

INCREASING BENEFITS AND REDUCING HARM CAUSED BY THE NORTH AMERICAN FREE TRADE AGREEMENT

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I. INTRODUCTION

The North American Free Trade Agreement (NAFTA)¹ went into effect on January 1, 1994² along with the North American Agreement on Environmental Cooperation (NAAEC),³ addressing environmental matters among the three trading partners, and the North American Agreement on Labor Cooperation (NAALC),⁴ addressing labor matters. NAFTA ties United States, Canadian, and Mexican commercial interests together by eliminating tariffs and other legal restrictions on trade between the three countries, partly in response to European integration that made it harder for each to compete with common market countries.⁵ However, NAFTA does not generate political integration as does the European Union; nor does it eliminate political borders except to the extent that dispute resolutions provided in NAFTA impose a common commercial legal structure on the three countries. NAFTA's goals were to reduce the costs of trade within a single market area while increasing employment, income, and international competitiveness of the three countries.⁶

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¹ North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Jan. 1, 1994; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289 (1993), approved by Congress in the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 19 U.S.C. § 3311 as a Congressional-Executive Agreement, conditioned on the requirement that no provision inconsistent with U.S. law will have any effect, 19 U.S.C. §3312(a)(1)(2000) (hereinafter "NAFTA"). NAFTA became effective on January 1, 1994 [Exec. Order No. 12889, 58 Fed. Reg. 69,681 (Dec. 27, 1993)], and replaced the United States-Canada Free Trade Agreement, Pub. L. No. 100-449, 102 Stat. 1851, 19 U.S.C. § 2112, implemented effective Dec. 14, 1988 by Exec. Order No. 5923, 53 Fed. Reg. 50,638 (Dec. 14, 1988).

² For general background, see Ewell E. Murphy, Jr., *Charting the Transnational Dimension of Law: U.S. Free Trade Agreements as Benchmarks of Globalization*, 27 HOUS. J. INT'L L. 47, 50 (2004).

³ North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, Sept. 14, 1993, art. 8-19, 32 I.L.M. 1480 (entered into force Jan. 1, 1994) (hereinafter NAAEC).

⁴ North American Agreement on Labor Cooperation Between the Government of the United States, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1499 (hereinafter NAALC).

⁵ See generally, Richard Schaffer, et al., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT, Chps. 9, 13, 14 (West 2005).

⁶ See generally, Ralph H. Folsom, NAFTA 1-17 (West Group 1999).

The arguments for passing NAFTA were (1) “comparative advantage” in trade would reduce production costs and increase productivity by permitting increased specialization, improved capital flows, and expanded markets;⁷ (2) reduced impediments would expand trade between Canada, the U.S., and Mexico;⁸ (3) free trade would improve the economic well being of residents of the three countries through lower prices and increased economic growth;⁹ (4) NAFTA would increase Mexican economic and political stability; and (5) NAFTA would slow immigration to the U.S. from Mexico.¹⁰

Arguments against NAFTA included (1) Mexico’s low wages would lead to lower wages in the U.S., reduce productivity and reduce income;¹¹ (2) capital would flow from the U.S. to Mexico, reducing capital available in the U.S. and adversely affecting U.S. productivity; (3) free trade would not increase the wages of Mexican workers; (4) high skill jobs would be pushed toward the U.S and low skill jobs toward Mexico, causing workers in both countries to lose jobs and be worse off;¹² (5) farmers in both countries argued that agricultural jobs would move to the other country;¹³ (6) in the U.S. labor objected that it would lose U.S. jobs to Mexico;¹⁴ in Mexico labor objected that it would lose jobs to the U.S.;¹⁵ (7) NAFTA would generate increased migration to the U.S.;¹⁶ and harm Mexico’s economy and contribute to its social problems.¹⁷

⁷ See Scott Baier & Jeffrey Bergstrand, *Do Free Trade Agreements Actually Increase Members’ International Trade?*, 71 J. INT’L ECON. 72, 92 (2007).

