

12-1-1996

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### Recommended Citation

Louise D. Williams, *Trade, Labor, Law and Development: Opportunities and Challenges for Mexican Labor Arising from the North American Free Trade Agreement*, 22 Brook. J. Int'l L. 361 (1996).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol22/iss2/2>

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# TRADE, LABOR, LAW AND DEVELOPMENT: OPPORTUNITIES AND CHALLENGES FOR MEXICAN LABOR ARISING FROM THE NORTH AMERICAN FREE TRADE AGREEMENT

*Louise D. Williams\**

"Trade, we insist, must be an instrument of development, not an end in itself."<sup>1</sup>

## I. INTRODUCTION

In the summer of 1993, passage by the United States Congress of the North American Free Trade Agreement (NAFTA)<sup>2</sup>—once considered a relative certainty—hinged precariously on the efforts of President Bill Clinton to respond to clamorous opposition to the pact waged by U.S. labor and environmental organizations.<sup>3</sup> U.S. labor unions decried the threat to U.S. manufacturing jobs posed by a free trade area within the United States, Mexico, and Canada, asserting that NAFTA would prompt U.S. and Canadian companies to move their manufacturing facilities to Mexico in order to take

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1. Cuauhtémoc Cárdenas, leader of El Partido Revolucionario Democrático, quoted in Marci McDonald, *Options to American Domination*, TORONTO STAR, Oct. 15, 1993, at A27.

2. North American Free Trade Agreement, done Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 [hereinafter NAFTA].

3. According to one observer, "Not since the tariff battle of 1832—when South Carolinians threatened secession—have Americans been as consumed by a trade issue." John B. Judis, *The Divide: History vs. NAFTA*, NEW REPUBLIC, Oct. 11, 1993, at 26, 26. After NAFTA negotiations began in 1991, a Gallup poll found 83% of individuals expressing an opinion in favor of NAFTA. *Id.* at 32. By March 1993, 63% were opposed. *Id.*; see also Jorge F. Perez-Lopez & Eric Griego, *The Labor Dimension of the NAFTA: Reflections on the First Year*, 12 ARIZ. J. INT'L & COMP. L. 473, 473 (1995) ("It is fair to say that no other trade policy initiative in recent memory generated the degree of public attention and debate as the prospects for free trade and investment flows in the North American continent.").

advantage of inexpensive labor costs and unscrupulous occupational health and safety standards.<sup>4</sup> Wary of alienating a major constituency,<sup>5</sup> the Clinton Administration hailed the adoption on August 13, 1993 of the North American Agreement on Labor Cooperation (NAALC)<sup>6</sup> as a partial antidote for these concerns.<sup>7</sup> The so-called "side agreement on labor" created a mechanism through which member countries could monitor and challenge the enforcement of each others' labor laws.<sup>8</sup> Although insufficient to transform the opposition of U.S. labor unions,<sup>9</sup> the side agreement on labor (along with a concurrently adopted side agreement on the environment)<sup>10</sup> sufficed to ensure passage of NAFTA in the U.S. House of Representatives on November 17, 1993<sup>11</sup> and by the U.S. Senate three days later.<sup>12</sup>

The controversy in the United States over NAFTA's impact

4. See Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117, 128-35 (1993) (reviewing role of trade unions and allied human rights organizations in the public debate prior to passage of NAFTA); see also Keith Bradsher, *NAFTA: Something to Offend Everyone*, N.Y. TIMES, Nov. 14, 1993, § 1, at 14; Peter T. Kilborn, *Hailing Health Plan but Denouncing Trade Pact, Big Labor is Heard Again*, N.Y. TIMES, Sept. 16, 1993, at A21.

5. "Sure, [Clinton] wants the treaty ratified, but not if it means confronting core constituency groups in the Democratic Party opposed to NAFTA, such as organized labor." Fred Barnes, *The Insider: White House Watch*, NEW REPUBLIC, Oct. 25, 1993, at 11, 11.

6. North American Agreement on Labor Cooperation, done Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 [hereinafter NAALC]. NAALC entered into force on January 1, 1994. See 19 U.S.C. § 3311(b) (1994).

7. See Warren Christopher, *Statement on NAFTA Supplemental Agreements*, Aug. 13, 1993, available in LEXIS, Intlaw Library, Dstate File.

8. For detailed discussions of the procedural underpinnings of the side agreement on labor, see Perez-Lopez & Griego, *supra* note 3, at 507-16; Michael J. McGuinness, Recent Development, *The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation*, 30 STAN. J. INT'L L. 579, 582-90 (1994).

9. See Bradsher, *supra* note 4, at 14 (U.S. labor unions objected to the lack of penalties within NAALC for violations of industrial relations law and to the cumbersome nature of NAALC process).

10. North American Agreement on Environmental Cooperation, done Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480. This agreement also entered into force on January 1, 1994. See 19 U.S.C. § 1311(b) (1994).

11. H.R. 3450, 103d Cong., 1st Sess. (1993) (enacted). The House approved the bill on a recorded vote of 234-200. 139 CONG. REC. D1323 (daily ed. Nov. 17, 1993).

12. The Senate approved the bill on a recorded vote of 61-38. 139 CONG. REC. D1356 (daily ed. Nov. 20, 1993).

on U.S. jobs largely ignored a simultaneous discussion in Mexico regarding the desirability of the agreement.<sup>13</sup> On the one hand, President Carlos Salinas de Gortari vigorously promoted NAFTA as a crucial component of the economic reforms he had fostered since taking office in 1988, which also included vast privatization efforts, curbing of deficit spending, and closer relations with the United States.<sup>14</sup> The Confederación de Trabajadores de Mexico (CTM), which, as Mexico's largest labor organization, historically has been closely tethered to Mexico's long-powerful El Partido Revolucionario Institucional (PRI), also strongly supported NAFTA.<sup>15</sup> In contrast, El Partido Revolucionario Democrático (PRD), the principal opposition party to the PRI, opposed NAFTA in favor of enacting a Continental Trade and Development Pact, which would have created a European-style Social Charter, Social Fund, and Court of Justice to stimulate trade and promote North American solidarity.<sup>16</sup> Among other

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13. "The approval of the labor side agreement was determined more by the economic and political needs that existed in the United States than by pressures exercised by diverse trade union and human rights organizations in Mexico." Manuel Fuentes Muñiz, *The NAFTA Labor Side Accord in Mexico and Its Repercussions for Workers*, 10 CONN. J. INT'L L. 379, 399 (1995); see also Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 405 (1995).

14. Tim Golden, *In Mexico, NAFTA Isn't Just About Trade*, N.Y. TIMES, Aug. 22, 1993, § 4, at 3; see also Peter Seybold, *The Politics of Free Trade: The Global Marketplace as a Closet Dictator*, MONTHLY REV., Dec. 1995, at 43, 46 (U.S. dealings with the Salinas administration included the extension of lines of credit in the amounts of \$3.5 billion, \$825 million, and \$325 million in 1988, 1989, and 1992, respectively).

15. Latin American Institute, *U.S. Labor Union A.F.L.-C.I.O. Asks Labor Secretariat for Permit to Establish Office in Mexico City*, SOURCEMEX: ECONOMIC NEWS & ANALYSIS ON MEXICO, Sept. 21, 1994, available in LEXIS, News Library, Srcmex File.

16. McGuinness, *supra* note 8, at 580 & n.3. The European Union (EU) has created an integrated labor policy and law, resulting from the concern that European companies choosing to invest in less-developed EU regions, such as Spain and Italy, would force workers throughout Europe to accept lower labor standards in order to remain competitive. *Id.* at 590-91. The EU has harmonized national labor standards "under the rubric of Community law, the development of the judicial doctrines of supremacy and pre-emption for conflicts between national and Community legislation, and the strengthening of 'infringement proceedings' against nations in violation of Community obligations." *Id.* at 591. Specifically, in the late 1980s, 11 of the then 12 European Community nations (all but the United Kingdom) approved the Community Charter of Fundamental Social Rights of Workers (Social Charter), which lists the "Fundamental Social Rights of Workers," including "occupational health and safety protections, guarantees for the

goals, anti-PRI activists sought stronger assurances than those found in NAFTA that the next century would not increase the pressures on the Mexican government to forego vigorous enforcement of worker protections in exchange for unfettered private investment.<sup>17</sup> This agenda for development in Mexico, however, which asked more from northern countries than the mere proliferation of their industries, found no place in the U.S. dialogue regarding NAFTA. U.S. supporters of free trade instead focused on the belief that "[t]he future of a stable, responsible, pro-American government" in Mexico depended on the enactment of NAFTA.<sup>18</sup> Opponents voiced only token interest in the welfare of Mexican workers, fastening their discourse instead on potential job loss in the United States.<sup>19</sup>

In the emerging era of free trade, Mexico shares a quandary of development with poorer nations all over the world. Undoubtedly, the future of development lies less in the traditional arena of international loans and grants projects, to which wealthier nations have diminished their commitment in recent years,<sup>20</sup> and more in the globalization of trade, through

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right to organize and bargain collectively, rights to adequate social welfare benefits, workplace consultation and participation rights, and protections for children, older workers, and the disabled." Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1001 (1995). The Social Fund aspires "to provide vocational training and resettlement allowances for displaced workers, and to enable workers to be geographically and occupationally mobile." *Id.* at 1000. The European Court of Justice ensures that Member States observe Community Law, including labor provisions therein, pursuant to their commitment under the European treaties. *See McGuinness, supra* note 8, at 592.

17. Although in the late 1980s the PRD nearly handed the PRI its first defeat in 70 years, this opposition party led by Cuauhtémoc Cárdenas, *see supra* note 1, thereafter experienced a decline into virtual irrelevance. Michael Stott, *Opposition Chief Says Mexico's Zedillo Doomed to Fail*, Reuters, May 10, 1996, available in LEXIS, News Library, Curnws File. Cárdenas blames the deterioration of his party's influence on PRI-sponsored murders of 400 PRD activists over the past decade. *Id.*

18. Golden, *supra* note 14, at 3. Because NAFTA represented the most important policy initiative of former Mexican President Salinas at the time, NAFTA supporters in the U.S. argued that failure of the pact to be passed by the U.S. Congress would result in serious political uncertainty in Mexico. *Id.* In addition, it was argued that failure to pass NAFTA would result in devaluation of the peso. *Id.* Ironically, Mexico suffered a grave peso devaluation crisis in 1994, notwithstanding the implementation of NAFTA on January 1 of that year. *See Lance Compa, Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA*, 10 CONN. J. INT'L L. 337, 362-64 (1995).

