

THE NAALC AND THE LABOR LAWS OF MEXICO AND THE UNITED STATES

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The status of labor relations between the United States, Canada, and Mexico is part of the current debate over the possible expansion of the North American Free Trade Agreement (NAFTA).¹ As part of the execution of the NAFTA, the three countries created a labor "side agreement," the North American Agreement on Labor Cooperation (NAALC),² which entered into force on January 1, 1994, immediately after the NAFTA. Three years after the NAALC was promulgated, considerable controversy continues over whether it has achieved its stated goals.³

I. THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

The enforcement of labor laws has traditionally been an issue of domestic concern, and intrusion by one nation into the labor affairs of another is generally unwelcome. The NAFTA labor side agreement is the first of its kind. In order to appreciate the thrust and scope of the Agreement, it is necessary to recall the framework and conditions under which the Agreement was approved. It was the U.S. which insisted upon the inclusion of the labor and environmental side agreements. The labor side agreement was essentially enacted to defend the interests of U.S. labor and prevent the possibility of "social dumping."

During the NAFTA negotiations, Mexico opposed the notion of permitting the NAALC Commission to intervene into the area of Mexico's enforcement of its own labor laws, particularly those laws regulating collective bargaining. Mexico argued that such intervention could result in interference with and

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1. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993) [hereinafter NAFTA].

2. North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., Annexes 1, 23, 39, 41(A), 41(B), 46, & 49, 32 I.L.M. 1499, 1515-17, (1993) [hereinafter NAALC].

3. JEROME LEVINSON, INSTITUTE FOR POLICY STUDIES AND INTERNATIONAL LABOR RIGHTS FUND, NAFTA'S LABOR SIDE AGREEMENT: LESSONS FROM THE FIRST THREE YEARS, (1996).

violation of Mexico's territorial sovereignty. Mexico took the position that permitting such interference was inappropriate in the context of a commercial treaty.

The U.S. nevertheless insisted that the NAALC be drafted. One of the primary motivations for the Agreement was the U.S.' concern over Mexico's failure to enforce its domestic labor laws. Special interest groups in the U.S. were concerned that Mexico's failure to observe its own laws would result in unfair competition and cause companies to outsource their labor to Mexico due to the low cost of labor in that country.

Since its enactment, the NAALC has been criticized as being little more than a statement of good intentions. Its critics maintain that the NAALC suffers from lack of clarity and lack of an efficient mechanism for achieving its goals, with the enforcement of most of its provisions left to the discretion of each of the NAFTA parties.

The NAALC consists of a Preamble, fifty-five articles, and seven annexes. The fifty-five articles are themselves divided into seven parts: objectives, obligations, Commission for Labor Cooperation, Cooperative Consultations and Evaluations, Resolution of Disputes, General Provisions, and Final Provisions. The annexes' headings cover labor principles, interpretive rulings, monetary enforcement assessments, Canadian domestic enforcement and collection, suspension of benefits, extent of obligations, and country-specific definitions.⁴

The NAALC's stated intentions are, among other things, to create an expanded market for goods produced in the NAFTA region, to enhance the worldwide competitiveness of companies based in the NAFTA countries, to improve working conditions and living standards within the NAFTA countries, and to protect, enhance, and enforce basic workers' rights.⁵ In the Preamble to the NAALC, the governments of the U.S., Mexico, and Canada acknowledge that protecting basic labor rights will encourage companies to adopt competitive strategies to increase quality and productivity and lead to greater prosperity for each party.⁶

The specific objectives of the NAALC are, *inter alia*, to improve living and working conditions in each of the NAFTA countries, to promote the labor principles set out in Annex 1 of the NAALC, to promote compliance with and effective enforcement of each countries' domestic labor laws, to encourage cooperation in labor matters, to promote increased levels of quality and productivity, to encourage the publication and exchange of information, to pursue cooperative labor-related activities which are mutually beneficial and, finally, to promote transparency in the administration of labor laws.⁷ The fundamental labor law principles which each country undertook to promote are set forth in Annex 1:

4. NAALC, *supra* note 2, Annexes 1, 23, 39, 41(A), 41(B), 46, & 49, 32 I.L.M. at 1515-16.

5. *Id.* pmb., 32 I.L.M. at 1502.

6. *Id.*

7. *Id.* art. 1, 32 I.L.M. at 1503.

freedom of association and the right to organize, the right to bargain collectively, the right to strike, a prohibition against forced labor, labor protections for children and young persons, minimum employment standards, the elimination of employment discrimination, equal pay for women and men, the prevention of occupational disease and injury, compensation in the event of work-related illness or injury, and the protection of migrant workers.⁸

The NAALC does not, however, undertake to establish uniform labor laws or uniform labor standards among the three NAFTA countries. Instead, the Agreement expressly reaffirms the right of each country to establish its own domestic labor standards and to enact domestic legislation in accordance with those standards. The NAFTA countries agreed to ensure that their domestic labor laws provide for high labor standards and to promote working conditions and higher living standards as productivity in the workplace increases.⁹

The NAALC requires the U.S., Mexico, and Canada to promote compliance with their domestic labor laws and enforce them through effective and appropriate government action.¹⁰ The governmental enforcement activities contemplated by the NAALC include: appointing and training labor inspectors; investigating suspected violations; promoting the formation of labor/management committees to address workplace labor regulation; providing or promoting labor mediation, conciliation, and arbitration services; and initiating timely proceedings to correct violations of each country's domestic labor laws.¹¹ Private parties must also be provided with appropriate access to procedures for the enforcement of each party's domestic labor laws.¹² Each party's domestic labor laws should be equitable and provide fair and transparent procedures for the enforcement of the laws.¹³ Each country must publish its own labor laws, procedures, and rulings¹⁴ and promote public awareness of its domestic labor laws.¹⁵

Sanctions for non-compliance are available only in the event of a persistent failure to enforce norms pertaining to occupational health and safety, child labor, or minimum wage standards.¹⁶ In order to allay the concerns of the NAFTA governments regarding the integrity of their territorial sovereignty, the NAALC specifically provides that the Agreement may not be interpreted as empowering the authorities of any party to undertake labor law enforcement activities within the territory of any other party.¹⁷ Instead, the NAALC created a tripartite commission to monitor the performance of the obligations undertaken by the

8. *Id.* Annex 1, 32 I.L.M. at 1515.

9. *Id.* art. 2, 32 I.L.M. at 1503.

10. *Id.* art. 3, 32 I.L.M. at 1503.

11. *Id.*

12. *Id.* art. 4, 32 I.L.M. at 1503.

13. *Id.* art. 5, 32 I.L.M. at 1504.

14. *Id.* art. 6, 32 I.L.M. at 1504.

15. *Id.* art. 7, 32 I.L.M. at 1504.

16. *Id.* arts. 27, 38, 39 & Annex 39, 32 I.L.M. at 1509, 1511, 1516.