⁸ *Id.* See also, Andreas Waldkirch, *The Effects of Foreign Direct Investment in Mexico Since NAFTA*, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115300&rec=1&srcabs=878882 (last visited Mar. 15, 2009); M. Ayham Kose, et al., *How Has NAFTA Affected the Mexican Economy? Review and Evidence*, INT’L MONETARY FUND (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878882&rec=1&srcabs=1115300 (last visited Mar. 15, 2009).

⁹ See generally, M. Angeles Villareal & Marisabel Cid, *NAFTA and the Mexican Economy*, CONGRESSIONAL RESEARCH SERVICE (2008) citing declines in poverty and increases in wages in the export sector; and growth in the economy as a whole, that were modest. See also J.F. Hornbeck, *NAFTA at Ten: Lessons from Recent Studies*, CONGRESSIONAL RESEARCH SERVICE, (2005).

¹⁰ NAFTA did not reduce illegal immigration, see Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J. OF L. & PUB. POL’Y 341 (2007).

¹¹ For a discussion of opposition to NAFTA and trade expansion with the U.S. in general, see Pastoral Juvenil Obrera, *The Struggle for Justice in the Maquiladoras: The Experience of the Autotrim Workers*, in CONFRONTING GLOBALIZATION: ECONOMICS INTEGRATION AND POPULAR RESISTANCE IN MEXICO 173 (Timothy A. Wise, et al., eds., 2003).

¹² F. Ray P. Marshall, *Center for Immigration Studies, Implications of the North American Free Trade Agreement for Workers* (1993), <http://www.cis.org/articles/1993/back293.html> (last visited Mar. 23, 2009).

¹³ Early opposition in Mexico was intertwined with the Chiapas Rebellion. Further, in Mexico, members of both the agricultural sector of the economy and farmers working communally owned *ejidos* opposed the agreement. See Jorge A. Vargas, *NAFTA, The Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 CAL. W. INT’L L.J. 1, 2 (1995); Neil Harvey, *THE CHIAPAS REBELLION: THE STRUGGLE FOR LAND AND DEMOCRACY* 2, 8, 170, 181-82 (1998).

¹⁴ Robert E. Scott, et al., *Revisiting NAFTA: Still Not Working for North America’s Workers*, Economic Policy Institute (2006) (hereinafter *Scott, EPI Briefing Paper 2006*).

¹⁵ Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me ... What, Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 85-89 (2007) (hereinafter *Oliver, Twelve Years of NAFTA*).

¹⁶ Jorge G. Castañeda, *Can NAFTA Change Mexico?* 72 FOR. AFF. 74 (1993) (hereinafter *Castañeda*).

¹⁷ Oliver, *Twelve Years of NAFTA*, *supra* note 15, at 69-70.

The plaudits and condemnations of NAFTA, reduced to their simplest terms, raise two sets of questions: first, on balance did NAFTA benefit the producers and consumers in the signatory countries by increasing employment, increasing output, and reducing prices; second, are the provisions of NAFTA adequate as they are or should they be revised. The two questions are addressed in turn.

II. THEORETICAL ARGUMENTS FOR AND AGAINST FREE TRADE UNDER NAFTA

A. NAFTA PROVISIONS GOVERNING FREE TRADE IN GOODS AND SERVICES

NAFTA eliminates tariffs on goods moving between the three member countries; each country's products are treated the same as the importing country's products.¹⁸ The imposition of taxes on either imports or exports is prohibited.¹⁹ In addition, non-tariff restrictions on trade such as quotas or licensing requirements are prohibited.²⁰ There are limited exceptions to these rules governing energy and basic petrochemicals, of which the most extensive are found in Annex 602.3 which limits exploitation of crude oil in Mexico to PEMEX (the Mexican government oil company) and export of natural resources generally to the Mexican government.²¹ Similarly, a party may deny another party the right to own or build telecommunications transmission networks or transmission services.²² While the general rule is that there can be no discrimination against goods of another NAFTA country, even in government procurement,²³ NAFTA does contain an exception for domestic production for national defense purposes.²⁴ Whether these free trade provisions have been beneficial or harmful to the U.S. or to Mexico are subject to testing based on theoretical arguments supported or refuted by empirical evidence.