19. *See Bradsher, supra* note 4, at 14.

20. *See Judis, supra* note 3, at 32 ("NAFTA may not be the best way to help

which private corporations channel resources to underdeveloped nations for the unabashed purpose of profit maximization. The pressure on underdeveloped nations to choose between proliferation of foreign industry and virtual international abandonment has never been greater; as a result, considerable incentive has grown for poor countries to surrender their commitment to their own regulatory objectives—including ideals of industrial labor relations—to the anti-regulatory demands of potential foreign investors. Where, as in Mexico, a government must choose between enforcing its legal commitment to fair labor practices and the competing demands of foreign investors offering employment to a multitude of the nation's low-skilled, underemployed workers, the choice most often proves to be the "sadder but wiser" one. After all, it has been reasoned, labor law itself becomes meaningless in the absence of jobs.<sup>21</sup> The globalization of trade thus has incited a world-wide "race for the bottom," which refers to both the pursuit of capital to areas with lower regulatory standards, as well as to the incentive for all countries to adjust their regulatory environment to a scale that is attractive to foreign companies.<sup>22</sup> It has been remarked further that the globalization of trade typically hurts domestic labor movements, both in developed countries and underdeveloped countries.<sup>23</sup>

This paper asserts that, notwithstanding the pressures on Mexico to nourish foreign investment while abandoning enforcement of its constitutional commitment to protect the rights of Mexican workers, significant potential remains for the realization through trade of Mexico's "home grown" vision of its own development as embodied in its labor law. Part II of this paper examines the progressive vision of labor rights and management-worker relationships found in Mexican labor law and the corresponding paucity of the law's enforcement. Part III reviews the recent surge of attention to the notion of international labor standards, considering the various interests behind this movement and the coinciding resistance to

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Mexico—some critics argue for huge development loans—but it's the only way that the American public will remotely accept.”).

21. Stone, *supra* note 16, at 992; *see id.* at 992-94.

22. *Id.* at 992; *see also* Compá, *supra* note 18, at 356.

23. Stone, *supra* note 16, at 990.

standards raised by developing countries. Part IV explores how, in the context of NAFTA, purportedly good intentions of standards proponents do not necessarily align with the development concerns of Mexican workers; in particular, NAFTA's side agreement on labor advances those international standards most likely to benefit the protectionist interests of U.S. and Canadian workers, while neglecting the two "core" labor standards that most directly enable Mexican workers to participate in the determination of the course of their nation's development—namely, freedom of association and the right to collective bargaining. Part V concludes that bolstered emphasis on association and bargaining rights through NAALC can ultimately support the quest of Mexico's independent labor unions to achieve a meaningful role for workers in charting the economic destiny of their country.

## II. MEXICAN LABOR LAW: AN UNREALIZED BLUEPRINT FOR DEVELOPMENT

### A. Aspirations of Social Equality

Mexico presents a unique case study of the intersection between trade policy and international development, two disciplines that, until recently, have remained virtual strangers from one another.<sup>24</sup> In particular, as an instrument

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24. Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 439 (1995). The intersection of trade and development first received significant attention at the 1972 United Nations Conference on Trade and Development, which established a Working Group of government representatives to draw up a draft Charter of Economic Rights and Duties of States. Adopted in 1974, the Charter sets forth a variety of principles, including the Fundamentals of International Economic Relations (Chapter I), the Economic Rights and Duties of States (Chapter II), and the Common Responsibilities Towards the International Community (Chapter III). The central principle espoused by the Charter appears to be that of self-determination in the context of international trade. For example, article 1 of the Charter states that "[e]very State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, *without outside interference, coercion or threat in any form whatsoever*." Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, 52, U.N. Doc. A/9631 (1974) (emphasis added) [hereinafter CERDS]. In addition, CERDS provides that "each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development." *Id.* art. 7.

that "marries" the economies of two advanced industrial powers and one underdeveloped nation, NAFTA will instruct development professionals for years to come about the impact of such "mix and match" free trade areas on the economies of their less developed member(s).<sup>25</sup> A review of Mexico's long-established labor law reveals a constitutional and statutory infrastructure that, if vigorously enforced, envisions Mexican workers as full participants in and beneficiaries of their nation's progress. Contrived as a means of compensating workers through law for their relative lack of power in the market, Mexico's modern labor law represents the "strong link" in the development ambitions of Mexican workers; indeed, a uniquely Mexican vision of development emerges from the nation's labor law.

An "astounding collection" of statutes, regulations and policies exists in Mexico for the purpose of protecting the collective bargaining and other employment rights of Mexican workers.<sup>26</sup> In fact, Mexico was the first country to incorporate basic labor protection into its constitution<sup>27</sup> and now has some of the strongest labor laws in the world.<sup>28</sup> Enacted at the

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25. See Garvey, *supra* note 24, at 442. He notes:

Because NAFTA established Mexico as the Third World partner in the first major free trade agreement for a free trade area otherwise made up of highly developed nations, the question about enforcement [of the labor and environmental side agreements] has great significance beyond NAFTA, involving the global future of free trade.

*Id.*

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

27. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.] art. 123, reprinted in *Mexico*, in 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 97 (A.P. Blaustein & G.H. Flanz eds., Ginsberg H. Flanz & Louise Moreno trans., 1988); see HARRY K. WRIGHT, *FOREIGN ENTERPRISE IN MEXICO: LAWS AND POLICIES* 283, 285-86 (1971). In fact, organized labor played a significant role in Mexico's revolutionary movement beginning in the 1900s. In 1906, organized labor aligned with the Mexican Liberal Party to launch a series of strikes and, in 1915, Mexico's dominant labor organization pledged to fight with President Carranza's Constitutional Army in exchange for the government's commitment to enact labor laws designed to protect workers' rights. See Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533, 541-42 (1995). These early alliances mark "the beginning of the long-lasting and current Mexican practice of making support for the dominant political force a requirement for official government recognition of the labor movement." *Id.* at 542.

28. Shawna O'Grady, *Doing Business in Mexico: The Human Resources Challenges*, BUS. Q. (Can.), Autumn 1995, at 43, 53.

conclusion of the Mexican Revolution, the 1917 constitution set forth "broad standards for the protection of the laboring class, at a time when no labor movement of importance existed," including principles relating to hours of work, rest days and vacations, minimum wages and other benefits, occupational safety, discharge of workers, collective bargaining, strikes, and dispute settlement.<sup>29</sup> Article 123 of the constitution mandates, *inter alia*, an eight-hour work day,<sup>30</sup> a seven-hour shift for night work,<sup>31</sup> a maximum work week of six days,<sup>32</sup> mandatory childbirth and maternity leave,<sup>33</sup> equal pay for equal work,<sup>34</sup> and a mandatory minimum wage "to be fixed by a national commission composed of representatives of workers, employers, and the government . . . ."<sup>35</sup> Mexican workers also share with employers the right to organize and represent their respective interests by forming unions or professional associations, and employee strikes are lawful "when they have as their purpose the attaining of an equilibrium among the various factors of production . . . ."<sup>36</sup> Without question, article 123 constitutes "a remarkable statement of social goals."<sup>37</sup> Moreover, Mexico's statutory law, including that enacted by

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29. WRIGHT, *supra* note 27, at 285. In 1929, the constitution was amended to give exclusive legislative jurisdiction in labor matters to the Federal Congress. *Id.* at 285-86.

30. CONST. art. 123(A)(I).

31. *Id.* art. 123(A)(II).

32. *Id.* art. 123(A)(IV).

33. *Id.* art. 123(A)(V).

34. *Id.* art. 123(A)(VII).

35. *Id.* art. 123(A)(VI), para. 3; see Bartow, *supra* note 26, at 183. In fact, U.S. and Canadian companies initiating business ventures in Mexico find that mandatory employment benefits alone add 30% to 40% of their basic payroll costs. O'Grady, *supra* note 28, at 52. For example, a typical compensation package for an unskilled Mexican laborer includes:

A mandatory Christmas bonus equivalent to a month's salary, 10% of the company's pretax profits, contributions to a mandatory government retirement savings plan, eight statutory holidays, double-time after 48 hours, a 25% premium for Sunday work, the right to a permanent job once an employee is past the 30-day probationary period, a six-day vacation with two additional days for each year up to a maximum of 24 days, training for workers, 12 weeks of paid maternity leave and the right to return to work, and a 5% payroll contribution to the Federal Workers' Housing Fund.

*Id.*

36. CONST. art. 123(A)(XVIII); Bartow, *supra* note 26, at 184-85.

37. Bartow, *supra* note 26, at 188.

the Federal Labor Act of 1970 (*Ley Federal del Trabajo*), provides even greater support for the procedural and substantive rights of Mexican workers.<sup>38</sup>

The objective of Mexican labor law, it has been observed, is to establish and preserve a balance between the extra-legal power and influence of capital and the rights of the nation's workers.<sup>39</sup> Substantively and procedurally, Mexico's labor law generally grants workers the upper hand,<sup>40</sup> in purported compensation for the "negative impacts they experience as a result of the 'free exercise of the right of ownership.'"<sup>41</sup> This legal framework, which aspires not necessarily to favor Mexican workers, but to place them "in the same bargaining position as their employers,"<sup>42</sup> in fact reflects Mexico's cultural and historical preference for "a consensus-building inclusionary dynamic, rather than the adversarial politics of other latitudes."<sup>43</sup>

Mexican labor law further incorporates other values inherent in Mexican culture. For example, the law supports the immense cultural commitment to the family in Mexico<sup>44</sup> through provisions providing for mandatory childbirth and maternity leave (six weeks prior to the approximate date of childbirth and six weeks after the child is born),<sup>45</sup> as well as through strong protections of job security.<sup>46</sup> Similarly, the law

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38. *Id.*

39. *Id.* at 189.

40. *Id.* at 190.

41. *Id.* at 189 (quoting Del Castillo, *Mexico*, in 7 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 29 (R. Blanpain ed., 1979)). "It appears that the purpose of defining labor law so broadly was to extend its reach to every aspect of labor relations, thereby providing a mechanism to neutralize the impact of market forces upon workers to the greatest extent possible." *Id.* at 191.

42. *Id.* at 189.

43. Lucy Conger, *Mexico: The Failed Fiesta*, CURRENT HIST., Mar. 1995, at 102, 106. For an interesting discussion of this conflict-averse dynamic as it arises within foreign management of employee relations, see generally O'Grady, *supra* note 28.

