THE NAFTA SIDE AGREEMENTS: TOWARD A MORE COOPERATIVE APPROACH?

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INTRODUCTION

During his campaign for the Democratic presidential nomination, Barack Obama promised to seek the inclusion of environmental and labor standards within the text of the North American Free Trade Agreement ("NAFTA").[1] Indeed, NAFTA is the only trade agreement recently signed by the United States that does not include complete environmental and labor chapters that are directly linked to the treaty's dispute-resolution mechanisms. Obama's promise revived a debate that began sixteen years ago regarding the existence of a legitimate link between trade on the one hand and the environment and labor on the other.

The environmental and labor side agreements to NAFTA—the North American Agreement on Environmental Cooperation ("NAAEC") and the North American Agreement on Labor Cooperation ("NAALC")—have enforcement procedures that differ from those of the main agreement and that place limits on monetary enforcement assessments, with suspension of benefits for noncompliance. More recent bilateral U.S. trade agreements include "fully enforceable commitment[s]" by all parties to maintain their environmental and labor laws and practices according to international regulations, to refrain from lowering their environmental and labor standards, to limit "'prosecutorial' and 'enforcement' discretion," and to apply "the same dispute settlement mechanisms or penalties available for other [free trade agreement ("FTA")] obligations."[2]

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1. Anthony Faiola & Glenn Kessler, *Trade Barriers Toughen with Global Slump: Despite Free-Market Pledge, Many Nations Adopt Restrictive Policies*, WASH. POST, Dec. 22, 2008, at A1.

2. MARY JANE BOLLE, CONG. RESEARCH SERV., NO. RS22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 4 (2008), *available at* http://assets.opencrs.com/rpts/RS22823_20080229.pdf.

Many of the FTAs that include environmental and labor dispute-resolution mechanisms are too recent—or have not even been ratified by the U.S. Congress—to provide a definite answer to the question of the effectiveness of such mechanisms. Although most criticism of the NAAEC and the NAALC has focused on the weakness of the enforcement mechanisms, this Article instead argues that the real failure is the agreements' institutional shortcomings, which have inhibited the three NAFTA parties—the United States, Canada, and Mexico—from building a North American regime aimed at defending universally recognized labor values across the region. From this perspective, U.S. environmental and labor organizations' goal of improving compliance with environmental and labor standards has not been achieved. Instead, the NAALC and, to a lesser extent, the NAAEC follow an adversarial, litigious approach to addressing environmental and labor challenges in North America. The emphasis that environmental and labor organizations, particularly from the United States, have placed on the more contentious dispute-resolution mechanisms as the key element in achieving effective enforcement of environmental and labor laws has indeed marginalized the roles that the Commission for Environmental Cooperation ("CEC") and the Commission for Labor Cooperation ("CLC") could have played as priority forums in the process of developing policies to address shared environmental and labor problems in North America.

This Article thus argues that linking the environmental and labor enforcement provisions to NAFTA's dispute-resolution mechanisms could end up further inhibiting the development of a more fruitful collaborative agenda on labor issues—one with the capacity to enhance regional compliance with labor standards. The adversarial model that has so far predominated in labor and trade has prevented the three NAFTA parties from taking advantage of the opportunities for cooperation that naturally arise from geographic proximity, shared resources, high economic integration, and complementary labor markets and demographic dynamics.

I. CORE ELEMENTS OF THE NAFTA SIDE AGREEMENTS

NAFTA set a precedent as the first FTA to include environmental commitments. In its preamble, NAFTA establishes purposes that include "promot[ing] sustainable development" and "strengthen[ing] the development and enforcement of environmental laws and regulations."[3] Additionally, when conflicts arise, NAFTA grants preeminence to a number of international environmental agreements over trade agreements, and it strongly discourages the

3. North American Free Trade Agreement, U.S.-Can.-Mex., pmbl., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993) [hereinafter NAFTA].

reduction of environmental standards to attract investments.[4] While NAFTA does not make similar commitments regarding labor standards, its preamble explicitly states that some of the agreement's goals are to "create new employment opportunities and improve working conditions and living standards" and to "protect, enhance and enforce basic workers' rights."[5] More important are the NAAEC and the NAALC, which the Clinton administration requested as preconditions for NAFTA's approval in the U.S. Congress.[6]

Although largely aspirational, the NAAEC and the NAALC established an ambitious list of goals to improve environmental and working conditions in the region.[7] The only firm commitment the three parties made was to promote adequate enforcement of domestically established environmental and labor standards.[8] While neither side agreement constitutes supranational legislation or aims to harmonize social standards in the three member countries, both agreements instituted a public-petition mechanism that allows any citizen of the United States, Canada, or Mexico to file a complaint against one of the three governments for failure to effectively enforce its own *national* environmental and labor regulations.[9] Moreover, the NAAEC also established the Joint Public Advisory Committee ("JPAC") within the CEC as a permanent channel of representation for nongovernmental stakeholders.[10] No similar arrangement was conceived for the NAALC. Together with the submissions procedure, the inclusion of this institutional innovation makes the NAAEC "virtually unique in

4. *See id.* arts. 104(1), 1114(2).

5. *Id.* pmbl.

6. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]; North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC]; John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, *in* GREENING NAFTA 1, 7 (David L. Markell & John H. Knox eds., 2003).

7. As Scott Vaughan has stated, in the case of the NAAEC, article 10 outlines "a dizzyingly long list of cooperative policy areas, some with ridiculously broad mandates like pursuing 'environmental matters as they relate to economic development' or promoting 'public awareness regarding the environment.'" Scott Vaughan, *Thinking North American Environmental Management*, *in* THE ART OF THE STATE II: THINKING NORTH AMERICA, NO. 5, at 3, 19 (Thomas J. Courchene, Donald J. Savoie & Daniel Schwanen eds., 2004); *cf.* NAALC, *supra* note 6, art. 11 (containing a similar list).

8. NAAEC, *supra* note 6, art. 5; NAALC, *supra* note 6, art. 3.

9. *See* NAAEC, *supra* note 6, arts. 14–15; NAALC, *supra* note 6, art. 16(3).