B. NEO-PROTECTIONIST THEORY: ARGUMENTS MADE IN OPPOSITION TO NAFTA

Mexico shifted from a closed economy characterized by substantial government intervention in economic affairs to a free market neo-liberal economic regime.²⁵ Neo-protectionists want to reverse the shift to a global market economy, arguing that because some businesses contracted and laid off workers as a result of increased competition while others expanded and hired workers as a result of removal of trade barriers, the re-

¹⁸ NAFTA art. 302.

¹⁹ *Id.* art. 314.

²⁰ *Id.* art. 309.

²¹ NAFTA ch. 6 & annex 602.3.

²² NAFTA art. 1301. However, both access to telecommunications transmission networks and the right to attach terminal and interface equipment are guaranteed (NAFTA art. 1302)

²³ NAFTA arts. 1003, 1008 and 1009.

²⁴ NAFTA art. 1018.

²⁵ Aaron Tornell, et al., *NAFTA and Mexico's Economic Performance*, CESIFO WORKING PAPER NO. 1155 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=526162 (last visited Mar. 20, 2009); *see also*, Aaron Tornell, et al., *The Positive Link Between Financial Liberalization, Growth and Crises*, CESIFO WORKING PAPER NO. 1164 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=528225 (last visited Mar. 20, 2009).

sult was “ruinous” competition.²⁶ They claim the economy should be closed because free trade (i.e. “neo-liberal” policies or “economic liberalism”)²⁷ is to blame for Mexico’s economic ills.²⁸ The more thoughtful objection to eliminating trade barriers is made by those who argue removing trade barriers reduced the government’s ability to redistribute resources within the country so as to ameliorate poverty and encourage economic growth and employment.²⁹

Neo-protectionists claim that closure of economies or restrictions on free trade are supposed to be necessary because of the lack of strong rule of law, lack of a culture of independence in developing countries, or distrust of market forces as a vehicle to improve economic well being.³⁰ Free trade is supposed to benefit the wealthy at the expense of the masses as it harms the society’s income distribution, economic growth, and social welfare.³¹ Neo-protectionists argue that domestic problems can best be corrected in an environment where trade is limited so that domestic infant industries can develop into mature industries³² in a way that allows the government to concentrate on correction of internal socio-economic policies through social engineering designed to promote internal growth, economic development and citizen well-being.³³ While the argument is not devoid of intellectual underpinnings³⁴ the application to Mexico fails to explain why almost a half century of applying the theory failed to produce favorable results or why NAFTA caused all three member countries to gain more jobs than they lost.³⁵

C. THE NEO-LIBERAL ARGUMENTS: ECONOMISTS’ SUPPORT OF

²⁶ Wolfgang F. Stolper & Paul A. Samuelson, *Protection and Real Wages*, 9 REV. ECON. STUD. 58 (1941); Scott, EPI 2006 Briefing Paper, *supra* note 14.

²⁷ See, e.g. Witness for Peace, *A Hemisphere for Sale: The Epidemic of Unfair Trade in the Americas*, Washington, D.C., (2001) (hereinafter *Witness for Peace*).

²⁸ John Stencel, *Free Trade Versus Fair Trade*, 36 DENV. J. INT’L LAW & POL’Y 349, 356 (2008) arguing for guaranteed prices and subsidies for farmers rather than free trade.

²⁹ Mexico long tried to manage its economy through high tariffs, subsidies, government monopolies, and redistribution of land, *see infra*.

³⁰ Miguel A. Centeno, *Political and Economic Dimensions of Free Trade: Liberalism and the Good Society in the Iberian World*, 610 ANNALS 45, 71, 95 (2007) (hereinafter *Centeno*).

