INTEGRATION OF THE MAQUILADORA PROGRAM AND NAFTA: A PROPOSAL TO PROTECT MEXICO'S ECONOMY

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I. INTRODUCTION

With its implications on manufacturing, the proposed North American Free Trade Agreement (NAFTA) is subject to wide debate. From one perspective, there is Ross Perot charging that the agreement will cause "a giant sucking sound of jobs being pulled out of our country."[1] On the other hand, U.S. manufacturers favor expanding production to Mexico under NAFTA.[2] They argue that burdensome taxes, unreasonable workers' compensation benefits and new labor laws have made U.S. production unprofitable.[3]

What these arguments ignore is the negative impact NAFTA will have on Mexican manufacturers. For the last quarter century, the maquiladora program has enabled U.S. manufacturers to assemble their goods in Mexico under a preferential tariff schedule. However, the maquiladora program has protected Mexican manufacturers from competition by requiring U.S. products assembled in the maquila to be re-exported to the United States.[4] NAFTA provides for no such protection.[5]

This Comment defines and explains the Mexican maquiladora and its role in North American business. In light of NAFTA, this Comment proposes that Mexico retain its current restriction on the sale of maquiladora products in the Mexican market.[6] In addition, it proposes an amendment to the United States Tariff Schedule applicable to most maquiladora products.[7] The proposed expansion will allow the maquiladora to engage in the "manufacture" of goods as opposed to mere

1. Charles Haddad, *TV Factory Shifts Jobs to Mexico — Huntsville Losing Goldstar to International Competitor*, Atlanta Const., Oct. 22, 1992, at G1.

2. Electronics manufacturer Goldstar Co. is one of many manufacturers to close a U.S. plant and move to Mexico. Goldstar Co.'s Huntsville, Alabama plant employed 250 workers before the move. However, the relocation to Mexico cut costs and has permitted Goldstar to continue selling its televisions inexpensively to U.S. consumers. *Id.*

3. Liz Lippincott, *Los Angeles Production: Eyeing the Mexican Temptation; Made in the U.S.A.*, 164 Capital Cities Media Inc. No. 94 at p. 6.

4. *See infra* text accompanying notes 85-90.

5. *See infra* part IV.

6. *See infra* text accompanying notes 85-90.

7. *See infra* part V.

"assembly" which is the current mandate of the applicable tariff schedule.[8]

This liberalization of the tariff schedule is an additional measure to be utilized in conjunction with NAFTA. Although NAFTA has some "phase-in" provisions to protect the Mexican economy,[9] none will protect Mexican manufacturing concerns from direct competition with U.S. products manufactured in Mexican maquiladoras. This Comment examines the competitive dangers associated with NAFTA[10] and presents a workable alternative that will not only protect Mexican industry but will also provide U.S. manufacturers with an incentive to expand production to Mexico.[11]

II. WHAT IS A MAQUILDORA?

A. Definition and History of the Maquiladora

The Spanish term "maquiladora" derives from the verb "maquilar."[12] "Maquilar" means to measure and take dues for grinding corn; to clip, retrench, cut off; to perform services at a lower cost than is otherwise available.[13] In modern usage, a maquiladora is an "assembly operation involved in export-manufacturing, processing, or secondary assemblage."[14] In this context, a U.S. parent company typically exports raw materials or manufactured parts to a Mexican maquiladora that assembles the materials and parts into a finished product. The parent company then re-imports the finished product to the United States under a preferential tariff schedule for final sale or further processing if necessary.[15] U.S. Customs levies a duty only on the value added to the

8. *See infra* text accompanying notes 98-110.

9 . *See infra* part IV.

10. *Id.*

11. *See infra* text accompanying notes 154-55.

12. Fernando Cervantes, *Matters of the Maquiladora—Maximizing Foreign Corporate Profits or a Social and Economic Jump-Start?*, 19 Sw. U. L. Rev. 1187 (1990).

13. Spanish & English Dictionary 375 (Edwin B. Williams ed., 1962). *See also* Cervantes, *supra* note 12, at 1187.

14. D. Gerardo Peña, Maquiladoras: A Select Annotated Bibliography and Critical Commentary on the United States-Mexico Border Industry Program, n.1 (Center for the Study of Human Resources Bibliography Series, Publication No. 7-81, 1981). "Secondary assemblage" refers to the assembly of manufactured parts into a finished product. Alternatively, "primary assembly" refers to the production and manufacture of parts that do not yet constitute a finished product.

15. *See infra* part III.B.

products while in Mexico.[16]

Maquiladoras are also referred to as "maquilas," "in-bond processing companies,"[17] or "off-shore assembly plants."[18] These terms are interchangeable. "In-bond processing" is the method by which maquiladoras operate in Mexico. Materials and equipment used in the maquiladora's operation are exported to Mexico under a bond in lieu of customs duties.[19] Any equipment and machinery needed for processing may remain in Mexico duty-free as long as the maquiladora is in operation.[20] Raw materials or manufactured parts, however, may remain in Mexico duty-free for only six months from the date of entry.[21]

The maquiladora program began in 1966 as the Mexican-United States Border Industrialization Program as a replacement for the "bracero" program.[22] Initially, the bracero program allowed Mexican farm laborers to work in the United States on a daily basis during World War II.[23] In 1964, however, U.S. farm unions forced the termination of the bracero program, and 185,000 Mexican laborers lost their jobs.[24] Consequently, the Mexican and United States governments developed maquiladoras to employ those laborers who were no longer permitted to work in the United States.[25]

The maquiladora program started with twelve plants in northern Mexico.[26] By 1991, maquila plants numbered over 1800.[27] Maquiladoras currently process a wide array of goods including, but not limited to, electronic components, surgical supplies, leather goods, metal

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16. *See infra* part III.B.

17. Doing Business in Mexico § 33.01.

18. Off-shore processing by U.S. companies is not limited to Mexico. Asian countries are also popular destinations for secondary assembly. "Maquiladora" is simply the term attached to the Mexican version of the off-shore assembly plant.

19. Diario Oficial de la Federación, Dec. 31, 1981. *See also* Zoltan M. Mihaly, *New Business Opportunities in Mexico: Maquiladora Operations*, 12 Los Angeles Law. 18, 20 (May, 1989).

20. Diario Oficial de la Federación, Aug. 15, 1983. *See also* John E. Tarbox, Comment, *An Investors' Introduction to Mexico's Maquiladora Program*, 22 Tex. Int'l L.J. 109, 123 (1987).

21. *Id.*

22. Donald W. Baerresen, The Border Industrialization Program of Mexico 3 (1971).

23. *Id.* at 2.

24. *Id.* at 3.

25. *Id.*

26. Khosrow Fatemi, *Introduction, in* The Maquiladora Industry: Economic Solution or Problem? 3 (Khosrow Fatemi ed., 1990).