10. NAAEC, *supra* note 6, arts. 8, 16; Noemi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well-Defined Role?*, 9 GEO. INT'L ENVTL. L. REV. 53, 69 (1996) ("Articles 16, 17, and 18 of Section B establish the Joint Public Advisory Committee (JPAC). The main venue for the NGOs, JPAC is a permanent advisory body to the Council . . . .").

international environmental law."[11]

The NAAEC also granted the CEC Secretariat the power to act independently of member-state representatives (the Council of Ministers, composed of the three environmental ministers from the member states) in the administration of articles 14 and 15 (which lay out the citizens' petition process), thus introducing an element of "supranationalism" that is absent in the NAALC.[12] In the latter, it is rather the National Administrative Offices ("NAOs") that have the mandate to receive citizens' complaints regarding another country's failure to enforce its domestic labor laws.[13] The Secretariats of both the CEC and the CLC have responsibilities that are characteristic of such offices in any other international organization, including assisting the Council of Ministers, conducting research, and supporting cooperative activities.[14] Compared with the CEC Secretariat, however, the CLC Secretariat is much more limited in its functions and resources.[15] Further, the research functions of the CLC Secretariat have been unduly constrained by the NAOs[16] and by a reduction in staff size—from thirteen in 2004 to four in 2007.[17]

Both side agreements introduce regulations establishing a process—albeit a tortuous one that has never been, and in all likelihood never will be, implemented—that ultimately can lead to the use of trade sanctions if "a persistent pattern" of nonenforcement of environmental or labor law is found.[18] Trade

11. John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359, 370 (2004).

12. *See* NAAEC, *supra* note 6, arts. 14–15; Gal-Or, *supra* note 10, at 54–55 ("The novelty of NAFTA+NAAEC is that, for the first time in the history of modern international trade agreements, such a treaty is linked to a regional, inter-governmental, supranational institution which monitors compliance with the environmental obligations to which the parties have bound themselves.").

13. *See* NAALC, *supra* note 6, art. 16(3).

14. *See* NAAEC, *supra* note 6, arts. 11–15; NAALC, *supra* note 6, arts. 13–14.

15. *Compare* NAAEC, *supra* note 6, arts. 11–15 (identifying expansive responsibilities), *with* NAALC, *supra* note 6, arts. 13–14 (identifying enumerated and more limited functions).

16. A rich research agenda was set over the years by the Secretariat on labor markets, migrant workers, health and occupational safety, discrimination in the workplace, etc. Outside experts were commissioned to prepare most of the studies, while some were prepared by the Secretariat's research staff. The NAOs' constant objections to sections or information contained in the studies and their frequent demands to revise every study or report explain the limited number of published materials from the Secretariat. This observation is based on the author's personal experience as Research Director of the CLC from 2005 to 2007.

17. *See* Comm'n for Labor Cooperation [CLC] Secretariat, *Four Year Report 2004–2007*, at 32–33 (Dec. 2009), *available at* http://www.naalc.org/UserFiles/File/AnnualReports/FinalAR04-07En.pdf.

18. NAAEC, *supra* note 6, art. 22(1); NAALC, *supra* note 6, art. 27(1).

sanctions, the "teeth" or "red meat" requested by anti-NAFTA groups, were the most controversial aspects of those agreements and the source of a political stalemate that has endured to this day. While such sanctions were seen as the only means by which environmental and labor groups could effectively impede the potential deterioration of environmental and labor standards in the region, they were perceived by the Mexican and Canadian governments as blunt protectionism.[19]

Sixteen years after its implementation, there is no clear indication that NAFTA has led to any greater environmental degradation or worsened labor conditions.[20] It is, however, apparent that the side agreements have contributed only marginally to improved environmental and labor conditions in the region and to more effective enforcement of environmental and labor legislation. What has become evident is that the "innovative" regulations of the NAFTA side agreements (the citizens' petition processes and the introduction of "teeth") have been a source of significant tension within the CEC and the CLC and among the governments of the three member countries. More specifically, the political stalemate over the use of trade sanctions as a mechanism for ensuring the effectiveness of the side agreements has diminished the roles that the CEC and CLC could have played as priority forums in the development of North American environmental and labor policies.

II. FAILURE BY DESIGN

The link between trade and environmental and labor concerns was at the center of a fundamental political and conceptual disagreement between the Mexican government and the interest groups (particularly from the United States) that rallied against NAFTA at the time of the treaty's negotiation. As the first FTA that the United States signed with a developing country, NAFTA was met by particularly fierce opposition from U.S. unions.[21] Anti-

19. *See, e.g.*, Vaughn, *supra* note 7, at 8–9 ("Canadian NAFTA negotiator Gerald Wright has recalled that the US motivation for including trade sanctions was . . . to counter Ross Perot's 'giant sucking sound' claim . . . .").

20. The literature on NAFTA's effects on the environment and labor is vast. *See, e.g.*, GREENING THE AMERICAS (Carolyn L. Deere & Daniel C. Esty eds., 2002); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 79–198 (2005); Vaughan, *supra* note 7. *See generally* KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? (2003) (examining the relationship between trade and labor around the globe).

21. *See* Lance A. Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX. L.J. 159, 162 (1995). For a detailed account of the environmental and labor negotiations, see BARBARA HOGENBOOM, MEXICO AND THE NAFTA ENVIRONMENT DEBATE: THE TRANSNATIONAL POLITICS OF ECONOMIC INTEGRATION 111–250 (1998); HUFBAUER

NAFTA groups argued that, in the context of free trade, the failure to enforce environmental and labor laws could provide noncompliant parties with an illegitimate competitive advantage. These groups also had concerns about a "race to the bottom" regarding environmental laws.[22] The Mexican government, which perceived these and similar arguments made by environmental nongovernmental organizations ("NGOs") as simply the result of protectionist interests,[23] accepted the side agreements as a sine qua non for the ratification of NAFTA by the U.S. Congress.[24] It did so, however, without acceding to all the interest groups' demands.

Thus the NAAEC and the NAALC are both permeated with a hybrid institutional framework that implicitly reflects two contradictory and irreconcilable paradigms: a confrontational or litigious approach, represented by trade sanctions and the citizens' petition process, and a more cooperative, intergovernmental approach, such as is typically found in other intergovernmental agreements. The side agreements' incipient "supranational aspects," particularly those embedded in the NAAEC, which center on the citizens' petitions and the limited role of the CEC Secretariat, as well as the potential use of trade sanctions, generated high expectations among North American interest groups that effective processes had been created to enforce domestic environmental laws.[25] These expectations were incommensurate with the institutional and financial resources granted to the CEC and the CLC.

The political victories for both NAFTA supporters and opponents were thus pyrrhic. The confrontational focus was

& SCHOTT, *supra* note 20, at 79–198; FREDERICK W. MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS (1998); Knox & Markell, *supra* note 6, at 3–9; Frederick W. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA*, *in* GREENING THE AMERICAS, *supra* note 20, at 97.

22. *See* Vaughan, *supra* note 7, at 6.

23. *See* Gustavo Alanis-Ortega & Ana Karina González-Lutzenkirchen, *No Room for the Environment: The NAFTA Negotiations and the Mexican Perspective on Trade and the Environment*, *in* GREENING THE AMERICAS, *supra* note 20, at 41, 42–54. Mexico's experience in the tuna-dolphin dispute played a significant role in shaping its positions regarding the linkage of trade and the environment. Mónica Araya, *Mexico's NAFTA Trauma: Myth and Reality*, *in* Greening the Americas, *supra* note 20, at 61, 66.