17. *Id.* art. 42, 32 I.L.M. at 1513.

parties.¹⁸ This body, the Commission for Labor Cooperation, is composed of a Ministerial Council and a Secretariat.¹⁹ The Council is the Commission's governing body and is comprised of each party's labor ministers or their appointees.²⁰ The Secretariat is headed by an Executive Director, who is appointed by the Council for a three-year term. The Director's term is renewable for one additional three-year term. The position is currently held by a Canadian national, but must be rotated consecutively between nationals of each party to the NAALC.²¹

The NAALC also provided for the creation of three National Administrative Offices (NAOs) at the federal government level of each NAFTA country.²² The NAOs' stated function is to assist the Commission. Each NAO serves as a liaison between other agencies of its home government, the NAOs of the other NAFTA countries, and the Secretariat.²³ The NAOs also serve as sources of information for the Secretariat and the other agencies.²⁴

Each NAO is required to provide for the submission and receipt of public communications on labor law matters which arise in the territory of any of the other parties.²⁵ Pursuant to Article 16(3) of the NAALC, procedural guidelines were enacted governing the receipt, acceptance, and review of submissions filed with the U.S. NAO.²⁶ In accordance with these guidelines, the U.S. NAO must review a submission to determine whether it falls within its jurisdiction. The complaining party must also establish that he or she has standing to bring the complaint. Once the U.S. NAO accepts a submission for review, it is required to conduct an examination of the submission as appropriate to assist the NAO to better understand and report publicly on the issues raised in the submission. Upon completion of the examination, the Secretary must issue a public report containing a summary of the review proceedings, findings, and recommendations. The review and report must be completed and the report issued within 120 days of acceptance of the submission. The 120-day period may be extended for an additional 60 days if circumstances require.²⁷

Where the NAO finds that the submission is well-founded, it may recommend in its report that the parties engage in ministerial consultations. Article 22 of the NAALC provides that "any Party may request in writing consultations with another Party at the ministerial level regarding any matter

18. *Id.* arts. 8-19, 32 I.L.M. at 1504-07.

19. *Id.* art. 8, 32 I.L.M. at 1504.

20. *Id.* arts. 9 & 10, 32 I.L.M. at 1505.

21. *Id.* art. 12, 32 I.L.M. at 1506.

22. *Id.* arts. 8 & 15, 32 I.L.M. at 1504, 1507.

23. *Id.* art. 16, 32 I.L.M. at 1507.

24. *Id.* arts. 8, 9, 12, 15, & 16, 32 I.L.M. at 1504-07.

25. *Id.* art. 16(3), 32 I.L.M. at 1507.

26. The guidelines were published on April 7, 1994. Revised Notice of Establishment of the U.S. National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16660-16662 (1994).

27. *Id.*

within the scope of this Agreement.”²⁸ If ministerial consultations fail to resolve the matter, any party may make a written request calling for the formation of an Evaluation Committee of Experts (ECE)²⁹ which, subject to the exceptions set forth in NAALC Article 23, must be established upon delivery of the party’s request.³⁰

An ECE will generally be composed of three members: the Chair, to be selected from a roster of experts developed in consultation with the International Labor Organization (ILO);³¹ and the other members, to be selected when possible from a roster developed by the parties to the NAALC.³² The intervention of the ECE may be invoked only where the matter is trade-related and covered by mutually recognized labor laws.³³ The ECE is a non-adversarial body that, when convened, must analyze each party’s patterns of practice in the enforcement of its occupational safety and health or other technical labor standards as they may relate to the submission in question.³⁴

The ECE is required to present first a draft report, then a final report of its findings to the Council. This report by the ECE is separate and independent from any reports previously issued by the NAO.³⁵ Once the ECE final report has been presented to the Council, any party may make a written request to enter into consultations regarding whether the other party has persistently failed to enforce such standards.³⁶ The parties have an obligation to make every attempt to arrive at a satisfactory solution to the dispute through consultations.³⁷

If consultations fail to resolve the matter, any party may request a special session of the Council.³⁸ If the Council is unable to resolve the dispute within 60 days after it has convened, it must convene an arbitral panel upon written request by a party and a two-thirds vote.³⁹ Such a panel may only be convened in the context of submissions alleging a party’s persistent pattern of failure to effectively enforce its labor standards regarding minimum wage, child labor, or occupational safety and health standards.⁴⁰ Moreover, the party’s alleged failure to enforce such standards must be trade-related and covered by mutually recognized labor laws.⁴¹

28. NAALC, *supra* note 2, art. 22, 32 I.L.M. at 1508.

29. *Id.*

30. *Id.* art. 23, 32 I.L.M. at 1508.

31. *Id.* arts. 22, 23 & 24, 32 I.L.M. at 1508.

32. *Id.* art. 24(1), 32 I.L.M. at 1508.

33. *Id.* art. 23 & Annex 23, 32 I.L.M. at 1508, 1516.

34. *Id.* art. 23(2), 32 I.L.M. at 1508.

35. *Id.* arts. 25 & 26, 32 I.L.M. at 1508.

36. *Id.* art. 27, 32 I.L.M. at 1509.

37. *Id.* art. 27(4), 32 I.L.M. at 1509.

38. *Id.* art. 28, 32 I.L.M. at 1509.

39. *Id.* art. 29, 32 I.L.M. at 1509.

40. *Id.* art. 29(1), 32 I.L.M. at 1509.

41. *Id.*

Pursuant to the Model Rules of Procedure established by the Council, the five-member panel must set at least one hearing and provide the parties with the opportunity to present initial and rebuttal written submissions.⁴² Unless the parties agree otherwise, the arbitration panel must present an initial report to the disputing parties within 180 days of the selection of the last panelist.⁴³ The report must contain findings of fact and determinations.⁴⁴ If the panel finds that a party has persistently failed to effectively enforce its labor standards, then the initial report should also include a recommendation that the party in breach of its NAALC obligations adopt and implement an action plan adequate to remedy the pattern of non-enforcement.⁴⁵

Parties may submit written comments to the panel in response to its initial report within thirty days of the issuance of the report.⁴⁶ The ECE panel must present its final report to the parties within sixty days following the presentation of its draft report.⁴⁷ Within fifteen days after receiving the panel's final report, the parties must transmit the report to the Council, along with any written attachments each wishes to submit.⁴⁸ The panel's final report will be published five days after its transmittal to the Council.⁴⁹

If the panel has determined that one party has engaged in a persistent pattern of non-enforcement, the parties may resolve the dispute by agreeing on a mutually satisfactory action plan in accordance with the panel's recommendations.⁵⁰ Where such a resolution is achieved, the parties must inform the Secretariat and the Council.⁵¹ If, however, the parties cannot establish an action plan or otherwise achieve a resolution of the matter, one or both of the parties may request that the panel be reconvened.⁵² A request to reconvene must be made no earlier than sixty days nor later than 120 days following the presentation of the arbitration panel's final report.⁵³ If no timely request is made and if the parties still cannot agree on an action plan, then the arbitration panel will deem the last action plan submitted to have been established.⁵⁴

Once the panel has reconvened, it has the authority to impose economic sanctions, which may be discretionary or mandatory, depending upon the circumstances. The panel may impose a monetary penalty where it has been

42. *Id.* art. 33, 32 I.L.M. at 1510.