44. See O'Grady, *supra* note 28, at 48.

45. Bartow, *supra* note 26, at 183.

46. *Id.* at 187. A labor relationship with an "innocent" employee may be terminated only as a result of mutual consent, termination of contracted work, mental or physical disability of the worker, or a closing down of the company. In addition, when a company is sold, the new employer assumes the conditions and duration of any existing labor agreement. *Id.*

appears to anticipate problems that may arise through the cultural norm of strict workplace hierarchy.<sup>47</sup> Although the law does not purport to eliminate hierarchical norms, it attempts to compensate for potential abuses by establishing a plethora of rights that might not otherwise be granted by powerful employers.

The breadth and substance of Mexico's labor protections may indeed be regarded as an agenda for development. In short, the theory behind Mexican labor law—that "the law must intervene on the side of the worker in order to equalize the labor-management relationship"<sup>48</sup>—constitutes a "home grown" vision of social justice about which both trade and development professionals should be conscious and respectful. Moreover, the precise elucidation of expectations within Mexican labor law means that foreign governments and corporations can hardly assert that the agenda of Mexico's workers has never been expressed.

### *B. Mexico's "Crisis of Non-Compliance"*<sup>49</sup>

It is, of course, the practical operation of Mexico's labor law that has fueled anti-NAFTA sentiment among various groups within all three member countries.<sup>50</sup> Notwithstanding the profound statement of ideals found within Mexico's constitution and statutory law, the labor law historically has

47. See O'Grady, *supra* note 28, at 44, 51.

48. Muñiz, *supra* note 13, at 384.

49. Mohan G. Gopal, Law and Development: Towards a Pluralist Vision 6 (Mar. 28, 1996) (unpublished paper presented at the American Society of International Law Annual Meeting, Panel on Law and Development, on file with the *Brooklyn Journal of International Law*) (attributing the "crisis of non-compliance" to laws within underdeveloped countries to, inter alia, the over-emphasis by development professionals on Western legal models at the expense of internal legal traditions which, though often informal and unwritten, carry far greater compliance than the "modern law").

50. In particular, U.S. and Canadian unions denounce the apparent migration of manufacturing jobs to a country where the strength of the labor laws is negated by their underenforcement, as well as the corresponding dilution of wages and standards within northern industry in order to remain competitive. Garvey, *supra* note 24, at 442 ("The principal complaint about Mexico has been not its lack of [worker safety and] health and environmental laws, but the lack of enforcement of its laws and the related endemic corruption of its legal system."). Conversely, some Mexicans object to their government's abandonment of its historically protective functions for a system in which labor rights are not permitted to interfere with foreign investment. See Muñiz, *supra* note 13, at 385.

operated as a means of confining concerted activity by Mexican workers and preserving union support for the PRI.<sup>51</sup> Since organized labor played a central role in its rise to power in 1928, the PRI has maintained a close alliance with Mexico's major labor unions, promoting and protecting generations of labor leaders in exchange for the faithful support of Mexican union membership.<sup>52</sup> Although the primary beneficiary of government favor has been CTM, which as Mexico's largest union consists of sixty to seventy percent of Mexico's eight million unionized workers, the government periodically shifts its support to other labor organizations (or even to other political sectors), thereby encouraging or undermining CTM's authority as circumstances dictate.<sup>53</sup> Accordingly, in the interest of maintaining favor with the government, CTM and the other government-endorsed unions<sup>54</sup> participate in a system of spoils for union leaders, offering stable and prestigious government positions to those union leaders who cooperate with the party.<sup>55</sup> This system results in a structure of union administration that detaches labor leaders, both physically and figuratively, from the workers they purport to represent. Corruption of union officials is endemic; one report estimates that union leaders earn \$750 million each year by using their public positions to extract bribes and payoffs from management, contractors, and public officials.<sup>56</sup>

In order to sustain the influence of government authority within a few, PRI-friendly labor organizations, Mexican law requires all unions to "register," a formality without which

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51. Amy H. Goldin, *Collective Bargaining in Mexico: Stifled by the Lack of Democracy in Trade Unions*, 11 COMP. LAB. L.J. 203, 203-04 (1990).

52. *Id.* at 203; see Jorge G. Castañeda, *Mexico's Circle of Misery*, FOREIGN AFF., July-Aug. 1996, at 92, 101 (After Mexico's Revolution of 1910, "[t]he union bureaucracy traded independence and activism for a limited welfare state, job security, and its very survival.").

53. *Id.* at 207-08; see also Bierman & Gely, *supra* note 27, at 543.

54. In 1966, CTM united with other government-endorsed labor confederations to form an umbrella group of the PRI's labor sector, called the Congress of Labor (*Congreso del Trabajo*), which ostensibly was created to work for the common goals of Mexican workers. Goldin, *supra* note 51, at 208. Encompassing about 90 percent of unionized workers in Mexico, *Congreso del Trabajo* in fact "serves not the unions but rather the PRI." *Id.* at 209.

55. *Id.* at 209.

56. *Id.* at 210 (citing Sergio Sarmiento, *Union Goons Gut Mexico's Ailing Oil Industry*, WALL ST. J., Jan. 6, 1984, at 21).

they are unable to sign contracts, obtain property, or, indeed, provide meaningful representation to their membership.<sup>57</sup> "Not only must workers [in independent unions] confront the employer and the entrenched official union," according to one Mexican commentator, "they must also contend with the labor law authorities that do everything possible to delay or deny recognition to a dissident local union even where a majority of workers want it."<sup>58</sup> The discrimination against independent unions begins with routine discharge by employers of union organizers<sup>59</sup> and the concurrent unwillingness of the government to enforce the constitutional prohibition of interference with the right to organize.<sup>60</sup> Moreover, the right to strike, although defended in principle by article 123,<sup>61</sup> has been undermined by various notification procedures, which include mandatory attempts at conciliation, that must be observed in order for a strike to be legal.<sup>62</sup>

The enduring alliance between the government and Mexico's most powerful unions results in scant enforcement of Mexican labor law, particularly within facilities owned by foreign investors. For example, both compliance with and enforcement of Mexico's various labor laws have been extensively criticized with respect to the *maquiladoras*, the foreign-owned manufacturing plants existing chiefly along Mexico's northern border.<sup>63</sup> A 1993 U.S. General Accounting

57. Muñiz, *supra* note 13, at 386; see also Goldin, *supra* note 51, at 211 & n.39; Bierman & Gely, *supra* note 27, at 548.

58. Muñiz, *supra* note 13, at 387.

59. See, e.g., Sebastian Rotella, *Worker Vote Tests Rights in Mexico*, L.A. TIMES (San Fernando Valley ed.), Dec. 26, 1993, available in LEXIS, News Library, Arcnws File.

60. Article 123 of Mexico's constitution sets forth the rights of both workers and employers to organize for the defense of their respective interests by forming unions or professional associations. CONST. art. 123(A)(XVI); see Bartow, *supra* note 26, at 184.

61. See CONST. art. 123(A)(XVII)-(XIX).

62. Bierman & Gely, *supra* note 27, at 548.

63. Susanna Peters, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226, 226-27 (1990). The *maquiladora* industry was formally established in 1965 under Mexico's Border Industrialization Program. *Maquiladoras: Industry Will Be Transformed by NAFTA*, MEX. TRADE & L. REP., Sept. 1994, at 8. Beginning that year with 12 plants, the program grew to include over 2200 plants and 541,200 workers by the end of 1993. *Maquiladoras: Production up 19 Percent*, MEX. TRADE & L. REP., May 1994, at 22; see also *Maquiladoras: Industry Will Be Transformed by NAFTA*, *supra*, at

Office (GAO) study of worker health and safety at eight U.S. owned *maquiladora* auto parts plants found that, although the United States and Mexico have similar laws protecting workers, Mexico is significantly less aggressive in protecting its low-skilled workers from ergonomic hazards.<sup>64</sup> In addition, the study found that the U.S.-owned plants at issue typically lacked hazard-specific training programs, provided inadequate Spanish-language safety warnings, and posed various unchecked noise and chemical hazards.<sup>65</sup> Moreover, although the GAO reported that the U.S. parent companies of the plants each "said that their corporatewide policy was to provide a healthy and safe work environment for all employees,"<sup>66</sup> the report suggested that the companies' efforts at compliance with health and safety standards in Mexico are in fact significantly less diligent than their compliance with comparable standards within the United States.<sup>67</sup>

One author explains that the Mexican government's interest in foreign investment, and its supposed benefits, uniformly outweighs its concern for enforcing its own labor laws:

The Mexican government views the *maquiladora* program as a way to transfer technology to Mexican industry, to upgrade workers' skills, improve employment and income in the border area, and to increase demand for Mexican goods. . . . [However,] [m]aquila workers are not well served by labor regulation in Mexico. In fact, while maquila industries are formally subject to the "labor protective and defensive" legislation first set out by the Mexican

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8. The original Border Industrialization Program allowed foreign materials and components of production duty-free importation, regardless of their origin, as long as the finished product was exported rather than sold on the domestic market. *Id.* Under the tariff and import provisions introduced by NAFTA, the meaning of *maquiladora* has changed to "indicate simply assembly-type operations with no special customs or tariff privileges and conditions . . ." *Id.*

64. *Worker Health and Safety at Eight U.S.-Owned Maquiladora Auto Parts Plants*, MEX. TRADE & L. REP., Jan. 1994, at 7-8, 27-31 (article based on the report prepared by the U.S. General Accounting Office). Ergonomics studies the long-term physical impact on workers who perform repeated physical activities, which is customary among the low-skilled jobs within the *maquiladoras*. *See id.* at 25-26, 31 n.6.

65. *Id.* at 24-26.

66. *Id.* at 27.

67. *See id.* at 27-28.