24. *See* Alanis-Ortega & González-Lutzenkirchen, *supra* note 23, at 53–54.

25. These high expectations even prevailed for the more limited provisions found in the NAALC. A statement in one Human Rights Watch report calling the NAALC "the most ambitious link between labor rights and trade ever implemented" illustrates this point well. Human Rights Watch, *Canada / Mexico / United States—Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement*, at 1, Apr. 1, 2001, *available at* http://www.hrw.org/en/reports/2001/04/01/canadamexicounited-states-trading-away-rights-unfulfilled-promise.

intended to serve the interests of the NAFTA opponents, but the trade sanctions were a dead letter from birth. The dispute-resolution mechanisms were designed to fail and have in fact proven too cumbersome to implement. In particular, the idea that sanctions and fines were "necessary to halt the highly remote chance of pollution havens from taking root underscores the extent to which politics overshadowed any policy logic around the final environmental deal that emerged from the tatters of the highly acrimonious trade negotiations."[26] While sanctions are appropriate in the trade context, where compensation through sanctions is easily implemented, these policy instruments are alien to environmental agreements, where a more positive, cooperative approach to environmental management and capacity building is usually required.

The concessions made by the Mexican government over the side agreements were insufficient to garner the unions' and NGOs' support for the negotiated outcome. This was particularly true for the NAALC. As NAFTA experts Hufbauer and Schott argue, "Labor advocates did not favor NAFTA with or without a side agreement. . . . [O]rganized labor in the United States denounced the NAALC as inadequate" and the U.S. Congress's passage of NAFTA "was tarnished because critics were able to disrupt trade liberalization efforts for the rest of the 1990s by claiming that NAFTA had made inadequate progress on labor issues."[27] Interest groups raised their concerns about the failure of the NAAEC and NAALC to defend domestic environmental and labor laws from challenges under NAFTA and the lack of avenues for public participation in NAFTA's dispute-resolution mechanisms.[28] The cooperative aspects contained in the NAAEC and NAALC are far more promising than the dispute-resolution mechanisms that were introduced in these agreements to address common regional problems. And yet the cooperative agenda has been compromised by the strong emphasis that anti-NAFTA groups have placed on the litigious elements of the agreements as a precondition to their acceptance of deepening economic integration in North America.

III. A LITIGIOUS APPROACH

A. The North American Agreement on Environmental Cooperation

Environmental NGOs won the adoption of articles 14 and 15 of the NAAEC, which allow any citizen from the three member states to initiate a process of investigation against one of the states for failure to effectively enforce environmental legislation.[29]

26. Vaughan, *supra* note 7, at 9.
27. HUFBAUER & SCHOTT, *supra* note 20, at 122.
28. *See, e.g.*, Knox & Markell, *supra* note 6, at 9.
29. NAAEC, *supra* note 6, arts. 14–15.

Interestingly, when filing a citizens' petition there is no need to demonstrate a link with trade liberalization; the petition may relate merely to environmental law-enforcement issues in general.[30] The petition is evaluated by the CEC Secretariat; if it meets certain criteria, a response is then solicited from the nation involved.[31] If this response is not satisfactory, the Secretariat may recommend that the Council carry out an investigation, culminating in a factual record.[32] If two of the Council's three members vote in favor of further investigation, the Secretariat creates a factual record.[33] Another two-thirds vote from the Council is required for this record to be published.[34]

Few petitions submitted by citizens have received Council approval and thus reached the stage of investigation and subsequent drafting of factual records. As of the end of February 2010, sixteen of the seventy-three petitions submitted since 1994 have culminated in factual records.[35] Three are in the process of investigation to compile a factual record, and ten more are still active.[36] Forty-two petitions have been dropped by the Secretariat or withdrawn by the petitioners themselves.[37] Only two requests have been rejected outright by the Council in spite of the Secretariat's recommendations that factual records be prepared.[38] The majority of petitions that have culminated in an investigation or are still active relate to cases of ineffective implementation of environmental law in Canada or Mexico—eight of these petitions correspond to Mexico, nine to Canada, and two to the United States.[39] Although the submission process has had some positive outcomes in terms of prompting corrective government action, as in the *Cozumel* and *BC Logging* cases,[40] given the low number of factual records developed today, "NAFTA citizens have come to the disappointing but realistic conclusion that a trip to the CEC will not generate enough policy payoff to justify the time and energy required."[41]

As previously mentioned, the right of the CEC Secretariat to act independently to initiate the citizens' petition process is the principal element of "supranationalism" in the NAAEC and thus its

30. *See id.* art. 14(1).
31. *Id.* art. 14(1)–(3).
32. *Id.* art. 15(1).
33. *Id.* art. 15(2).
34. *Id.* art. 15(7).
35. *See* Comm'n for Envtl. Cooperation, Registry of Citizen Submissions, http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250 (last visited Apr. 17, 2010) (providing hyperlinks that lead to information on each submission).
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*
40. HUFBAUER & SCHOTT, *supra* note 20, at 162.
41. *Id.* at 179.

most innovative institutional aspect.[42] However, along with the power to review the information necessary to prepare a factual record, this power of independent initiation has been at the center of the conflict between the Secretariat and the Council since the creation of the CEC. It has also spawned tensions among members of the Council, as well as between Council members and the JPAC, which represents NGOs and other sectors of society (academia and industry) in the three countries.[43] Since factual records are not binding, the process that leads to a factual record largely "aims at 'shaming' the accused government into correcting the implementation of its own domestic laws."[44] The Council's reaction has been to repeatedly accuse the Secretariat of exceeding its authority in matters related to the citizens' petition process.[45] At the same time, the Council has been criticized for attempting to amend official guidelines in order to control the process.[46] As Scott Vaughan has stated,

> With the sole exception of the 2002 meeting, every single annual council meeting of the [CEC] since the creation of the commission has been consumed by crises involving the scope of factual records prepared under article 14. These crises touch upon the independence of the secretariat in preparing factual records, as well as the kind of information that can be examined in the factual records themselves.[47]

Pressure brought by interest groups forced the Council to authorize the JPAC to open public hearings and then craft recommendations for improving the citizens' petition process.[48] Although the Council was presented with the JPAC's recommendations in 2001 and again in 2002, the Council largely ignored them and repeatedly restricted the scope of the factual

42. *See supra* note 12 and accompanying text. In addition, "[a]rticle 13 authorizes the Secretariat to prepare a report on any matter within the scope of the annual program without Council authorization and a report on any other environmental matter related to the cooperative functions of the NAAEC unless the Council objects by a two-thirds vote." Knox & Markell, *supra* note 6, at 12; *see* NAAEC, *supra* note 6, art. 13(1).