43. *Id.* art. 36, 32 I.L.M. at 1511.

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

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

46. *Id.* art. 36(4), 32 I.L.M. at 1511.

47. *Id.* art. 37(1), 32 I.L.M. at 1511.

48. *Id.* art. 37(2), 32 I.L.M. at 1511.

49. *Id.* art. 37(3), 32 I.L.M. at 1511.

50. *Id.* art. 38, 32 I.L.M. at 1511.

51. *Id.*

52. *Id.* art. 39(1), 32 I.L.M. at 1511.

53. *Id.* art. 39(2), 32 I.L.M. at 1512.

54. *Id.*

reconvened due to the parties' inability to agree upon an action plan.⁵⁵ Where the panel has been reconvened because of a dispute as to whether the party complained of is fully implementing an agreed-upon plan, and where the panel determines that that party has indeed failed to fully implement the plan, the panel must impose a monetary penalty.⁵⁶ If the party subsequently fails to pay a monetary penalty within 180 days after the panel has imposed it, the application of NAFTA benefits to the party complained of may be suspended in an amount no greater than that of the penalty.⁵⁷

Six submissions have been filed to date under the NAALC: five against Mexico and one against the U.S. None have raised the possibility of sanctions. The first two submissions filed against Mexico involved the activities of the maquiladora plants of Honeywell and General Electric. These submissions alleged violations of the maquiladora workers' rights to organize. The submissions were ultimately dismissed on the grounds of insufficient evidence.⁵⁸ The third submission, filed with the U.S. NAO in August 1994, was brought by the American Friends Service Committee, the *Asociación Nacional de Abogados Democráticos*, the Coalition for Justice in the Maquiladoras, and the International Labor Rights Fund.⁵⁹ The third submission involved the maquiladora operations of Sony Electronics, which was doing business in Mexico as *Magnéticos de México*. The submission alleged violations of workers' rights to organize and to associate freely. The submission also alleged that Mexico had violated its obligations under the NAALC and ILO Conventions 87 and 98, which govern freedom of association and collective bargaining.⁶⁰

The submission alleged, *inter alia*, that the Mexican government had failed to enforce its domestic labor laws guaranteeing the right of Mexican workers to free association. After review, the U.S. NAO recommended that the parties engage in ministerial consultations pursuant to NAALC Article 22. Consultations were held and an implementation plan was entered into on June 26, 1995.⁶¹ Almost one year later, on March 29, 1996, the submitters requested that consultations be reopened, arguing that Mexico remained out of compliance.⁶² U.S. Labor Secretary Robert Reich declined to reopen ministerial consultations, but instructed the U.S. NAO to continue to monitor events in Mexico related to

55. *Id.* 39(4), 32 I.L.M. at 1512.

56. *Id.* art. 39(5), 32 I.L.M. at 1512.

57. *Id.* art. 41, Annexes 39 & 41A, 32 I.L.M. at 1512, 1516.

58. For a discussion of the U.S. NAO's handling of the first two submissions, see Lance A. Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX. L.J. 159 (1995).

59. See U.S. DEP'T OF LABOR, U.S. NAT'L ADMIN. OFFICE REPORT OF REVIEW, NAO SUBMISSION No. 940003 (Apr. 11, 1995).

60. *Id.*

61. See U.S. DEP'T OF LABOR, U.S. NAT'L ADMIN. OFFICE REPORT OF REVIEW, NAO SUBMISSION No. 940003 (June 26, 1995) (Follow-Up Report).

62. *Id.*

the issues raised in the consultations.⁶³ On December 4, 1996, the U.S. NAO issued a follow-up report on the Sony submission which detailed relevant legislative and judicial developments in Mexico.⁶⁴

More than two years after the Sony submission was filed, the workers terminated by the Sony maquiladora during the events which gave rise to the submission remain unemployed. The workers believe that they have been blacklisted and have been unable to obtain employment anywhere in Nuevo Laredo, Tamaulipas, the city in which the Sony maquila operations are located.⁶⁵ The filing of the submission has served primarily to disseminate information regarding Mexico's failure to enforce its laws in the areas of free association and the right to organize and to sensitize experts as to the practical obstacles to the free exercise of these collective rights in Mexico. The complaint also demonstrates, however, how formalistic and bureaucratic the procedures established by the NAALC can be.

On June 13, 1996, Human Rights Watch/Americas, the International Labor Rights Fund, and the ANAD filed a fourth submission against Mexico with the U.S. NAO. NAO submission No. 9601 arose out of the 1994 consolidation of the Mexican Fishing Ministry with parts of the Ministry of Agriculture and Water Resources. The reorganization created a new Ministry, the Ministry of Environment, Natural Resources and Fishing. Employees of the newly formed Ministry were precluded from having more than one union pursuant to Article 68 of the Federal Law for Employees in the Service of the State.⁶⁶

Submission No. 9601 alleged, among other things, that Mexico had failed to enforce its own labor laws concerning freedom of association and the right to organize by failing to amend the law to permit more than one union in a given federal public sector workplace.⁶⁷ The submission also alleged that Mexico had failed to comply with its obligations under ILO Convention 87, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the International Covenant on Economic, Social and Cultural Rights,⁶⁸ as well as with its obligations under the NAALC to maintain impartial labor tribunals.⁶⁹ Following review and investigation of the facts and law surrounding Submission No. 9601, on January 27, 1997, the NAO recommended ministerial consultations pursuant to NAALC Article 22.⁷⁰

On October 11, 1996, a fifth submission was filed against Mexico by Communications Workers of America, *Sindicato de Telefonistas de la Republica*

63. *Id.*

64. *Id.*

65. *Id.*

66. See U.S. DEP'T OF LABOR, U.S. NAT'L ADMIN. OFFICE REPORT OF REVIEW, U.S. NAO REPORT OF REVIEW: NAO SUBMISSION No. 9601 (Jan. 27, 1997).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

Mexicana, and the Federación de Sindicatos de Empresas de Bienes y Servicios. NAO Submission No. 9602 alleged a persistent pattern of failure to enforce and discrimination in enforcement of Mexico's labor laws. The submitters alleged that Mexico's labor arbitration and conciliation boards had been partial in their recognition of unions and certification of bargaining rights. The submission contended that Mexico had breached its obligations under the NAALC by failing to provide procedures that are fair, equitable, and transparent and by failing to effectively enforce its labor laws protecting workers from unjustified dismissals or other retaliatory actions by employers. Finally, the submission alleged that Mexico had failed to effectively enforce its domestic laws regarding freedom of association, minimum employment standards, and overtime pay. Submission No. 9602 was withdrawn on April 15, 1997.

While no submissions have yet invoked the possibility of sanctions, the cases processed to date demonstrate the weaknesses and inefficiency of the NAALC provisions. The NAALC submissions have served primarily as vehicles to publicly denounce the violation of labor laws, to sensitize public opinion regarding these violations and their impact, and to focus attention on the concept of international labor relations.