Constitution of 1917, in practice, many aspects of the legislation are seldom enforced—or indeed enforceable—in foreign [owned] factories. . . . [T]he maquiladora [sic] boom has created special difficulties for Mexican employees who have little or no collective bargaining power: they do not seem to benefit from statutorily mandated profit sharing; they do not receive statutory compensation for layoffs, plant closings, and work-related injuries; and, as northerners, they tend to be politically alienated from the PRI (*Partido Revolucionario Institucional*), the party which dominates Mexican politics.<sup>68</sup>

According to other observers, enforcement of Mexican labor law in domestically-owned companies may be even worse.<sup>69</sup> Indeed, rather than delivering on its promise to quell the excesses of hierarchy, Mexican labor law provides the setting for continuous dealmaking and mutual gain for the PRI and labor leaders. In light of the historical affiliation between the Mexican government and Mexico's major unions, and, ultimately, private industry,<sup>70</sup> independent unions face extreme difficulties not simply in organizing workers, but also in securing the very right to exist. In exchange for law enforcement geared to preserving the power of the CTM and other government-endorsed unions, the government receives unremitting support from the largest, most powerful labor organizations as well as relative labor peace.<sup>71</sup> Moreover, CTM acts in concert with the government to quell independent labor activity, as evidenced by CTM's cancellation of the traditional May Day celebration in 1995 in an attempt to silence protests by small, independent labor unions and other anti-establishment groups.<sup>72</sup> CTM's support for NAFTA seems particularly at odds with the aspira-

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68. Peters, *supra* note 63, at 227 (footnotes omitted).

69. See, e.g., McGuinness, *supra* note 8, at 581 & n.10 (citing studies indicating that Mexican workers employed in U.S.-owned factories are healthier than those employed in comparable domestic industries); see also WRIGHT, *supra* note 27, at 287 ("In the absence of a union, workers are likely to be ignorant of the laws and procedures or lacking in sufficient power to enforce their rights, and violations of the minimum wage and other requirements are regularly reported.").

70. "The employer actually substitutes for the union in all respects." Muñiz, *supra* note 13, at 389.

71. See Harry Sterling, *Labor Unrest A Symptom of Mexico's Growing Pains*, FIN. POST, May 20, 1995, available in LEXIS, News Library, Finpst File.

72. Notwithstanding the official cancellation of the May Day festivities, 75,000-100,000 workers "marched through the heart of Mexico City denouncing the CTM and the government's policies . . . ." *Id.*

tions of Mexican labor law, given the Mexican government's original opposition to *any* correlation between free trade and labor rights.<sup>73</sup> In light of the reciprocal benefits arising from CTM's affiliation with the PRI, however, government-endorsed union support for NAFTA is hardly surprising.

Thus, both external and internal factors share the responsibility for the meager enforcement of labor law in Mexico. In particular, the external factors consist of the government's current preoccupation with encouraging foreign investment, along with the "anti-labor and anti-union policies" brought to Mexico by foreign investors.<sup>74</sup> The internal factors chiefly include the historical affiliation of union leadership with the PRI, resulting in leaders who have proven more loyal to the PRI than to their own membership, and the concurrent restraints on organization of independent unions that could provide meaningful representation to Mexican workers.

### III. INTERNATIONAL LABOR STANDARDS: CONFRONTING THE "RACE TO THE BOTTOM"

As the major force fostering development in the next century, the globalization of trade may also represent development's most significant antagonist. World-wide retraction of trade barriers among nations allows multinational corporations to open manufacturing facilities in nations where the business conditions are the most favorable. Companies may utilize low-cost labor and permissive health, safety, and environmental standards to assemble their products as cheaply as possible, then ship the products to customers without having to pay trade-prohibiting tariffs. Globalization of trade therefore presents the development community with a strategic dilemma: Are workers in poor countries such as Mexico better served by the implementation and enforcement of international labor standards, which prescribe harmonious treatment of laborers throughout the world, or by a "pluralist" approach to trade and development that permits individual nations to identify their own economic priorities and workforce norms when seeking to generate foreign investment? As discussed below, aspects of both approaches warrant meaningful consideration

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73. See *infra* Part IV.A.

74. See Muñiz, *supra* note 13, at 379.

on a regional and global level.

*A. The Trade-Induced Movement Toward International Labor Standards*

Until recently, the notion of international labor standards has remained the largely overlooked philosophical agenda of the International Labor Organization (ILO).<sup>75</sup> During the course of its seventy-five-year history, the ILO has developed over 170 conventions pertaining to labor and employment rights, including the "human rights core" of six conventions addressing freedom of association, the right to organize and bargain collectively, forced labor, child labor, discrimination, and minimum acceptable conditions with respect to wages, hours and workplace health and safety.<sup>76</sup> Proponents of international standards contend that all nations must adhere to certain principles of fair labor practice, that nations must be held internationally accountable for failure to comply with the core standards, and that multinational corporations must not be permitted "to implement labor policies based solely upon the laws of each nation where they operate, especially where laws are designed to repress rather than protect workers, and provide a competitive edge in international trade."<sup>77</sup>

In the era of accelerated global trade and elimination of trade barriers, international labor standards—particularly the core standards—have emerged as a topic of renewed debate. Chiefly, globalization of trade illuminates the empirical reality that "differences in labor standards, worker organization, and labor relations policies among countries at varying levels of development become critical variables in trade and investment decision making."<sup>78</sup> Without question, international labor standards serve the interests of anti-trade advocates in developed nations who seek to prevent the "export" of jobs to developing countries;<sup>79</sup> standards can thereby be construed by critics as representing a flagrant attempt to deny developing nations the trade advantages of low-cost labor.<sup>80</sup> On the other

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75. See Compa, *supra* note 18, at 337.

76. *Id.* at 337 n.3 (citing INT'L LAB. ORG., HUMAN RIGHTS: A COMMON RESPONSIBILITY (1988)).

77. Compa, *supra* note 4, at 117 (footnote omitted).

78. *Id.* at 120.

79. See Seybold, *supra* note 14, at 47-48.

80. See David Aaron, *Labor Standards as a Universal Right*, FIN. TIMES, Aug.

hand, international standards also constitute a tactic of addressing genuine objections of nations and consumers to obtaining goods manufactured under conditions that they find morally unacceptable, such as by indentured servitude or child labor. Professor Compa further explains the dual interests behind labor standards-trade linkage:

Working people in developed countries who have fought for decades to achieve middle class living standards will not be willingly driven back toward poverty in a global "race to the bottom." In many poorer countries, the notion that employees are happy to be exploited for the sake of development is one proffered by the government and commercial elites, not by workers and genuine trade union leaders. The premise of labor rights advocates is a simple one: no country—and no company operating in the country—should gain a competitive advantage in global trade by killing union organizers, banning strikes, using prison labor or brutalized child labor, or by purposely holding wages and conditions below levels commensurate with workers' productivity with any elemental social justice.<sup>81</sup>

Proponents of international labor standards thus assert that universal norms constitute a necessary response to a variety of trade-related problems, both for developed and underdeveloped trading partners. In addition to the problems inherent in a "race for the bottom," "the advent of trading blocs, free-trading zones, the World Trade Organization (WTO) and other 'free-trade' reforms" removes the "legal restrictions on capital's ability to flow to locations which generate the highest returns at the lowest factor costs."<sup>82</sup> Accordingly, unless capital confronts the same general labor standards in all countries—including not only wage requirements, but also genuine association and collective bargaining rights and worker health and safety standards—the ability of domestic labor organiza-

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8, 1995, at 11 (permanent U.S. representative to the Organization for Economic Cooperation and Development (OECD)) ("Those who promote international labour standards, such as the [United States], are often castigated as protectionists seeking to impose minimum wages, minimum working hours or basic health and safety standards on developing countries in an effort to deny them the trade advantages of low-cost labour.").

81. Compa, *supra* note 18, at 338-39 (footnotes omitted).

82. Stone, *supra* note 16, at 992.

tions in developed countries to counter the issue of runaway shops is subverted.<sup>83</sup> In addition, in the absence of common standards, labor unions in different nations are unable to work together "in a way that jointly harnesses their economic weapons and furthers their joint bargaining goals."<sup>84</sup> Rather, unions from developed and underdeveloped countries are forced to work *against* each others' interests, and, in fact, the unions from underdeveloped countries are rewarded—through the influx of jobs, at least—by inactivity.

International labor standards may be implemented through a variety of measures, either multilateral or unilateral. The multilateral approach creates the possibility that, in the future, international tribunals constructed for the enforcement of labor standards will continue to develop, concurrent with the emergence of an international labor movement.<sup>85</sup> Presently, the European Union (EU) has constructed one of the world's strongest multilateral models to establish and enforce international labor standards: first, preemptive EU legislation mandates that citizens of each member state abide by certain treaty provisions and *règlements*, and, second, EU directives and other various incentives exist for member states to "harmonize" their labor and employment laws with a common set of norms.<sup>86</sup> As discussed in Part IV, NAFTA's side agreement on labor, which establishes an international mechanism through which the United States, Canada, and Mexico can challenge the domestic enforcement of each other's labor laws, also constitutes a multilateral approach to implementation of international labor standards.<sup>87</sup> In addition to these methods that generally leave enforcement of shared standards up to

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83. *Id.* at 990-92. "Companies that can freely and costlessly relocate to low-wage areas are unlikely to accede to union demands for higher wages or improved working conditions." *Id.* at 991.

84. *Id.* at 995.

85. At this time, the notion that labor standards may be effectively promulgated and enforced on an international level is considered "a bit rosy-eyed," given the absence of multilateral agencies authorized with the power of enforcement as well as the fact that there are "no serious cross-border labor organizations which can engage in multilateral bargaining." *Id.* at 998. Indeed, a global consensus in support of international labor standards does not exist at this time. *See* discussion *infra* Part III.B.

86. Stone, *supra* note 16, at 998-1006; *see also* McGuinness, *supra* note 8, at 590-96.

87. *See generally* McGuinness, *supra* note 8.

individual nations, pressure has increased on the WTO, constructed as an enforcement body of the General Agreement on Tariffs and Trade (GATT), to establish a permanent working group to discuss the interrelationship between international trade and workers' rights.<sup>88</sup> In conjunction with this initiative, the Organization for Economic Cooperation and Development (OECD) has identified "core" labor standards similar to those developed by the ILO, and currently promotes international labor standards as a means of "raising living standards by encouraging the fair distribution of gains from growth and development."<sup>89</sup> The ILO similarly is working to develop models and mechanisms that may be adopted on an international level to condition the benefits of free trade on the commitment to basic labor standards.<sup>90</sup>

Alternatively, the United States in recent years has developed a series of unilateral methods to promote international adherence to basic labor standards, including such methods as preference programs, unfair trade policy, international economic policy, and linkage of foreign aid to observance of workers' rights.<sup>91</sup> For example, beginning in 1974, the Generalized System of Preferences (GSP)<sup>92</sup> has authorized the President to grant duty-free treatment to eligible merchandise exports from beneficiary developing countries.<sup>93</sup> Under GSP, the President may consider countries eligible for such preferences only if they have taken steps to afford internationally recognized labor rights to their workers;<sup>94</sup> those rights designated by GSP as "internationally recognized" include the right of associ-

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88. See *U.S. Encountering Stiff Opposition to Discussing Trade, Labor in WTO*, 13 INT'L TRADE REP. (BNA) 472 (Mar. 20, 1996) [hereinafter *Stiff Opposition*].