43. *See* Richard Fisher, *Trade and Environment in the FTAA: Learning from the NAFTA*, *in* GREENING THE AMERICAS, *supra* note 20, at 183, 187.

44. Dimitris Stevis & Stephen Mumme, *Rules and Politics in International Integration: Environmental Regulation in NAFTA and the EU*, ENVTL. POL., Winter 2000, at 20, 29 (U.K.).

45. *See* Comm'n for Envtl. Cooperation [CEC], Ten-Year Review & Assessment Comm., *Ten Years of North American Environmental Cooperation*, at 45 (June 15, 2004) [hereinafter TRAC], *available at* http://www.cec.org/files/PDF//TRAC-Report2004_en.pdf.

46. *See id.* at 44–46.

47. Vaughan, *supra* note 7, at 11.

48. *See* TRAC, *supra* note 45, at 44; ERIC DANNENMAIER, THE JPAC AT TEN 13 (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078362.

records to be prepared by the Secretariat—where citizens' petitions alleged "a persistent pattern" of failure to enforce environmental legislation, the Secretariat was directed to investigate only specific instances.[49]

The Council apparently took these actions because, although there is no formal link between the citizens' petition process and the commercial sanctions established in Part Five of the NAAEC,[50] and although the Part Five provisions have never been employed (in large part because of the intrinsic complexity of the sanctions process), the possibility exists, even if it is remote, that trade sanctions could be invoked under the NAAEC.[51] The mere potential for sanctions seems to be preventing the Council members, individually and collectively, from approving the filing of factual records.[52]

Not surprisingly, some critics are calling for the annulment of these sanctions provisions. The Ten-Year Review and Assessment Committee of the CEC, in fact, recommended that the parties abstain from invoking this process for a decade.[53] (Perhaps it is not coincidental that the vast majority of factual records produced by the CEC have been published since 2000.)[54]

There are two important additional limitations hindering the NAAEC's citizens' petition process.[55] The first is the intrinsic conflict of interest within the Council itself, whose members must vote for the compiling and publication of factual records that are directed against the very governments the members represent.[56] The second constraint relates to the lack of any instrument mandating that governments correct the problems identified through the citizens' petition process.[57] For this reason, since the establishment of the NAAEC, stakeholders have warned about the lack of teeth in the agreement, particularly in reference to articles

49. *See* TRAC, *supra* note 45, at 44; DANNENMAIER, *supra* note 48, at 13–15.

50. NAAEC, *supra* note 6, arts. 22–36 (constituting Part Five).

51. For a discussion about the connections between article 14 and Part Five of the NAAEC, see Vaughan, *supra* note 7, at 11–12.

52. *See id.*

53. TRAC, *supra* note 45, at 55.

54. *See* Comm'n for Envtl. Cooperation, Factual Records, http://www.cec.org/Page.asp?PageID=924&SiteNodeID=543 (last visited Apr. 17, 2010) (providing hyperlinks that lead to information on each factual record).

55. Other criticisms of the environmental citizens' petition process are the unlimited amount of time allotted to review petitions and the lack of human and financial resources allocated to the process. Only three members of the Secretariat staff are responsible for attending to all the petitions submitted. The period needed to process a petition from beginning to end is very long—for six petitions discussed by Dr. Dorn, the average processing time was four years and five months. *See* Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT'L ENVTL. L. REV. 129, 139 (2007).

56. *See id.* at 141–42.

57. *See id.* at 140–41.

14 and 15.[58] The petition process makes use of the power of transparency in the form of open display, "embarrassing" those countries that fail to comply with their own legislation; this is done to pressure governments to face and respond to their omissions or environmental violations.[59]

B. The North American Agreement on Labor Cooperation

The original NAALC proposal "contemplated the creation of an independent secretariat with the power to investigate citizens' complaints and with remedies" that included trade sanctions for nonenforcement of labor laws, but both the U.S. business community and the governments of Mexico and Canada voiced strong opposition to ceding authority in labor issues to a "supranational" institution.[60] In particular, the Mexican government resisted any enforcement mechanism "that could be used to restrict trade or compromise Mexican sovereignty" through the review of domestic labor laws.[61] At the same time, "U.S. business and even some labor groups were uneasy with the idea of a powerful international labor institution" for North America.[62]

The NAOs, which are located within the Department of Labor of each country, became responsible for the citizens' complaints.[63] Enforcement questions were handled bilaterally, which confirmed the suspicion that the side agreements primarily sought to monitor Mexico: "Between the United States and Mexico, fines and suspension of trade benefits are the potential enforcement mechanisms. Trade sanctions do not apply to Canada, and Canadian courts will impose fines (if at all)."[64] In addition, any party to the NAALC "may request ministerial consultations with another party regarding any matter within the scope of the agreement. . . . One NAO can initiate consultations with [another NAO] regarding labor law, labor law administration, and labor-market conditions."[65]

Mirroring the NAAEC, "part five [of the NAALC] provides a

58. *See, e.g.*, HUFBAUER & SCHOTT, *supra* note 20, at 162, 178.

59. In 2004, in the "Puebla Declaration," the Council agreed to explore ways to improve this process, but little progress has been made since then. *See* CEC Council, *Puebla Declaration*, para. 13, C/04-00/SR/01/Final/Annex F (June 23, 2004), *available at* http://www.cec.org/Storage/26/1756_Session_04-00_of_Alternate_Representatives.pdf.

60. HUFBAUER & SCHOTT, *supra* note 20, at 121–22; *see* MAYER, *supra* note 21, at 181–82, 185.

61. HUFBAUER & SCHOTT, *supra* note 20, at 121–22; *see* MAYER, *supra* note 21, at 185.

62. HUFBAUER & SCHOTT, *supra* note 20, at 122; *see* MAYER, *supra* note 21, at 181–82.

63. HUFBAUER & SCHOTT, *supra* note 20, at 122. *See generally* NAALC, *supra* note 6, arts. 15–16 (establishing the NAOs).