The problem of labor relations has arisen in the context of international commercial treaties other than the NAFTA. It is a complex issue with no facile solution. These problems arise due to differences in the labor laws and customs of the signatory countries and asymmetries in their economies which make it impossible to equalize salaries and working conditions. Moreover, it is a practical impossibility to force signatories to comply with the labor component of international commercial treaties.⁷¹

Adding a labor component to an international commercial agreement is a difficult, if necessary, task. While the cost of goods is not determined solely by the cost of labor, there is still a direct relationship between the two, a relationship which gives rise to the ever-present threat of social dumping due to differences in labor costs. These differences are not readily eliminated, however, because they are due not only to deficiencies in a country's domestic labor laws or to that country's failure to enforce those laws, but also due to diverse economic, monetary, political, and commercial factors which cannot be corrected through the establishment and imposition of external mechanisms such as international treaties.⁷²

71. See AMÉRICO PLA RODRIGUEZ, *CLÁUSULAS SOCIALES EN LOS ACUERDOS INTERNACIONALES SOBRE COMERCIO* (1996).

72. In this respect, the comparison between Mexico and the U.S. is illustrative. In the case of Mexico, one cannot speak of an insufficiency of laws. In fact, Mexico has a labor law structure which is more protective of the worker than that of the U.S. One may raise the issue of lack of enforcement, but even enforcing all of the labor laws, the cost of the work force in Mexico is disproportionately lower than that of the cost of the U.S. work force.

Three years after the NAALC went into effect, its limitations have become evident. These limitations may perhaps be explained by the conditions and circumstances which gave rise to the Agreement. It is, however, clear that the NAALC does not seek to eliminate the differences between the parties—it does not seek to equalize or homogenize working conditions, nor does it analyze the commercial impact caused by differences in laws and salary levels.⁷³ The NAALC does not introduce new legislation for the signatory countries; rather, the Agreement is based upon the domestic legislation already in existence in each country. Annex 1 of the NAALC, in discussing labor principles, establishes that “the goal is to define broad areas of focus . . . without establishing common minimum standards for said legislation . . .”⁷⁴

Given the NAALC’s failure to seek equalization of either labor laws or income, the Agreement becomes more than anything a statement of intention: it expresses a desire to comply with the domestic labor laws each of the signatory parties has in place. The problem is that, three years after the implementation of the NAFTA, conflicts which reflect the deficiencies in the Agreement have begun to arise. The few NAO submissions presented to date show that it is necessary to revise and amend the NAALC to provide for more rapid procedures and broader enforcement powers so that the NAALC may achieve and enforce its stated goals.

II. LABOR LAW IN THE U.S. AND MEXICO

A. The U.S.

The following discussion summarizes some of the similarities and differences between the labor laws of the U.S. and Mexico. This overview may serve to promote a greater understanding of the labor laws of these two countries in order to facilitate determination of the changes that would be required for minimum common labor standards in the three countries to be developed.

The legal systems of Mexico and the U.S. were developed in different historical contexts. Mexico’s labor laws were drafted in the wake of a popular revolution.⁷⁵ In contrast to Mexico, where labor rights are enshrined in

73. The treatment of the labor aspects, among other things, differentiates the NAFTA from the treaty of the European Union. In Europe, in order to avoid competition between salaries and working conditions, there is a minimum salary and minimum safety and health conditions applicable to all of the countries of the E.U. Workers have freedom to travel between the different countries of the E.U. Recently, a system of coordinated social security has been implemented which permits workers to save and accumulate their social security benefits even when they move from one country to another.

74. NAALC, *supra* note 2, Annex 1, 32 I.L.M. at 1515.

75. Mexico is a civil law country whose legal traditions derive largely from Romano-Germanic roots. The U.S. is a common law legal system. The common law

Constitutional provisions, the U.S. Constitution contains no specific provisions protecting workers' rights. Labor protections have, however, been developed through federal legislation.

The National Labor Relations Act of 1935 (NLRA) was the first major piece of U.S. legislation focusing on labor relations.⁷⁶ The NLRA is authorized by the Commerce Clause of the U.S. Constitution, Article I, Section 9, which authorizes Congress to enact legislation regulating commerce among the states. The premise underlying the NLRA is that statutory regulation of labor and management is necessary to keep interstate commerce running smoothly. Section 151 of the NLRA provides:

It is declared to be the policy of the U.S. to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁷⁷

Given the nature of its constitutional predicate, labor law in the U.S. has historically been perceived and interpreted from the perspective of interstate commercial activity. Workers' rights to minimum employment standards, to associate, and to organize and bargain collectively have been developed with the stated aims of eliminating obstacles to the free flow of goods and facilitating commerce. The NLRA covers only those workers engaged in interstate commerce or in the production of goods for interstate commerce.

The NLRA enabled workers to protest working conditions they considered unfair, to organize into unions and select union representatives, and to compel management to collectively bargain in good faith with those unions representing a majority of the workers in an appropriate unit.⁷⁸ The NLRA, established by the National Labor Relations Board (NLRB), is one of a number of administrative agencies established pursuant to New Deal legislation to adjudicate labor disputes.⁷⁹ The NLRB's orders are not self-enforcing. If the parties to the dispute

originated as a law applied by practical jurists in resolving specific disputes. As a general rule, common law legal systems place significant emphasis on case law, relying on the application of precedent in determining the applicable law. In contrast, Mexico is a civil law system. Civil law systems are characterized by reliance on codified laws and the application of doctrine

76. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994) [hereinafter NLRA].

77. *Id.* § 151.

78. *Id.* §§ 157 & 158.

79. WILLIAM B. GOULD, A PRIMER ON AMERICAN LABOR LAW 23 (1982).

do not comply with the Board's order, the order may be enforced by the federal courts, through one of the twelve U.S. Circuit Courts of Appeal.⁸⁰

B. Mexico

Labor protections in Mexico are incorporated into the text of the Mexican Constitution. Labor legislation is seen as part of a body of "social" law premised upon the progressive ideological principles reflected in the 1917 Constitution. In contrast to the U.S., Mexican labor laws focus on the welfare of the worker, not on the promotion of commercial activity. In fact, Mexican labor laws recognize certain individual and collective labor rights even though some of these rights may not promote commercial interests.

Article 123 of the Mexican Constitution sets forth the rights of workers in the private and public sector. Among other protections, Article 123 provides for a maximum working day of eight hours, a weekly paid day of rest, paid vacation time, and equal pay for equal work. Wages must be paid in legal tender. The Constitution also contemplates minimum wage protections and establishes workers' rights to be compensated for unjust dismissal, to organize and bargain collectively, and to strike. Mexican workers are entitled to receive training, social security, and workers compensation benefits, and disability and maternity leave benefits. Article 123 establishes certain benefits for Mexican workers that have no equivalent in U.S. law, such as employer-subsidized housing funds and the right to receive a share of profits on an annual basis. The Constitution also provides for the formation of conciliation courts to resolve labor disputes.

