010 articles.<sup>289</sup> Unlike the U.S. support for a "hands-off" approach with regard to employment rights as demonstrated in the "employment-at-will" philosophy, the Mexican government actively steps into the ring as mediator or a protector of workers' rights.<sup>290</sup> Articles 2 and 3 lay out the underlying rationale for the law.<sup>291</sup> Article 2 states that the objective of labor standards is to achieve a balance and social justice with regard to the relationship between employer and employee.<sup>292</sup> Article 3, sounding very similar to § 17

283. *Id.* art. 123, ch. A, §§ XXIX-XXX.

284. *Id.* art. 123, ch. A, § XXVI.

285. *Id.*

286. *Id.* art. 123, ch. A, § XXVII. Invalid and unenforceable contract terms include: (1) Inhuman work hours; (2) Wages set below that which the Board would consider just; (3) Pay periods in excess of a week; (4) Designation of places of recreation, bars etc. as pay terminals when there is no other connection with the employees; (5) "Company Store" clause requiring the employee to purchase designated items at designated places; (6) Provisions for offsetting wage for fines charged by employer; (7) Renunciation by employee of indemnification due for accidents, injuries, and illness owed by the employer or of the obligation of employer to compensate for damages incurred due to breach of contract; (8) Any renunciation of any legal right of the employee. *Id.*

287. Befort & Cornett, *supra* note 153, at 275. It should be noted that the Mexican judicial system does employ what is called *jurisprudencia*. When five identical legal circumstances give rise to five identical Supreme Court holdings a law is deemed to have been judicially created. Needless to say this is rare.

288. Ley Federal del Trabajo [hereinafter L.F.T.], art. 1 (1972). See also CAVAZOS FLORES, *supra* note 233, at 75.

289. *Id.*

290. Befort & Cornett, *supra* note 153, at 276.

291. L.F.T., arts. 2-3.

292. *Id.* art. 2.

of the Clayton Act,<sup>293</sup> declares that labor is a right and a social duty and is not an article of commerce.<sup>294</sup> It goes farther, however, than the U.S. view that labor is not a commodity, and demands both respect for those who offer it, and a right to working conditions that assure life, health and a comfortable economic level of subsistence.<sup>295</sup> Article 18 requires that when interpreting the labor standards set out in the law, one do so in consideration of the objectives laid out in Articles 2 and 3 and if there is doubt, the interpretation most favorable to the worker should prevail.<sup>296</sup>

## 1. Labor Negotiation Rights

### *a. Freedom of Association and Protection of the Right to Organize*

Both workers and employers have a right to form unions (*sindicatos*) or associations for the purpose of pursuing their interests in a collective manner.<sup>297</sup> No one is to be forced to join such unions or associations.<sup>298</sup> Anyone over the age of fourteen may join a union.<sup>299</sup> To qualify as a valid union it must be composed of at least twenty employees.<sup>300</sup> Additionally, unions must register with the Secretary of Labor and Social Welfare (STPS)<sup>301</sup> in Federal jurisdiction and the CAB in local jurisdictions.<sup>302</sup>

CAB reviews and attempts to resolve labor conflicts that arise.<sup>303</sup> It is comprised of a representative from labor, industry, and government.<sup>304</sup> The President of the Republic appoints the President of the CAB who must be a Mexican national by birth and a qualified lawyer.<sup>305</sup>

293. See *infra* notes 410-414 and accompanying text.

294. L.F.T., art. 3.

295. *Id.*

296. *Id.* art. 18.

297. *Id.* art. 357.

298. *Id.* art. 358.

299. *Id.* art. 362.

300. *Id.* art. 364.

301. *Secretaría del Trabajo y Previsión Social.*

302. L.F.T., art. 365.

303. *Id.* art. 604. Article 125 requires that employers provide commissions made up of both management and labor to monitor profit sharing and occupational and health concerns. *Id.* art. 125. If the commission fails to reach consensus in a dispute, it requests a hearing before the CAB. Befort & Cornett, *supra* note 153, at 296.

304. L.F.T., art. 605.

305. *Id.* art. 612.

*b. Right to Collective Bargaining*

Article 386 defines a collective contract as an agreement between a union or unions with an employer or employer association for the purpose of establishing the terms and conditions of work.<sup>306</sup> The employer is obligated under threat of strike to negotiate with the union or unions.<sup>307</sup> If no one contests the contract, it continues indefinitely.<sup>308</sup> It only terminates by mutual consent or, if for a single contractual job, upon the completion of that job.<sup>309</sup> The law also permits unions to negotiate with employers or employer associations of a particular industrial branch or in a particular economic zone.<sup>310</sup>

Article 395 provides that a union may negotiate for, and employers may agree to establish, a “closed shop” as long as it in no way prejudices the existing non-union employees.<sup>311</sup> This article is appropriately called the “Exclusion Clause” and is considered by some scholars and recently by the Supreme Court of Mexico to be unconstitutional and certainly contradictory. This is because the Exclusion Clause first prohibits such a clause to function to the detriment of those existing non-union employees, but then permits the employer (*patrón*) to terminate an employee for refusing to join or for having been expelled by the union.<sup>312</sup> In addition, it appears to directly violate Article 358, which states that no one is obliged to join a union and prohibits any clause that creates a fine or any other obstacle to the employee’s freedom of choice against one who leaves a union.<sup>313</sup>

*c. Right to Strike*

A strike is defined as a temporary suspension of work under-

306. *Id.* art. 386.

307. *Id.* art. 387. The strike must be made pursuant to Article 450. *Id.*

308. *Id.* art. 400.

309. *Id.* art. 401.

310. *Id.* arts. 404-21. This agreement is called a Contrato-Ley.

311. *Id.* art. 395.

312. CAVAZOS FLORES, *supra* note 233, at 196-97. Señor Cavazos alleges that article 359 violates articles 4 and 5 of the Mexican Constitution. On April 17, 2001, in a review of a lower court’s decision to grant amparo relief to certain employees in the sugar industry who were fired after leaving the established National Sugar and Alcohol Workers’ Union with the intent to form an independent union, the Supreme Court of Mexico advocated the abrogation of Articles 395 and 413 of the Federal Labor Code. See La Suprema Corte de México, amparo directo en revisión, 1124/2000. Due to the Mexican *jurisprudencia* requirement that five cases involving the same circumstances receive the same holding, this recent holding will not likely become judicial law any time soon but it may signal a trend.

313. L.F.T., art. 358.

taken by a coalition of workers.<sup>314</sup> A strike is legal when it complies with Article 450.<sup>315</sup> Article 450 requires that the object of the strike be to balance rights of labor with those of capital, to create, modify or enforce terms in a collective bargaining agreement, or to support another strike whose purpose is one of the preceding.<sup>316</sup> A strike is illegal when a majority of strikers commit violent acts against person or property, or in time of war if the employer is servicing the military.<sup>317</sup> As stated, the strike suspends the employee/employer relation.<sup>318</sup>

To suspend the operation, a majority of the employees must be on strike or it is not considered a strike.<sup>319</sup> The CAB as well as other civil authorities must respect the nature of a legal strike.<sup>320</sup> Consequently, it also suspends any conflict being considered before the CAB.<sup>321</sup>

## 2. Technical Labor Standards

### *a. Protection Against Servitude*

#### i. Prohibition of Forced Labor

Article 40 mandates that in absolutely no instance is a worker obligated to provide services for a period greater than one year.<sup>322</sup> The workday is set at eight hours during the day and seven at night.<sup>323</sup> The employee is entitled to one day of rest for every six days of work.<sup>324</sup> The employee and employer may, however, make agreements whereby the employee can work an additional hour Monday through Friday and take Saturday or Sunday afternoon off.<sup>325</sup>

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314. *Id.* art. 440.

315. *Id.* art. 444.

316. *Id.* art. 450.

317. *Id.* art. 445.

318. *Id.* art. 447. This differs from the United States' concept of "lock-outs" or replacement employees, actions which in essence sever the employee/employer relationship.

319. *Id.* art. 451.

320. *Id.* art. 449.

321. *Id.* art. 448.

322. *Id.* art. 40.

323. *Id.* art. 61.

324. *Id.* art. 69.

325. *Id.* art. 59.

ii. Labor Protections for Children and Young Persons

Codifying Article 123 of the Constitution, Mexican labor law prohibits the employment of children less than fourteen years of age.<sup>326</sup> Those children between the ages of fourteen and sixteen must apply for and obtain a certified medical statement attesting to their ability to work and undergo subsequent periodic medical examinations.<sup>327</sup> Children are not to work more than three-hour intervals for a maximum of six hours a day.<sup>328</sup> An employer is prohibited from having children work during federal or state holidays or Sundays.<sup>329</sup> Furthermore, until the age of eighteen, children are not permitted to work at night.<sup>330</sup> Finally, children between fourteen and sixteen are to be afforded at least eighteen days paid vacation per year.<sup>331</sup>

iii. Minimum Employment Standards, e.g., Minimum Wages and Overtime Pay

The law establishes a national commission made up of labor, employer, and government representatives who determine the minimum wage.<sup>332</sup> The wage is to be paid in cash.<sup>333</sup> Except in limited cases, the minimum wage of an employee is not to be used for compensation, discounts, or reductions by the employer or third party creditors.<sup>334</sup>

There are certain cases whereby an employment relationship is severed without liabilities on the part of either employer or employee.<sup>335</sup> Generally, they involve non-work-related injuries incurred by the employee, contraction of a contagious disease, or arrest or imprisonment.<sup>336</sup> An employer suspension of an employee without the authorization of the CAB constitutes an ille-

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326. *Id.* art. 173.

327. *Id.* art. 174.

328. *Id.* art. 177.

329. *Id.* art. 178.

330. *Id.* art. 175.

331. *Id.* art. 179.

332. *Id.* art. 94.

333. *Id.* art. 90.

334. *Id.* art. 97. This addresses the possibility of an employer setting up the classic "company store" to which many employees owe much more than they could ever earn thus creating a type of indentured servitude.

335. *Id.* art. 42.