64. HUFBAUER & SCHOTT, *supra* note 20, at 122.

65. *Id.* at 125.

mechanism for resolution of disputes over 'persistent' nonenforcement of select labor standards. The side agreement identifies [eleven] labor principles and divides them into three tiers," with remedies for nonenforcement differing for each of these tiers.[66] As Dr. Dombois and his colleagues have argued, the majority of labor standards are protected only by weak remedies that do not involve any penalty for nonenforcement.[67] The first three labor principles of the NAALC—freedom of association, the right to collective bargaining, and the right to strike—are protected only by NAO review and ministerial oversight.[68] These are the only mechanisms that have been utilized in response to the thirty-five citizens' petitions that have been filed under the NAALC.[69]

The intermediate level of protection involves the Evaluation Committee of Experts ("ECE"), a panel of nongovernmental experts convened to make a recommendation. The ECE was conceived to deal with five labor principles: the prohibition of forced labor, equal pay for equal work, nondiscrimination in employment, workers' compensation in case of injury or illness, and the protection of migrant workers.[70] The only NAALC remedy with "teeth" is the dispute-resolution procedure, which applies to minimum-wage, child-labor, and occupational-safety-and-health standards. Under this procedure, a panel of experts is given the authority to establish an action plan to remedy violations, as well as the power to levy fines and even invoke a loss of tariff preferences if the proposed action plan is not implemented.[71]

The use of the citizens' petition mechanism under the NAALC has been limited, even when measured against the number of petitions filed under the NAAEC. As expected, Mexico has been the

66. *Id.* at 123; *see* NAALC, *supra* note 6, arts. 27–41 (constituting Part Five); *id.* Annex 1 (identifying the eleven labor principles).

67. *See* Rainer Dombois, Erhard Hornberger & Jens Winter, *Transnational Labor Regulation in the NAFTA—a Problem of Institutional Design? The Case of the North American Agreement on Labor Cooperation Between the USA, Mexico and Canada*, 19 INT'L J. COMP. LABOUR L. & INDUS. REL. 421, 423–24, 428 (2003) (Neth.).

68. *See id.* at 428; *see also* NAALC, *supra* note 6, arts. 21–22 (discussing NAO and ministerial consultations); *id.* art. 49(1) (defining "technical labor standards" to include all but the first three labor principles and thus excluding them from the next level of protection).

69. *See* Ruth Buchanan & Rusby Chaparro, *International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labor Cooperation*, 13 UCLA J. INT'L L. & FOREIGN AFF. 129, 146 & n.51 (2008). *See generally id.* at 145–51 (providing a detailed account of the petitions).

70. *See* NAALC, *supra* note 6, arts. 23–26 (establishing and explaining the ECE); *id.* arts. 27(1), 49(1) (effectively focusing the ECE mechanism on the five labor principles listed by excluding other principles from this process while permitting others to proceed to the final tier); Dombois, Hornberger & Winter, *supra* note 67, at 428.

71. *See* NAALC, *supra* note 6, arts. 27–41 & Annexes 39, 41A–41B; Dombois, Hornberger & Winter, *supra* note 67, at 428.

target of the majority of the citizens' petitions filed: twenty-two petitions have been filed against it since 1994, compared to eleven petitions filed against the United States and only two filed against Canada.[72] Twenty-five of the citizens' petitions—a majority—invoked "'enabling' rights," which "relat[e] to collective bargaining, freedom of association, and the rights to strike."[73] Twelve of these framed freedom of association "as a unique claim . . . while the other thirteen included the protection of freedom of association as a claim connected to rights such as to occupational health, non-gender based discrimination, minimal employment standards, child labor prevention, or collective bargaining . . . and strike."[74]

Initially, "labor advocates saw the [NAALC] as a vehicle for highlighting the suppression of independent unions in Mexico and the poor conditions in *maquiladoras* owned by U.S. firms."[75] Only a few of these early complaints reached the ministerial-consultation stage, where they resulted in "commitments . . . to implement educational activities involving public seminars, forums, conferences, expert's reports, meetings, and exchange of information regarding national legislation."[76] Some petitions have achieved more significant results. One example was the case of a cross-national advocacy coalition that challenged the use of pregnancy tests for new female employees in some *maquiladoras*. The citizens' petition procedure of NAALC was instrumental in ending this practice.[77] As Professor Teague has argued, however, "[N]o systemic change has been triggered to labour market governance in Mexico due to NAALC related activity. The main impact has been the 'shaming' of some companies with labour practices that would not be considered distinguished."[78]

By the late 1990s, more sophisticated activist networks filed complaints involving occupational health, discrimination, and safety—areas to which the remedies beyond ministerial consultations potentially applied.[79]

> These submissions involved more discrete "protective" rights and the institutional response was more welcoming. . . . Ministerial consultations were held in these cases and led to compromises in terms of educational programs on occupational health, safety in the work place, environment, migrant

72. Buchanan & Chaparro, *supra* note 69, at 146.
73. *Id.* at 147.
74. *Id.* at 147–48.
75. *Id.* at 148.
76. *Id.*
77. *See* Paul Teague, *Labour-Standard Setting and Regional Trading Blocs: Lesson Drawing from the NAFTA Experience*, 25 EMP. REL. 428, 436 (2003) (U.K.).
78. *Id.*
79. Buchanan & Chaparro, *supra* note 69, at 148.

> workers' rights, and exchange of information among the three offices.[80]

More recent submissions have challenged "structural deficiencies in labormarket governance" and have involved participation by broader networks of interest groups (one recent petition was signed by fifty-five complainants).[81] The submissions, which dealt with, for example, state-government employees and migrant workers in the United States or Mexico's effort to reform its labor law, started to "demand interpretation of local laws through the lens of international labor standards," thus aiming "to broaden the scope of the NAALC, which . . . is meant to only promote the enforcement of domestic laws."[82] In all of these "submissions the institutional response has been slow and convoluted."[83]

Much criticism of the NAALC has focused on the institutional and procedural shortcomings of the agreement, particularly the small likelihood of sanctions. But the argument that the NAALC is a "'toothless' instrument" is too conveniently simplistic for a number of reasons, as Professor Dombois and his colleagues have contended.[84] First, the NAALC does not have even the incipient elements of supranationalism found in the NAAEC, as the NAALC preserves national sovereignty via the NAOs. The NAOs, which have the power to investigate labor-law issues within other NAFTA states, are embedded in national institutions.[85] Furthermore, they have virtually no political incentive to take the process of public submissions to its ultimate consequence: trade disputes.[86]

A more significant problem is the NAALC's bias toward an adversarial approach, which is heavily influenced by the United States' industrial-relations model.[87] While many complainants perceive the citizens' petition process as a "quasi-juridical instrument with accountable results," it is actually a political instrument often used to "supplement . . . other routes, basically legal proceedings at [the] national level, political channels and publicity campaigns, in order to put additional political pressure on . . . governments by internationalising national labour disputes."[88] As in the case of the NAAEC, the petition process too often serves merely to embarrass governments that fail to comply