The inclusion of workers' rights in the Constitution means that these rights are considered to be guaranteed by the Mexican government, and that the government is under an obligation to enforce them: it has a duty to intervene when it has knowledge of the nonobservance of these guarantees, even if no complaint has been made.⁸¹

The provisions of Article 123 are implemented by federal law. Article 73 (X) contemplates that labor legislation is essentially federal legislation. Thus, the primary labor laws are under the authority of the Federal Congress.⁸² Article

80. *Id.* at 33-34.

81. To initiate a labor proceeding in Mexico, just as in the U.S., a complaint must be filed by a party. It is not possible to initiate a labor proceeding *de officio*. However, the labor authorities have the authority to monitor and impose sanctions upon those individuals who violate the labor laws. Moreover, it is considered a crime for an employer to fail to pay the minimum wage.

82. One exception is those laws that govern the relations of workers in the service of individual states and municipalities and those municipal and state governments. The labor legislation governing those employees is enacted by the state governments in accordance with Mexican Constitution Article 115 (IX). CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS art. 115 (IX) [hereinafter MEXICAN CONST.].

123 (A), which governs private sector workers, is regulated by the Federal Labor Law (*Ley Federal de Trabajo, FLL*), while Article 123 (B), which governs public sector employment, is implemented by either federal or state law, depending upon the circumstances.

The FLL, enacted in 1931 and restructured in 1970, was the first law which sought to implement those rights established by Article 123 of the Constitution. It is comprised of 1010 articles that regulate minimum working conditions, including minimum wages, the duties of employers and employees, the right to organize, the right to strike and bargain collectively, norms governing work-related injury and illness, rules for the resolution of labor disputes, substantive and procedural norms pertaining to special employment such as domestic service, maritime service, agricultural work, and special protections for female employees and minors.

The FLL is protective of the rights of the Mexican worker, and treats employers and employees differently, granting more rights to the latter. For example, the employer is obligated to contract with an employee for an indefinite period of time if the employment is permanent in nature. Employers who fail to do so may be required to pay the employee compensation. In contrast, the employee may terminate the employment relationship at any time.⁸³

In labor proceedings, the worker does not have the burden of proving unjust dismissal, nor of proving matters relating to work conditions. The employer, on the other hand, must prove that the employee was not dismissed and that he in fact paid the employee certain benefits such as overtime, seniority bonuses (*antigüedad*), vacation time, paid holidays, and other benefits that may be in dispute.⁸⁴ Thus, any doubts that arise in the proceedings must be resolved by applying the criteria most favorable to the worker, and the employer has the burden of proof.⁸⁵

Article 123 (B) was enacted in 1960 and is implemented by the Federal Law of Workers in the Service of the State (*Ley Federal Para Los Trabajadores al Servicio del Estado, LFTSE*), which applies to workers employed by the federal government.⁸⁶ The LFTSE contains protections similar to those of the FLL, except that under the former, workers are entitled to seniority bonuses (*prima de antigüedad*) and profit sharing, but it provides greater benefits than the FLL with regard to vacation time and rest days.⁸⁷ Under the LFTSE, in contrast to the FLL, federal public-sector workers carry the burden of proving all of the allegations of the claim in the event of litigation. The LFTSE also requires the public sector employee to provide his employer with proof of the claim prior to

83. Mexican Federal Labor Law arts. 35-40, 48 (Apr. 1, 1970) [hereinafter FLL].

84. FLL art. 784.

85. FLL art. 18.

86. Federal Law of Workers in the Service of the State (Dec. 28, 1963) [hereinafter LFTSE].

87. MEXICAN CONST. art. 123(B)(III); LFTSE, *supra* note 86, art. 30.

litigation.⁸⁸ The LFTSE also limits the federal public sector employee's right to strike to situations involving systematic and general violations;⁸⁹ permits only one union per workplace;⁹⁰ and forbids collective bargaining.⁹¹

States and municipalities are governed by state law.⁹² Depending upon the state, these laws may be patterned after the FLL or the LFTSE and apply only to state and municipal public sector workers.

The Social Security Law (*Ley de Seguro Social, LSS*), recently amended in December 1995, also provides workers with protections.⁹³ The LSS regulates the payment of medical and hospital benefits to workers, benefits for work-related injuries and illnesses, old age and disability benefits, maternity benefits, and survivors' benefits, among others. The National Housing Fund Law (*Ley del Instituto del Fondo Nacional de la Vivienda para los Trabajadores, INFONAVIT*)⁹⁴ regulates benefits relative to housing, including low-cost loans to help workers to purchase or repair housing. Finally, the Retirement System Law (*Sistema de Ahorro para el Retiro, SAR*) regulates retirement benefits available to employees in the event of unemployment, old age, or disability.⁹⁵

III. INDIVIDUAL LABOR RIGHTS

A. The U.S.

The NLRA is only one of several federal legislative schemes governing labor relations. The Fair Labor Standards Act of 1938 (FLSA) applies to employees engaged in commerce or in the production of goods for commerce.⁹⁶ As with other federal labor legislation enacted by Congress, the FLSA is predicated upon the Commerce Clause of the U.S. Constitution, which permits Congress to regulate interstate commerce.⁹⁷ The FLSA was intended to establish minimum employment standards to promote the well-being of covered workers.⁹⁸ It establishes a minimum wage and sets a ceiling on the number of hours in the work week.⁹⁹ Employees of government contractors are protected by the standards

88. LFTSE, *supra* note 86, art. 29.

89. MEXICAN CONST. art. 123(B)(X); LFTSE, *supra* note 86, art. 94.

90. LFTSE, *supra* note 86, art. 68.

91. MEXICAN CONST. art. 123(B)(IV); LFTSE, *supra* note 86, art. 91.

92. MEXICAN CONST. art. 115(VIII).

93. The Social Security Law (Dec. 21, 1995) (amended Nov. 21, 1996) [hereinafter LSS].

94. The National Housing Fund Law (Apr. 24, 1972).

95. The Retirement System Law (Feb. 22, 1992).

96. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1996) [hereinafter FLSA].

97. *See Wirtz v. Mayer Const. Co.*, 291 F. Supp. 514 (D.C.N.J. 1968).

98. FLSA, 29 U.S.C. § 202.

99. *Id.*

set by other federal legislation, including the Walsh-Healy Act¹⁰⁰ and the Davis-Bacon Act.¹⁰¹

In the U.S., the FLSA establishes that the maximum length of the work day for non-exempt workers is forty hours per week. An employee who works more than forty hours per week is entitled to receive overtime pay at a rate of one-and-a-half times his or her normal salary.¹⁰² Mexican workers receive a greater amount, proportionately, in the event of overtime. The FLSA creates a number of exemptions with regard to the duration of the work day and the employer's obligation to pay for overtime work.¹⁰³

The FLSA also establishes the employer's obligation to pay the minimum salary to those employees who work in commerce or in the production of goods for commerce.¹⁰⁴ An employer who fails to pay the minimum wage or overtime where required by the FLSA may be fined up to \$10,000 and/or imprisoned for a maximum of six months.¹⁰⁵

The FLSA does not provide benefits such as those found in the FLL with regard to seniority bonuses, vacations, Christmas bonuses, days of rest, profit sharing, and housing subsidies. The determination of additional terms and conditions of employment is left up to direct negotiations between the employer and employee or between the union and the employer.