³¹ Patricia Fernandez-Kelly, *Introduction, NAFTA and Beyond: Alternative Perspectives in the Study of Global Trade and Development*, 610 ANNALS 6 (2007) and the papers in the same issue that she summarizes (hereinafter *Fernandez-Kelly, NAFTA and Beyond*); Witness for Peace, *supra* note 27. The “ruinous competition” and “fair trade” arguments seem to lack validity, at least with respect to the historic development of Japan, *see* Daniel M. Bernhoffen & John C. Brown, *An Empirical Assessment of the Comparative Advantage Gains from Trade: Evidence from Japan*, 95 AM. ECON. REV. 208 (2005) (finding 8 to 9 percent increase in GNP attributable to gains from trade).

³² Castañeda, *supra* note 16 at 66, 74. Kurt Weyland, *Neoliberalism and Democracy in Latin America: A Mixed Record*, 46 LATIN AM. POL. & SOC’Y 135 (2004); The “infant industry” argument would carry more weight with respect to Mexico had Mexico not tried the approach without success, *see* Centeno, *supra* note 30.

³³ See, e.g. Adam D. Morton, *Structural Change and Neoliberalism in Mexico: ‘Passive Revolution’ in Global Political Economy*, THIRD W. QUAR., Vol. 24 No. 4 631-653, esp. 632 (2003) (hereinafter *Morton, Neoliberalism in Mexico*).

³⁴ For example, *see* José Wynne, *Wealth as a Determinate of Comparative Advantage*, 95 AM. ECON. REV. 226 (2005).

³⁵ The argument was put forward by Jorge Castañeda in 1993—before NAFTA was implemented, Castañeda *supra*, note 16, at 66. The evidence is to the contrary, *see, e.g.*, Carnegie Report, *supra* note 20.

NAFTA AND FREE TRADE

Economists generally supported formation of NAFTA while labor, agricultural interests, and some manufacturing industries opposed it.³⁶ Eighty seven percent of economists surveyed by the American Economic Association said that they support free trade.³⁷ They argue that reliance on trade permits market forces to distribute resources and encourages individual well being and economic growth far more effectively than closed economies managed by government.³⁸ Just as competition between producers in different states has led to increased productivity and lower prices for goods and services produced within the U.S., competition between producers in different countries increases competition and lowers the prices of goods and services.³⁹ The consensus of economists is that removing barriers to trade with agreements like NAFTA will produce gains to all trading partners.⁴⁰ Paul Samuelson, who proved in 1938 that harm from free trade can occur under very limited circumstances, has repeatedly affirmed that his proof does not provide a basis for abandoning support for free trade or for NAFTA as a vehicle for expanding free trade.⁴¹

To illustrate, clothing producers in the U.S. South displaced producers in the Northeast by producing clothes at lower cost. They in turn were displaced by producers in Mexico who were then displaced by producers in Asia, again because of lower costs.⁴² As a result, the prices of imported clothing are far lower than the cost of domestically produced clothing would have been.⁴³ Free trade, both domestically and internationally, lowered clothing costs, forced workers to find alternative employment and generated alternate employment for them in other industries.⁴⁴ Apparel and textile industries together account for more than 40 percent of employment reductions in the U.S. since 2000.⁴⁵ Textiles are now disproportionately imported into the United States from the Pacific Rim countries of China, Japan, and Vietnam, not Mexico.⁴⁶

³⁶ David Rosenbaum, *Good Economics Meet Protective Politics*, N.Y. TIMES, Sept. 19, 1993, at D5) (noting that 300 economists had signed a letter to President Clinton supporting NAFTA; Timothy Whitehouse, *International Trade and the Environment*, 18 PACE INT'L L. REV. 243, UA-45 (2006); Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 917 n.2 (1994).