336. *Id.*

gal termination.<sup>337</sup>

Article 47 presents conditions under which the employer may terminate the services of an employee, i.e., for just cause.<sup>338</sup> Examples of just cause terminations include: misrepresentation through false documents, violent acts against the employer or the employer's family, placing the work place or peers in jeopardy, disclosure of proprietary information, drunkenness on the job, and immoral acts.<sup>339</sup> An employee who feels that they have been wrongfully discharged may, however, appear and present their case before the CAB.<sup>340</sup> If the CAB finds for the employee, the employee has the option of requesting to be reinstated or accepting an indemnification of three months' wages.<sup>341</sup>

As noted *supra*, Article 69 codifies section A, paragraph IV, of Article 123 of the Mexican Constitution by providing at least one paid day of rest for every six days of work.<sup>342</sup> Although the day off can be any day of the week,<sup>343</sup> the law prefers that the day be Sunday.<sup>344</sup> Any employee required to work on Sunday must receive at least a 25% increase in their hourly wage for the hours worked.<sup>345</sup> Employees are not obligated to work on their day off.<sup>346</sup> Should they do so they are entitled to a 200% increase of their regular wage, i.e., they are to earn three times their regular pay.<sup>347</sup>

337. CAVAZOS FLORES, *supra* note 233, at 116-17. (Citing Jurisprudencia 4a. Sala. Informe Suprema Corte de Justicia. Año 1968, págs. 21 y 22).

338. L.F.T., art. 47.

339. *Id.* It should be noted that section XV on the list of "just causes" is a "catch-all" clause making any acts "analogous" to the ones cited before it also just reason for termination. *Id.* Additionally, Article 53 presents instances when the employer and employee may terminate the relationship with impunity for the employer. *Id.* art. 53. The reasons are: mutual consent, the employee's death, completion of contract, incapacitation, *force majeure* cases, bankruptcy, or the inability to continue with the particular project. *Id.* There are times, however, depending on the type or scope of incapacitation, when the employer will be responsible to either pay one month's wage and twelve days severance for every year of service or, in the alternative, if the employee requests, provide a position more compatible to the employees new circumstances. *Id.* art. 54.

340. *Id.* art. 48.

341. *Id.* One scholar suggests that this is in fact a "catch-twenty-two" for the unsuspecting employee because if the employee elects to take the three month wage indemnification he or she loses his/her seniority right to twenty days pay for every year of service, yet if he or she elects to be reinstated the employer will certainly find a just cause for terminating him. CAVAZOS FLORES, *supra* note 233, at 81.

342. L.F.T., art. 69.

343. CAVAZOS FLORES, *supra* note 233, at 106.

344. L.F.T., art. 71.

345. *Id.*

346. *Id.* art. 73.

347. *Id.* art. 73.

There are eight mandatory federal holidays (*descansos obligatorios*).<sup>348</sup> Employees and employers are to agree upon the number and identity of employees who will work during these paid holidays.<sup>349</sup> If they do not come to an accord, the CAB will make the decision for them.<sup>350</sup> In any event, those who are required to work on a federal holiday receive three times their normal wage rate.<sup>351</sup> Those employees, however, who refuse to comply with a CAB order requiring that they work during a federal holiday are deemed to have terminated their employment contract.<sup>352</sup>

For the Christmas holidays the law provides that a type of "bonus" (*aguinaldo*) be paid to the employees prior to December 20th equivalent to at least fifteen days wages.<sup>353</sup>

Article 123 of the code provides for an annual, mandatory, profit-sharing distribution.<sup>354</sup> It is a two-fold distribution:<sup>355</sup> the first is an equal distribution to all employees and the second is based upon net profits attributable to work performed.<sup>356</sup>

Finally, the law authorizes the creation of a National Employment Service.<sup>357</sup> It is charged, under the authority of the STPS,<sup>358</sup> with assisting in finding and providing labor as well as studying and implementing programs designed to educate and empower the work force.<sup>359</sup> When developing such programs for non-federal businesses, the STPS calls upon the assistance of the State Advisory Councils appointed by the governors of the various states.<sup>360</sup>

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348. *Id.* art. 74.

349. *Id.* art. 75. The eight federal holidays are January 1st, February 5th, March 21st, May 1st, September 16th, November 20th, December 25th and every six years December 1st to honor the ascendancy to office of the new President. L.F.T., art. 74.

350. *Id.* art. 75.

351. *Id.*

352. CAVAZOS FLORES, *supra* note 233, at 107. (Citing La Suprema Corte de Justicia de la Nación, amparos 3930/76 de Ignacio Camarena Tercero y 460/76 de Enrique Islas).

353. L.F.T., art. 87.

354. *Id.* art. 123.

355. *Id.*

356. *Id.*

357. *Id.* art. 537. In Spanish, the name is *Servicio Nacional de Empleo, Capacitación y Adiestramiento*. *Id.*

358. *Id.* art. 538.

359. *Id.* art. 537.

360. *Id.* art. 539-B. According to some commentators, however, Mexico misses the boat in not investing more in its education system. See Javier A. Elguea & Pilar Marmolejo, *Educating and Training the Mexican Labor Force for a Global Economy, in MEXICO'S PRIVATE SECTOR* 189-205, 199 (Riordan Roett ed., 1998). Mexico has a relatively young population and if it is to compete, it is argued, it must raise the mandatory education level. *Id.* at 194. As of 2001, Mexico ranked 51st in the United Nations Development Programme's human development index, available at



*b. Protection Against Discrimination*

i. Elimination of Employment Discrimination on the Basis of Race, Religion, Age, Sex etc.

There are certain variations in treatment with regard to sex.<sup>361</sup> These considerations, however, are expressly driven by the need to protect maternity.<sup>362</sup> Without prejudice to her salary or rights, a pregnant or lactating woman cannot be forced to work in unhealthy or dangerous circumstances.<sup>363</sup> The most significant provisions codify the constitutional rights enumerated in Article 123 and require that a pregnant woman be afforded paid leave six weeks prior to and six weeks after giving birth.<sup>364</sup> She may take a longer time off before and after birth, if necessary, but she will only receive 50% of her wage for up to sixty days.<sup>365</sup> After returning to work and during the lactation period, the woman is to be permitted two one-half hour breaks for the purpose of lactating.<sup>366</sup> In any event, the time off is not deducted from her seniority status.<sup>367</sup> The Mexican Social Security Service also offers care services for infants of working mothers.<sup>368</sup> Finally, the employer is to provide a sufficient amount of seating for the women.<sup>369</sup>

The law also provides for preferences with regard to seniority.<sup>370</sup> All advancements or promotions are made according to a seniority system.<sup>371</sup> After an employee has worked more than twenty years for an employer it is very difficult for the employer to sever the relationship.<sup>372</sup>

Finally, the law also requires that 90% of all of a companies' workforce be of Mexican nationality.<sup>373</sup>

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www.undp.org. The author would only remind commentators who are impatient with Mexico's advancement in raising the mandatory education level that Mexico is still a poor country and many children must leave school and go to work just to survive or help their families to survive. I would promote a mandatory infrastructure investment on the part of foreign investors— not a large amount so as to frighten them, but certainly some amount.

361. L.F.T., arts. 164-72.

362. *Id.* art. 165.

363. *Id.* art. 166.

364. *Id.* art. 170.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.* art. 171.

369. *Id.* art. 172.

370. *Id.* arts. 154-62.

371. *Id.*

372. *Id.* art. 161.

373. *Id.* art. 7.

## ii. Equal Pay for Men and Women

Article 86 demands equal pay for equal work or working conditions.<sup>374</sup> Women are guaranteed the same rights and have the same obligations as men.<sup>375</sup>

### c. Health Protection and Compensation

#### i. Prevention of Occupational Injuries and Illnesses

Mexico provides a comprehensive program for the prevention of injuries and illnesses in the workplace. Many of these are benefits that U.S. workers must obtain at the bargaining table.<sup>376</sup> The law provides a list of 161 *per se* work-related illnesses relative to certain types of work, from inhalation of various kinds of particles to neurosis.<sup>377</sup> In all other cases, a work-related accident is that which arises from the circumstances of any employee's obligated work duties<sup>378</sup> and a work-related illness is that which arises from the circumstances or surroundings of the work place.<sup>379</sup> To attend to potential accidents, all employers are to maintain first aid supplies and the personnel trained in applying them.<sup>380</sup> Businesses with more than one hundred employees are required to provide an infirmary and those with over three hundred employees are to maintain a hospital.<sup>381</sup>

STPS<sup>382</sup> regulates the "workplace safety and health standards."<sup>383</sup> In addition to the STPS, a national advisory commission made up of labor, management, and government representatives was set up in 1978 to study workplace injuries and to make recommendations for their prevention.<sup>384</sup> When an accident occurs or someone is treated for a work-related illness, the employer is to notify the STPS, the Labor Inspector,<sup>385</sup> and the CAB within sev-

374. *Id.* art. 86.

375. *Id.* art. 164.

376. Befort & Cornett, *supra* note 153, at 279.

377. L.F.T., art. 513.

378. *Id.* art. 474.

379. *Id.* art. 475.

380. *Id.* art. 504. It should be emphasized that the usually exempt "small family-run businesses" are also obligated to comply with these occupational, safety and health regulations. Befort & Cornett, *supra* note 153, at 281.

381. L.F.T., art. 504.

382. *Secretaría del Trabajo y Previsión Social.*

383. Befort & Cornett, *supra* note 153, at 281.

384. *Id.*

385. Translated as *Inspector del Trabajo*. The duties of the Labor Inspector are defined in Article 540, *Ley Federal del Trabajo*.

enty-two hours and provide them with the appropriate data.<sup>386</sup> Each business is to create a safety and health committee composed equally of employee and employer representatives for the purposes of investigating the cause of work-related injuries or illnesses.<sup>387</sup> The investigations are to be made on company time.<sup>388</sup> Labor inspectors are appointed by STPS to inspect the cause of such accidents and to collaborate with the safety and health committees in developing standards to prevent reoccurrence.<sup>389</sup>

The law authorizes the creation of a National Advisory Commission for Safety and Hygiene in the Workplace<sup>390</sup> made up of representatives of the STPS, the Secretary of Safety and Assistance,<sup>391</sup> and the Mexican Social Security Institute as well as representatives of national organizations of employers and employees.<sup>392</sup> Employers must implement any changes required by the labor authorities under threat of sanction by the STPS.<sup>393</sup>

## ii. Compensation in Cases of Occupational Injuries and Illnesses

Indemnification is to be paid directly to the employee if they are capable of receiving it.<sup>394</sup> Otherwise, in the case of incapacity or death, the employer must pay the employee's spouse or heirs.<sup>395</sup> A valuation table for purposes of compensation exists for standard injuries and illnesses.<sup>396</sup> The indemnification is to be no less than the minimum wage,<sup>397</sup> and if the CAB finds that it was attributable to the employer's inexcusable act, the CAB will increase the amount by 25%.<sup>398</sup> The amount and duration of compensation depends upon whether the injury or illness resulted in a temporary disability, permanent partial disability, permanent disability, or death.<sup>399</sup>

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386. L.F.T., art. 504.