27. Cheryl Schechter & David Brill, Jr., *Maquiladoras: Will the Program Continue?*, 23 St. Mary's L.J. 697, 699 (1992).

furniture, and bicycles.[28] This expansion demonstrates the success of the program. Both the United States and Mexico have enjoyed its mutual benefits, and both governments have continued to encourage these cooperative ventures.[29]

In 1985, the maquiladora industry surpassed tourism to become Mexico's second largest industry behind Petroleos Mexicanos (Pemex).[30] The popularity of the maquiladora program has caused explosive growth along Mexico's northern border. In Nogales, Sonora, the population has increased from 50,000 to 250,000[31] in the twenty years since the United States and Mexico initiated the maquiladora program. Similarly, Agua Prieta, Sonora's population has grown by 67,000 in the last ten years.[32] Currently, Nogales has seventy processing plants and Agua Prieta has twenty-eight.[33]

B. U.S. Perspective

U.S. companies are attracted to the maquiladora due to Mexico's cheap labor. In Nogales, Sonora, an entry level maquila worker makes approximately $40 a week,[34] an amount far below American minimum

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28. Matilde K. Stephenson, *Mexico's Maquiladora Program: Challenges and Prospects*, 22 St. Mary's L.J. 589, 590 (1991). Except for a slight dip due to the 1970's recession, the maquiladora has had consistent and significant growth. Edward J. Williams, The Maquiladora Program: Mexican and U.S. Perspective 65 (1987) (unpublished research report prepared by The Latin American Area Center, University of Arizona) (on file with Arizona Journal of International and Comparative Law).

29. *See generally* Edward Y. George, *What Does the Future Hold for the Maquiladora Industry?*, *in* The Maquiladora Industry: Economic Solution or Problem? 220 (Khosrow Fatemi ed., 1990).

30. William R. Leighton & T. Richard Sealy III, *Federal Income Tax Issues in the Organization, Financing, and Operation of Maquiladoras*, 23 St. Mary's L.J. 721 (1992)

31. Ignacio Ibarra, *Maquiladora Impact*, Ariz. Daily Star, Sept. 16, 1991, 1B.

32. *Id.*

33. *Id.* Nogales, Agua Prieta, and Naco, Sonora are the most common destinations for U.S. companies located in Arizona. Maquiladoras, however, are not limited to towns along the Arizona-Mexican border. Matamoros, Nuevo Laredo, and Ciudad de Juárez, located in the respective Mexican states of Tamaulipas, Nuevo León, and Chihuahua are common locations for maquiladoras associated with U.S. companies in Texas. Likewise, Tijuana is a normal processing site for maquiladoras with connections in San Diego, California.

34. *Id.*

wage laws.[35] Low-cost Mexican labor is even more attractive because of Mexico's geographic proximity to the United States. Compared to similar assembly plants in Asia, Mexico's plants offer lower transportation, managerial, and inventory costs.[36]

Generally, a U.S. company using a maquiladora will send one of its own managers to oversee the operation. By locating its processing plant along the border, an American manager enjoys the luxury of living in the United States while still working in an off-shore assembly plant.[37] Thus, few maquilas are located beyond the Mexican border states.[38] Although maquiladoras may be located almost anywhere in Mexico, approximately ninety percent are on the United States-Mexico border.[39]

There are, however, some problems for U.S. companies that use maquiladoras. A U.S. company seeking to start a maquiladora deep in Mexico may encounter difficulties finding an American manager willing to relocate to the proposed assembly site. One solution is to hire Mexican management, but it may be unfamiliar with the American company's culture or standards of production. In addition, hiring new management for the maquiladora may threaten internal controls because the American company can not easily oversee the Mexican operation.[40]

A better alternative is to hire a third company to oversee the implementation of the maquiladora. Such companies, known as "shelter operations," specialize in managing Mexican operations.[41] Services provided include administrative tasks such as obtaining governmental authorization, work permits, hiring and overseeing labor, and finding the appropriate Mexican plant sites for the American company.[42] The American company generally provides the technology, technical assistance, raw materials and machinery to the shelter.[43] American

35. Currently, minimum wage in the United States is $4.25 per hour ($170 per week for a 40 hour work schedule). Fair Labor Standards Act, 29 U.S.C. § 206 (1992).

36. Williams, *supra* note 28, at 63. Opalin, *In-Bond Program Links U.S. and Mexico*, Wall St. J., Dec. 30, 1985, at 14, col. 7.

37. *See supra* text accompanying note 18.

38. Tarbox, *supra* note 20, at 119.

39. *Id.*

40. Interview with Charles V. Harrington, Member, Arizona-Mexico Commission, in Tucson, Ariz. (Sept. 15, 1991).

41. Jeff Herr, *U.S. Firms Find Border 'Shelter'*, Ariz. Daily Star, Mar. 2, 1992, at D8.

42 . Some shelter operations maintain large office parks in Mexico which are available to U.S. companies seeking to start a maquiladora. For example, Maquilas Teta Kawi, a Mexican shelter, operates a 120-acre industrial park in Empalme, Sonora, and a 112,000 square-foot building in Guaymas. *Id. See also*, Schechter & Brill, *supra* note 27, at 705.

43. *Id.*

companies using shelter operations typically depend on such services for an average of seven years before the companies can run their Mexican operations independently.[44]

Operating a maquiladora, despite the substantial cost savings, is not without further disadvantages. In addition to the language barrier, maquiladora operations are vulnerable to potential political change.[45] In recent years, left-wing candidates have shown surprising strength in Mexican elections demonstrating a shift in power from the moderate Partido Revolucionario Intitucional (PRI) which has controlled Mexican politics for approximately three-quarters of a century.[46] This may signify that the PRI is losing support among the middle and professional class voters.[47] Without the stability of the PRI, the present policy of economic deregulation would be the first victim of a serious political upheaval.[48] Although PRI's Mexican government has promoted the maquiladora industry through various tax and duty incentives,[49] a new governmental policy could greatly affect the maquiladora.

Increased Mexican labor demands must also be considered by American companies. Although most maquilas are not currently unionized,[50] Mexican unions are gaining support in an attempt to raise wages and combat unhealthy working conditions.[51] For example, labor unionization in Matamoros, Tamaulipas has resulted in wages that are forty-nine percent higher than in non-unionized Ciudad de Juárez, Chihuahua.[52] Further, as the maquiladora industry expands, some argue that experienced maquila labor may become in relatively short supply.[53]

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44. Herr, *supra* note 41.

45. Stephenson, *supra* note 28, at 591.

46. *Id.* at 592-93.

47 . Peter F. Drucker, *Mexico's Ugly Duckling—The Maquiladora*, Wall St. J., Oct. 4, 1990, at A22, *as cited in* Stephenson, *supra* note 28, at 593.

48. *Id.*

49. *See infra* part III.A.

50. Susanna Peters, Note, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 Comp. Lab. L.J. 226, 240 (1990).

51. According to human rights groups, child labor laws are continuously disregarded in the maquiladora. In addition, the maquiladora has long been accused of giving worker safety low priority. *See, e.g.*, Thomas Gibbons, *Tough Trade-offs*, 19 Human Rights 26 (1992). Similarly, for a discussion of unionization in the Maquiladora industry, *see* Peters, *supra* note 50, at 239.

52. Tarbox, *supra* note 20, at 135.

53. Williams, *supra* note 28, at 72. The strength of this argument is suspect due to the vast increases in population experienced by Mexican border towns. *See supra* text accompanying notes 31-33. In addition, with 75% - 80% of the maquiladora work force being young women, it seems that the maquiladora is using a previously untapped source of labor. However, employee turnover has proved to be high among a labor force comprised of

Consequently, workers will be drawn to the maquiladora offering the highest wage and benefit package.