89. Aaron, *supra* note 80, at 11.

90. Jorge F. Perez-Lopez, *The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects*, 10 CONN. J. INT'L L. 427, 445-48 (1995).

91. *Id.* at 430-39. For an exhaustive list of unilaterally-declared labor rights provisions in U.S. trade laws, see Compá, *supra* note 18, at 340 n.14.

92. 19 U.S.C. §§ 2461-2466 (1994). The GSP was part of the overall Trade Act of 1974. 19 U.S.C. §§ 2101-2495 (1994).

93. 19 U.S.C. § 2461. The Generalized System of Preferences Renewal Act of 1984 extended the 10-year mandate of the original GSP for an additional eight and one-half years. Pub. L. No. 98-573, § 506(a), 98 Stat. 3000, 3023 (codified as amended at 19 U.S.C. § 2465(a) (1994)); see Perez-Lopez, *supra* note 90, at 431. The duty-free treatment provisions of § 2465(a) terminated, however, on July 31, 1995, and as of September 1996 the GSP has not been renewed.

94. 19 U.S.C. § 2462(c)(7).

ation, the right to bargain collectively, a prohibition against forced labor, a minimum age for employment of children, and "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."<sup>95</sup> In addition, section 301 of the U.S. Trade Act of 1974 furnishes the authority of the President to deny or restrict access to U.S. markets, as well as to retaliate against foreign government acts, policies or practices that are deemed unreasonable or unfair.<sup>96</sup> Although section 301 has not yet been wielded as redress for violation of international labor standards, it is viewed as implicating U.S. Trade Representative action against countries that fail to follow internationally accepted labor standards.<sup>97</sup> Other unilateral U.S. policies promoting basic labor standards include the Caribbean Basin Initiative,<sup>98</sup> which conditions the granting of trade preferences to twenty-seven countries or territories within the Caribbean Basin region on various criteria, including adequate "steps to afford internationally recognized worker rights,"<sup>99</sup> and a statutory mandate that the Overseas Private Investment Corporation (OPIC) restrict its development assistance to nations that are "taking steps to adopt and implement laws that extend internationally recognized worker rights . . . to workers in that country . . . ."<sup>100</sup>

For proponents of international standards, both the multi-

95. 19 U.S.C. § 2462(a)(4)(A)-(E).

96. Pub. L. No. 93-617, § 301, 88 Stat. 1978, 2041 (1975) (codified at 19 U.S.C. § 2253(a)(3) (1994)).

97. *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 343 (1996) (transcript of Jan. 7, 1995 meeting of the section on International Law of the American Association of Law Schools) (remarks of Frederick M. Abbott); see also Perez-Lopez, *supra* note 90, at 434-35.

98. Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2701-2707 (1994).

99. 19 U.S.C. § 2702(b)(7).

100. 22 U.S.C. § 2191a(a)(1) (1994). Created as part of the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151-2430i (1994), OPIC aspires "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies, thereby complementing the development assistance objectives of the United States . . . ." 22 U.S.C. § 2191. The OPIC labor rights clause "led to the removal from OPIC insurance coverage for U.S. corporate investments in China, Saudi Arabia, and South Korea." Compa, *supra* note 18, at 344 (citing James M. Zimmerman, *The Overseas Private Investment Corporation and Worker Rights: The Loss of Role Models for Employment Standards in the Foreign Workplace*, 14 HASTINGS INT'L & COMP. L. REV. 603, 603-18 (1991)).

lateral and unilateral approaches have advantages and disadvantages. The unilateral initiative by one country to condition positive economic treatment—in the arenas of both trade and direct development assistance—offers the practical advantages of relative speed and effectiveness of implementation, and avoids criticism by domestic detractors who feel threatened by multilateral activity that purportedly compromises state sovereignty. In addition, enforcement mechanisms for unilateral actions generally already exist, thereby avoiding the need to construct new procedures or tribunals.

On the other hand, although unilateral promotion of labor standards may be extolled as one nation's virtuous statement of principles and expectations—in the absence of which it will not trade—unilateralism has been widely criticized as an imperious method of dictating cultural norms to other nations, shrouding protectionist motives in edicts of moral righteousness.<sup>101</sup> In contrast, multilateral initiatives toward international labor standards carry the additional authority of consensus. Although encumbered by the complexities of achieving international agreement on common issues, as well as constructing methods of international enforcement, multilateral approaches nonetheless offer the various advantages inherent in "teamwork." This includes the opportunity for affected nations to participate in the delineation of standards, contributing their own economic concerns and cultural norms to the dialogue and ultimate determination of which standards shall be accepted and enforced. As discussed below, however, there does not exist an international consensus regarding the desirability of labor standards, for important reasons that standards proponents must strive to comprehend and address.

### *B. Pluralist Objections to International Labor Standards*

Notwithstanding newly energized discussion of international labor standards, surprisingly little attention has been paid to parallels between trade as an avenue of development and the traditional approaches to development, such as programs supported by international lending institutions and foreign aid. Significantly, the lessons of traditional law and devel-

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101. Compa, *supra* note 18, at 345-48 (discussing criticisms against and arguments in favor of unilateral promotion of international labor standards).

opment instruct that international advocacy of a single set of legal norms—that is, Western-oriented models of law, at the exclusion of traditional and customary law—has been a failure.<sup>102</sup> The law-and-development “pluralists” charge that conventional avenues of modernization over-emphasize the Western value of individualism, at the expense of traditional sources of communal authority, such as those found in families and ancient community relationships.<sup>103</sup> Consequently, it is argued, the “modern law,” typically based on cultural and social values of the West, lacks authority in the underdeveloped nations where it is imposed, and a “crisis of non-compliance” results where the externally imposed norms constitute “a distant phenomenon in largely illiterate societies that do not attribute the same cultural sanctity to written communication as Western traditions do . . . .”<sup>104</sup> According to Professor Gopal,

[T]he law and development movement must shed its imperial compulsions. It should disassociate itself with the effort . . . to use law as an instrument of social change. Instead, the law and development movement should set as its main objective the protection of the freedom of States and people to choose their social and cultural norms and values (including their legal systems) in accordance with rules of international law. Its main commitment should be to freedom of choice of economic, political, social and cultural systems as guaranteed in international law. It should not be the vehicle for promotion of any particular set of national cultural and social norms. Rather, it should be committed to the freedom of States and people to choose the laws by which they are governed.<sup>105</sup>

Thus, the pluralist argument calls for close empirical study of underdeveloped countries prior to recommending legal reforms, as well as incorporation of traditional sources of authority, including the historic roles of family and community, into all legal structures.<sup>106</sup> According to the pluralists, pro-

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102. See Gopal, *supra* note 49, at 1-4 (citing Michael M. Cernea, *The Sociologist's Approach to Sustainable Development*, FIN. & DEV., Dec. 1993, at 11-13).

103. Gopal, *supra* note 49, at 1.

104. *Id.* at 6.

105. *Id.* at 4 (footnote omitted). In general, this view reflects the priorities enunciated in CERDS, discussed *supra* note 24.

106. Gopal, *supra* note 49, at 8-10. In recent years, according to Professor

posed legal reforms in a developing country should be grounded not in the intervenor's view about what policy is best, but in the priorities identified by the country's various interested groups. The pluralist approach specifically eschews dictation by developed countries and international lending institutions of what the best interests of an underdeveloped country are and the procedures it should follow to achieve those interests.<sup>107</sup> In the absence of the pluralist approach, according to its proponents, increased lawlessness and violence, as well as declining social integrity and order, will permeate the world's underdeveloped nations.<sup>108</sup>

The pluralist concerns that originate in traditional approaches to law and development also arise in the debate over linkage of international labor standards to world trade.<sup>109</sup> For example, in the course of debate within the ILO regarding trade-labor standards linkage, one representative of a Pakistani corporation has argued that the preexisting commitment within GATT's preamble to raising world-wide standards of living—*without* mention of encumbering "social" provisions regarding environment, labor, or human rights—"leaves no room for creating new obligations" such as a specific commitment to core labor standards.<sup>110</sup> The chief argument voiced against ILO support for conditioning trade on adherence to interna-

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Gopal, the World Bank has embraced various aspects of this approach, including the following "lessons" of law and development: (1) each country needs to make a clear choice about the direction of legal reform; (2) each country should prioritize its reform needs to reflect the particular circumstances of that country; (3) for legal technical assistance to bring about desired results, the recipient governments need to demonstrate a clear commitment to legal reform and take full ownership of the legal reform process; (4) broad participation of local lawyers is important, as is the need to include local lawyers as advisors and diversify the source of foreign advisors in a way that best assists the country's chosen path of legal reforms; and (5) training included in legal technical assistance must be adjusted to local conditions. *Id.* at 2.

107. See Compa, *supra* note 4, at 120 & n.13 (citing instances in which organized labor movements in underdeveloped countries have resisted austerity and privatization measures imposed on their governments by the World Bank, the International Monetary Fund, and other global lending agencies).

108. Gopal, *supra* note 49, at 1.

109. See, e.g., *Stiff Opposition*, *supra* note 88, at 473.

110. Fasihul Karim Siddiqui, *Ramifications of "Social Clause" in International Trade Agreements*, ECON. REV., Apr. 1995 (Pak.), available in LEXIS, News Library, Curnws File (derived from paper presented at United Nations sponsored conference regarding labor standards).

tional labor standards is that such standards may prove inconsistent with the "stage of social and economic development attained by" less developed nations.<sup>111</sup> Consequently, it is argued, including such standards "may [be] tantamount to impeding the fundamental and sovereign right of freedom in trade available to member states."<sup>112</sup> Other concerns include the potential conflict between internationally imposed labor standards and constitutional protections within certain nations, such as Pakistan, that prohibit most types of governmental restraints on trade.<sup>113</sup> In addition, the concern remains that developing countries will be the object of "aggressive unilateralism" in the name of promoting workers' right[s] [which] will thus impede the process of economic growth and full employment as an outcome of trade liberalisation efforts."<sup>114</sup>

In order to gain support beyond their established base of developed nations, proponents of international labor standards must thoroughly consider and respond to the pluralist concerns raised by developing nations. After all, the proposition that international standards will benefit working people everywhere proves less compelling if only wealthy, industrial nations support their enactment. A dilemma remains: Should those countries that object to such norms as the pervasive use of child labor found in Pakistan,<sup>115</sup> wages for shoe assemblers of seventeen cents an hour in Indonesia,<sup>116</sup> or the suppression of

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111. *Id.*

112. *Id.*

113. *Id.* According to Siddiqui:

Inclusion of any social clause as a condition precedent for liberalisation of trade will impose an obligation on the part of the government to initiate enactments which may not only be in restraint of trade thus impeaching the constitutional guarantee available to citizens but will also be void for being inconsistent with or in derogation of fundamental rights.