387. *Id.* art. 509.

388. *Id.* art. 510.

389. *Id.* art. 511.

390. *Comisión Consultiva Nacional de Seguridad e Higiene en el Trabajo.*

391. *Secretaría de Salubridad y Asistencia.*

392. L.F.T., art. 512.

393. *Id.*

394. *Id.* art. 483.

395. *Id.* art. 501.

396. *Id.* art. 514.

397. *Id.* art. 485.

398. *Id.* art. 490.

399. *Id.* arts. 491-500.

#### d. *Protection of Migrant Workers*

The Mexican Federal Labor Law does not address the needs of migrant workers directly, but it does set aside, as a special labor category, "workers of the field."<sup>400</sup> This category establishes special rights for workers who work more than three months in agriculture or forestry.<sup>401</sup> At the employer's expense, these workers must be provided with adequate, safe, and healthy room and board, recreation, and medication.<sup>402</sup> The law, however, does not address the indigenous population that was originally addressed in Article IV of the Constitution<sup>403</sup> and recently replaced by the enactment of the "Law Governing the Rights and Cultures of the Indigenous Peoples of Mexico."<sup>404</sup> Unfortunately, even these amendments fail to address the peculiar labor needs and rights of this segment of society.

### C. *United States*

#### 1. Introduction

Unlike Mexico, the United States labor policy was not shaped by the Constitution. It was, rather, a product of judicial intervention.<sup>405</sup> Often the judicial system, made up of upper middle class citizens, favored the employers who were of the same class.<sup>406</sup> In fact, employers in the United States still retain much more control over the workplace than that found in other industrialized coun-

400. *Id.* arts. 279-84. The term is translated as *trabajadores del campo*. *Id.*

401. *Id.* arts. 279-80.

402. *Id.* art. 283.

403. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 4.

404. Ley sobre Derechos y Cultura Indígena, April 25, 2001. This Act added a second and third paragraph to Article 1 to expand its scope to directly prohibit discrimination based upon ethnicity, culture, age, or religion etc. *Id.* It rewrote Article 2, prohibiting slavery, to recognize the unique Cultural plurality of Mexico and to guarantee autonomy to the indigenous people of Mexico with regard to their internal dispute resolution systems, education, religious ceremonies, etc. *Id.* It derogated the first paragraph of Article 4 that recognized the Linguistic and Cultural plurality of Mexico and guaranteed the development of such diversity and added in its place a sixth paragraph to Article 18 that required that prisoners be imprisoned in proximity to their communities to facilitate reintegration into the community upon their release. *Id.* Finally, to Article 115, which defines the structure of the municipal government in Mexico, it adds a final paragraph granting the right of indigenous peoples to organize their units as their cultures require. *Id.*

405. See, e.g., *Vegehn v. Gunter*, 44 N.E. 1077 (Mass. 1896) (Holmes, J., dissenting); *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900) (Holmes, J., dissenting).

406. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484-85 (1921) (Brandeis, J., dissenting).

tries.<sup>407</sup> The ability to terminate employment at-will gives the employer substantial leverage.<sup>408</sup> Nevertheless, with the decline of union strength and membership and, perhaps partially, in reaction to changing social and economic demands, Congress has introduced several statutes into the labor legal sphere.<sup>409</sup>

## 2. Labor Negotiation Rights

The Clayton Act of 1914 first recognized labor negotiation rights.<sup>410</sup> It proclaimed that "the labor of a human being is not a commodity or article of commerce."<sup>411</sup> It exempted labor from the Sherman Anti-Trust Act of 1890,<sup>412</sup> and declared that labor and agricultural organizations were free to practice "mutual help."<sup>413</sup> Samuel Gompers, the first president of the American Federation of Labor, called the Clayton Act "the 'Magna Carta' of labor – a final guarantee of the workers' right to organize, to bargain collectively, to strike, to boycott, and to picket."<sup>414</sup>

The Norris-LaGuardia Act of 1932<sup>415</sup> went further than the Clayton Act, setting out official public policy stating that it was necessary for the unorganized worker to "have full freedom of association, self-organization, and designation of representatives of his/her own choosing, to negotiate the terms and conditions of his/her employment."<sup>416</sup> It essentially banned "yellow-dog" contracts<sup>417</sup> and prevented the federal courts from enjoining unions from striking.<sup>418</sup> Although some viewed the Act as a step in the direction of Communism, it could not be denied that the pendulum

407. Befort & Cornett, *supra* note 153, at 284.

408. *Id.* at 285 (alleging that this "at-will rule" has its roots in the U.S. "notions of freedom of contract and unfettered entrepreneurship").

409. *Id.* at 284-85.

410. Clayton Act, ch. 323, 38 Stat. 730 (1914) (amended by 15 U.S.C. §§ 17 et seq. (2000)).

411. *Id.*

412. Sherman Act, ch. 647, 26 Stat. 209 (1890) (amended by 15 U.S.C. §§ 1 et seq. (1988)).

413. Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (1997)).

414. DUBOVSKY & DULLES, *supra* note 177, at 190.

415. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-15 (1988)).

416. Norris-LaGuardia Act, § 2, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 102 (1988)).

417. These contracts were prevalent among employers in the first third of the twentieth century. DUBOVSKY & DULLES, *supra* note 177, at 180. They "obligated employees to agree that they would not join any union." *Id.*

418. *Id.* at 247.

had swung in the direction of union support.<sup>419</sup> That position was further strengthened in the Wagner Act of 1935,<sup>420</sup> subsequently codified in the current National Labor Relations Act (NLRA).<sup>421</sup>

In 1947, as a reaction to union pressure during WWII and fear that its economically disruptive powers had gotten out of hand, the pendulum swung back with the enactment of the Taft-Hartley Amendments to the Wagner Act.<sup>422</sup> These amendments attempted to balance the bargaining power between employers and employees.<sup>423</sup> The Taft-Hartley amendments, in effect, gave the employer more opportunities to intervene in the process of union elections and subsequent union bargaining tactics.<sup>424</sup> Mexico has refused to do this and gives preference to the workers.<sup>425</sup>

The NLRA established the National Labor Relations Board (NLRB).<sup>426</sup> It is the U.S. equivalent to the CAB. Five members appointed "by the President by and with the advice of the Senate" make up the NLRB.<sup>427</sup> The members are appointed to five-year terms.<sup>428</sup> The President designates one of them as the Chairman and may only remove him or her "for neglect of duty or malfeasance in office."<sup>429</sup> The NLRB generally delegates its powers "to determine the unit appropriate for the purpose of collective bargaining,"<sup>430</sup> and other powers of investigation to its regional directors.<sup>431</sup> The President also appoints a General Counsel to the Board.<sup>432</sup> The General Counsel "exercise[s] general supervision over all attorneys" but not over the administrative law judges

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419. *Id.*

420. Wagner Act of 1935, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1988)).

421. 29 U.S.C. §§ 151-69.

422. Wagner Act of 1935, ch. 120, 61 Stat. 136 (1935) (current version at 29 U.S.C. §§ 151-69 (1988)).

423. *See* 29 U.S.C. §§ 151-69.

424. *Id.*

425. Befort & Cornett, *supra* note 153, at 289.

426. 29 U.S.C. § 153(a). Today, the Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 151-88 (1988)), regulating the process of Railway and Aviation labor disputes, and the NLRA are the federal labor regulations with regard to labor disputes. Because of the specialized nature of those disputes covered by the Railway Labor Act and the scope of this Article, only the NLRA mechanism will be explored.

427. 29 U.S.C. § 153(a).

428. *Id.*

429. *Id.*

430. *Id.*

431. 29 U.S.C. § 153(b).

432. 29 U.S.C. § 153(d).

(ALJs) or other persons in the regional offices.<sup>433</sup> The General Counsel's word is final with respect to "the investigation of charges and issuance of complaints [of unfair labor practices] . . . and in respect of the prosecution of such complaints."<sup>434</sup>

Complaints are first heard by an ALJ who reports his/her findings to the NLRB.<sup>435</sup> These reports are confidential and no one other than NLRB members may see them.<sup>436</sup> After receiving a complaint, the NLRB notifies the alleged offender and allows that person to answer the complaint and appear at the hearing.<sup>437</sup> The hearing is conducted pursuant to the Federal Rules of Evidence and Civil Procedure.<sup>438</sup> "If upon the preponderance of the testimony," the NLRB believes that the alleged complaint is warranted, it will order the offender to "cease and desist" in its unfair labor practice.<sup>439</sup> If the NLRB believes that the complaint on its face is justified, it may file "for appropriate temporary relief or restraining order" in the U.S. District Court where the alleged "unfair labor practice" is taking place.<sup>440</sup>

When applicable, it will also ask for reinstatement of unjustly terminated employees with or without back pay.<sup>441</sup> In the event the offender resists, the NLRB may file for a temporary restraining order (TRO) or "appropriate temporary relief" in either the U.S. Courts of Appeals, or in their absence, in the Federal District Courts.<sup>442</sup> At this point the court takes jurisdiction of the proceeding and will review the findings of the NLRB.<sup>443</sup> If it finds the decision is "supported by substantial evidence on the record considered as a whole," it will deem the NLRB's determination as final.<sup>444</sup> On the other hand, if the employer feels that they have been unjustly sanctioned, they can apply to the U.S. Court of Appeals in the circuit where the alleged unfair labor practice occurred for review of the order.<sup>445</sup>

Finally, in the case of an allegation of illegal strike or secon-

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433. *Id.*

434. *Id.*

435. 29 U.S.C. § 154.

436. *Id.*

437. 29 U.S.C. § 160(b).

438. *Id.*

439. 29 U.S.C. § 160(c).

440. 29 U.S.C. § 160(j).

441. 29 U.S.C. § 160(c).

442. 29 U.S.C. § 160(e).