The Taft-Hartley Amendments of 1947 subsequently imposed duties on labor as well as management. The Amendments also split the NLRB into separate prosecutorial and adjudicatory entities and added a number of defined "unfair labor practices" to the NLRA.¹⁰⁶

Other significant U.S. federal legislation in the area of labor includes the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001(b) (1976), the first comprehensive pension law enacted by Congress. ERISA does not require employers to establish a pension plan, but requires disclosure and reporting of financial information by establishing standards of conduct for fiduciaries of such a plan.¹⁰⁷ The Occupational Safety and Health Act of 1970 (OSHA) was enacted to ensure safe and healthful working conditions.¹⁰⁸ OSHA authorizes the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses engaged in interstate commerce and established an adjudicatory body, the Occupational Safety and Health Review Commission.¹⁰⁹

100. 40 U.S.C. § 276(a) (1988).

101. 41 U.S.C. §§ 35-45 (1994).

102. FLSA, 29 U.S.C. § 202.

103. *Id.*

104. FLSA, 29 U.S.C. § 213.

105. *Id.*

106. GOULD, *supra* note 79.

107. *Id.*

108. Occupational Safety and Health Act of 1970 (OHSA), 29 U.S.C. §§ 651-678 (1994).

109. GOULD, *supra* note 79.

Perhaps the most litigated area of labor law is discrimination in the workplace. Title VII of the Civil Rights Act of 1964 prohibits discrimination in the terms and conditions of employment.¹¹⁰ Employers subject to the provisions of Title VII may not discriminate on the basis of race, color, sex, national origin, or religion. Discrimination on the basis of pregnancy is prohibited by the Pregnancy Discrimination Act in the Americans with Disabilities Act (ADA).¹¹¹ The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employers from discriminating against workers on the basis of age.¹¹² Employees between the ages of forty and seventy fall within the class of persons protected by the ADEA. Finally, the Americans with Disabilities Act of 1990 precludes employers from discriminating against employees with an existing or prior physical or mental disability.¹¹³

In addition to existing federal legislation, state legislatures have enacted their own labor laws which may afford more extensive protections than corresponding federal legislation, but not less. State laws play a significant role in regulating compensation for work-related illnesses and injuries and unemployment compensation benefits.

B. Mexico

Mexican and U.S. labor statutes differ significantly in the area of individual rights. The FLL sets forth the minimum rights to which Mexican workers are entitled.¹¹⁴ Employees may enter into individual agreements with the employer or negotiate a collective bargaining agreement.

The FLL provides for a maximum eight-hour work day.¹¹⁵ Employers are required to pay workers double pay for overtime and triple pay if the overtime exceeds nine hours per week.¹¹⁶ Employers are also required to provide at least

110. Civil Rights Act of 1964, 42 U.S.C. § 2000 (1994).

111. American with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994) [hereinafter ADA].

112. Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994).

113. ADA, 42 U.S.C. §2000.

114. This law is applicable to all workers in the Mexican territory with the exception of those workers who are employed in the public sector, either for the federal, state, or municipal governments. The laws pertaining to public sector workers provide for similar working standards, with the exception of a share in the profits of the employer and the seniority bonus, which is not granted in governmental enterprises. Vacations for government employees consist of 20 days per year, rest days are 2 days per week, and the Christmas bonus (*aguinaldo*) is 60 days. With regard to social security and the housing fund, different agencies administer these.

115. FLL, *supra* note 83, art. 61.

116. *Id.* arts. 61, 67 & 68.

one paid rest day per week.¹¹⁷ An employee who must work on a Sunday is entitled to receive an extra twenty-five percent of his or her salary as a Sunday bonus (*prima dominical*).¹¹⁸

Employees are also entitled to triple pay if required to work on one of the obligatory paid holidays:¹¹⁹ January 1, February 5, March 21, May 1, September 16, November 20, and December 25.¹²⁰

Employers must also provide employees with paid vacation time, at least six days for the first year of employment and two additional days each year until the employee reaches the fourth year of employment. After the fourth year of employment, vacation time increases by two days each five years, up to a maximum of twelve.¹²¹ In addition to receiving his or her regular pay during the vacation period, the worker is entitled to receive a vacation bonus of at least twenty-five percent.¹²² In addition, sometime during the first two weeks of December, workers are entitled to receive at least fifteen days of wages as a Christmas bonus (*aguinaldo*).¹²³

Mexican labor laws also provide for a minimum wage. The Mexican Constitution establishes that "the general minimum wage must be sufficient to satisfy the normal material, social and cultural needs of the head of a family and to provide for the mandatory education of his children."¹²⁴ Nonetheless, this protection is rarely afforded in practice. Although most employers respect the provisions regarding the official minimum salary set out by the Minimum Salary Commission, that salary is insufficient to cover the basic needs of the worker and his or her family. The minimum salary in Mexico is approximately one-twelfth of that in the U.S., since the current official minimum salary in Mexico amounts to approximately \$3.30 per day, depending upon the geographical location of the worker.¹²⁵ The decline of the minimum salary is one of the fundamental problems faced by the Mexican worker. As a practical matter, the inadequacy of the minimum salary negates many of the protections afforded by the more progressive provisions in the FLL.

The FLL contains a number of wage protection provisions.¹²⁶ In addition to receiving the minimum salary, the employee is entitled to receive preferential

117. *Id.* art. 69.

118. *Id.*

119. *Id.* arts. 69, 74 & 75.

120. *Id.* art. 74.

121. *Id.* art. 76.

122. *Id.* arts. 76 & 80.

123. *Id.* art. 80.

124. MEXICAN CONST. art. 123(A)(VI).

125. In Mexico, a government minimum salary commission sets the minimum salary at three different rates, depending upon whether the employment is located in one of three separate geographical zones, Zones A, B, or C.

126. FLL, *supra* note 83, arts. 82-116.

payment in the workplace.¹²⁷ Employers cannot attach, retain, or garnish workers' wages.¹²⁸

Workers are entitled to be considered as contract employees who have contracted for an indefinite period of time,¹²⁹ unless the nature of the employment is temporary or the employee is replacing another worker.¹³⁰ An employee who is unjustly dismissed may seek reinstatement or payment of three months' salary and proportionate benefits. An employee who is successful in a lawsuit for unjust dismissal may be entitled to back pay in addition to three months' salary.¹³¹

In addition to salary, employees are also entitled to receive an annual sum from the employer consisting of a percentage of the profits of the company for which the employee works.¹³² The employer is also required to pay the National Housing Fund (*Fondo Nacional de Vivienda, INFONAVIT*) an amount equal to five percent of the employee's salary.¹³³ The National Housing Fund assists workers in obtaining the necessary credit to acquire, construct, or repair worker housing.¹³⁴ Employees are also entitled to employer-provided training to permit them to develop their abilities and raise their standard of living.¹³⁵ Employees and their families are entitled to receive medical and hospital attention, medication, and rehabilitation,¹³⁶ and to have access to a system of pension payments for disability, old age, death, or work-related injuries through a social security system financed by worker, employer, and government contributions (Social Security Law, Article 12). When the employment relationship is terminated, any employee with more than fifteen years of seniority or any employee who has been dismissed is entitled to be paid twelve days' salary for each year of employment as a seniority bonus (*prima de antigüedad*).¹³⁷

IV. COLLECTIVE LABOR RIGHTS

Legislation in both the U.S. and Mexico recognizes the right of free association, the right to bargain collectively, and the right to strike. Nonetheless, significant differences exist in law and in practice.