On the northern side of the border, U.S. labor has vehemently argued that maquiladoras drain the United States of valuable jobs. Since 1967, the AFL-CIO has continually urged Congress to repeal tariff provisions that favor maquiladoras.[54] Big labor contends that firms with assembly operations employing low-cost foreign labor will expand uncontrollably until the American firm functions solely as a conduit to the U.S. consumer market.[55] Labor's concern is that the American firms maintain their U.S. presence solely to market the products of its Mexican subsidiary. As a result, U.S. labor unions believe that when American firms move any production away from the United States, American jobs are lost, thereby increasing unemployment rates.[56]

Aside from exporting American jobs, the AFL-CIO argues that the maquiladora program bolsters U.S. corporate profits without passing on reduced tariff benefits to the American consumer.[57] Thus, the AFL-CIO concludes that the maquiladora program should be completely eliminated because it places companies producing goods entirely within the United States at a competitive disadvantage and increases unemployment among low-skilled and unskilled U.S. workers without passing any savings in production costs to the consumer. However, two commentators note that U.S. corporations have benefitted from the maquilas by lowering their total cost of manufacture, which in turn, broadens markets for U.S. products by lowering the costs of goods for consumers.[58] U.S.

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women of childbearing age. For example a maquila in Nogales, Sonora may experience as much as 35% turnover monthly. Turner, *Mexico's In-Bond Industry Continues its Dynamic Growth*, Bus. Am., Nov. 26, 1984 *as cited in* Abelardo L. Valdez, *Expanding the Concept of Coproduction Beyond the Maquiladora: Toward a More Effective Partnership between the United States and Mexico, and the Caribbean Basin Countries*, 22 Int'l Law. 393, 400 n.41 (1988).

54. Comment, *The Approaching over Item 807.00 of th eTariff Schedule* 4 Law and Pol'y Int'l Bus. 628, 632 (1972). *See infra* Section III(B) for a discussion of the U.S. tariff schedules applicable to maquiladoras.

55. Comment, *supra* note 54, at 633. Usually, a maquiladora enterprise is a Mexican company which is a subsidiary of a larger U.S. concern that supplies the Mexican operation with U.S.-fabricated components. There are, however, also maquiladoras owned and controlled by Mexican nationals who purchase U.S. raw materials, assemble them, and send them back to the United States using U.S. tariff schedules that give preference to off-shore assembly operations. *See also* Mihaly, *supra* note 19, at 20.

56. Stephenson, *supra* note 28, at 589.

57. Comment, *infra* note 77, at 634.

58. Rodolfo Villalobos & Bruce B. Barshop, *Social Infrastructure Needs of the Maquiladora Industry: A Proposal for United States Corporate Contributions*, 22 St. Mary's L.J. 701 (1991).

corporations using maquiladoras surely enjoy higher profit margins due to lower production costs. It is also likely that these higher profits are partially due to increased sales volumes created by lower consumer prices.[59]

Admittedly, the use of foreign assembly facilities does tend, at least in the short run, to substitute foreign labor for American labor.[60] However, in the long term, such use of foreign labor has been shown to actually increase U.S. employment. Also, using foreign labor enables the American concern to remain globally competitive. In one case,[61] an American radio manufacturer relocated an assembly facility from the United States to Taiwan.[62] Although the move resulted in an initial loss of jobs, the relocation enabled the domestic producer to remain competitive with Japanese imports.[63] Within five years the transfer had actually increased U.S. employment in management and parts production despite an initial loss of jobs due to the relocation.[64] The alternative to opening a foreign assembly plant in this case would have been the producer's departure from the market.[65] Thus a temporary loss of U.S. jobs is a better alternative when compared to a complete shutdown of an American company.[66]

Another study concluded that tariff avoidance is not a major factor in the decision to transfer assembly operations abroad.[67] Rather, economies

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59. Duane Boyett, President of Offshore International, Inc., a shelter operation in Tucson, Ariz., justifies this problem by explaining that United States companies are struggling to compete internationally. However, Boyett states, "I've stood in front of the labor guys before and tried to explain this, but you cannot provide enough logic to someone who has just lost their [sic] job." *See* Herr, *supra* note 41.

60 . Comment, *infra* note 77, at 633.

61 . U.S. Department of Commerce, U.S. Multinational Enterprises and the U.S. Economy 19 (1972), *as cited in* Comment, *supra* note 54, at 636.

62. *Id.*

63. *Id.*

64. *Id.*

65. United States Representative Jim Kolbe (R-Ariz.) conducted a survey in 1987 of maquiladoras operated by U.S. companies. 82% of these companies reported they would have been forced to relocate in Asia or close their doors had the maquiladora program not been available as an alternative. Williams, *supra* note 28, at 36.

66. Comment, *supra* note 54, at 637. It has been estimated that for every three jobs created in the maquiladora industry, two jobs have been created in the United States. Stephenson, *supra* note 28, at 591. Although low-level manufacturing jobs are exported to the maquila, the existence of the maquila creates higher paying U.S. jobs associated with exporting raw materials.

67 . D.P. Clark, W.C. Sawyer, & R.L. Sprinkle, *Determinants of Industry Participation Under Offshore Assembly Provisions in the United States Tariff Code*, 23 J. World Trade (Law-Econ.-Pub. Pol'y) 123, 127.

of scale and the availability of low-cost labor are the most important factors influencing an industry's decision to conduct foreign operations.[68] The study finds that repealing a tariff preference given to maquiladoras and other off-shore assembly operations would have a small impact on the decision to locate assembly operations abroad.[69] In fact, eliminating the beneficial treatment given to off-shore operations might have a detrimental long-range impact on the U.S. economy.[70] Maquiladoras and other off-shore assembly operations allow U.S. manufacturers to remain competitive in the world market by using low cost labor.

C. Mexican Perspective

Mexico benefits from the maquiladora program in a number of ways. The program attracts foreign investment in Mexico, creating thousands of new jobs for Mexican workers.[71] Mexican exports have also increased, thereby enhancing the country's ability to pay its foreign debt.[72] In addition, the maquiladora program has given Mexico increased access to modern technology and an opportunity to learn business know how.[73] Similarly, maquilas have enabled workers to upgrade their skills[74] thus increasing Mexico's ability to create domestic manufacturing concerns.

On the other hand, the heavy concentration of maquilas in border towns has caused a myriad of urban social problems that accompany the benefits of the industry. Rural Mexicans have migrated to the border towns to obtain jobs in maquila plants. Thus, border towns have become increasingly overcrowded, making bad conditions even worse. Housing shortages have given rise to unplanned neighborhoods lacking basic sanitation and water services.[75]

The beneficial effect of maquiladoras on Mexican employment is also suspect. The majority of maquiladora employees are young women between the ages of seventeen and twenty-five, who traditionally have not been a part of the labor force and are not counted among the nation's

68. *Id.*
69. *Id.*
70. Comment, *supra* note 54, at 639.
71. Mihaly, *infra* note 19, at 18.
72. Tarbox, *supra* note 20, at 112.
73. Stephenson, *supra* note 28, at 589.
74. Peters, *supra* note 50, at 227.
75. Ibarra, *supra* note 31, at 4B. *See generally* Sharrell Ables, Note, *The Integrated Environmental Plan for the Mexican-U.S. Border: A Plan to Clean Up the Border or a Public Relations Ploy to Promote a Free Trade Agreement?*, 9 Ariz. J. Int'l & Comp. L. 487 (1992).

unemployed.[76] Males are typically not employed in the maquila plants.[77] Thus, the maquiladora program may have done nothing to decrease Mexican unemployment rates. One commentator has argued that women actually raise the rates of the unemployed because they are active job seekers after they leave employment with a maquila.[78] Therefore, the overall number of employed persons increases without any actual effect on the unemployment rate.