80. *Id.* at 148–49.
81. *Id.* at 149, 151.
82. *Id.* at 149–50.
83. *Id.* at 150.
84. Dombois, Hornberger & Winter, *supra* note 67, at 425.
85. *See* NAALC, *supra* note 6, arts. 15–16, 21; HUFBAUER & SCHOTT, *supra* note 20, at 122. The NAOs can also set their own operational rules, thus creating an additional level of complexity for those filing a citizens' petition. *See* NAALC, *supra* note 6, art. 16(3).
86. *See* HUFBAUER & SCHOTT, *supra* note 20, at 122.
87. *See* Dombois, Hornberger & Winter, *supra* note 67, at 438.
88. *Id.* at 433–34.

with their own legislation.[89] Also, since public communications are generally submitted to an NAO of a different country from where the alleged violation is taking place, disputes become internationalized and provoke resistance from the accused government, which "will seek to refute complaints of breaches of labor principles in its territory or deny responsibility for them."[90] As in the case of the NAAEC, member states' concerns about the potential negative consequences of public submissions on trading relations have effectively precluded recourse to the "harder" aspects of the agreement.[91]

The adversarial nature of the NAALC perhaps also explains the tensions that exist within the organization, the lack of political engagement of the North American labor ministers in the CLC's affairs, and the dominant role that the NAOs have played overall. The Secretariat pursued a relatively active research agenda in the early years of the agreement's implementation, but this has subsided recently, falling victim to the more dominant role that the NAOs have come to play. The ministers have indeed met only a few times since the NAALC was adopted, and they have signed only nine ministerial-consultation agreements since 1994.[92]

Third, none of the parties to the NAALC, least of all the United States, are prepared to accept an international regulatory body with powers to enforce changes in their national labor laws. Paradoxically, and in stark contrast with environmental law, there is a body of international law that protects core labor principles. A set of such principles is already accepted around the world. In 1995, the United Nations World Summit on Social Development in Copenhagen delineated four categories of core labor principles and rights: freedom of association and collective bargaining, the elimination of forced labor, the elimination of child labor, and the elimination of discrimination with respect to employment and occupation.[93] These core international labor standards, which were

89. *See id.*

90. *Id.* at 432, 438.

91. *See id.* at 430–32.

92. For information on the Secretariat's research activity and on meetings of the CLC Council of Ministers, see NAALC, Annual Reports, http://new.naalc.org/index.cfm?page=292 (last visited Apr. 17, 2010) (providing hyperlinks to the CLC annual reports). Between 1994 and 2007, the ministers met only seven times. *See id.* For details on the nine ministerial-consultation agreements, see NAALC, Summary of Activity Related to Public Communications, http://new.naalc.org/public_communications/summary_of_activity.htm (last visited Apr. 17, 2010) (providing hyperlinks to descriptions of each public communication and its result). Regarding the dominance of the NAOs over the Secretariat, see Buchanan & Chaparro, *supra* note 69, at 135; *supra* note 16.

93. Erika de Wet, *Governance Through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work*, 9 GERMAN L.J. 1429, 1435 (2008) (F.R.G.), http://www.germanlawjournal.com

enshrined in the International Labour Organization's (ILO) *Declaration on Fundamental Principles and Rights at Work*, are globally accepted as such.[94] Historically, the responsibility to monitor labor standards internationally has fallen on the ILO, which has adopted 188 conventions to cover a wide range of labor rights.[95]

As ILO members, all three NAFTA countries adhere to the *ILO Declaration*—the benchmark against which actions in other countries are evaluated.[96] The United States, however, has signed only two of the eight core ILO conventions, while Mexico and Canada have signed six and five, respectively (as of 2002).[97] Although Mexico is generally perceived to be reluctant to enforce the NAALC labor principles, the United States may not be strongly interested in such enforcement either. Although the NAALC principles are "less detailed and specific" than the principles outlined in the ILO conventions, the latter could be used to define the former and could "subject a number of U.S. labor laws to challenge."[98]

Well before NAFTA, the United States already required countries that were beneficiaries of preferential access to the U.S. market to take measures protecting "internationally recognized worker rights."[99] This was true of preferential market-access laws enacted in the 1970s and 1980s, such as the Generalized System of

/index.php?pageID=11&artID=1027; *see* World Summit for Social Dev., Copenhagen, Den., Mar. 6–12, 1995, *Report of the World Summit for Social Development*, ch. I, Annex II, para. 54(b), U.N. Doc. A/CONF.166/9 (Apr. 19, 1995).

94. Int'l Labour Org. [ILO], *ILO Declaration on Fundamental Principles and Rights at Work*, para. 2 (June 18, 1998), *reprinted in* 37 I.L.M. 1233. For a discussion regarding the global acceptance of these core labor standards, see ELLIOTT & FREEMAN, *supra* note 20, at 11–14.

95. *See* Michael A. Cabin, Note, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, 109 COLUM. L. REV. 1047, 1064–65, 1065 n.121 (2009).

96. *See* Philip Alston, *'Core Labor Standards' and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457, 458–59 (2004) (Italy); Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 344 (2006).

97. *See* Kimberly Ann Elliott, *Labor Standards and the Free Trade Area of the Americas* 10 & tbl.3 (Inst. for Int'l Econ., Working Paper No. 03-7, 2003), *available at* http://www.iie.com/publications/wp/03-7.pdf. The two core conventions ratified by the United States are "conventions 105 (on the abolition of forced labor) and 182 (on the worst forms of child labor)." *Id.* at 10. By contrast, the "average" country in the Western Hemisphere has ratified forty-four of the ILO's 188 conventions and seven of the eight core conventions. *Id.*

98. *See* BOLLE, *supra* note 2, at 6 (discussing an analogous effect). A similar argument was made by the U.S. Council for International Business, the U.S. affiliate of the International Chamber of Commerce. *See id.* at 5. *See generally id.* at 3–4 (containing a comparative analysis of labor and enforcement provisions in NAFTA and other FTAs signed by the United States).

99. *Id.* at 2 (emphasis omitted).

Preferences and the Caribbean Basin Initiative.[100] But the controversy that emerged when the United States proposed the introduction of labor standards into the North American trade regime has focused on "whether implementation and enforcement of global labor standards should be explicitly linked to trade agreements."[101] More specifically, the discussion has centered on what the institutional mechanisms for monitoring and implementing these rights should be. Since the inclusion of labor provisions in the NAFTA labor side agreement, the United States has progressively introduced more stringent labor requirements in FTAs signed with other countries.[102] One problem with this approach is that such standards are considered eminently domestic issues that are unrelated to trade. Also, there is a broad range of ways that these standards may be implemented from nation to nation, in contrast to rules that are more consistently applied around the world. The question remains, then, whether the objectives sought by U.S. labor organizations—to improve compliance with labor standards through fully enforceable commitments in trade agreements—have been or can be achieved.