³⁷ N. Gregory Mankiw, *Beyond the Noise on Free Trade*, N.Y. TIMES, Mar. 17, 2008

³⁸ Scott, *EPI 2006 Briefing Paper*, *supra* note 14; Witness for Peace, *supra* note 27.

³⁹ Scott Taylor, "Once-off" and Continuing Gains from Trade, 61 REV. OF ECON. STUDIES, 589 (1994); Rögnvaldur Hannesson, *Renewable Resources and the Gains from Trade*, 33 CAN. J. ECON. 122 (1994); Vincent P. Crawford, et al., *Bargaining, Strategic Reserves, and International Trade in Exhaustible Resources*, 66 AM. J. OF AGRIC. ECON. 472 (1984); Trent J. Bertrand, *The Gains From Trade: An Analysis of Steady-State Solutions in an Open Economy*, 89 Q. J. ECON. 556 (1975).

⁴⁰ Paul A. Samuelson, *Welfare Economics and International Trade*, 28 AM. ECON. REV. 261(1938); Paul A. Samuelson, *The Gain from International Trade Once Again*, 72 ECON. J. 820 (1962); Paul A. Samuelson, *A Ricardo-Sraffa Paradigm Comparing Gains from Trade in Inputs and Finished Goods*, 39 J. ECON. LIT. 1204 (2001).

⁴¹ *Id.* Response from Paul A. Samuelson to Avinash Dixit and Gene Grossman, *The Limits of Free Trade*, 19 J. ECON. PERSP. 241, 242 (2005).

⁴² Cynthia D. Anderson, et al., *Globalization and Uncertainty: The Restructuring of Southern Textiles*, 48 SOC. PROBLEMS 478 (2001).

⁴³ *Id.*

⁴⁴ Scott L. Baier & Jeffrey H. Bergstrand, *Do Free Trade Agreements Actually Increase Members' International Trade?* 71 J. OF INT'L ECON. 72, 92 (2007).

⁴⁵ *Id.*

⁴⁶ U.S. Dept. of Commerce, U.S. Census Bureau, U.S. International Trade Statistics, VALUE OF EXPORTS,

D. NEO-PROTECTIONISM VERSUS NEO-LIBERALISM IN MEXICO

Between 1876 and 1911 Mexico sought integration with the world economy and foreign investment. When the Partido Revolucionario Institucional (“PRI”) came to power in the thirties it imposed tariffs and import restrictions to shelter domestic firms from foreign competition.⁴⁷ Mexico remained a less developed country for half a century despite these policies. In 1981, oil prices collapsed, triggering a peso devaluation and bank nationalization. As the price of bailing Mexico out of its economic problems the International Monetary Fund encouraged Mexico to again reduce tariffs, promote exports, increase trade and join the General Agreement on Tariffs and Trade (“GATT”). In 1988, Mexico flirted with reclosing its economy, then decided to expand its neo-liberal policies through NAFTA. The historical data do not support the neo-protectionist alternatives that NAFTA naysayers continue to propose.⁴⁸

III. THE EVIDENCE ON THE EFFECTS OF NAFTA ON US AND MEXICAN ECONOMIES

A. EMPIRICAL EVIDENCE PURPORTING TO SHOW NAFTA HARMED THE U.S.

Some have argued that NAFTA has been harmful to one or all of the trading partners.⁴⁹ Robert Scott and his colleagues at the Economic Policy Institute (EPI)⁵⁰ assert that because of NAFTA “over a million jobs that would otherwise have been created were lost, and wages were pressured downward for workers with less than a college edu-

GENERAL IMPORTS, BY COUNTRY, <http://censtats.census.gov/cgi-bin/sitc/sitcCty.pl> (last visited Mar. 1, 2009).

⁴⁷ See generally, PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 (Norton, 2009) at 32-38, 42-55 (hereinafter, *Krugman 2009*). These are the policies to which those opposed to “economic liberalism” seem to want to return; see, e.g., *Fernandez-Kelly, NAFTA and Beyond*, *supra* note 31.