*Id.*

114. *Id.*; see also Garvey, *supra* note 24, at 441 (explaining the historical mandate of GATT as that of unequivocal promotion of international trade, with only nominal consideration for linkage between trade and health, environment, and labor regulation).

115. See Jonathan Silvers, *Child Labor in Pakistan*, ATLANTIC MONTHLY, Feb. 1996, at 79, 79 (notwithstanding recent laws passed in Pakistan that greatly limit child labor and indentured servitude, laws are universally ignored and 11 million children, age four to fourteen, work in Pakistani factories that often have "brutal and squalid conditions").

116. Jefferson Morley & Robert Dorrell, *A Kathie Lee Shopping Spree?*, WASH.

independent unions in Mexico<sup>117</sup> act to construct and maintain trade barriers against countries practicing those norms? Or should developed countries refrain from using trade as a means of imposing their cultural values and protectionist concerns on nations that sustain vastly different economies and subscribe to dissimilar cultural norms, in observance of the pluralist concerns discussed above?

Preliminarily, developed nations that strive to promote international standards should be cognizant of how such initiatives may be perceived in poorer countries to which the edicts of labor correctness are directed, and the long-term harms resulting from these perceptions. First, the movement toward international labor standards may be regarded as nothing less than an attack on cultural norms within certain developing nations, thereby legitimizing and perpetuating the notion that "developed" values are necessarily superior to "underdeveloped" values.<sup>118</sup> Promotion of international standards casts developing nations in a role of constant defensiveness, in which they must continuously summon their scant resources to explain and justify their practices to a hostile international audience that extends less and less equanimity to cultural differences among trading partners. Accordingly, notwithstanding the apparent intentions of standards proponents, the undermining of non-Western values and the imbalance of authority on the world stage may be perpetuated.

Second, as Professor Gopal warned, "A social reform agenda designed and managed by people who assume no risk in the endeavor, and have little accountability for its failures and successes, is undemocratic and authoritarian," and, ultimately, ineffectual.<sup>119</sup> Indeed, developed nations harboring practices that certain developing nations may find abhorrent—such as workplace restrictions on religious expression, or institutional disregard for family concerns—simply do not confront the same

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POST, May 12, 1996, at C5 (identifying sources of products sold by numerous U.S. clothing retailers operating under conditions that likely do not conform with "core" international labor standards, an issue attracting attention when television talk-show host Kathie Lee Gifford was reported to sponsor a clothing line produced by workers, sometimes children, making thirty cents an hour in Honduras).

117. See Goldin, *supra* note 51, at 210.

118. See Gopal, *supra* note 49, at 4.

119. *Id.* at 3-4.

international pressure to change their norms. If the notion of international standards means that only "Western" standards receive international endorsement, such standards lack persuasiveness and authority. Accordingly, when they are enforced without regard for the economic, political, social, and cultural systems on which they are imposed, international labor standards face probable failure.

Third, and most importantly, promotion of international labor standards as a condition for free trade directly threatens the very means through which developing countries aspire to achieve economic growth. After all, the process of eliminating culturally ingrained aspects of industry within certain developing nations—such as widespread use of child labor or unhealthy factory environments—itself may require an impetus that is economic, rather than moral or trade-imposed. Specifically, without capital derived from international trade, edicts that factories must refuse to hire children or comply with certain ergonomic standards will almost certainly be disregarded as practical impossibilities. Standards proponents must understand that conditions of work often turn not on the preferences of developing societies, but on the availability of resources. In the absence of continued foreign investment and trade, changes in working conditions may simply be unattainable.

Although each of these problems must be understood and addressed, they do not result in the necessary conclusion that the movement toward international labor standards must be abandoned. Rather, pluralist opponents of international labor standards must recognize certain realities that justify the advancement of standards.

First, to the extent that developing nations wish to ground their future development in international trade, they must understand that certain cultural sacrifices may be inevitable. Trade entails not merely the transaction of goods, but also an exchange of cultural and societal norms.<sup>120</sup> Thus, developing

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120. For example, as recently portrayed by National Geographic, trade between Mexico and the United States results in the blending of cultures:

As on no other international border on earth, the First and Third Worlds mingle [along the Rio Grandel], each with something to tantalize the other, each with its entrepreneurs keenly attentive to the shifting prices, laws and enforcement practices on the other side.

... Whether or not either side likes it, America is being Mexicanized by immigrants (salsa now outsells catsup in the United

nations can hardly expect barrier-free import of their goods to occur without commensurate expectations; although they are not *required* by any means to abandon certain norms and promote certain others, such cultural changes may constitute the logical price of participating in the global marketplace.

Second, pluralists should recognize that international labor standards represent not simply a method of dictating the conduct of governments and individuals, but also a legitimate attempt to prevent excesses and abuses by multinational corporations that open manufacturing facilities in developing nations. In addition to harming workers in nations that lose jobs to cheaper labor markets, these corporations also have the potential to perpetuate working conditions that neither developed nations nor the developing host countries themselves find acceptable.<sup>121</sup> Rather than dictating the "superiority" of Western values, international standards may be viewed as representing a global initiative to prevent Western corporations from prolonging abuses that governments of Western countries do not condone and that individual governments may be unable to extinguish themselves.

Finally, developing nations should reconsider the long-term ramifications of opposing advancement of the "core" international labor standards in the name of state sovereignty or economic development. As argued by one proponent, the core standards represent principles that most developed and developing nations already support, and "[c]ountries that deny these basic rights to their workforce artificially hold down living standards and restrict the benefits of trade to a narrow elite."<sup>122</sup> In particular, governments that obstruct free association and collective bargaining rights simply lack credibility if they argue that their practices represent the cultural will of their own people. Regardless of whether trade shall be used in the future as a means of enforcing international labor standards, developing nations that refuse to practice the core standards are destined to face international scorn in other arenas.

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States), and Mexico is being Americanized by commercial competition and mass culture.

Richard Conniff, *Tex Mex: The Winding Border Along the Rio Grande Both Divides and Unites Two Fast-Changing Worlds*, NAT'L GEOGRAPHIC, Feb. 1996, at 44, 50.

121. See Morley & Dorrell, *supra* note 116, at C5.

122. Aaron, *supra* note 80, at 11.

For example, they may lose out on foreign aid or the economic benefits of tourism. Accordingly, acceptance of and adherence to the core standards may be regarded as a positive step toward advancing, rather than confining, economic development.

#### IV. INTERNATIONAL LABOR STANDARDS, NAFTA AND MEXICO

The foregoing discussion of the international labor standards movement and the pluralist objections thereto bears particular relevance to the regional labor issues confronting members of NAFTA. NAFTA's side agreement on labor (NAALC) represents the first occasion in which a workers' rights provision—that is, a multilateral commitment to the enforcement of basic labor standards—has been included in any international trade treaty to which the United States is a party.<sup>123</sup> In addition, of the five regional trade agreements within the Western Hemisphere,<sup>124</sup> NAALC sets forth the only explicit multinational scheme for addressing labor issues.<sup>125</sup> Thus, both as a revolutionary document that joins the economies of one developing and two developed nations, and as an example of multilateral linkage of trade to workers' rights, the impact of NAFTA and NAALC on trade and development will be examined for years to come. To date, U.S. insistence on Mexican enforcement of certain labor standards has been met by various sectors of Mexican society with an ambivalence that reflects the general misgivings afforded international labor standards by developing nations. In addition, because NAALC is structured to favor the interests of U.S. and Canadian workers over those of Mexican workers—specifically, by regarding freedom of association and collective bargaining

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123. Murphy, *supra* note 13, at 406.

124. In addition to NAFTA, the four other "currently active subregional economic integration arrangements" are, in chronological order: (1) the Central American Common Market (CACM) (including Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica); (2) the Caribbean Community (CARICOM) (including numerous "very small, and very open, Caribbean economies"); (3) the Andean Pact (Bolivia, Colombia, Ecuador, Peru, and Venezuela); and (4) the Southern Common Market (MERCOSUR) (Argentina, Brazil, Paraguay, and Uruguay). Perez-Lopez, *supra* note 90, at 462-66.

125. MERCOSUR includes a Working Group on Labor Relations, Employment, and Social Security, through which labor matters are discussed. *Id.* at 467 (citing Winston Fritch & Alexandre A. Tombini, *The Mercosur: An Overview*, in *ECONOMIC INTEGRATION IN THE WESTERN HEMISPHERE* 96 (Roberto Bouzas & Jaime Ros eds., 1994)).

rights as "second-tier" standards—NAALC currently stops short of its potential to enable meaningful participation of Mexican workers in the advancement of their nation's economy.

*A. Pluralism in Mexico: What Have You Done For Us Lately?*

In Mexico, skepticism over the general commitment of its northern neighbors to meaningful enforcement of workers' rights—both before and after the enactment of NAFTA and NAALC—has been articulated both by pro-labor Mexican activists, who have little faith in the U.S. commitment to Mexico's economic and social progress, and by government officials, who perceive advancement of common labor standards as jeopardizing foreign investment and attenuating Mexican sovereignty. On the labor side, distrust of the ability of the United States and Canada to help solve the problems of Mexican workers arises from the influx into Mexico of U.S. companies that condition the promise of jobs on the veritable renunciation of labor rights, as well as on the historic disinterest in Mexican development exhibited by its northern neighbors. The Mexican government, for its part, objects to attempts by outside governments to compromise its sovereignty by dictating the enforcement of labor law in Mexico and decelerating Mexican economic growth. Thus, on a regional level, Mexico shares the pluralist apprehensions over universal standards articulated in other international fora.