Mexico also fears that the maquiladora program will allow American industry to dominate its economy.[79] The maquiladora industry rarely utilizes Mexican investment capital, and U.S. manufacturers usually do not reinvest earnings in Mexican markets.[80] This means that only imported capital is used for the production of the company's goods, and none of the related profit remains in Mexico's economy. Similarly, a substantial portion of the maquiladora work force's income is spent in the United States.[81] With most maquiladoras located in border areas, employees will typically choose to shop in the United States where the variety and quality of goods and services is much greater.

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76. There is wide debate over why the maquiladora industry employs predominantly women. According to one side, maquilas draw women into their work force because they accept lower wages in addition to being more docile, politically unaware, and inexperienced. Others argue that U.S. manufacturers habitually employ females under the belief that women are more dexterous at assembly jobs. *See* Peters, *supra* note 50, at 244. In any event, the trend has been for fewer women to be employed in maquila operations although they still make up the majority of employees. This downward trend is attributed to the increased emphasis on heavy assembly activities (such as in the automobile industry) where "traditionally male" jobs are more prevalent. Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 Yale J. Int'l L. 173, 190 (1992).

77. Williams, *supra* note 28, at 71-74. *See also* Comment, *supra* note 54, at 631 n.25.

78. Williams, *supra* note 28, at 74.

79. Stephenson, *supra* note 28, at 591.

80. Maquila plants buy 97% of their production raw materials, supplies and components from the United States. Baker, *Mexico: A New Economic Era*, Bus. Wk., Nov. 12, 1990, at 108, *as cited in* Stephenson, *supra* note 28, at 591.

81. The Mexican economic crisis has diminished the relative amounts of Mexican spending in the United States, but even so, approximately 35% of wages earned on the Mexican side are spent across the border. Williams, *supra* note 28, at 69. Recently, however, the Mexican government imposed a limitation on the amount of U.S. goods Mexican nationals can bring into Mexico.

III. CURRENT MEXICAN AND U.S. REGULATION OF MAQUILA PRODUCTS

A. Mexican Regulation

Although Mexico does not impose a customs duty on materials, equipment, and machinery imported for use in the maquiladora industry,[82] these duty free importations are not without restrictions. By Mexican law, maquiladoras must re-export goods assembled in Mexico to the United States.[83] If the maquiladora does not comply, it must pay the originally applicable duty and fines.[84]

Although the maquiladora program is intended to attract foreign companies to assemble goods for export, the maquila may sell some goods domestically. Under current law, a maquila may request to sell in Mexico up to fifty percent of the value of the prior year's export sales.[85] However, the domestic sales may not replace the maquiladora's exports. Thus the fifty percent value must be in addition to the previous year's export sales and represent an increase in total production.[86] For example, a maquiladora which produces one hundred widgets in year one will have to produce one hundred and fifty in year two in order to sell fifty on the Mexican market.[87] In addition, once a maquila product is sold in Mexico, the maquila must pay the applicable import duties on the imported components.[88]

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82. Diario Oficial de la Federación, Dec. 31, 1981, *as cited in* Mihaly, *supra* note 19, at 20.

83. Diario Oficial de la Federación, Dec. 22, 1989.

84. Ley Aduanera; Diario Oficial de la Federación, Dec. 30, 1981. *See also* Mihaly, *supra* note 19, at 20.

85. Diario Oficial de la Federación, Art. 20, Dec. 2, 1989.

86. *Id.*

87. Diario Oficial de la Federación, Art. 22, Dec. 20, 1989, *as cited in* Schechter & Brill, *supra* note 42, at 708. The current decree also requires the maquila to maintain a balanced foreign currency account to qualify for selling goods in Mexico. A balanced foreign currency account exists if the maquila's expenditures in Mexico on labor, overhead and supplies exceeds the value of the imports used for production. *Id.*

This obligation requires the maquila that sells domestically to utilize high amounts of raw materials and supplies from Mexico. In reality, maquiladoras purchase the overwhelming majority of their raw materials and components from U.S. suppliers. *See* Leighton & Sealy, *supra* note 30, at 722; Charles T. Dumars, *Liberalization of Foreign Investment Policies in Mexico: Legal Changes Encouraging New Direct Foreign Investment*, 21 N.M. L. Rev. 251, 266 (1991).

88. Diario Oficial de la Federación Art. 22, Dec. 20, 1989, *as cited in*

Through these protectionist regulations, Mexico attempts to promote Mexican assembly operations and create jobs without jeopardizing Mexican efforts in manufacturing.[89] In addition, the ability to make domestic sales is tied to Mexico's policy of integrating the maquiladora with Mexican national industry.[90]

The maquiladora employing Mexican labor must also comply with the Federal Labor Law of Mexico.[91] Government-mandated employee bonuses and profit-sharing are the most notable Mexican benefits not found in the United States. Mexican employees must receive a twenty-five percent bonus for working on Sunday and are entitled to fifteen days pay as a Christmas bonus.[92] Employers must distribute a share of profits to most employees. Generally, Mexican companies distribute a total of eight percent of earnings before taxes.[93]

Employee dismissal and related severance pay requirements are also quite protective of labor in Mexico. After thirty days, no employee may be dismissed because of lack of qualifications.[94] After one year, employees are tenured and can only be "justifiably" dismissed for certain reasons.[95] If the dismissal is "unjustified," the employee receives severance pay of three months salary plus twenty additional days' salary for each year of service.[96] Although these benefits may appear to be generous by American standards, it should be remembered that the total cost of a minimum wage employee in Mexico, including all taxes and benefits, is less than $3.00 per hour.[97]

Schechter & Brill, *supra* note 42, at 708. If the goods contain a minimum percentage of Mexican materials, the imported components in the finished product are subject to duty at the tariff rate applicable to the parts and components rather than that applicable to the finished product. *Id.*

89. *See* George, *supra* note 29, at 220.

90. *Id.*

91. *See* Mexican Lab. L. (CCH)(1974), arts. 90-97.

92. Tarbox, *supra* note 20, at 134 n.204.

93. *Id.* Employers are also required to provide housing for workers, which is generally accomplished by contributing 5% of the employees income to a government trust fund for housing projects. *See* Herr, *infra* note 95.

94. Tarbox, *supra* note 20, at 134.

95. "Just cause" for terminating an employee can include insubordination, drunkenness or frequent absence. Having workers quit is sometimes the only way some companies can reduce their labor force. Because of these stiff regulations, most companies try to reassign their workers rather than resort to costly layoffs. *See* Jeff Herr, *Pay Doesn't Mean Mexico is Cheap*, Ariz. Daily Star, Mar. 2, 1992, at D9.

96. *Id.*

97. Interview with Peter M. Raptis, National Law Center for Inter-American Free Trade, in Tucson, Ariz. (Apr. 16, 1993). *See supra* text accompanying note 34.

B. United States Tariff Schedules

The U.S. Harmonized Tariff Schedule, Items 9802, governs the re-importation of maquila products into the United States.[98] Items 9802 were promulgated in accordance with the purposes of United States tariff legislation[99] set forth by the Tariff Act of 1930.[100] Article HTS 9802.00.00 (formerly item 800.00), the most important item for maquiladoras, states that "products of the United States when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad," shall enter duty-free. This item, in conjunction with Article HTS 9802.00.80 (formerly item 807.00), effectively limits maquiladoras to assembly and prohibits them from engaging in manufacturing in Mexico.[101] These regulations also indirectly accommodate the Mexican Government's policy of protecting its developing economy from American domination.[102] More importantly, at least from the viewpoint of U.S. labor, by limiting the range of improvements, the prohibition of maquiladora manufacturing prevents exportation of technology as well as American jobs.