⁴⁸ Morton, *Neoliberalism in Mexico*, *supra* note 33.

⁴⁹ For arguments that increased free trade and foreign investment have hurt both employment and the environment in the member countries, see, e.g., *Scott Vaughan, The Greenest Trade Agreement Ever? Measuring the Environmental Impacts of Agricultural Liberalization*, in *NAFTA’S PROMISE AND REALITY* (Carnegie Endowment for Int’l Peace 2003) available at <http://www.carnegieendowment.org/files/nafta1.pdf>, at 61 (last visited Mar. 19, 2009); John Cavanagh & Sarah Anderson, *Happily Ever NAFTA?*, *FOR. POL’Y*, Sept. 1, 2002, at 58; Timothy Wise & Kevin P. Gallagher, *Foreign Policy in Focus, NAFTA: A Cautionary Tale*, Oct. 24, 2004, <http://www.globalpolicy.org/soecon/ffd/2002/1024caution.htm> (last visited Mar. 19, 2009) Timothy Wise, *NAFTA’s Untold Stories: Mexico’s Grassroots Responses to North American Integration*, *AM. PROG. INTERHEMISPHERIC RES. CTR.* (2003), <http://americas.irc-online.org/reports/2003/0306globalization.html>; Hagen, *supra* note 36.

⁵⁰ The attacks by the Economic Policy Institute on NAFTA began in 1996, Robert E. Scott, *North American Trade after NAFTA: Rising Deficits, Disappearing Jobs*, EPI Briefing Paper, *ECON. POL’Y INST.* (1996); continued with Robert E. Scott, *The High Price of ‘Free’ Trade: NAFTA’s Failure has cost the United States Jobs across the Nation*, EPI Briefing Paper, *ECON. POL’Y INST.* (2003); and was restated most recently in Robert E. Scott, et al., *Revisiting NAFTA: Still Not Working for North America’s Workers*, EPI Briefing Paper, *ECON. POL’Y INST.* (2006).

cation.”⁵¹ According to Scott, “growing [U.S.] trade deficits with Mexico and Canada have displaced production that supported roughly 660,000 (manufacturing only) and 1.0 million (total) U.S. jobs..., while imports displaced domestic production that would support 2 million jobs.”⁵² Scott claims NAFTA is “part of a long-term campaign by conservative business interests in all three countries to rip up their respective domestic social contracts.”⁵³ He continues, “The reality is that the denial of social protections in the rules of an internationally integrated market inevitably undermines the protections established in the previously separate domestic economies after decades of political struggle.”⁵⁴ His real complaint is with neo-liberal *laissez faire* capitalism, “the ‘vision’ of NAFTA is profoundly reactionary: it pushes nations back toward a 19th century ideology in which government’s economic function is to protect the interests of investors, while working people—the overwhelming majority in each nation—are left to fend for themselves.”⁵⁵

U.S. trade with Mexico is more balanced than its trade with the rest of the world. . . . In 1993, prior to NAFTA, US imports of goods and services from Mexico were over \$39 billion while U.S. exports to Mexico were about \$41.5 billion. By 2007, U.S. imports of goods and services from Mexico had soared to \$229 billion while U.S. exports to Mexico had increased to \$160 billion.⁵⁶ In 2008 the U.S. imported \$176 billion in goods other than oil and exported \$152 billion; oil that would otherwise be imported from other countries added \$42 billion to the deficit.⁵⁷ The ratio of goods and services exported to Mexico to goods and services imported from Mexico has been consistently higher than the ratio of exports to imports to the rest of the world.⁵⁸ The far smaller reductions in U.S. tariffs than in Mexican tariffs triggered by NAFTA suggests that the U.S. had relatively little to fear from free trade, a view supported by the trade data.⁵⁹ International trade

⁵¹ *Id.* at 2.

⁵² *Id.* at 3.