As Kimberly Ann Elliott and Professor Richard B. Freeman have argued, the evidence so far on the effectiveness of sanctions demonstrates "that trade measures could be designed to contribute to improved compliance with labor standards *in discrete situations* while also guarding against protectionist abuse."[103] They concluded, however, that the ILO, not the World Trade Organization or the FTAs, should have the principal role in promoting and enforcing international labor standards generally.[104] Furthermore, the absence in the U.S. bilateral FTAs of a requirement that national laws "be consistent with . . . core labor standards as defined by the ILO" has undermined the progress made toward achieving an international consensus on key labor standards.[105]

Most significantly, while U.S. unions want to contain the globalization forces unleashed by free trade, they also oppose the adoption of international standards and prefer to maintain their domestic prerogatives. According to Professor Teague, "the strong domestic orientation of organised labour has contributed to the under-testing of the consultation and dispute resolution machinery of NAALC. Thus compounding the undoubted cumbersome and

100. *Id.*

101. Elliott, *supra* note 97, at 2.

102. For a detailed discussion of how the United States modified the NAFTA model for the FTAs negotiated over the last sixteen years, see BOLLE, *supra* note 2, at 2–4.

103. Elliott, *supra* note 97, at 2 (emphasis added) (citing ELLIOTT & FREEMAN, *supra* note 20, at 73–92).

104. *See* ELLIOTT & FREEMAN, *supra* note 19, at 89–92; Elliott, *supra* note 97, at 2.

105. Elliott, *supra* note 97, at 15.

convoluted procedures of NAALC is a process of self-blockage on the part of organised labour."[106] Indeed, it is shocking to recognize the low level of involvement of unions that "carry considerable political weight in their own countries and could give the NAALC . . . [the] legitimacy and effectiveness" that it has thus far lacked.[107] One reason for this is the corporatist nature of the Mexican labor-union organizations, which are frequently the target of complaints against Mexico.[108] Large North American unions, such as the Canadian Labor Congress and the AFL-CIO, have continued to criticize the NAALC "as 'toothless' and ineffectual."[109] As one set of authors has concluded, "[T]he organisation in the USA best placed to give the NAALC real political 'clout' is not involved at all in the NAALC regime."[110] Not surprisingly, the citizens' petition process "has been tested mostly by small trade unions or labour rights activist groups that have a strong 'international' dimension."[111]

IV. LOOKING TOWARD THE FUTURE

While the CEC and the CLC were given very limited resources and powers for monitoring the national enforcement of environmental and labor standards, the very existence of administrative and judicial enforcement procedures has had a preemptive effect on the willingness of the three NAFTA countries to use the institutional structures that materialized to advance a cooperative agenda that would clearly favor their individual and collective interests.

> Even viewed through the trade/environment prism, and despite the issues it does not address, the range and creativity of the tools the NAAEC brings to bear on the pollution haven problem are remarkable. But the NAAEC is not only, or even primarily, an agreement on "trade and the environment." Its greater importance may be that it is the first regional environmental organization in North America, with broad mandates to address almost any environmental issue arising

106. Teague, *supra* note 77, at 443.
107. Dombois, Hornberger & Winter, *supra* note 67, at 432.
108. *See id.* at 432–33.
109. *Id.* at 433.
110. *Id.* A number of studies have praised the formation of transnational alliances between labor organizations as an unintended consequence of the citizens' petition process of the NAALC. *See, e.g.*, Tamara Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, 111 AM. J. SOC. 715, 743–44 (2005). But most studies accept that such collaboration among organized labor in the three NAFTA countries has not taken place in the context of the NAALC. *See, e.g.*, Ian Thomas MacDonald, *NAFTA and the Emergence of Continental Labor Cooperation*, 33 AM. REV. CANADIAN STUD. 173, 184 (2003).
111. Teague, *supra* note 77, at 442.

anywhere on the continent.[112]

The most visible successes of the NAAEC are not those related to the resolution of disputes, but rather those linked to the cooperative aspects of the CEC's work program, as revealed by periodic reviews carried out by the CEC. Many analysts have praised the innovative features of the NAAEC, noting that it has promoted transparency and the involvement of civil-society groups[113] and pointing out its achievements in Mexico, where the CEC made vital contributions to the creation of a national pollutant release and transfer registry and to bans on substances like DDT and chlordane.[114] The CEC has been a helpful source of research and analysis, as well as a relevant forum; it has developed programs of cooperation around themes of common concern, including threats to air quality and to biodiversity.[115] The CEC has encouraged transparency and citizen participation not only through citizens' petitions and the JPAC, but also through the promotion of open ministerial meetings and innumerable seminars, workshops, and conferences on environmental themes.[116] The CEC has contributed to the development of environmental-protection capabilities in all three NAFTA countries, including the prevention of contamination, the disposal of toxic chemical substances, and the expansion of "toxic release inventories."[117]

The intrinsic tensions that exist at the core of the CEC probably explain why it has remained on the fringes of important debates such as the one surrounding Chapter Eleven of NAFTA,[118] high-level discussions on the alignment of environmental standards within the framework of the Security and Prosperity Partnership (SPP),[119] and most recently, the discussions leading to the North American Leaders' Declaration on Climate Change and Clean Energy.[120]

112. Knox & Markell, *supra* note 6, at 10; *see also* Vaughan, *supra* note 7, at 20–21 (pointing to "impressive" results from the CEC).

113. *See* Donald McRae, *Trade and Environment: The Issue of Transparency*, *in* GREENING NAFTA, *supra* note 6, at 237, 248–52.

114. *See* Greg Block, *The CEC Cooperative Program of Work: A North American Agenda for Action*, *in* GREENING NAFTA, *supra* note 6, at 25, 31–33.

115. *See id.* at 30, 34.

116. *See, e.g.*, Janine Ferretti, Speech, *Innovations in Managing Globalization: Lessons from the North American Experience*, 15 GEO. INT'L ENVTL. L. REV. 367, 371 (2003).

117. Block, *supra* note 114, at 30–33.

118. NAFTA, *supra* note 3, arts. 1101–1139 (constituting Chapter Eleven).

119. *See generally* Sec. & Prosperity P'ship, Prosperity Working Groups, http://www.spp.gov/prosperity_working/index.asp?dName=prosperity_working (last visited Apr. 17, 2010) (discussing the SPP's "prosperity agenda," which includes the environment, and the goals of each SPP working group).

120. Press Release, White House Office of the Press Sec'y, North American Leaders' Declaration on Climate Change and Clean Energy (Aug. 10, 2009), *available at* http://www.whitehouse.gov/the-press-office/north-american-leaders-declaration-climate-change-and-clean-energy.