Article HTS 9802.00.80 subjects maquiladora products to a duty on only the value added to the product while abroad, provided the product retains its physical identity. Specifically, it states:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting [are subject to a] duty upon the full value of the imported article, less the cost or value of such products of the United States.[103]

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98. Harmonized Tariff Schedules of the United States, 19 U.S.C. § 1202 (1988).

99. Comment, *supra* note 77, at 628.

100. "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes." Tariff Act of 1930, Preamble, ch. 497, 46 Stat. 590 (1930).

101. For a discussion of the legal distinction between "manufacturing" and "assembly", *See infra* text accompanying notes 111-21.

102. *See* Valdez, *supra* note 53, at 401.

103. Harmonized Tariff Schedule of the United States (19 U.S.C. § 1202) (1988).

A maquila that manufactures a pair of sunglasses demonstrates how the tariff schedule works. In this example, an American company manufactures all parts that make up a pair of sunglasses for $2.00 and sends the parts to the maquiladora. Mexican workers then assemble the various parts into a finished pair of sunglasses with the maquila incurring a total labor and overhead cost of $1.00. When the maquila subsequently exports the pair of sunglasses back to the United States, U.S. Customs levies the applicable duty on the full value of the sunglasses ($3.00) less the cost of the parts manufactured in the United States ($2.00). Thus, the sunglasses are dutiable to the extent of the value added which is $1.00 in this example.

Generally, maquiladora operations are most effective for the assembly of products where the Mexican labor input is approximately thirty percent of the production cost.[104] For example, products requiring simple assembly such as electronics, automotive parts, and toys are suitable for secondary assemblage. Alternatively, products which require higher and more skilled labor inputs such as foundry or other capital goods are less suited for co-production operations.[105] The Mexican government has, however, sought to increase capital goods production so as to improve the technical skills of its labor force.[106]

In addition, as labor intensity increases, the maquiladora runs the risk of engaging in what the U.S. courts consider manufacturing which will disqualify the product from preferable tariff treatment.[107] Because the American parts must retain their physical identity, the parts can not undergo any process of manufacture in foreign plants.[108] Maquiladoras are therefore limited to assembly procedures in order to qualify re-imported products for preferential tariff treatment.[109] Otherwise, a maquila product re-imported into the United States is subject to a tariff on the full value of said product instead of only the value added during the Mexican assembly

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104. *See* Valdez, *supra* note 53, at 401 n.42.

105. *Id.*

106. *Id.*

107. *See infra* text accompanying notes 111-21.

108. Harmonized Tariff Schedule of the United States (19 U.S.C §1202) (1988).

109. Assembly Operations — the assembly operations performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing or the use of fasteners, and may be preceded, accompanied, or followed by operations incidental to the assembly. . . . The mixing or combining of liquids, gases, chemicals, food ingredients, and amorphous solids with each other or with solid components is not regarded as an assembly. 19 C.F.R. § 10.16 (1992).

process.[110]

Disputes about the requirements of HTS 9802 often lead to litigation in the United States Court of Customs and Patent Appeals over the distinction between "manufacture" and "assembly." *Samsonite Corporation v. United States*[111] illustrates the rules associated with HTS 9802. In *Samsonite*, steel strips manufactured in the United States were shipped to Samsonite's assembly plant in Mexico for use in the assembly of luggage.[112] When the strips left Tucson, Arizona, they were straight, approximately fifty-five inches long and had a protective coat of oil. The Nogales, Sonora assembly plant then bent the strips, removed the oil coating, covered the strips with vinyl, and incorporated them into "carry-on" luggage products.[113]

When Samsonite re-imported the product, the Customs Service imposed the applicable tariff on the luggage's full value including the metal strips.[114] Samsonite argued that, under HTS 9802, it was entitled to a deduction for the cost of the metal strips since they were fabricated in the United States.[115] The court held that the transformation of the strip into a metal frame for a piece of luggage was a fabrication.[116] Samsonite therefore did not receive treatment under HTS 9802.00.80 because "what emerged after the bending operation was a different object from that which left the United States."[117]

However, manufacture operations of a minor nature will not necessarily disqualify the product from preferential treatment under the tariff schedule. In *United States v. Oxford Industries, Inc.*,[118] the court ruled that sewing buttonholes on men's dress shirts constituted an operation incidental to the assembly process rather than fabrication. There, the government argued that the buttonholing operations were further fabrications so that a tariff could be imposed on the full value of the shirt rather than on just the value added.[119] The court held that under HTS 9802, the buttonholing operation was incidental to assembly of the shirt collar and cuff components.[120] The court found that Congress intended to permit the duty-free treatment of a component manufactured in the United States if subjected to an operation of a "minor nature"

110. Harmonized Tariff Schedule of the United States (19 U.S.C. § 1202)(1988).

111. 889 F.2d 1074 (Fed. Cir. 1989).

112. *Id.* at 1075.

113. *Id.*

114. *Id.*

115. *Id.* at 1077.

116. *Id.*

117. *Id.* at 1076.

118. 668 F.2d 507 (1981).

119. *Id.* at 509.

120. *Id.* at 510.

occurring before, during, or after assembly.[121]

There is a fine legal distinction between assembly and manufacture. If U.S. raw materials lose their physical identity as a result of a manufacturing process, U.S. Customs will levy a tariff on the full value of the product instead of only the value-added while in Mexico. In addition to the more costly tariff, the maquila may incur additional legal expenses if litigation ensues.

IV. NORTH AMERICAN FREE TRADE AGREEMENT

On February 5, 1991, President Bush, President Salinas of Mexico, and Prime Minister Mulroney of Canada announced their intent to create a three-way trade agreement among the United States, Mexico, and Canada.[122] In his proclamation of World Trade Week, President Bush went on to claim that such an expansion in trade is vital to the United States' economic growth.[123] In response, Congress authorized the U.S. Trade Representative to negotiate a treaty with Mexico. Congress will vote on the treaty as a complete package with no opportunity to make amendments.[124] The resulting agreement, if passed, will be officially

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121. *Id. See also* United States v. Mast Industries, Inc., 668 F.2d 501 (1981) (In the assembly of women's pants, buttonholing and pocket slitting operations are incidental to the assembly process); Surgikos, Inc. v. United States, 12 C.I.T. 242, 10 I.T.R.D. 1062 (1988) ("Finish folding" of surgical sheets is fabrication because they are unique folds which enable the surgical team to avoid contamination of the surgical site and the sheet itself); L'Eggs Products, Inc. v. United States, 704 F.Supp. 1127 (1989) (Pantyhose leggings underwent mere assembly and not fabrication when attached to form a complete pair of pantyhose. Similarly, the sewing yarn, the gusset, and the garment labels all qualified for treatment under item 807.00, TSUS because they were products of the United States.); General Motors Corporation v. United States, 976 F.2d 716 (Fed.Cir. 1992) (Sheet metal automobile components manufactured by General Motors in the United States were sent to Mexico for assembly. Subsequent painting of the sheet metal in Mexico constituted fabrication and was not an "operation incidental to assembly" of automobiles.).