⁵³ *Id.* at 1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ U.S. Dept. of Commerce, Bureau of Economic Analysis, International Economic Accounts, Table 1, U.S. International Transactions,

http://www.bea.gov/international/bp_web/simple.cfm?anon=71&table_id=1&area_id=3 (last visited Feb. 24, 2009); and Table 12, U.S. International Transactions, by Area – Mexico,

http://www.bea.gov/international/bp_web/simple.cfm?anon=71&table_id=10&area_id=22 (last visited Feb. 24, 2009).

The U.S. Census Bureau, Foreign Trade Division, Data Dissemination Branch, Washington, D.C. 20233, retrieved from <http://www.census.gov/foreign-trade/balance/c2010.html#2008> (last visited Feb. 24, 2009) maintains a similar series. For reasons we can’t explain, the numbers are slightly different from those maintained by the Bureau of Economic Analysis.

⁵⁷ U.S. Census Bureau, U.S. International Trade Statistics, Value of Exports, General Imports, and Imports by Country by 2-digit Commodity Groupings Mexico (2010), U.S. Dept. of Commerce, Feb. 2009, <http://censtats.census.gov/cgi-bin/sitc/sitcCty.pl> (last visited Mar. 16, 2009). Alternatively, go to <http://www.census.gov/foreign-trade/statistics/country/index.html>, click on statistics, then on *Country/Product Trade Data: Foreign Trade Statistics by Various Commodity Classification and Country Breakdowns*.

⁵⁸ *Id.* The percentages were calculated from the trade figures in the cited sources. *See also* U.S. Dept. of Commerce, Bureau of Economic Analysis, International Economic Accounts, 2005-2007, www.bea.gov/international/bp_websimple.cfm? (last visited Feb. 24, 2009).

⁵⁹ Congressional Budget Office econometric model results reported in Bruce Arnold, *The Effects of NAFTA on U.S.-Mexican Trade and GDP*, CONGRESSIONAL BUDGET OFFICE (2003) at 17; www.cbo.gov/ftpdocs/42xx/doc4247/report.pdf (last visited Feb. 24, 2009).

forces largely unrelated to NAFTA - increased globalization and increased U.S. labor productivity - are the causes of the decline in manufacturing employment in the U.S.⁶⁰

More fundamentally, Scott does not show employment fell—only that employees lost jobs in some industries; the evidence shows employment did not fall.⁶¹ The Carnegie Report found that employment stayed the same or increased slightly as a result of NAFTA.⁶² The World Bank's analysts found that the U.S. had a net gain in employment of 270,000.⁶³ Hufbauer and Schott estimated that employment was probably neutral.⁶⁴ The U.S. Trade Representative estimated that NAFTA created 914,000 jobs.⁶⁵ Before NAFTA U.S. unemployment was higher than after. Unemployment in the United States in 1991 was 6.8 percent; in 1992 it was 7.5 percent; and in 1993 it was 6.9 percent.⁶⁶ From 1997 through 2007 unemployment generally was below 5 percent, exceeding that level only in 2002 (5.8 percent), 2003 (6 percent), 2004 (5.5 percent) and 2005 (5.1 percent).⁶⁷ It is therefore difficult to argue that NAFTA generated unemployment.

From the Mexican perspective jobs were generated by increased U.S. investment in Mexico that increased Mexican employment.⁶⁸ By 2003, Mexican employment related to NAFTA increased by 500,000 while overall employment in Mexico was falling.⁶⁹ In both countries increased trade was accompanied by a decline in the rate of increase in prices caused by increased productivity.⁷⁰ The governments of both countries believed

⁶⁰ David Brauer, *Factors Underlying the Decline in Manufacturing Employment Since 2000*, CONGRESSIONAL BUDGET OFFICE (2008).