While recognizing fifteen years of environmental cooperation, the Declaration does not make explicit reference to the CEC. However, it commits to the development of a trilateral plan to facilitate cooperation in making the transition toward a low-carbon economy in North America.[121] The Declaration calls for the exchange of information; the development of "comparable approaches to measuring, reporting, and verifying emissions reductions"; the building of capacity and infrastructure "with a view to facilitate future cooperation in emissions trading"; the reduction of transportation emissions; the alignment of energy-efficiency standards among the participating nations; cooperation in "sustainably managing [national] landscapes for [greenhouse-gas] benefits"; and the construction of a smart grid for North America.[122] The CEC has the institutional capabilities to identify where analysis is needed and to compile the information necessary to support this cooperation agenda.

Although cooperation is not an aspect of the NAALC that is often highlighted, the agreement grants the NAOs the power to initiate cooperative activities between the three member countries on labor-market affairs.[123] These activities can include seminars, training courses, and technical assistance, as well as sharing best practices regarding, for example, occupational health and safety.[124] The activities also promote social participation among union, business, and NGO representatives. About ninety-five such activities were developed between 1994 and 2007, almost half of which focused on occupational health and safety.[125]

"[D]eveloping public goods in [transnational] labour markets" could be a better way of "securing decent work and higher living standards for workers than the imposition of prohibitive rules."[126] It is indeed doubtful that trade sanctions are the right tool for ensuring the enforceability of labor standards, much less for fostering cooperation on labor matters. Business cycles, technological advancements, and macroeconomic policies, in

121. *See id.*

122. *Id.*

123. *See* NAALC, *supra* note 6, art. 21.

124. *See* Buchanan & Chaparro, *supra* note 69, at 134 n.12, 135 n.13; Claudia Anel Valencia, Deputy Coordinator, Nat'l Admin. Office, Mexican Ministry of Labor and Soc. Welfare, PowerPoint Presentation at the Organization of American States (OAS) Department of Social Development and Employment's Workshop on Labor Dimension of FTAs and Regional Integration Processes: The North American Agreement on Labor Cooperation: The Mexican Perspective (July 10, 2007), *available at* http://www.sedi.oas.org/ddse/dimension/ingles/fr_agenda.html.

125. *See* Valencia, *supra* note 124. Around forty-five focused on occupational health and safety, eleven on labor markets, nine on minimum working conditions, nine on freedom of association, seven on work discrimination, six on migrant workers' rights, two on child labor, and eight on other areas. *See id.*

126. Teague, *supra* note 77, at 444.

addition to trade, all affect labor conditions. A trade agreement, by itself, cannot supersede the asymmetries that exist in North America's labor markets, nor can it counteract decades of domestic political compromises in labor legislation in each NAFTA country. Trade agreements do increase competitive pressures in labor markets and do create labor-market distortions, as evidenced by the significant migration of Mexicans to the United States during the past sixteen years.[127] The protectionist stance taken by U.S. unions against NAFTA has not helped to improve labor conditions in Mexico or in North America generally.[128] But soft law, rather than hard law or trade sanctions, could be used as an effective tool for regulation. Organized labor could "devis[e] innovative measures that test to the full the international channels that connect each national labour market inside NAFTA."[129] As Elliott has argued, "[L]abor activists [should] . . . shift their attention from sanctions to enforce standards in trade agreements to pressuring governments to adopt concrete, real plans of action for raising labor standards and to provide the financial resources to implement them."[130] Training programs, labor mobility, and immigration reform present areas of opportunity where unions could help boost labor rights throughout North America and take advantage of the lessons learned from NAALC and NAFTA.

More forward-looking proposals that unveil the potential for exploiting similarities and complementarities of market and social conditions among the three North American countries could provide a starting point for new collective, trilateral approaches. An example would be a regional strategy that places a number of core labor values that are already internationally accepted—such as minimum wages, the elimination of child labor, and occupational-health-and-safety concerns—at the center of a North American cooperative strategy. Another promising strategy is for the three countries to invest heavily in human capital in order to ensure a competitive workforce in North America and a sustained North American capacity to generate well-paying jobs. Given the large investments that emerging economies such as China and India are making in this area, in the medium term the United States may see its lead in science and technology narrow. The educational

127. *See* Jeanne Batalova, *Mexican Immigrants in the United States*, MIGRATION INFO. SOURCE, Apr. 23, 2008, http://www.migrationinformation.org/Usfocus/display.cfm?ID=679 (noting that the number of foreign-born Mexicans living in the United States rose from 4.3 million to over 11.5 million between 1990 and 2006).

128. *See* MacDonald, *supra* note 110, at 190. For a discussion of transnational collaboration among North American labor unions, see *id.* at 184–90. For a discussion of the failure of this collaboration to build a regional labor regime in North America, see Teague, *supra* note 77, at 441–43.

129. Teague, *supra* note 77, at 444.

130. Elliott, *supra* note 97, at 20.

underperformance of racial and ethnic minorities in the United States takes place at a time when a "technologically sophisticated and globally competitive economy demands increasingly higher level skills from all workers" as well as a continual upgrading of skills.[131] The competitive risks facing the North American labor market could be exacerbated by an aging population in both the United States and Canada. Mexico's demographics could become a positive factor, but only if there is a regional plan to invest in human capital throughout the region.

Unfortunately, options to modify NAFTA and its side agreements are virtually nonexistent, largely because both environmental and labor organizations and the Mexican government prefer to maintain the small gains realized through the side agreements. Interest groups in North America continue to expect that NAFTA's dispute-resolution mechanism will accomplish something that it simply cannot bring about—improved environmental and labor conditions throughout North America. A trade agreement (and trade sanctions in particular) is simply not the right instrument to address environmental and labor challenges. This Article argues that a more cooperative approach—one that focuses on capacity building and provides for strong citizen participation—is a far superior, more effective means of achieving the ultimate goal of an improved environmental and labor situation in North America. Reopening the NAFTA debate could unlock a Pandora's box of protectionist forces, which are particularly strong in times of economic crisis. For political expediency, Mexico and Canada may end up accepting the original Obama proposal to include language that promises to enforce environmental and labor legislation within the text of NAFTA itself. But that proposal would not translate into environmental or labor improvement in the region. A more productive route would be to strengthen the intergovernmental cooperative agenda, which has proven to be the most successful facet of the NAFTA side agreements. In the best-case scenario, and particularly in light of the political obstacles already explained, the three NAFTA countries may decide to strengthen their cooperative agenda outside of the NAFTA framework.

131. COUNCIL ON COMPETITIVENESS, COMPETITIVENESS INDEX: WHERE AMERICA STANDS 17 (2007), *available at* http://www.compete.org/images/uploads/File/PDF%20Files/Competitiveness_Index_Where_America_Stands_March_2007.pdf.