122. Peter Truell, *U.S., Canada, and Mexico to Negotiate A North American Free-Trade Pact*, Wall St. J., Feb. 6, 1991, at A7.

123. Proclamation No. 6291, 56 Fed. Reg. 22627, (1991). If the North American Free Trade Agreement is passed, the three North American economies would form the largest integrated market in the world with an estimated 350 million consumers and $6 trillion in annual output. *Id.*

124. North American Free Trade Agreement: Hearings, Mar. 20-May 15, 102d Cong., 1st sess., 102-15 . *See also* Lori M. Rodgers, *What Will Mexican Trade Agreement Mean to the U.S. Energy Industry?*, 128 Fortnight 35 (1991). This is the "fast track" approach to free trade negotiations favored

known as the North American Free Trade Agreement (NAFTA).

On August 12, 1992, representatives from the three countries completed negotiations on the proposed NAFTA.[125] The objectives of the proposed Agreement include the elimination of trade barriers, the promotion of fair competition, and the enhancement of investment opportunities.[126] NAFTA seemingly covers all aspects of trade and investment including agriculture, telecommunications and financial services.[127]

With respect to trade in goods, NAFTA progressively eliminates all tariffs on products qualifying as North American under its rules of origin.[128] For most goods, existing tariffs are either eliminated immediately or phased out over five to ten years.[129] NAFTA incorporates the national treatment obligation of the General Agreement on Tariffs and Trade.[130] This means that once goods have been imported into one NAFTA country from another NAFTA country, they must not be the object of discrimination based on differing tariffs.[131]

In keeping with the objective of tariff elimination, NAFTA phases out the preferential tariff treatment given to maquila products over the next eight years.[132] By 2001, maquila products will pass freely between

by President Bush. Proclamation No. 6291, *supra* note 123.

Instrumental in the passing of the fast track trade negotiations was the testimony of Ambassador Carla A. Hills, U.S. Trade Representative, to the House Subcommittee on Trade. Since Congress will not have the luxury of amending the proposed free trade treaty, Ambassador Hills stated: "As part of this process, we will seek your views as well as those of other members of Congress. I look forward to receiving your guidance on this venture and promise to listen closely to you. As with any potential trade agreement, we want a partnership with Congress." Testimony of Ambassador Carla A. Hills, United States Trade Representative, Before The Subcomm. on Trade, Comm. on Ways and Means, U.S. House of Representatives, June 14, 1990, *reprinted in* 22 St. Mary's L.J. 583, 587 (1991).

125. The White House, Office of the Press Secretary, The North American Free Trade Agreement: Official Notification of Congress, Sept. 18, 1992.

126. North American Free Trade Agreement (Proposed) [hereinafter NAFTA (Proposed)], Sept. 6, 1992, Can.—Mex.—U.S.

127. NAFTA, Table of Contents.

128. NAFTA, pt. 2, ch. 3. Rules of origin are necessary to define which goods are eligible for this preferential tariff treatment. The rules of origin ensure that NAFTA benefits are only conferred on goods produced in the North American region. Goods containing input materials from other non-member countries do not qualify for tariff preference or elimination. NAFTA, pt. 2, ch 4.

129. NAFTA, pt. 2, ch. 3.

130. NAFTA, pt. 2, ch. 3, art. 301. *See infra* part V.D.

131. NAFTA, pt. 2, ch. 3.

132. NAFTA, pt. 2, ch. 3, art. 303. Programs that provide for the refund or

NAFTA member countries without any imposition of tariffs.[133] NAFTA Article 303, which establishes these rules governing maquiladoras, applies only to the tariffs levied on materials and finished products passing between the United States and Mexico.[134] NAFTA does not address the issue of a maquiladora selling its products on the Mexican market. If NAFTA is passed, a maquiladora will be able to compete with other manufacturers in the Mexican market. Presumably, NAFTA will eliminate Mexico's fifty percent restriction on maquiladora domestic sales.[135]

As a cooperative venture between the United States, Canada, and Mexico, NAFTA is a logical extension of the existing maquiladora industry.[136] NAFTA will permit U.S. and Mexican companies to expand their operations to both sides of the border and to sell goods on either side.[137] U.S. companies will be the primary beneficiary of the ability to expand manufacturing across the border due to the lower cost of Mexican labor.[138] NAFTA further benefits the United States by exposing domestic industry to a market of 86 million people.[139] Because of increasing concerns over challenges from abroad, particularly from Japan, U.S. industry is especially interested in NAFTA's approval.[140]

For a Mexican company, however, there is little incentive to expand production into the United States because American wages exceed those in

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waiver of customs duties on materials used in the production of goods subsequently exported to another NAFTA country will terminate by January 1, 2001. *Id.*

133. Until January 1, 2001, the amount of customs duties that a country may waive under a drawback program may not exceed the lesser of (a) duties owed or paid on imported, non-North American materials used in the production of a good subsequently exported to another NAFTA country; or (b) duties paid to that NAFTA country on the importation of such good. *Id. See also* Description of the Proposed North American Free Trade Agreement, Aug. 12, 1992.

134. NAFTA, pt. 2, ch. 3, art. 303.

135. *See* text accompanying notes 85-90.

136. Rodolpho Sandoval, *Legal Issues with Respect to Free Trade Between United States and Mexico*, 19 Int'l J. of Legal Information 91 (1991).

137. Jesus Silva & Richard K. Dunn, *A Free Trade Agreement Between the United States and Mexico: The Right Choice?*, 27 San Diego L. Rev. 937, 974 (1990).

138. *Id.*

139. Terry Wu & Neil Longley, *A U.S.-Mexico Free Trade Agreement: U.S. Perspectives*, 25 J. World Trade 5, 12 (1991). Indirectly, the U.S. will benefit from NAFTA as a result of Mexico's gains. Mexico is expected to experience increased economic prosperity which will enhance political stability. Also, NAFTA is expected to decrease Mexican unemployment which may deter illegal immigration into the United States. *Id.*

140. *Id.* at 13.

Mexico by an estimated 10:1 ratio.[141] Nevertheless, NAFTA is expected to generate additional jobs for Mexican workers and generally increase Mexico's social and economic status.[142] The Mexican consumer will also benefit from the wider variety of goods that will be available for purchase.

President Salinas' support for NAFTA reinforces a recent shift in Mexican policy toward world trade. Following World War II, Mexico pursued a protectionist economic policy and enjoyed three decades of rapid economic growth.[143] During this period, the major sources of foreign exchange were agriculture and tourism.[144] With the discovery of oil in the 1970s, Mexico's foreign economic policies changed, and its export economy evolved into one focused on industry rather than agriculture.[145] Gradually Mexico has reduced restrictive trade barriers, and the oil and manufacturing industries have surpassed agriculture and tourism as the primary generators of foreign exchange.[146] Today, Mexico has one of the more open economies among developing countries.[147] NAFTA is another step in Mexico's shift from protectionism to trade liberalization.

Unfortunately, the effects of these past protectionist policies still linger in Mexico. For most products, local firms dominate the Mexican market.[148] However, these products are outdated and lower in quality than those sold in the United States.[149] Furthermore, many sectors of the

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141. *Id.* at 8.