443. *Id.*

444. *Id.*

445. 29 U.S.C. § 160(f).

dary boycott,<sup>446</sup> “the officer or regional attorney . . . [if he or she] has reasonable cause to believe [the] charge is true” may seek injunctive relief in the U.S. District Court within the district where the unfair labor practice has occurred.<sup>447</sup> The Labor Management Relations Act of 1947<sup>448</sup> provides that an employer injured by an “unfair labor practice” such as a secondary boycott has a right of action for damages “in any District Court of the United States.”<sup>449</sup> Furthermore, the same statute provides that either employer or labor organization may bring an action for breach of contract against the other with regard to the collective bargaining contract.<sup>450</sup>

The NLRA unlike its Mexican counterpart, the CAB, does not enter the fray and influence substantive terms of employment.<sup>451</sup> Rather, its role is procedural by nature.<sup>452</sup> It is a neutral regulator of the collective bargaining process.<sup>453</sup> It guarantees no rights to employment, just the right to disagree.<sup>454</sup>

*a. Freedom of Association and Protection of the Right to Organize; Right to Collective Bargaining; and the Right to Strike*

The NLRA guarantees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other *concerted activities* for the purpose of collectively bargaining or *other mutual aid or protection*.”<sup>455</sup> Collective bargaining “is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer *in good faith* with respect to wages,

446. 29 U.S.C. §§ 158(b)(4)(A) - (C). Secondary boycotts occur when a labor organization “threaten[s], coerce[s], or restrain[s] any person engaged in commerce” for the purpose causing the person to stop having anything to do with another person or business not in privity with the labor organization. 29 U.S.C. § 158(b)(4)(B). Examples of illegal strikes are those trying to coerce a person into joining a “labor or employer organization” (29 U.S.C. § 158(b)(4)(A)) and those that try to force an employer to bargain with a labor organization that has not been certified by the NLRB to represent his/her employees. 29 U.S.C. § 158(b)(4)(C).

447. 29 U.S.C. § 160(l).

448. 29 U.S.C. § 141.

449. 29 U.S.C. § 187(b)(1).

450. 29 U.S.C. § 185(a).

451. *Befort & Cornett, supra note 153, at 277.*

452. *Id.*

453. *Id.*

454. *See id.*

455. 29 U.S.C. § 157 (2000) (emphasis added).



hours, and other *terms and conditions* of employment."<sup>456</sup> As under Mexico's Exclusion Clause, employers may contract to enforce mandatory union membership as a term of employment.<sup>457</sup>

Nevertheless, the NLRA leaves the door open for employer intimidation and pressure by permitting "[t]he express[ion] of any views, argument, or opinion . . . if [it] contains no threat of reprisal or force or promise of benefit."<sup>458</sup> The NLRB does not generally supervise the elections but it does determine the "unit appropriate" to constitute a single bargaining unit.<sup>459</sup> As for collective bargaining, however, there have been expressions in the Court that the NLRA is not a ticket for meddling with substantive bargaining issues and that "public concern ends at the bargaining room door."<sup>460</sup> On the other hand, many courts now allow an employee a cause of action in tort for a discharge that "offends public policy."<sup>461</sup>

The single most debilitating characteristic of U.S. policy with regard to strikes is the ability of the employer to replace striking workers without an obligation to terminate the replacement upon conclusion of the strike.<sup>462</sup> Thus, it lacks the compelling force that the Mexican workers entertain in being able to suspend the employer's activity altogether. Furthermore, union membership has decreased in the last decade and statutory worker protections have increased.<sup>463</sup>

### 3. Technical Labor Standards

#### *a. Protection Against Servitude*

The Fair Labor Standards Act of 1938 (FLSA) governs the standards for hours, minimum wage and child labor restrictions.<sup>464</sup> The rationale underlying the standards is that unsafe, unhealthy conditions in the work place, or "conditions detrimental to the maintenance of the minimum standard of living . . . burdens commerce and the free flow of goods in commerce; constitutes an unfair method of competition . . . [and] leads to labor disputes"

456. *Id.* § 158(5)(d) (emphasis added).

457. *Id.* § 158(a)(3).

458. *Id.* § 158(c).

459. *Id.* § 159(b).

460. *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 219 (1964) (Stewart, J., concurring).

461. *Befort & Cornett*, *supra* note 153, at 286.

462. *Id.* at 295.

463. *Id.* at 279.

464. 29 U.S.C. §§ 201-219.

that further impede the stream of commerce.<sup>465</sup> It must be emphasized that Congress is exercising its power granted under the U.S. Constitution to regulate commerce “among the several States.”<sup>466</sup> Consequently, any business deemed not to be “engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce”<sup>467</sup> will be regulated by the state within which the business operates. In these times one would be hard put, however, to find a business, the effects of which do not stray beyond the borders of its state.

### i. Prohibition of Forced Labor

The FLSA provides that no employer is to obligate an employee to work more than forty hours per week without compensating him/her with a rate “one and one-half times the regular rate at which he/she is employed.”<sup>468</sup> Unlike Mexican law, however, an employee, through a union certified by the NLRB, may waive the additional compensation if they are not employed for an average of forty hours per week over a twenty-six week period.<sup>469</sup> Although it makes other exceptions, most of them involve adjusting the rate of pay to accommodate an average of forty hours per week and increasing that rate in some form for any hours in excess of forty hours.<sup>470</sup> Nevertheless, the FLSA makes no provisions for mandatory vacations, bonus, or profit sharing.<sup>471</sup>

### ii. Labor Protections for Children and Young Persons

U.S. law regulating child labor is similar to that of Mexico. “Oppressive child labor” is defined as the employment of children under the age of sixteen “in any occupation” with the exception of certain family-run ventures or the employment of children between the ages of sixteen and eighteen in occupations the Secre-

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465. *Id.* § 202.

466. U.S. CONST. art. I, § 8, cl. 3.

467. 29 U.S.C. §§ 206-207.

468. *Id.* § 207(a)(1).

469. *Id.* § 207(b)(1). This, of course, means that he/she may work eighty hours one week and none the next, alternating this arrangement for a period of twenty-six weeks.

470. *See Id.* § 207(g) (requiring that any overtime worked under a “piece rate” agreement is reflected in an increased “piece premium” rate).

471. Befort & Cornett, *supra* note 153, at 284.

tary of Labor has found to be dangerous for those children.<sup>472</sup> Children older than fourteen may, however, work in occupations approved by the Secretary of Labor as long as they have certificates of authorization issued by the Secretary.<sup>473</sup> The FLSA prohibits the shipment of goods produced by a business that employs oppressive child labor.<sup>474</sup> The Secretary of Labor is authorized to investigate any allegations of illegal employment of minors and to enjoin<sup>475</sup> any such practices.<sup>476</sup> Employers are obligated to obtain proof of age before hiring.<sup>477</sup> The only exemptions to this law relate to family run farms.<sup>478</sup> Again, unlike Mexico, there are no mandatory rest periods or vacations for children who are employed in the United States. On the other hand, penalties for child labor violations in the United States can be as great as \$10,000 per child.<sup>479</sup>

iii. Minimum Employment Standards, e.g.,  
Minimum Wages and Overtime Pay

Congress has created the Administration of Wage and Hour Division of the Labor Department, the administrator of which is appointed by the President.<sup>480</sup> The administrator is obligated to study the effects of wage and hour standards in place and report biennially to Congress.<sup>481</sup> Based upon this information Congress determines the minimum wage.<sup>482</sup> Since September 1, 1997, the minimum wage has been set at \$5.15 per hour.<sup>483</sup> In contrast to Mexico's mandated profit sharing law, the United States simply establishes procedural requirements for the administration, management, and funding of a retirement plan.<sup>484</sup> Remedies with regard to violations are generally back pay plus liquidated

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472. 29 U.S.C. § 203(l) (2000).

473. *Id.*

474. 29 U.S.C. § 212(a) (2000).

475. *Id.* § 217.

476. *Id.* § 212(b).

477. *Id.* § 212(d).

478. *Id.* § 213(c).

479. *Id.* § 216(e). If they also violated the hours and minimum wage requirements they are subject to another penalty not to exceed \$1000 per violation.

480. *Id.* § 204.

481. *Id.*

482. *Id.* § 206.

483. *Id.*

484. Employee Retirement Income Security Act of 1988, 29 U.S.C. §§ 1001-1461 (1988). The recent Enron debacle has uncovered the fact that in the past decade the burden for financing retirement plans, often in the form of 401-K (so-called from its Internal Revenue Code designation 26 U.S.C. § 401(k)) has fallen to the employees

damages.<sup>485</sup>

*b. Protection Against Discrimination*

*i. Elimination of Employment Discrimination on the Basis of Race, Religion, Age, Sex etc.*

Generally, U.S. law lacks the *machismo* prejudice displayed in Mexican law with regard to women and speaks out in other areas, such as disability, where Mexico remains silent. There are several legislative Acts addressing discrimination on the grounds of race, age, disability, or sex.<sup>486</sup> Title VII of the Civil Rights Act of 1964, among other things, makes illegal the refusal to hire or otherwise discriminate against a person “with respect to his/her compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>487</sup> The Civil Rights Act defines the terms “because of sex” or “on the basis of sex” as including, but not limited to, because of, or on the basis of, pregnancy, childbirth, or related medical conditions.<sup>488</sup> Furthermore, it explicitly states that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”<sup>489</sup> It does not, however, hold the employer responsible to pay for insurance that covers abortions.<sup>490</sup>

The Act also prohibits discrimination in the admission, expulsion, or general practices of labor unions.<sup>491</sup> The complaining party need only prove that discrimination was one of the motives for the employer’s conduct to cause a finding of a violation of the Act.<sup>492</sup> To monitor and enforce its provisions, the Act creates a five-member commission, the Equal Employment Opportunity

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while government protections and guarantees have diminished. See Edward Wyatt, *Pension Change Puts the Burden on the Worker*, N.Y. TIMES, April 5, 2002, at A1.

485. 29 U.S.C. § 216 (2000). The Secretary of Labor is authorized to supervise the payments. *Id.* § 216(c).

486. *E.g.*, The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-17; Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000).

487. 42 U.S.C. § 2000e-2(a)(1) (2000).

488. *Id.* § 2000e(k).

489. *Id.*

490. *Id.*

491. *Id.* § 2000e-2(c).

492. *Id.* § 2000e-2(m).