127. *Id.* arts. 99 & 108.

128. *Id.* arts. 97-110.

129. *Id.* art. 35.

130. *Id.* arts. 36-37.

131. *Id.* arts. 35, 36, 37 & 48.

132. *Id.* arts. 117 & 119.

133. *Id.* art. 136.

134. *Id.* arts. 136 & 137.

135. *Id.* art. 153(a).

136. MEXICAN CONST. art. 123(A)(XXIX).

137. FLL, *supra* note 83, art. 162.

A. The U.S.

U.S. labor law has historically excluded large groups of workers from coverage.¹³⁸ The NLRA excludes various categories of workers, including public sector workers, agricultural workers, domestic servants, and supervisory employees.

The NLRA protects workers' collective rights, including the right to bargain collectively through a union representative. Workers covered by the NLRA are entitled to file a petition with the NLRB requesting that an election be called to ascertain whether a particular union represents the majority of workers within an appropriate unit of employees. Employers are required to negotiate a collective agreement in good faith where a union is certified as the majority union and is designated as the exclusive bargaining representative for that unit.

The NLRB determines whether a group of employees constitutes an "appropriate unit." Generally, an appropriate unit may be formed at any point between a local and an industry-wide level, as long as the group shares a "community of interest." For an election to be called, at least thirty percent of the employees in the appropriate unit must make a "showing of interest" by indicating their desire to hold an election for collective bargaining purposes.¹³⁹

If the requisite showing of interest is made, the relevant NLRB Regional Director will order that an election be held. Elections are generally held on the employer's premises and conducted by secret ballot. The union must win the election by a majority vote to compel the employer to enter into collective negotiations.¹⁴⁰ Elections are monitored by a representative of the NLRB, although all parties may have observers. Objections to the manner in which an election was conducted may be filed with the Regional Director within five days of the election. Where appropriate, the NLRB may set aside an election and hold another.¹⁴¹ Employers may also voluntarily recognize unions without certification where the union presents the employer with authorization cards indicating that a majority of the relevant workers have designated the union to represent them in collective negotiations.¹⁴²

U.S. labor legislation is intended to protect a worker's right to choose their representatives. The NLRA prohibits employers from discriminating against employees either because they are union members or because they decline to join a union. A union may, however, enter into a collective bargaining agreement that contains a "union security clause" requiring workers to pay dues and initiation fees to the majority union as a condition of employment. Closed shop agreements, which require a worker to join the majority union before being hired,

138. GOULD, *supra* note 79, at 40.

139. *Id.*

140. NLRA, 29 U.S.C. § 159.

141. *See generally* GOULD, *supra* note 79, at 48-50.

142. *Id.* at 89.

are prohibited by the NLRA. Many states have enacted state legislation prohibiting the negotiation of union security agreements as well.¹⁴³

The NLRA provides that neither employers nor unions may engage in unfair labor practices.¹⁴⁴ Employers are precluded from interfering with, restraining, or coercing employees in any way in connection with their right to engage in collective activities. Employers may not use union "spies," question workers about their union activities, threaten workers for being involved in a union, nor promise them benefits for leaving a union or joining an employer-backed union. Neither may employers assist in creating a labor union, assist a union in obtaining recognition, or give a union financial assistance. Employers are required to bargain with a majority union in good faith where the union has been designated by the majority of workers in an appropriate unit as their exclusive bargaining agent. Lastly, employers may not retaliate against an employee for cooperating with the NLRB or testifying in a NLRB hearing.

In turn, unions may not engage in certain unfair labor practices, including restraining and coercing employees. Unions may not cause an employer to discriminate against a worker because he or she is not a union member.

The NLRA also places a number of restrictions upon the right to strike.¹⁴⁵ For example, an emergency strike provision precludes strikes during emergencies affecting the health and safety of the nation.¹⁴⁶ The right to strike is not a fundamental constitutional right in the U.S., as it is in Mexico, and the U.S. Supreme Court has declined to infer such rights into the Constitution.¹⁴⁷ While striking is protected conduct and employers may not fire or discipline employees for engaging in a strike, employers may permanently replace striking workers. The NLRA also permits lock-outs by employers under certain circumstances.

B. Mexico

Since 1917, the Mexican Constitution has granted employers and employees the right to organize. Employers and employees may form unions or confederations of unions which represent their respective interests and objectives.¹⁴⁸ The FLL makes it unlawful to compel any person to form part of a union¹⁴⁹ defined as an association of workers or employers which is formed to improve and defend the interests of its members.¹⁵⁰ It establishes twenty workers

143. *Id.* at 51-56.

144. NLRA, 29 U.S.C. §§ 152, 158 & 160.

145. NLRA, 29 U.S.C. § 157.

146. NLRA, 29 U.S.C. §§ 157 & 158.

147. *See* United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971), *aff'd* 404 U.S. 802 (1971); GOULD, *supra* note 79, at 103.

148. MEXICAN CONST. art. 123(A)(XVI) & (B)(X).

149. FLL, *supra* note 83, art. 358.

150. *Id.* art. 356.

as the minimum required to form a workers' or an employer union.¹⁵¹ Trade unions may be formed as well as industry unions, company unions, and industry-wide unions.¹⁵²

Unions must be registered with the appropriate labor authority. For local unions, this would be the local Conciliation and Arbitration Board. Where the union is national or for some other reason falls under federal jurisdiction, it must register with the federal Department of Labor.¹⁵³ In order to register, unions must present the labor authorities with a copy of their bylaws, their constitution, and the minutes of their assembly, which is to designate their board and give a list of the names and addresses of the union members.¹⁵⁴

The FLL provides that union registration may be denied only if the union fails to comply with the above-referenced minimum membership requirements.¹⁵⁵ Despite those provisions, which are designed to guarantee free association in Mexico, practical obstacles have prevented these rights from being enforced. Independent unions are frequently denied registration by the labor authorities for arbitrary reasons. The tripartite labor boards are composed of one member each from government, labor, and management. The labor representative is typically a member of one of the "official" government-supported unions. The result is that many independent unions with differing political party affiliations are denied registration. Those unions denied registration lack authority to exercise the rights of collective bargaining and the right to strike.