For example, Mexican labor attorney and law professor Manuel Fuentes Muñiz argues that, since even before NAFTA, Mexican labor has been under assault from multinational corporations that open manufacturing facilities in Mexico, then proceed to impose working conditions that in many instances blatantly and deliberately ignore Mexican law.<sup>126</sup> Under the premise of "flexibilization,"<sup>127</sup> corporations institute such practices, often found to the north of Mexico, as, inter alia, abolishment and alteration of job descriptions; acceleration of the pace and hours of production; employment of temporary workers, part-time workers, and casual labor while eliminating full-time, secure employment; abolition of seniority as the basis

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126. Muñiz, *supra* note 13, at 380-81.

127. *Id.*

of promotions and layoffs; and resistance of union organizing campaigns through "illegal threats and promises."<sup>128</sup> Such actions not only violate the law in many instances, but they also flout various cultural norms that exist in the Mexican workplace. For example, although the institution of more efficient work practices in Mexican factories may constitute "good business sense" in the eyes of the U.S. or Canadian industrialist, such action may occur without understanding of the cultural norm in Mexico that is less hasty and time-sensitive than that of the United States and Canada.<sup>129</sup> Similarly, management practices that emphasize temporary or casual labor conflict with societal norms in Mexico that emphasize the importance of family, thereby resulting in a greater need for job security and decreased mobility.<sup>130</sup> Where foreign corporations actively resist or even subtly discourage the organization of labor, Mexican workers lose the fair chance to impress upon their employers how business operations may successfully incorporate these cultural norms.

Professor Muñiz contends that the "anti-labor and anti-union" policies brought to Mexico by foreign corporations reflect "similar employer-driven changes in employee and labor relations in the United States" that, he further asserts, are simply not welcome.<sup>131</sup> "The United States might think more about setting a positive example of protecting workers' rights," he adds, "before telling other nations how to behave."<sup>132</sup> To that end, Professor Muñiz believes that multilateral involvement in attempts to resolve the crisis in Mexican labor law will not necessarily benefit Mexican workers. Rather, he concludes, the problem "is one that working people [in Mexico] themselves have to solve in the political and trade union milieu of Mexico."<sup>133</sup>

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128. *Id.* at 381.

129. *See generally* O'Grady, *supra* note 28, at 45-46.

130. *Id.* at 48.

131. Muñiz, *supra* note 13, at 381; *see id.* at 399. Professor Muñiz specifically decries such U.S. labor practices as worker replacement during strikes, alternative dispute resolution methods that "are being foisted on employees to deprive them of rights and remedies in the judicial system," threats of plant closure to discourage union organizing drives, and the potential repeal of laws upholding wages of workers under federal contracts. *Id.* at 383.

132. *Id.* at 399.

133. *Id.*

In fact, Mexican workers regard U.S. labor unions, and their sudden interest in aligning with Mexican unions, with similar misgivings.<sup>134</sup> Mistrust of U.S. labor organizations arises from the conflicting messages regarding NAFTA and international trade that have emanated from U.S. unions over the years. Specifically, notwithstanding their occasional statements of "paternalistic concern for Mexican workers,"<sup>135</sup> the clear priority of U.S. unions throughout the NAFTA debate was preservation of U.S. jobs, giving "proponents of NAFTA an opportunity to label them as protectionist."<sup>136</sup> Indeed, the interest periodically expressed by U.S. labor organizations in cultivating a hemispheric or international labor movement proves inconsistent with their historic tolerance of the beleaguered status of independent unions in Mexico, while the system of government-endorsed, ineffectual unions has persisted.<sup>137</sup> Moreover, in the midst of the 1994 Mexican peso crisis, which resulted in a "\$50 billion international rescue package for Mexico orchestrated by the U.S. Treasury,"<sup>138</sup> U.S. unions at once expressed sympathy with Mexican workers, while they generally opposed the bailout.<sup>139</sup> Even as CTM suppressed worker protests arising from the peso crisis, U.S. unions failed to join the remonstrations by human rights coalitions, such as the Border Rights Project, and even "discouraged local labor leaders from linking up to these coalitions."<sup>140</sup> Nonetheless, since NAALC entered into force, U.S. unions have aligned with various Mexican interests, including independent unions and the Mexican government, to formally protest labor practices both in U.S. companies operating in

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134. See, e.g., Latin American Institute, *supra* note 15 (attempt by AFL-CIO to open office in Mexico City greeted with mix of opposition and support from both government-endorsed and independent unions in Mexico).

135. Seybold, *supra* note 14, at 44.

136. *Id.* at 47.

137. *Id.* at 45. This tolerance is attributed to the historical confinement of internationalism within U.S. unions to anti-communism, an interest shared by Mexico's government-endorsed labor unions. "When the Cold War ended[,] the leadership of the U.S. labor movement made minimal adjustments to its previous stance on international issues." *Id.* at 44.

138. Michael Prowse, *The Rescuers: Why We Saved Mexico*, NEW REPUBLIC, Feb. 27, 1995, at 11.

139. Seybold, *supra* note 14, at 45-46.

140. *Id.*

Mexico<sup>141</sup> and in domestically operated U.S. companies.<sup>142</sup> Thus, although cooperative endeavors between U.S. and Mexican labor groups appear destined to accelerate, they emerge from the uneasy politics of necessity and opportunism, and shall be received with fitting skepticism by Mexican workers for the indefinite future.

For separate reasons, the Mexican government has proven similarly wary of outsider attempts to prescribe specific standards and enforcement mechanisms for the country's labor law. For example, during the NAFTA negotiations, anti-NAFTA organizations (particularly U.S. unions) advocated various means of achieving continental labor standards, in a transparent attempt to raise labor costs in Mexico to such a degree that loss of U.S. manufacturing jobs would possibly be forestalled.<sup>143</sup> Proposed tactics included U.S. intervention rights into Mexican courts and edicts that the Mexican government "amend its own legal system to ensure easier judicial review of administrative action."<sup>144</sup> These external attempts to alter the conditions for doing business in Mexico were regarded as a threat to the Mexican government's own ambitions for development. Namely, in the uncouth terms of one U.S. publication, "For Mexicans, the one thing worse than being 'exploited' is *not* being exploited."<sup>145</sup> Indeed, President Salinas grounded his government's agenda for Mexican development in NAFTA, selling the pact "assiduously to wary countrymen, promising that only more jobs and better pay [could] come of it."<sup>146</sup> Ac-

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141. For a detailed discussion of the first four complaints lodged under NAALC against the Mexican government for alleged failure to enforce Mexican labor law (each complaint specifically addressing free-association rights), see Bierman & Gely, *supra* note 27, at 549-61; see also Mary Hull, *U.S. Unions' New NAFTA Strategy Strikes Out*, LEGAL TIMES, Oct. 3, 1994, at 4.

142. Clay Chandler & Frank Swoboda, *A Union Rehabilitates NAFTA*, WASH. POST, Feb. 27, 1996, at C1; Carey Goldberg, *U.S. Labor Making Use of Trade Accord it Fiercely Opposed*, N.Y. TIMES, Feb. 28, 1996, at A11 (U.S. labor unions persuaded Mexican government to file a complaint under NAALC alleging U.S. failure to enforce labor relations law against the Sprint Corporation, which purportedly closed a subsidiary in San Francisco in the midst of unionization efforts by the subsidiary's 200 Spanish-speaking female employees).

143. See Andrew Sullivan et al., *For NAFTA*, NEW REPUBLIC, Oct. 11, 1993, at 7; Marshall J. Breger, *Hitting Mexican Industry With NAFTA Rules*, LEGAL TIMES, Nov. 14, 1994, at 45.

144. Breger, *supra* note 143, at 45.

145. Sullivan et al., *supra* note 143, at 8 (emphasis added).

146. Golden, *supra* note 14, at 3.

cordingly, due to both Mexican and Canadian opposition to so intrusive a stratagem,<sup>147</sup> the final construction of NAALC proved far less ambitious than that advocated by certain U.S. interests.<sup>148</sup> Nonetheless, the enactment of a side agreement designed to secure certain shared rights of workers in NAFTA's member countries occurred over the grave misgivings of the Mexican government.

*B. The Second-Tier Status of Association and Bargaining Rights Within NAALC*

In ultimately agreeing to the enactment of NAALC, the Mexican government entered into a scheme devised not to establish specific standards or harmonize Mexico's domestic labor standards with those of the United States and Canada, but to impel all three nations to enforce their existing laws that specifically align with the broad principles set forth in NAALC's preamble and article one.<sup>149</sup> Namely, under NAALC, the United States, Mexico, and Canada each agreed to make a consistent effort to incorporate the following principles into their own labor law and practices:

- Freedom of association and protection of the right to organize;
- The right to bargain collectively;
- The right to strike;
- Prohibition against forced labor;
- Labor protections for children and young persons;
- Minimum employment standards;
- Elimination of employment discrimination;
- Equal pay for women and men;
- Prevention of and compensation for occupational injuries and illnesses; and
- Protection of migrant workers.<sup>150</sup>

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147. Mexican officials approved NAALC in August 1993 only "[a]fter insisting that they would never accept trade sanctions to enforce their environmental and labor laws . . . ." *Id.*

148. See Breger, *supra* note 143, at 45; see also *supra* Part III.B.

149. McGuinness, *supra* note 8, at 583; see NAALC, *supra* note 6, pmbl., 32 I.L.M. at 1502-03.

150. NAALC, *supra* note 6, Annex 1, 32 I.L.M. at 1515; see *id.*, pmbl., art. 1(b), 32 I.L.M. at 1502-03; McGuinness, *supra* note 8, at 583 n.17.