Commission.<sup>493</sup> The President appoints a General Counsel to the Commission to investigate allegations of violations and prosecute those that are deemed valid.<sup>494</sup>

The Act also sets up a "revolving fund to be known as the Equal Employment Opportunity Commission (EEOC) 'Education, Technical Assistance, and Training Revolving Fund' . . . and to pay the cost . . . of providing education, technical assistance, and training relating to laws administered by the Commission."<sup>495</sup> The Commission must review any written complaint and investigate it but may dismiss it if there is cause to believe that the allegations are not true.<sup>496</sup> The Commission must notify the aggrieved party of its determination.<sup>497</sup> If the Commission cannot extract a conciliation agreement from the violating party it may take civil action.<sup>498</sup> If state law covers the violation, a person may not file a grievance with the Commission until sixty days after initiating an action under the state law.<sup>499</sup>

Although included in the Civil Rights Act, the Age Discrimination in Employment Act of 1967 specifically prohibits an employer from refusing to hire or causing to terminate a person's employment due to age.<sup>500</sup> The EEOC treats the amount owed to an aggrieved party as a result of a violation of the Act as "minimum wages or unpaid overtime" and affords the same remedy available under the FLSA.<sup>501</sup> Any aggrieved person may file a civil action in lieu of applying to the EEOC, but once the person files a complaint with the EEOC any right to a judicial determination is waived.<sup>502</sup>

Finally, Congress has found that forty-three million persons with "one or more physical or mental disabilities" live in the United States,<sup>503</sup> and that they are to be considered a "discrete and insular minority" who are unjustly discriminated against.<sup>504</sup>

493. *Id.* § 2000e-4(a).

494. *Id.* § 2000e-4(b).

495. *Id.* § 2000e-4(k)(1).

496. *Id.* § 2000e-5(b).

497. *Id.*

498. *Id.* § 2000e-5(f)(1).

499. *Id.* § 2000e-5(c).

500. 29 U.S.C. § 623(a)(1) (2000). Congress reacted to among other things the rising unemployment rate among older person caused by apparent arbitrary age limits set by companies forcing competent employees to leave their place of work or not be hired at all. *Id.* § 621(a).

501. *Id.* § 626(b).

502. *Id.* § 626(c)(1).

503. *Id.* § 12101(a)(1).

504. *Id.* § 12101(a)(7).

Based upon this finding, Congress created the Americans with Disabilities Act of 1990 to provide a mandate for the elimination of discrimination against persons with disabilities and to provide clear and enforceable standards to that end.<sup>505</sup>

## ii. Equal Pay for Men and Women

With regard to “equal pay” the United States and Mexico offer the same rights and prohibitions. The FLSA prohibits discrimination in wage based upon sex except where the employer is utilizing a “wage rate differential” such as seniority, merit, or “piece premium.”<sup>506</sup> These exceptions emphasize the fact that all of the congressionally enacted statutes prohibit discrimination “on the basis of class status.”<sup>507</sup> They do not prevent unfair discrimination towards individuals “as workers per say.”<sup>508</sup> Redress for individual treatment is to be found in the courts under an action in tort or contract.<sup>509</sup>

## c. Health Protection and Compensation

Congress enacted the Occupational Safety and Health Act of 1970<sup>510</sup> to establish a uniform national standard for workplace health and safety regulations.<sup>511</sup> To implement the legislation, it enabled the creation of three agencies: (1) the Occupational Safety and Health Administration (OSHA) under the Department of Labor, which creates and enforces “mandatory safety and health standards”,<sup>512</sup> (2) the National Institute for Occupational Safety and Health (NIOSH), which researches hazards and possible controls,<sup>513</sup> and (3) the Occupational Safety and Health Review Commission (OSHRC), an independent adjudicatory agency<sup>514</sup> that reviews “contested enforcement actions.”<sup>515</sup> The Act requires

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505. 42 U.S.C. § 12101(b) (2000).

506. 29 U.S.C. § 206 (d)(1) (2000).

507. Befort & Cornett, *supra* note 153, at 286.

508. *Id.*

509. *Id.*

510. 29 U.S.C. §§ 651 et seq. (2000).

511. U.S. DEPT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH LAWS IN THE UNITED STATES, MEXICO AND CANADA: AN OVERVIEW, Mar.12, 2002, [hereinafter OSHA OVERVIEW] available at <http://www.dol.gov/ilab/media/reports/nao/oshreport2.htm> (last visited Oct. 11, 2002).

512. *Id.* See also 29 U.S.C. §§ 655 (a)&(b) (2000).

513. 29 U.S.C. § 669 (2000).

514. *Id.* § 651(b)(3).

515. *Id.* § 659.

every employer to comply with its regulations<sup>516</sup> with the exception of state and local governments.<sup>517</sup> The states are to comply with the Act, but may create and administer their own plans if they meet the federal standards laid out by the Secretary of Labor.<sup>518</sup> "Twenty-one states and two territories operate an approved plan covering both public and private sector workers."<sup>519</sup>

The United States does not require that employers provide employees with means for adequate housing as Mexico does.<sup>520</sup> Nor are U.S. employers required to provide employees with either health care or day care benefits.<sup>521</sup> The United States does, however, provide unpaid time-off for family and medical leave without prejudice to the employee's position or rate of pay.<sup>522</sup>

### i. Prevention of Occupational Injuries and Illnesses

OSHA has the responsibility to enforce both permanent<sup>523</sup> and emergency temporary standards (ETS).<sup>524</sup> The courts, however, frown on the issuance of ETSs. Consequently, OSHA rarely creates them.<sup>525</sup> In fact, as much as the NLRA attempts to maintain a balance of rights and obligations between employer and employee, so also does OSHA. The Act establishes a National Advisory Committee (Committee) made up of twelve members including representatives of labor, management, occupational health and safety professions, and the general public.<sup>526</sup> The Committee advises the Secretary of Labor and the Secretary of Health and Human Resources.<sup>527</sup> The Committee meets no less than twice a year.<sup>528</sup>

OSHA must find a significant risk in the work-site before it

516. *Id.* § 654(a)(2).

517. *Id.* § 652(5).

518. *Id.* § 667.

519. OSHA OVERVIEW, *supra* note 511. See also 29 U.S.C. §§ 655(a)-(b) (2000). They are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Wyoming, Virgin Islands, Puerto Rico. *Id.*

520. Befort & Cornett, *supra* note 153, at 288.

521. *Id.*

522. The Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000).

523. 29 U.S.C. § 655(b) (2000).

524. *Id.* § 655(c).

525. OSHA OVERVIEW, *supra* note 511. See also 29 U.S.C. §§ 655(a)&(b) (citing *Visitron v. OSHA*, 6 O.S.H.C. 1483 (6th Cir. 1978)).

526. 29 U.S.C. § 656(a)(1) (2000).

527. *Id.* § 656(a)(2).

528. *Id.*

can issue permanent standards.<sup>529</sup> Once issued, the federal courts of appeal may review the standard within sixty days.<sup>530</sup>

[The] standards *must be feasible* both economically and technologically. A standard is technologically feasible if the most advanced plants usually can meet it. Standards can force industry to develop and diffuse new technology. A standard is economically feasible, even if financially burdensome, if it poses no long-term threat to an industry's profitability or competitive structure. OSHA considers the impact of compliance costs on consumer prices and industry profitability, for both large and small firms, to determine feasibility.<sup>531</sup>

An employer may, nonetheless, file with OSHA for a variance.<sup>532</sup>

OSHA is restricted in how it can make standards by the Administrative Procedure Act (APA)<sup>533</sup> and other legislation.<sup>534</sup> If the subsequent impact will be greater than \$100, OSHA is required to "regulate cost effectively."<sup>535</sup> Every employer is to "furnish to each of his/her employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his/her employees"<sup>536</sup> and comply with the standards resulting from the Act.<sup>537</sup> An employer violates the standard if their "employees are exposed to a regulated hazard the employer knew or should have known about."<sup>538</sup> The employer also breaches their duty under the Act when the "firm's employees are exposed to hazards recognized as harmful by the individual employer or its industry that are likely to cause death or serious harm unless"

529. OSHA OVERVIEW, *supra* note 511. The report cites *Indus. Union Dept v. Am. Petroleum Inst.*, 448 U.S. 607, 639-40 (1980), in which the court "suggested risks of 1/1000 are plainly significant and authorized OSHA to risk error on the side of worker protection." *Id.*

530. 29 U.S.C. § 656(f) (2000).

531. OSHA OVERVIEW, *supra* note 511 (citing *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1264-65 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981)) (emphasis added).

532. 29 U.S.C. § 656(d) (2000).

533. 5 U.S.C. pt. 1, ch. 5.

534. OSHA OVERVIEW, *supra* note 511 (citing the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 1996 U.S.C.C.A.N., 110 Stat. 857; The Paperwork Reduction Act, 44 U.S.C. § 3501).

535. *Id.* (citing Exec. Order No. 12,866; *American Textile Mfrs. v. Donovan*, 452 U.S. 490, 540 (1980)).

536. 29 U.S.C. § 654(a)(1) (2000).

537. *Id.* § 654(a)(2).

538. OSHA OVERVIEW, *supra* note 511 (citing *Brennan v. OSHRC (Alsa Lumber Co.)*, 511 F.2d 1139 (9th Cir. 1975)).



something is done to prevent it.<sup>539</sup>

OSHA enforces the Act through work-site inspections initiated by "complaint, general schedule, fatality/catastrophe, imminent danger, and follow-up[s]."<sup>540</sup> If there is a violation, OSHA may issue a citation or if the violation is considered to be *de minimus* it may simply issue a notice.<sup>541</sup> Citations usually involve fines.<sup>542</sup>

As may also be said of its Mexican counterpart, OSHA is over-worked and is unable to adequately perform its inspection duties.<sup>543</sup> In an attempt to broaden its net without increasing its expenditures, OSHA has implemented three basic alternative approaches.<sup>544</sup> First, it promotes small-employer involvement in high-hazard plants by recognizing their efforts to meet its standards through its Safety and Health Achievement Recognition Program (SHARP).<sup>545</sup> If an employer receives this status, it is

539. *Id.* (citing Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1261 (D.C. Cir. 1973)).