Under the FLL, employers are required to enter into collective bargaining agreements at the request of a union.¹⁵⁶ Only a majority union enjoys the right to collective bargaining. Once the union is no longer the majority union, this right is lost.¹⁵⁷ A union may resort to calling a strike if the employer refuses to sign a collective agreement or an agreement relating to working conditions executed by a union or unions and its employers.¹⁵⁸

The collective bargaining agreement must be in writing, must be registered before the labor authorities,¹⁵⁹ and must contain the terms of the contract regarding salary, working conditions, and the names and addresses of the contracting parties.¹⁶⁰ The benefits established by the collective bargaining agreement are provided to all workers.¹⁶¹ These conditions may not be inferior to those provided by law or agreed upon in prior contracts between the employer and

151. *Id.* art. 364.

152. *Id.* arts. 356, 358, 359, 360 & 364.

153. *Id.* art. 365.

154. *Id.*

155. *Id.* arts. 365 & 366.

156. *Id.* art. 387.

157. *Id.* arts. 386-89.

158. *Id.* art. 386.

159. *Id.* art. 390.

160. *Id.* art. 391.

161. *Id.* art. 396.

the union.¹⁶² Closed shop agreements have preserved union control for corrupt union bosses. However, these clauses, although they contravene the right of free association, are nevertheless defended by some independent unions that believe that these clauses help unions maintain control over the bargaining process. Collective bargaining agreements must be reviewed at least every two years; they must be reviewed every year with regard to wages.¹⁶³

Closed shop agreements are permitted in Mexico, so it is possible to stipulate in such agreements that the employer must hire only those who are members of the majority union.¹⁶⁴ Such agreements may also require the employer to terminate all those employees who resign from the union or are expelled from it.¹⁶⁵

The right to collectively bargain in Mexico has been affected by the pervasive control exercised by the "official" unions. For example, certain types of collective agreements are referred to as "contracts of protection." These "contracts" are not mentioned in the FLL, but occur frequently in practice. Corrupt union bosses enter into these arrangements with management, often without consulting the workers they claim to represent. Once this "sweetheart deal" between the union and the employer is registered, an independent union seeking to collectively bargain with the employer must first have the registered contract set aside and establish that the new union in fact has majority status. This practice thus creates a significant obstacle to democracy in the collective bargaining process.

Collective bargaining has also been negatively affected by current political factors. Only in rare cases do unions utilize democratic procedures in the negotiation and review of collective bargaining agreements. Instead, the "official" unions often enter into "sweetheart" deals with management at the expense of workers. These problems notwithstanding, some collective agreements provide for benefits considerably superior to the minimum requirements established by the FLL, for instance, in the petroleum, electric, telephone, and automobile industries.

The right to strike in Mexico is protected under both the Mexican Constitution and the FLL.¹⁶⁶ Strikes may be called to execute collective bargaining agreements, to review such agreements, or to require their observance. Strikes may also be called in support of other strikes.¹⁶⁷ The majority of workers must agree to suspend work for purposes of a strike.¹⁶⁸ Labor authorities must also be notified of the purpose and the motivation behind the

162. *Id.* art. 394.

163. *Id.* arts. 390-99.

164. *Id.* art. 395.

165. *Id.*

166. MEXICAN CONST. art. 123 (XVII).

167. FLL, *supra* note 83, art. 450.

168. *Id.* art. 451.

strike before it is held.¹⁶⁹ The petition for a strike must be filed at least six days before the strike (ten days if the strike involves public services workers).¹⁷⁰ The strike must comply with objectives outlined in the FLL.¹⁷¹ Before a strike is carried out, another negotiation proceeding must be held before the labor board.¹⁷²

The labor board must initiate a pre-strike negotiation/conciliation process.¹⁷³ If a strike is held, the same board must decide whether the strike is legal.¹⁷⁴ In the event of a strike, the appropriate labor authorities must determine the number of workers who must continue to work¹⁷⁵ and request assistance from the police force.¹⁷⁶ The law regarding the right to strike requires only that the required objectives and certain requirements be met. In practice, however, workers' ability to exercise their right to strike is limited due to union control and the tendency of labor tribunals in recent years to find most strikes to be illegal. The practice of classifying a strike as "illicit" has stopped most strike movements in recent years. In addition, recent strikes in universities and small enterprises have failed to achieve proposed goals. To the contrary, these strikes have served as a pretext for the employer to collectively terminate the employer-employee relationship. One example of this recent trend can be seen in the case of recent mine, airline, and automobile strikes in Mexico.

The Mexican Constitution establishes that a strike may only be called when labor rights are violated in a systematic and general manner.¹⁷⁷ Public sector workers' freedom of association is restricted by the LFTSE, which permits only one union per government workplace;¹⁷⁸ though the Mexican Supreme Court recently struck down this type of restriction in certain state laws as unconstitutional.

The LFTSE does not give public sector workers the right to strike or bargain collectively.¹⁷⁹ With regard to government workers' salaries, the Constitution merely provides that they be set forth in the agency's budget, so that government workers' salaries end up being fixed by the government employer unilaterally. For federal workers, public sector employee unions are therefore denied the ability to collectively bargain with regard to salaries. The collective rights of workers employed by states or municipalities are regulated by either the FLL or state law, depending upon state law.

169. *Id.* art. 920(II).

170. *Id.* art. 920(III).

171. *Id.* arts. 451, 920 & 921.

172. *Id.* art. 926.

173. *Id.* arts. 926-27.

174. *Id.* arts. 920-34.

175. *Id.* art. 935.

176. *Id.* arts. 935 & 936.

177. MEXICAN CONST. art. 123(B)(X); LFTSE, *supra* note 86, art. 94.

178. LFTSE, *supra* note 86, art. 68.

179. *Id.* art. 91.

V. CONCLUSION

The NAALC does not introduce new labor legislation in the signatory countries, nor does it seek to equalize or harmonize pay scales. In addition, the labor side agreement fails to take into account the commercial impact of the differences in laws, benefits, and salaries among the NAFTA countries. The labor side agreement thus becomes little more than a statement of intentions which calls for each country to enforce its own laws.

Submissions processed to date under the side agreement indicate that the enforcement provisions of the NAALC remain inadequate to resolve labor disputes effectively and rapidly. The institutions created by the NAALC have no power to sanction in most cases. The proceedings available under the side agreement primarily permit the NAOs to invoke the threat of public censure and issue a moral, rather than a legal, judgment.

The implementation of the NAFTA and the side agreements to date reveals their deficiencies. Amendment and expansion of the NAALC is necessary in order to increase agencies' effectiveness in achieving the stated goals of enforcing each country's labor laws.

Different labor cultures have evolved in the U.S. and Mexico. The NAALC does not call for the NAFTA countries to adhere to a common international standard but allows differences in their domestic labor legislation to remain. An understanding of the differences between U.S. and Mexican labor laws is thus necessary to promote cooperation between the NAFTA countries in the area of labor and is essential to determining whether countries are in fact complying with their NAALC obligations.

The labor laws of the U.S. and Mexico, while they present significant historical and cultural differences, also contain similarities. This common ground points the way to the development of common minimum employment standards among the NAFTA countries.