142. *Id.* The AmeriMex limited partnership purchases U.S. manufacturers and relocates them to Mexico to take advantage of savings in the cost of labor. One of the limited partners of the Amerimex is National Financiera S.N.C., a development bank set up by the Mexican government to encourage industrial investment in Mexico. The partnership seeks U.S. companies where labor is a significant component of the costs of goods sold. John Maggs, *Mexico Starts Fund to Lure U.S. Manufacturers*, Ariz. Daily Star, Feb. 17, 1993, at A1.

143. Wu & Longley, *supra* note 139, at 6.

144. Ignatius A. de Gennaro, The Arizona-Sonora Border Economy 42 (1987) (unpublished research report prepared by The Latin American Area Center, University of Arizona) (copy on file with the Arizona Journal of International and Comparative Law).

145. *Id.* at 43.

146. *Id. See* also, Wu & Longley, *supra* note 139, at 6.

147. Hills, *supra* note 124, at 584. For example, Mexico dropped its top tariff from 50% to 20%. In addition, import licensing requirements have been reduced for U.S. exports to Mexico. In 1983, all importers were required to be licensed, but today, license requirements are only extended to 250 types of goods. The Mexican government has also eliminated public ownership of numerous enterprises. Of the 1,155 enterprises owned by the state in 1982, 619 have been privatized. *Id.*

148. Doing Business in Mexico § 2.07[2] (S. Lefler ed., 1991).

149. *Id.*

Mexican economy remain relatively inefficient and uncompetitive.[150] If NAFTA is approved, Mexican industry will be seriously injured or completely displaced when forced to compete directly with more efficient U.S. companies that can sell products in Mexico without any tariff restraint.[151] Particularly dangerous to Mexican industry will be the maquiladora operating under NAFTA. NAFTA will enable a maquiladora to produce what are essentially U.S. goods manufactured by low-cost Mexican labor for direct sale into the Mexican market.

Under NAFTA, the maquiladoras may no longer be required to re-import their products back into the United States. Instead, those products, as well as products manufactured in the United States, may be eligible for sale in Mexico. Therefore, because of the weakness of its industry, Mexico should not approve the proposed NAFTA without some qualification. By retaining Mexican regulation of maquiladora domestic sales[152] and lobbying for an expansion of the U.S. tariff schedule applicable to maquilas,[153] Mexico can avoid the consequent devastation of its own industry.

V. EXPANDING THE MAQUILADORA PROGRAM

As the court decisions indicate,[154] a fine line exists between assembly and manufacture. Therefore American companies considering a Mexican assembly operation must make sure that such an operation will not be construed as "manufacturing." The courts have painstakingly limited maquiladoras to assembly in accordance with the present language of the tariff schedule. However, allowing maquiladoras to engage in manufacturing as well as assembly under HTS 9802 may enhance the economic viability of the maquiladora and bolster the U.S. economy. In addition, such an amendment will not only relieve the courts from drawing the frequently difficult distinction between "assembly" and "manufacturing,"[155] it may also provide American companies with a new edge for competition in the world market. This proposed expansion of the tariff schedule, however, should not be without limitations.

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150. Wu & Longley, *supra* note 139, at 6.

151. *See* Sandoval, *supra* note 136, at 95. This author proposes that NAFTA provide some reserve legal rights to relieve Mexican industries that are injured by imports. *Id.*

152. *See supra* text accompanying notes 85-90.

153. *See infra* part V.

154. *See supra* notes 111-21 and accompanying text.

155. *Id.*

A. Limiting the Expansion to Mexican Operations

Any elimination of the HTS 9802 assembly requirement should only apply to maquiladoras that are importing raw materials from the United States for production in Mexico. Furthermore, regulations should be implemented to prevent a maquiladora from exporting its products to the United States and subsequently re-importing them to Mexico for sale. Also, as part of NAFTA, Mexico should retain the present restriction on maquiladora sales in the domestic Mexican market.[156] These measures should protect Mexican industry from overly burdensome competition with U.S. maquiladoras. Limiting the liberalization of this tariff schedule to Mexican operations will prevent uncontrolled expansion into Asian labor markets while still allowing U.S. corporations the benefits of lower production costs associated with maquilas. American business has lost valuable market shares to Japanese and other Asian corporations due to its inability to curb production costs. Allowing American corporations to manufacture in Mexico and still reap the benefits of HTS 9802 may be the advantage American business needs to become more competitive with Asian counterparts.

B. Mexican Labor—Low Cost without Quality?

In addition to concerns about exporting jobs, a further objection to expanding the tariff schedule may center on the quality of Mexican work product. U.S. manufacturing evokes images of high-tech, capital-intensive production; Mexican manufacturing, however, appears to be low-tech and labor-intensive.[157] Although this image may have been true twenty years ago, Mexico currently has the capabilities for the most highly advanced, capital-intensive forms of production.[158] A study of forty high-tech plants in Mexico determined that quality and productivity there equaled or exceeded that in comparable plants in the United States.[159]

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156. Diario Oficial de la Federación, art. 20, Dec. 2, 1990. *See* text accompanying notes 85-90.

157. Harley Shaiken, *Mexico's Poorly Paid Workers Are as Highly Skilled as Their U.S. Counterparts*, L.A. Daily J., May 29, 1991, at 6.

158. *Id.*

159. *Id.* In one automobile assembly plant in northern Mexico, a U.S. corporation has invested almost $1 billion in a single production facility. The plant produces 160,000 cars annually, and 100% of the production is exported to the United States. This plant produces the highest quality car made in North America and is second in its class only to the Japanese-produced Honda Accord. The only ascertainable difference between the Mexican plant and its American counterpart is labor cost. In Mexico, combined wages and

In addition, permitting manufacturing processes in Mexico may benefit American companies by forcing wage concessions from American workers.[160] Efforts of U.S labor unions have essentially priced American labor out of the market through inflated wage and benefit packages.[161] High wage rates logically impair a company's ability to compete with imported goods produced with lower labor and overhead costs. Thus, Mexican workers have the necessary skills to produce quality products and can do so at lower wages than their U.S. counterparts.

C. Mexican Community

Even the modest tariff schedule expansion proposed in this Comment must account for Mexican concerns about U.S. influence on Mexican policies.[162] Some Mexicans think that the United States' political and economic influence is already too great under the present maquiladora program.[163] Some may consider an expansion of this program intolerable. However, even greater encroachment will occur if NAFTA is passed without qualification because it will force Mexican business to compete directly with the Americans, despite the official Mexican policy of promoting local industry.[164]

Under a revised and expanded HTS 9802, this concern can be alleviated. A U.S. parent company could export raw materials to its maquiladora subsidiary for whatever manufacture, fabrication, or assemblage that is necessary to produce a finished good. Then, under this proposed plan, together with current Mexican regulation, the finished goods must be re-exported to the United States.[165] Thus, with this expanded allowance for maquiladora manufacturing, American encroachment on local Mexican industry would still be much less than the proposed NAFTA scheme.

If HTS 9802 is liberalized, the American company using a maquiladora would be well advised nonetheless to transfer company philosophy and conduct operations with a sense for the Mexican community. Increased production via manufacturing in fact will require additional supervision and control. Strong local management is essential,

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benefits for a worker amount to just over $2 an hour. In the United States, wages and benefits total over $35 an hour. *Id.*

160. *Id.*

161. *Id.*

162. Stephenson, *supra* note 28, at 595.

163. *Id.* at 595

164. Tarbox, *supra* note 20, at 137.

165. *See supra* text accompanying notes 85-90.

and the maquiladora should be managed with a sense of permanency.[166] If American personnel in Mexico make no effort from the beginning of operations to understand Mexican culture, Mexicans might well resent the perceived encroachment, possibly compromising the effectiveness of operations.[167] American companies that have already achieved financial success with maquiladoras should also give greater attention to the pressing social problems of the Mexican border towns if the maquiladora program is to expand.[168] From a long range perspective, improvements in both living and working conditions may enhance productivity and improve community opinion of the maquiladora.