540. *Id.* It is required to do so without notice. 29 U.S.C. § 666(f) (2000). Because the U.S. Constitution requires employer consent without a warrant, OSHA must obtain a warrant in order to arrive unannounced. OSHA OVERVIEW, *supra* note 511 (citing Marshall v. Barlow's Inc., 436 U.S. 307 (1978)). The inspection begins with an explanation of what the inspector intends to do, followed by a tour through the workplace, and concluded with a conference with the employer and/or his/her representatives to apprise them of any violations. *Id.*

541. 29 U.S.C. § 658(a) (2000).

542. *Id.* § 666(b). The citation must be issued within six months (*Id.* § 658(c)) and notice of the violation is "posted" at or near the place of the violation. *Id.* § 658 (b). Penalties can be as high as \$7000 but average only \$800. *Id.* § 666(b); *see also* OSHA OVERVIEW, *supra* note 511. "An employer who willfully or repeatedly violates [a requirement] . . . may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$5000 for each willful violation." *Id.* § 666(a). If the willful violation resulted in death, the employer faces up to \$10,000 fine or six months in prison. *Id.* § 666(e). A \$20,000 fine if it was a repeated violation, and failure to mend the problem can result in a daily fine of up to \$7000. *Id.* § 666(d).

The employer may contest a citation within fifteen days of receipt of the citation. *Id.* § 659(a). If he/she fails to contest within that period, the citation is binding and final. *Id.* If the employer, however, does contest the citation within the allotted period, the Secretary must inform the Occupational Safety and Health Review Commission, which then must conduct a hearing in accordance with the APA (5 U.S.C. § 554 (2000)) and report its "findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief." 29 U.S.C. § 659(c) (2000). The hearing is open to the public and the facts are heard by an ALJ. *Id.* § 661(j). If the Commission does not grant a review, the decision of the ALJ is final after thirty days. *Id.* Finally, an employer may file an appeal to the federal "court of appeals for the circuit in which the violation is alleged to have occurred." *Id.* § 660(a).

543. OSHA OVERVIEW, *supra* note 511.

544. *Id.*

545. *Id.*

exempt from OSHA's regularly scheduled inspections for one year.<sup>546</sup> Second, a Voluntary Protection Program (VPP) awards employers for exceptional "safety and health programs" by exempting them from regularly scheduled inspections.<sup>547</sup> Third, OSHA advocates that "joint labor-management committees" be created either by state law or collective bargaining contracts.<sup>548</sup>

Just as in Mexico, employees are encouraged to get involved in the inspections and employers are required to keep them fully informed.<sup>549</sup> OSHA is also obligated to investigate any written request by an employee with regards to alleged safety hazards.<sup>550</sup>

## ii. Compensation in Cases of Occupational Injuries and Illnesses

The various states of the union have the discretion to provide for some type of workers' compensation plan for workplace injuries and every state has implemented one.<sup>551</sup> Unlike Mexico's ability to punish recklessness, workers' compensation resembles a strict liability insurance plan whereby the injured party need not prove negligence in exchange for immunizing the employer from a tort liability claim.<sup>552</sup> Workers' compensation excludes "the self-employed, independent contractors, agricultural, and casual or domestic workers."<sup>553</sup>

Although the occupational health and safety protection seeks to be comprehensive, in practice it falls short.<sup>554</sup> Many diseases that are similar to everyday diseases, but in fact stem from the circumstances of the work-site, are left undetected.<sup>555</sup> Some states now exclude stress-related or psychological conditions not associated with physical injury.<sup>556</sup> In addition, it is thought that the

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546. *Id.*

547. *Id.*

548. The report points out that such joint committees are banned by the National Labor Relations Act unless they are imposed by a collective contract or state law. *Id.*

549. 29 U.S.C. §§ 657(c)(1)&(3) (2000).

550. *Id.* § 657(f)(1).

551. OSHA OVERVIEW, *supra* note 511.

552. *Id.*

553. *Id.*

554. *Id.*

555. *Id.*

556. State control leaves plan coverage significantly under the influence of business lobbyists, particularly insurance companies. The recent battle in Maine with regard to retroactively covering injuries that did not necessarily occur in job-related circumstances is a perfect example of the struggle between the Chambers of Commerce and workers' rights advocates. *See* Ted Cohen, PORTLAND PRESS HERALD, April 6, 2002 at A1.

employee does not file some claims for fear of retaliation.<sup>557</sup> “Under the employment-at-will doctrine, employees can be discharged for any reason, including disability. No requirement exists for reinstatement when an employee’s work capacity returns. In addition, OSHA gives disabled workers limited job-retention and no reinstatement protection.”<sup>558</sup> If the circumstances do not come within the Americans with Disabilities Act,<sup>559</sup> then this type of protection is left to collective bargaining sessions by the unions.<sup>560</sup> Nor are “noneconomic losses like pain and suffering . . . compensated.”<sup>561</sup>

Finally, it must be noted that the states also have discretion to administrate an unemployment compensation plan.<sup>562</sup> The state’s program must be approved by the Secretary of Labor under the Federal Unemployment Tax Act.<sup>563</sup> Under the Federal Unemployment Tax Act, each employer must pay the federal government an excise tax of “6.2% in the case of calendar years 1988 through 2007, or 6.0% in the case of calendar year 2008 and each calendar year thereafter.”<sup>564</sup>

#### *d. Protection of Migrant Workers*

In contrast to the absence of protection for migratory workers in Mexican law, the United States has enacted legislation to protect this vulnerable class.<sup>565</sup> This legislation is a noble attempt to protect an ever-increasing vulnerable class of workers. Migration is a dynamic cultural evolution that generates “transnational families and communities” that give rise to new services such as “child sharing” and “communication assistance.”<sup>566</sup> Such activity has been labeled “internal colonialism.”<sup>567</sup> There are, however, no laws governing these latter nascent migrant transactions.

557. OSHA OVERVIEW, *supra* note 511.

558. *Id.*

559. 29 U.S.C. § 12101 (2000).

560. OSHA OVERVIEW, *supra* note 511.

561. *Id.*

562. 42 U.S.C. § 501 (2000).

563. *Id.* § 502 (requiring compliance with 26 U.S.C. § 3301 (2000)).

564. 26 U.S.C. § 3301 (2000).

565. Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §§ 1801-1872 (2000). *See also* Russo, *supra* note 1.

566. David Griffith, *Work and Immigration: Winter Vegetable Production in South Florida*, in POVERTY OR DEVELOPMENT 141 (Richard Tardanico & Mark B. Rosenberg eds., 2000).

567. *Id.* at 140.

## V. NATIONAL ADMINISTRATIVE ORGANIZATION INVESTIGATIONS

Despite the fact, as the preceding analysis shows, that Mexico's laws are by all standards adequate and in some respects superior to those of its northern brother, some commentators maintain that equivalence of labor laws is not good enough.<sup>568</sup> The NAALC, they point out, requires that the laws be enforced.<sup>569</sup> In their view, this is Mexico's stumbling block.<sup>570</sup> That is, it continues to maintain a "hands-off" attitude with respect to labor law enforcement.<sup>571</sup> Other commentators find stereotyping and racism as the underlying impetus for such negative evaluations of Mexico's enforcement system.<sup>572</sup> Whatever the case may be, the fact remains that in the cases that have arisen since 1994 there has been little effort on the part of the responsible organs created under the NAALC to test or verify these accusations.

An inherent flaw of the NAALC is that it is "state-centered."<sup>573</sup> If the respective NAO adopts the complaint of a *sindicato* or union, the union or *sindicato* loses their voice from that point on and the NAO takes over.<sup>574</sup> A study of a few cases readily exposes the fact that the NAOs never shed their sovereign armor. Rather, they embellish their inability to enforce with the magic of "reach-out" programs and educational seminars.

### A. Against the United States

In 1998, the Mexican NAO entered into ministerial consultations with the U.S. NAO as a result of a complaint filed by certain independent Mexican unions alleging that U.S. authorities persistently failed to protect workers at a subsidiary of Sanyo and Sumitomo Bank from OSHA violations.<sup>575</sup> The complaint only reached the ministerial consultation stage with the result that it was resolved, along with two complaints about U.S. protection of

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568. See generally Michael Joseph McGuinness, *The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico*, 21 U. PA. J. INT'L ECON. L. 1, 1 (2000).

569. McGuinness, *supra* note 568, at 17-18.

570. *Id.*

571. *Id.*

572. *Id.* at 20.

573. Williams, *supra* note 213, at 172.

574. *Id.*

575. THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 9801 (1998), available at <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2002).

Mexican migrant workers, through government sessions, public fora and an agreement to disagree.<sup>576</sup>

### B. *Against Mexico*

In 1994, there were three Chihuahuan complaints.<sup>577</sup> Failing to obtain the support of the CTM, the unions of the United Electrical, Radio, and Machine Workers of America (UE) and the International Brotherhood of Teamsters (IBT) persuaded the Authentic Labor Front (FAT) to try to organize two *maquiladoras*<sup>578</sup> owned by General Electric and Honeywell.<sup>579</sup> When FAT failed to unionize the plants, the UE and IBT filed complaints with the U.S. NAO alleging that the Mexican government had impeded FAT's attempt to organize the plants "because it did not correctly apply its own labor code."<sup>580</sup> Neither the CTM nor the AFL-CIO got involved.<sup>581</sup>

Another case brought before the U.S. NAO relating to union activity took place in Nuevo Laredo, Tamaulipas.<sup>582</sup> On October 13, 1994, the U.S. NAO agreed to investigate allegations made by workers at a Sony plant that their attempts to replace the CTM with another union was thwarted by the CAB refusal to allow an election.<sup>583</sup> The complaints alleged violations of the guaranteed freedom of association and to organize.<sup>584</sup> Police had even been sent in to break up the demonstration and were accused of using

576. THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 9802 (1998) & 9803 (1998), available at <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2002).

577. Williams, *supra* note 213, at 172-73.

578. The Border Industrialization Program (BIP) authorized, in 1965, the creation of maquiladoras. Bryan Roberts & Richard Tardanico, *Employment Transformations in Mexican and U.S. Gulf Cities*, in POVERTY OR DEVELOPMENT 229 (Richard Tardanico & Mark B. Rosenberg eds., 2000). The border between the U.S. and Mexico is the home of "almost 1800 foreign-owned plants." McGuinness, *supra* note 568, at 32. These plants are generally located along the Mexican side of the Mexican-U.S. border permitting U.S. manufacturers to take advantage of Mexico's cheap labor force. *Id.* Some commentators credit the maquiladora system with having raised the average wages of "semiskilled female manufacturing workers" to a level higher than that of male craftsman. *Id.* at 245.