In order to enforce these "moral" obligations<sup>151</sup> assumed by the three NAFTA countries, NAALC relies chiefly on cooperation between the countries—specifically, "exchanges of information, technical assistance, and consultations."<sup>152</sup> NAALC further creates a series of procedures through which one member country may call into question another's enforcement of its laws relating to NAALC's central labor principles. Under NAALC, each country has established a National Administrative Office (NAO), which, as the initial point of contact between intergovernmental agencies and other NAALC players, is charged with receiving complaints pertaining to labor law issues in the territorial domain of another party.<sup>153</sup> After considering a complaint and determining that it falls within the scope of NAALC, an NAO may then request a ministerial consultation with the party at issue, while also notifying the third party of the request.<sup>154</sup> The consulting parties are then obligated to make "every attempt to resolve the matter through consultations . . . including through the exchange of sufficient publicly available information to enable a full examination of the matter."<sup>155</sup>

If the ministerial consultations fail to resolve the matter, a party may next request the establishment of an Evaluation Committee of Experts (ECE),<sup>156</sup> which is charged with analyzing "patterns of practice by each Party in the enforcement of its occupational safety and health or other technical standards as they apply to the particular matter" first considered by the NAO.<sup>157</sup> Comprised of three members possessing subject-matter expertise, the ECE is expected to study the complaint and issue a draft report within 120 days of its formation.<sup>158</sup> Each party may submit to the ECE written comments on the draft report;<sup>159</sup> the ECE then has sixty days after presentation of the draft report, unless otherwise designated, to file a complete

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151. Murphy, *supra* note 13, at 408.

152. Perez-Lopez, *supra* note 90, at 450.

153. NAALC, *supra* note 6, arts. 15-16, 32 I.L.M. at 1507; *see also* Perez-Lopez & Griego, *supra* note 3, at 508-09.

154. NAALC, *supra* note 6, arts. 21-22, 32 I.L.M. at 1507-08.

155. *Id.* art. 22(3), 32 I.L.M. at 1508.

156. *Id.* art. 23(1).

157. *Id.* art. 23(2).

158. *Id.* art. 25(1), 32 I.L.M. at 1508-09.

159. *Id.* art. 25(2), 32 I.L.M. at 1509.

report.<sup>160</sup> The ECE files its report with the Ministerial Council of the tripartite Commission for Labor Cooperation (the Council). The Commission, comprised of the Ministerial Council and a Secretariat, is NAALC's highest institution, generally responsible for overseeing the implementation of the agreement and developing recommendations on its further elaboration.<sup>161</sup>

With respect to most of the labor principles espoused by NAALC, an ECE report constitutes the farthest extent to which labor issues within a member country may be officially scrutinized under NAALC. If, however, a complaint concerns one of three issues—occupational safety and health, child labor, or minimum wage technical requirements—any party may proceed to a third level of recourse, namely, a second consultation with the party at issue regarding whether there has been a “persistent pattern of failure” by that party to enforce its pertinent labor standards.<sup>162</sup> If the consulting parties fail to resolve the matter within sixty days of the delivery of the request for consultation, a special session of the Ministerial Council may be requested, at which the Council may convene technical advisors or working groups, resort to appropriate dispute resolution procedures, and/or make recommendations, “as may assist the consulting Parties to reach a mutually satisfactory resolution to the dispute.”<sup>163</sup>

If the issue is not resolved within sixty days after the Council has convened, the Council may assemble an arbitral panel to consider the matter,<sup>164</sup> so long as the matter is trade-related and covered by mutually recognized labor laws.<sup>165</sup> The arbitral panel is then obliged to render findings of fact; determine whether there has been a persistent pattern of failure by the party complained against to effectively enforce its occupational safety and health, child labor, or minimum

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160. *Id.* art. 26(1).

161. *Id.* arts. 8-11, 32 I.L.M. at 1504-06. The Ministerial Council is comprised of “labor ministers of the Parties or their designates.” *Id.* art. 9(1), 32 I.L.M. at 1505. The Secretariat is an administrative body initially staffed with 15 people, *id.* art. 12(3), 32 I.L.M. at 1506, and headed by an Executive Director, *id.* art. 12(1).

162. *Id.* art. 27(1), 32 I.L.M. at 1509.

163. *Id.* art. 28(4).

164. *Id.* art. 29(1).

165. *Id.* art. 29(1)(a)-(b).

wage technical requirements in a manner that is trade-related and covered by mutually recognized labor laws; and, if such a persistent pattern is found, issue recommendations for resolution of the dispute, "which normally shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement."<sup>166</sup> Failure of a party to fully implement the action plan recommended by the arbitral panel, or a mutually agreed-upon action plan, could lead to the imposition of a monetary enforcement assessment of potentially millions of dollars.<sup>167</sup>

Thus, NAALC constitutes a multilateral scheme that promotes adherence to certain "core" labor standards, through the primary use of communicative and cooperative methods between nations, while also providing for substantive penalties in rare situations. Indeed, the initial lack of support for NAALC demonstrated by the Mexican government resulted in certain features in the NAFTA side agreement that address the pluralist concerns of developing countries. Specifically, unlike some multilateral schemes, NAALC does not require any member nation to change its laws, and NAALC's implementation procedures rely chiefly on "consultative" methods. That is, nations whose labor practices are challenged always have the opportunity to articulate the legal, economic, social and/or cultural reasons behind their actions.

However, as evidenced by the four complaints filed against Mexico under NAALC since its entry into force—*each* alleging that the Mexican government failed to enforce the law protecting workers' rights to organize in factories owned by non-Mexican corporations<sup>168</sup>—NAALC stops short of addressing the issues that appear to confine most dramatically the participation of Mexican workers in national and international conversations about their own nation's development—namely, limitations in Mexico against free association and meaningful collective bargaining.<sup>169</sup> By neglecting to include the rights of association and collective bargaining among NAALC's "first-tier" standards, the failure of which to enforce may ultimately re-

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166. *Id.* art. 36(2)(c), 32 I.L.M. at 1511.

167. *Id.* art. 39(4)(b), 32 I.L.M. at 1512; *id.* Annex 39, 32 I.L.M. at 1516; *see also* Perez-Lopez, *supra* note 90, at 460-61.

168. *See supra* notes 141-42 and accompanying text.

169. *See supra* Part II.B.

sult in trade sanctions, NAALC tacitly accepts the clear intent of Mexico's government to continue its suppression of independent unions and other organizations that seek to challenge Mexico's eighty-year tradition of government-controlled labor relations. As stated otherwise by Professor Muñiz:

By agreeing to these exclusions, [NAALC] negotiators left untouched what are in the long run the gravest threats to workers under NAFTA: the continued denial of free choice of unions and free collective bargaining to Mexican workers, and the continued dominance of an official labor movement by a government willing to hold labor costs below productivity gains to lure business from the United States.<sup>170</sup>

Moreover, just as NAALC appears to underplay the "core" rights of association and collective bargaining that represent "the most effective means of empowering workers to realise the gains from their labour,"<sup>171</sup> the issues that most directly threaten U.S. and Canadian workers—i.e., health, safety, wage, and child labor conditions that may motivate multinational corporations to move south—conspicuously receive "first-tier" treatment in NAALC. This dichotomy unquestionably substantiates the grievances of Professor Muñiz and other Mexican activists who complain that promotion of international labor standards generally encompasses nothing more than the protectionist agenda of developed nations masked in self-righteous dogma. Although an escalation of support under NAALC for genuine association rights in Mexico could ultimately upset the interrelationship between the Mexican government and the unions that the country has traditionally sustained, it is hard to imagine how Mexican workers would be harmed by such an effect. Rather, they would finally be invited to participate in the discussion of how Mexico can best achieve the vision of development that is found in Mexico's labor law, but that has yet to be truly achieved.

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170. Muñiz, *supra* note 13, at 392.

171. Aaron, *supra* note 80, at 11.

## V. CONCLUSION: FREE TRADE IN MEXICO—AN INSTRUMENT FOR DEVELOPMENT?

Thus far, this paper has discussed the labor law in Mexico (strong in theory, ineffectual in practice), the movement toward international labor standards and the pluralist objections lodged against this movement, and the Western Hemisphere's first attempt at a multilateral scheme promoting shared labor standards among Mexico, the United States, and Canada. Given each of these considerations, the question remains: Does the promulgation of regional labor standards through NAFTA ultimately help or harm Mexican workers? Professor Muñiz regards this question with both skepticism and hope:

Mexico has good labor laws. It does not need to be lectured by the United States about its labor laws, nor to have the U.S. labor law model imported into Mexico. . . .

On the other hand, those rights specified in the Constitution and the Law are not being respected by employers or enforced by the government of Mexico. What Mexico needs is honest, effective enforcement of its labor laws by a Labor Ministry committed to the rule of law and by an independent judiciary—not . . . a conscious non-enforcement policy aimed at pleasing multinational companies and foreign investors.

This is not a problem to be solved by intervention from the North. It is one that working people themselves have to solve in the political and trade union milieu of Mexico. If the NAFTA labor side agreement creates more space for such struggles to be carried, without violating Mexican sovereignty, it can have a positive effect. If instead it put[s] pressure on Mexico to eliminate its progressive labor laws to conform more to the U.S. model of labor-management relations, it should be resisted.<sup>172</sup>

For a variety of reasons, NAALC may very well contribute to the realization of the optimistic possibilities enunciated by Professor Muñiz. First, notwithstanding certain unwelcome "American" labor practices imported to Mexico by U.S. companies,<sup>173</sup> Mexico possesses within its legal infrastructure the laws and the authority to enforce its historic, purely Mexican view of labor relations. In other words, unlike certain other

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172. Muñiz, *supra* note 13, at 399.

173. See *supra* notes 127-30 and accompanying text.

developing countries, Mexico is not vulnerable to the potential import of foreign law, because it presently boasts one of the most comprehensive labor laws in the world.

Second, even as "second-tier" labor priorities under NAALC, freedom of association and collective bargaining rights in Mexico have attained regional and international attention by virtue of NAALC's complaint procedures. Given the increased activity of independent unions in Mexico in recent years,<sup>174</sup> the Mexican government thus faces both domestic and international pressure to receive the diversity of interests within Mexican labor, rather than limiting its consideration of worker interests to the contributions of the government-endorsed unions over which the government commands ultimate authority. Even in the name of sovereignty, resistance of the apparent will of the Mexican people can hardly be defended.

Third, to the extent that independent unions in Mexico cannot count on support from their government, they can surely take advantage of the resources and increasing goodwill of the governments and unions to the north. After all, regardless of their self-interest, U.S. unions that file complaints under NAALC on behalf of Mexican workers do not face the same repercussions that dissident workers themselves face in Mexico under present conditions.<sup>175</sup>

Thus, the linkage of free trade in North America to adherence to basic labor rights may very well contribute to the attainment of the vision of labor rights and Mexican development that is found in Mexico's labor law. For Mexico, trade may indeed prove to be an instrument of development, not an end in itself.

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174. See Sterling, *supra* note 71, at 23; Rotella, *supra* note 59, at B9.

175. See Goldin, *supra* note 51, at 214-16 (discussing repression in Mexico of influential union leaders).