D. GATT Considerations

The proposed alteration of HTS 9802 for Mexico but not for other countries raises an issue under the General Agreement on Tariffs and Trade (GATT).[169] GATT's cornerstone is Art. I, which provides that each member state[170] shall extend most favored nation treatment ("MFN") to all other member countries.[171] Thus, for example, if Argentina lowered

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166. Cervantes, *supra* note 12, at 1191.

167. *See id.*

168. Villalobos & Barshop, *supra* note 58, at 704.

169. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. GATT is not an organization where countries become members but a treaty where countries become contracting parties. GATT essentially establishes a code for international trade whereby countries can achieve economic and social goals. Major principles of GATT include:

1. Trade without discrimination as accomplished through GATT's Most-Favored-Nation principle.

2. Use of tariffs to regulate trade rather than other commercial measures (such as, restrictions on quantity, voluntary export restraints, etc.) when domestic industry needs protection.

3. Structured negotiation to provide for stable and predictable trade.

4. Settlement of disputes through consultation, conciliation, and structured dispute settlement procedures. Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward achieving the Objective of an Equitable World Trading System*, 18 Cal. W. Int'l L.J. 291, 291 (1988). *See also* Anita Blair, *Prospects for Implementation of the GATT Standards Agreement in the United States*, 20 Va. J. Int'l L. 699 (1980).

170. Member countries of GATT are generally referred to as "contracting parties." The United States has been a contracting party since the inception of GATT in 1947. Mexico became a contracting party in 1986. Villalobos & Barshop, *supra* note 58, at 703.

171. Beverly M. Carl, *Current Trade Problems of the Developing Nations*, *in* Legal Issues in International Trade (1988).

its duty on radios from China, Argentina would have to extend the same reduced rate to every other GATT nation.[172] GATT's basic principle is non-discrimination and equal access to all national markets.[173]

Revising the tariff schedule in favor of only Mexico seemingly would violate this MFN principle. GATT contains an exception to the MFN principle, however, which allows preferential treatment to be afforded to developing nations.[174] Under the generalized system of preferences,[175] industrialized countries have a legal basis for offering lower duties to developing nations without other GATT members invoking their Art. I right to the same reduced tariff.[176] Although there is no definition of "developing country,"[177] Mexico has, in the past, been considered a developing nation.[178] Therefore, extending HTS 9802 to allow manufacturing in Mexico will not violate the MFN principle enumerated in Art. I of GATT.

Furthermore, in Art. XXIV, GATT provides another exception to the MFN principle for free trade associations.[179] In order to qualify for this exception, each member country in the free trade association must eliminate tariffs and quota barriers against trade from the other member states.[180] Each member country, however, continues to charge its regular tariffs on products coming from countries outside the association.[181] NAFTA has adopted GATT's national treatment requirement[182] which

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172. *Id.* at 102.

173. *Id.*

174. GATT, art. XXV(5). Under this article, GATT members may waive the MFN requirement by a two-thirds vote. Carl, *supra* note 171, at 105. For example, in 1971, sixteen developing nations waived the MFN requirement and extended tariff concessions to each other on certain items. The waiver further required other contracting parties to refrain from invoking their Art. I MFN right to the same reduced tariff. Protocol Relating to Trade Negotiations among Developing Countries, December 8, 1971, BISD 18S/24 *as cited in* Carl, *supra* note 171, at 105.

175. *See* OECD, The Generalized System of Preferences: Review of the First Decade (1983), *as cited in* Carl, *supra* note 171, at 105.

176. Carl, *supra* note 171, at 105.

177. There is no criterion available for determining whether a country should be classified as a developing country. To qualify for the benefits associated with this group, the country must merely designate itself as such. G. Patterson & E. Patterson, *Objectives of the Uruguay Round, in* The Uruguay Round: A Handbook on the Multilateral Trade Negotiations (A. Finger & Olechowski, eds., 1987) 7, 9, *as cited in* Carl, *supra* 171 at 101.

178. *See* Carl, *supra* note 171, at 117.

179. GATT, art. XXIV 8(a),(b). *See* Carl, *supra* note 171, at 103.

180. F. R. Root, International Trade and Investment-Theory, Policy, and Enterprise 378-79 (1973) *as cited in* Carl, *supra* note 171, at 103.

181. *Id.*

182. NAFTA, pt. 2, art. 301.

prohibits tariff discrimination between member countries[183] and would thus presently qualify for the free trade exception in GATT.

Contracting parties have been flexible in interpreting Art. XXIV especially where developing nations are concerned.[184] There is a tolerant attitude toward the various integration schemes used in free trade agreements involving developing nations.[185] The tariff liberalization proposed in this Comment is such an integration scheme because it operates to protect Mexican industry. Thus, although this tariff liberalization may not be in full conformity with Art. XXIV of GATT, experience shows that such preferential treatments given to developing countries have not, as a practical matter, violated GATT.[186] In summary, whether the tariff expansion proposed here is incorporated in NAFTA or adopted independently of NAFTA, it will not violate GATT.

VI. CONCLUSION

NAFTA represents a trend toward diminished governmental intervention in the North American economic field. The emergence of the maquiladora as an important and respected industry[187] has proven that the United States and Mexico can establish co-production ventures that provide mutual benefits by using the capital and labor from both countries. With concerns over American companies' ability to compete with foreign manufacturers in the future, it is time to recognize the potential that lies in expanding Mexican-American co-production.

NAFTA proposes a comprehensive charter to liberalize trade and investment between the United States, Mexico, and Canada. However, this liberalization comes at the expense of Mexican manufacturing efforts. NAFTA would not preclude U.S. manufacturers from relocating production to Mexico and selling their goods directly into the Mexican market. U.S. companies should be permitted to sell their U.S. manufactured goods in Mexico without restraint. This is the essence of a free trade agreement. However, U.S. companies that manufacture their goods in Mexico have a substantial advantage over Mexican manufacturers. This advantage should not go unchecked.

Mexico should retain its domestic sales restriction which prevents maquilas from freely selling goods on the Mexican market. Further, a revision of HTS 9802 to allow manufacturing in Mexico will afford

183. NAFTA pt. 2, art. 301. *See supra* text accompanying notes 130-31.

184. Carl, *supra* note 171, at 104.

185. *Id.*

186. *Id.*

187. Zack V. Chayet & Eduardo A. Bustamante, *The Mexican Maquiladora Industry: Legal Framework of the 1990s*, 20 Cal. W. Int'l L.J. 263 (1990).

American manufacturers the opportunity to experiment with Mexican co-production as currently guaranteed by NAFTA. In short, a revised and expanded HTS 9802 may accomplish many of the objectives sought by NAFTA but without the negative impact. A revised tariff schedule will relieve companies from the cumbersome regulation of being limited to assembly in Mexico while still affording preferential tariff treatment. More importantly, from the Mexican perspective, the livelihood of local Mexican industry will be protected from direct competition with American industry as is certain to occur under NAFTA.