579. Williams, *supra* note 213, at 172-73.

580. *Id.*

581. *Id.*

582. *Id.* at 173.

583. THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 940003, available at <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2002).

584. *Id.*

violence.<sup>585</sup> Furthermore, Sony was accused of having dismissed those workers who tried to organize the elections.<sup>586</sup>

The International Labor Rights Fund, the National Association of Democratic Lawyers, the Coalition for Justice in the Maquiladoras, and the American Friends Service Committee filed with the U.S. NAO.<sup>587</sup> Over the vociferous objections of the CTM, the NAO found that there had been violations and advanced the case to ministerial-level consultations.<sup>588</sup> "The Ministerial Consultations resulted in an agreement to conduct a series of three public seminars on union registration and certification, an internal study on union registration by the Mexican authorities, and a series of meetings between Mexican authorities and the parties concerned."<sup>589</sup> In its final report, issued in December 1996, the Ministerial Council recognized the dynamic and positive activity taking place with regard to Mexican labor legislation.<sup>590</sup>

FAT, small, radical, and independent as it is, has been the most supportive and active in helping to monitor labor activity in Mexico.<sup>591</sup> The Telephonists Union of the Republic of Mexico (STRM), under the leadership of Francisco Hernández Juárez, is also a progressive and active promoter of unionism.<sup>592</sup> Both unions have consistently locked horns with the CTM.<sup>593</sup>

Most U.S. NAO submissions deal with the inability of Mexican workers to organize independent unions.<sup>594</sup> Since 1997, there has been one complaint submitted alleging discrimination against pregnant women by mandating pregnancy tests as a requirement to employment,<sup>595</sup> one complaint, subsequently dismissed for insufficient evidence, alleging violations of child labor laws in the

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585. *Id.*

586. *Id.*

587. THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 940003, *available at* <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2000).

588. Williams, *supra* note 213, at 173.

589. THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 940003, *available at* <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2000).

590. *Id.*

591. Williams, *supra* note 213, at 173-74.

592. *Id.* at 173.

593. *Id.*

594. *See* THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 9602 (1996), 9702 (1997), 9703 (1997), 9901(1999), *available at*, <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2002).

595. THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 9701 (1997), *available at*, <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2000).

vegetable fields;<sup>596</sup> and one complaint claiming that an executive order had the effect of depriving airline workers of their constitutional right to strike.<sup>597</sup> Nevertheless, with the exception of the complaint that was dismissed, all of these allegations only survived until they reached the ministerial consultation stage. There the government parties, through information tribunals, reach-out programs and various public fora, "resolved" them.<sup>598</sup>

## VI. IS THERE REALLY AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM?

The relationship between the United States and Mexico has never produced an effective mechanism for enforcement of any of its treaties.<sup>599</sup> The United States' reputation for large jury awards and the possibility of treble damages in some cases acts as a bulwark against any chance of a common recognition of judgments issued under the parties' respective judicial systems.<sup>600</sup> Furthermore, Mexico mandates that the foreign laws governing the foreign judgment be "compatible with Mexican Law"; that it not violate Mexican public policy; and that the action only proceed as a result of *in personam* not *in rem* jurisdiction.<sup>601</sup>

Although generally more favorable to enforcing foreign judgments, the United States, under its implied "doctrine of reciprocity," in light of Mexico's exacting conditions for recognition of foreign judgments, would not be able to afford recognition of Mexi-

596. THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 9802 (1998), available at, <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2000). It is unfortunate that the complaint was dropped because child labor violations are one of the few categories that can actually lead to final and binding arbitration awards. NAALC art. 29.

597. THE COMMISSION FOR LABOR COOPERATION, U.S. NAO 9801 (1998) available at <http://www.naalc.org/english/publications/summaryusa.htm> (last visited Oct. 11, 2000).

598. See generally CLC, *supra* note 11.

599. Matthew H. Adler, *Enforcement in a New Age: Judgments in the United States and Mexico*, 5 U.S.-MEX. L.J. 149, 150 (1997).

600. *Id.* at 151. Mexico currently follows a procedure called *homologación* (approval) when determining whether to enforce a foreign judgment. In doing so, it looks to such factors as jurisdiction, and the availability of due process. *Id.* at 152.

601. *Id.* at 152. The stringency of these factors are compounded by Mexico's adherence to both the Montevideo Convention, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, OEA/Ser. A.28 (SEPF), 18 I.L.M. 1224 (1979) and the La Paz Convention, Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, May 24, 1984, OEA/Ser. A/39 (SEPF), 24 I.L.M. 468 (1985), both of which expand upon the three requirements mentioned in the text. *Id.*

can judgments against U.S. parties and would have to apply the same insurmountable conditions.<sup>602</sup> Accepting this reality, some commentators look in vain to international law for help.<sup>603</sup> In short, the prospects for common recognition of judgments made on the other party's soil look slim.

Nevertheless, some commentators fear that what some have labeled "social dumping" – transfers of operations to countries that do not enforce labor regulations – will drive jobs offshore and lead to sub-quality products at prices profitable only to the corporation.<sup>604</sup> They insist upon developing a common mechanism by which the maximum number of local laws of one Party may be challenged by interested persons of any of the other Parties.<sup>605</sup> They assert that Chapter Nineteen of NAFTA provides a channel to do just that.<sup>606</sup> If the NAALC is a side plate to NAFTA, could something be snatched from the entrée?

A. *Chapter Nineteen of North American Free Trade Agreement: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters*

Chapter Nineteen of NAFTA creates a dispute settlement mechanism for resolving conflicts arising from charges of dumping and illegal subsidization.<sup>607</sup> Some commentators view it as having created four Alternative Dispute Resolution Measures (ADRM's).<sup>608</sup> It creates a bi-national panel to review and make determinations concerning disputes arising from issues of dump-

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602. Adler, *supra* note 599, at 154. Although U.S. courts give a nod to the concept of "comity"—the recognition by one sovereign of the official acts of another sovereign – it in practice adheres to the doctrine of reciprocity. *Id.*

603. *Id.* The author naively anticipated some closure of The Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters. *Id.* at 156. As of this writing, however, the Convention is labeled as "future." See Hague Conference on Private International Law, available at <http://www.hcch.net/e/workprog>.

604. McGuinness, *supra* note 568, at 1.

605. Isidro Morales, *NAFTA: The Governance of Economic Openness*, 565 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 60 (1999).

606. *Id.*

607. North American Free Trade Agreement, Dec. 8, 1993, art. XIX, 107 Stat. 2057.

608. Morales, *supra* note 605, at 52. Two facilitate "quasi-judicative decisions" through either a panel requested by an interested party or through the Extraordinary Challenge Committee. *Id.* The other two promote a mutually acceptable solution by panel review of whether the laws of a challenged party permit the challenging party to have recourse to the panel and if so after a decision is made the requested "legal reform is . . . consistent with the agreement." *Id.*



ing and subsidies.<sup>609</sup> This bi-national panel is to “replace judicial review of final antidumping and countervailing duty.”<sup>610</sup> With the exception of the number of panelists, and the preference that panelists come from a roster of “judges or former judges,” and in particular are “lawyers in good standing,”<sup>611</sup> Chapter Nineteen’s panel is similar to that of the NAALC’s. Unlike the NAALC, however, the panelists need not come from the other party’s candidates.<sup>612</sup> The strength of Chapter Nineteen is the ability of a party to directly access an arbitral panel to review its complaint.

Parties may request that any amendment of another Party that acts to change its antidumping and countervailing duty statute be referred to a bi-national panel for a declaratory opinion as to its conformity and general effect.<sup>613</sup> The panel operates in strict confidence unless there is agreement by the Parties to the contrary.<sup>614</sup> It makes its decisions based solely on the arguments and submissions of the Parties.<sup>615</sup> If the panel finds that the amendment is not consistent with the General Agreement on Tariffs and Trade (GATT),<sup>616</sup> the Antidumping Code,<sup>617</sup> or the Subsidies Code,<sup>618</sup> it may make recommendations.<sup>619</sup>

If the Panel recommends modifications, the Parties are to try to reach a solution within approximately three months of the Panel’s recommendation.<sup>620</sup> If the Parties fail to come to an agreement, the challenging Party may ask the panel to take some executive action “or terminate the agreement with regard to the amending Party.”<sup>621</sup> The challenged Party may respond with its objections and may request reconsideration within fourteen days of the declaratory opinion.<sup>622</sup> If the panel does reconsider, it must “issue a final written opinion, together with dissenting and con-

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609. North American Free Trade Agreement, Dec. 8, 1993, art. XIX, 107 Stat. 2057.

610. *Id.* art. 1904.

611. *Id.* Annex 1901.2.

612. *Id.* Annex 1901.2(2).

613. *Id.* art. 1903.

614. *Id.* Annex 1903.2.

615. It has ninety days after the selection of its chair to offer its declaratory opinion. *Id.*

616. General Agreement on Tariff and Trade, April 15, 1994, reprinted in 33 I.L.M. 1154 (1994) (entered into force Jan. 1, 1995).

617. *Id.* art. VI.

618. *Id.* arts. VI, XVI & XXIII.

619. *Id.* Annex 1903.2.

620. *Id.* art. 1903.

621. *Id.*

622. *Id.* Annex 1903.2.

curing” opinions,<sup>623</sup> which is then published.<sup>624</sup> A Party may also request the panel to review and determine whether an antidumping and/or countervailing duty determination made by a “competent investigating authority” of the importing Party complies with the importing Party’s antidumping and/or countervailing duty statutes.<sup>625</sup>

The panel imposes the standard of review and “legal principles” of the importing Party.<sup>626</sup> It may either make a final judgment or remand for “action not inconsistent” with its decision.<sup>627</sup> Its decision is final and binding.<sup>628</sup> A Party may, however, challenge the final panel determination, but only on the following grounds: that a panel member

(a)(i) . . . was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise *materially* violated the rules of conduct, (ii) the panel seriously departed from a fundamental rule of procedure, or (iii) the panel manifestly exceeded its powers, authority or jurisdiction, . . . *and* (b) any of the actions set out in subparagraph (a) has *materially* affected the panel’s decision *and* threatens the integrity of the bi-national panel review process . . . .<sup>629</sup>

A three-member committee, one of which is chosen by each Party and one by lot, reviews the charge.<sup>630</sup> The decision must be made quickly and may vacate or remand the initial decision or may dismiss the challenge altogether.<sup>631</sup>

623. *Id.*

624. *Id.*

625. *Id.* art. 1904. In the United States, the “competent investigating authority” is the International Trade Administration of the U.S. Department of Commerce (ITA) or the U.S. International Trade Commission (ITC). *Id.* Annex 1911. In Mexico, this authority is vested in the *Secretaría de Comercio y Fomento Industrial* (SECOFI). The U.S. “antidumping statutes” are incorporated in the provisions of Title VII of the Tariff Act of 1930 and the Mexican statutes in the *Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior* (Foreign Trade Act Implementing Article 131 of the Constitution of the United States of Mexico). *Id.*

626. *Id.* art. 1904. The standard of review for the United States is generally that found in § 516A(b)(1)(B) of the Tariff Act of 1930. *Id.* Annex 1911. The standard is that found in § 516(b)(1)(A) of the Tariff Act of 1930, however, when the ITC decides not to review pursuant to section 751(b) of the Tariff Act of 1930. The Mexican standard is found in Artículo 238 del Código Fiscal de la Federación (Article 238 of the Federal Fiscal Code). *Id.*

627. *Id.* art. 1904.

628. *Id.*

629. *Id.* (emphasis added).

630. *Id.* Annex 1904.13.

631. The procedural rules require a decision to be made within ninety days of the creation of the committee. *Id.*

There also exists a procedure for reviewing the compliance of one Party's legal system with the bi-national panel mechanism.<sup>632</sup> If a Party alleges that another Party's domestic law has prevented it from either availing itself of the panel mechanism or of satisfactory judicial review outside the panel mechanism, it is first to commence consultation with the offending Party.<sup>633</sup> They are expected to work out a solution themselves.<sup>634</sup> Nevertheless, if no solution is reached, the complaining party may either suspend its request for a bi-national panel review returning the matter to the domestic courts or suspend its obligations to the challenged Party under NAFTA.<sup>635</sup> The challenged Party, however, as one last chance, may subsequently request a review of the severity or excessiveness of the action taken against it by the complaining Party.<sup>636</sup> The direct access to the arbitral proceedings is advantageous in terms of time and efficiency. Unlike the NAALC mechanism, a decision as to the validity of a complaint is reached quickly and the sanctions can be very serious.

As one commentator has articulated, ADRMs are most effective if they are used to facilitate "government-to-government negotiations when dealing with conflicts stemming from . . . issue areas in which economic integration is taking place."<sup>637</sup> That is, they are not simply to enforce static rules.<sup>638</sup> Agreements based upon a broad scope and ambiguous principles may act to shield countries from the very thing the agreement purports to enforce.<sup>639</sup> The NAALC, through its lack of precision, achieves this type of reclusiveness with regard to labor issues.<sup>640</sup> Although non-governmental organizations and interest groups can direct attention to perceived violations, the final determination as to whether there was a "persistent pattern of failure" to comply with a particular law is left to state officials.<sup>641</sup> Furthermore, the term "persistent pattern of failure" is not defined.<sup>642</sup> In addition, an arbitral panel is not convened automatically, once a charge is lodged.<sup>643</sup> Rather

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632. *Id.* art. 1905.

633. *Id.*

634. *Id.*

635. *Id.*

636. *Id.*

637. Morales, *supra* note 605, at 41.

638. *Id.*

639. *Id.*

640. *Id.* at 46.

641. *Id.* at 46-47.

642. *Id.* at 46.

643. *Id.* at 46-47.

it depends upon a two-thirds vote of the Council.<sup>644</sup> Furthermore, unlike Chapter Nineteen of NAFTA, the arbitral panel may only determine whether the alleged conduct does in deed violate an existing law of the challenged Party.<sup>645</sup> It may not pass judgment upon the quality of the law itself.<sup>646</sup>

The advantages of a Chapter Nineteen styled system of dispute resolution are many. First, it provides immediate access to a panel that represents the two parties in conflict for the purpose of a declaratory opinion, thus eliminating wasted efforts. Second, if the process proceeds beyond the declaratory opinion stage, the panel retains control of the investigative stage. Third, once the decision is handed down, it becomes final and binding. Finally, a limited review of decisions is permitted in the case of egregious error.

In contrast, the NAALC simply affords a complainant the opportunity to metaphorphose what may be a serious violation into a political dog and pony show. Instead of offering an immediate access to the potential panel, it sets up hurdles such as the ECE to evaluate the allegations. Additionally, if a party were fortunate enough to surmount these hurdles the satisfaction could easily be lost because as one advances in the NAALC system the issues permitted for review are narrowed. That is, at the onset a party may address any matter within the scope of the NAALC, but if the party advances to the ECE level, that scope is funneled down to "patterns of practice" with regard to "occupational safety and health or other technical labor standards."

If the party should then, after what could be a very long time, reach the arbitral panel level of resolution, it is limited to the issues of "occupational safety and health, child labor or minimum wage." Once in the hands of the panel the panelists are constrained to find no violation if the agency or official in question was reasonably exercising their discretion, or if there were more pressing matters elsewhere that caused the failure to enforce the law in question.

The ADRM of the NAALC does not even reach the threshold of the resolution power offered in Chapter Nineteen of NAFTA.<sup>647</sup> Even if one could overcome the obstacles and successfully convene a panel, whether the judgment of a monetary fine could be

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644. *Id.*

645. *Id.* at 47.

646. *Id.*

647. Morales, *supra* note 605, at 61.

enforced is doubtful.<sup>648</sup> At best, the NAALC provides a forum for interested groups and non-governmental organizations to air their concerns.<sup>649</sup> Having said this, there remain areas of labor that do not currently, but should fall within the protective scope of an agreement like the NAALC. There are entire populations within Mexico that are, practically speaking, left to fend for themselves. These are the indigenous tribes of Mexico – Mexican “untouchables.”

There can be no question that the NAALC system was designed to stall. Likewise it is arguable whether it can ever be jump-started. Another alternative is to go beyond a self-styled roster and look to already established conventions to supply the procedural aspects as well as the arbitrators.

### B. Beyond NAFTA

Chapter Eleven of NAFTA governing investments sends Parties to the International Center for Settlement of Investment Disputes (ICSID)<sup>650</sup> or the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL),<sup>651</sup> and “market actors [can] activate a panel dispute against a state without having to go through their own governments.”<sup>652</sup> The ability of a Party to take its grievance outside of Mexican law has forced Mexico to reevaluate its adherence to the Calvo Doctrine.<sup>653</sup> By signing NAFTA, Mexico is subordinating the Calvo Doctrine to a bi-national tribunal.<sup>654</sup> Although it would be a pipe dream to imagine that Mexico has discarded the Calvo Doctrine, it is an

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648. *Id.*

649. *Id.*

650. ICSID was set up under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) which came into force on October 14, 1966, available at <http://www.worldbank.org/icsid/> (last visited Oct. 11, 2002).

651. The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966), available at, <http://www.uncitral.org/en-index.htm> (last visited Oct. 11, 2002).

652. Morales, *supra* note 605, at 48-49.

653. *Id.* at 49. The Calvo Doctrine articulated by Carlos Calvo, an Argentine magistrate, was created in the nineteenth century as a protectionist tool to protect the sovereignty and independence of less developed Latin American countries against the intrusion of more powerful states. It required that foreign residents or investors be submitted to the laws of the foreign host state. DICCIONARIO DE CIENCIAS JURÍDICAS POLÍTICAS Y SOCIALES 357 (26th ed. 1999). See also CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 27.

654. Morales, *supra* note 605, at 50.

indication that the door is ajar.<sup>655</sup> It must always be emphasized that Mexico bought into both Chapters Nineteen and Eleven. Finally, it must be remembered that Mexico and the United States are parties to the New York Convention<sup>656</sup> and are not averse to honoring the final and binding awards of arbitral panels.

## VII. CONCLUSION

The fact that the NAALC may very well serve as a forum for concerned labor and human rights organizations to air their complaints, allegations, and concerns does not respond to the reality that the NAALC cannot provide what it purports: effective regulatory development and enforcement of the domestic labor laws of each of the NAFTA parties. It was given to light stillborn; it never had a chance. The unions, whose obligation it is to promote and advance the interests of labor, are so bound up by the desire to attract jobs with their supply of "cheap labor," in the case of Mexico, or so frightened by the aspect of losing low paying jobs, in the case of the United States, that they fail to take advantage of an instrument that could strengthen their position *vis á vis* both the government and large businesses. The fate of the labor class should not be left in their hands. The predominant unions like CTM and the AFL-CIO have shown that they support a national protectionism, not the rights of labor *per se*. They walk hand in hand with their respective governments. The government, in turn, interprets its laws to accommodate what it considers to be the collective good of its citizenry. Too often, this position leaves the laborer holding the short end of the stick.

The arguments asserting that it is the inherent differences between the legal systems of Mexico and the United States that block real resolution fail before the reality that the United States has been actively involved in Mexican politics and influencing its laws since the end of the nineteenth century. Since that time, the governments on both sides of the *frontera*, through their unions, have engaged and meddled in each other's affairs.

As long as the respective governments fail to invest in the workforce by increasing its ability to compete through increased education, wage, and health levels, there will always be instability and unrest. As a well respected Mexican labor law scholar once

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655. *Id.* at 50-51.

656. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 U.S.T. 2517, codified in 9 U.S.C. § 201 (West 1997). For a listing of signatories see <http://www.uncitral.org/english/status/Status.pdf>.

wrote: "The *patrón*<sup>657</sup> must understand that it is preferable to have one well-paid, well-trained employee doing the work of three underpaid, inefficient, and illiterate employees not the other way around."<sup>658</sup>

As long as interested groups, whether non-governmental human rights organizations or independent unions, are not able to expeditiously force the challenged Party's government to the arbitration room and instigate a speedy investigation and determination, it is impractical and unrealistic to expect true enforcement of labor laws that may adversely affect the political tenor of the time. The NAALC does not offer this. It is time to lay the shroud over the casket and lower it into the realm of fora and conferences. It is time to rethink our objectives with regard to labor rights, obligations, and protections.

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657. Literally, *patrón* means "boss" but can mean any authority such as government, etc.

658. CAVAZOS FLORES, *supra* note 233, at 24.