⁶¹ The Annenberg Foundation's FactCheck.org argued that there was no negative effect on employment and pointed out that displacement was not the same as loss of employment. FactCheck.org, *More NAFTA Nonsense*, Mar. 3, 2008, at 1, 2, http://www.factcheck.org/elections-2008/more_nافتa_nonsense.html (last visited Feb. 23, 2009). See also *How Many U.S. Jobs Have Been Lost Since the Inception of the North American Free Trade Agreement?*, FactCheck.org, Jul. 7, 2008 at 1, http://www.factcheck.org/askfactcheck/how_many_us_jobs_have_been_lost.html (last visited Feb. 23, 2009), reporting negligible job loss.

⁶² Carnegie Report, *supra* note 20, at 27.

⁶³ Daneil Lederman, et al., *Lessons from NAFTA for Latin America and the Caribbean Countries: A Summary of Research Findings*, (World Bank, Wash. D.C., 2003) at 28.

⁶⁴ Gary C. Hufbauer & Jeffrey J. Schott, *NAFTA Revisited: Achievements and Challenges*, INST. FOR INT'L ECON. (2005).

⁶⁵ Comments of Peter F. Allgeier, Deputy United States Trade Representative, PARLIAMENTARY SUMMIT FOR HEMISPHERIC INTEGRATION, Nov. 19, 2002, Brasilia, Brazil, http://www.ustr.gov/assets/Document_Library/USTR_Deputy_Speeches/2002/asset_upload_file855_6701.pdf (last visited Feb. 23, 2009).

⁶⁶ U. S. Dept. of Labor, Bureau of Labor Statistics, ANNUAL AVERAGE UNEMPLOYMENT RATE, CIVILIAN LABOR FORCE OVER 16 YEARS, www.bls.gov/cps/prev_yrs.htm (last visited Feb. 24, 2009).

⁶⁷ *Id.*

⁶⁸ Some academics have argued, contrary to the overwhelming weight of evidence, that NAFTA reduced employment. See Raul Delgado Wise & James M. Cypher, *NAFTA, Labor, and the National State: The Strategic Role of Mexican Labor under NAFTA: Critical Perspectives on Current Economic Integration*, 610 ANNALS 120 (2007).

⁶⁹ Enrique Dussel Peters, *Industrial Policy, Regional Trends and Structural Change in Mexico's Manufacturing Sector*, In Kevin J. Middlebrook & Eduardo Zepeda, eds., CONFRONTING DEVELOPMENT: ASSESSING MEXICO'S ECONOMIC AND SOCIAL POLICY CHALLENGES (Stanford Univ. Press, 2003), cited in Carnegie Report, *supra* note 20, at 15-16. With respect to the impact on relative wages of skilled and unskilled workers, see Rafael Otero & Gautham Hazarika, *North-South Trade Liberalization and Returns to Skill in the South: The Case of Mexico*, IZA DISCUSSION PAPER NO. 3788 (2008). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1293560 (last visited Mar. 16, 2009).

⁷⁰ See, e.g., John J. Audrey, et al., *NAFTA's Promise and Reality, Lessons from Mexico for the Hemi-*

that NAFTA would increase the rate of economic growth in both the United States and Mexico by increasing access to the other country's markets so as to increase stability and demand for goods.⁷¹ The U.S. trade representative shows that NAFTA expanded the Mexican economy by expanding exports, increasing wages, increasing foreign investment, and strengthening the agricultural industry by encouraging export of agricultural products.⁷²

Arguments against NAFTA are neo-protectionist arguments made by those opposed to "economic liberalism"⁷³ that run counter to contemporary economic analysis of both U.S. and Mexican economists.⁷⁴ As Dornbusch, who trained the current generation of Mexican economists points out, making the country attractive to investors, producing products that can be sold in other countries, expanding the economy, and reducing costs of production coupled with a sound monetary policy are the tools with which to grow an economy. Failure to implement such plans properly imposes costs on the society, just as much as failing to implement any economic plan will.⁷⁵

B. MEXICAN GROWTH AND EMPLOYMENT

Mexico's real economic growth between 1994 and 2003 was 1.8% per capita.⁷⁶ During the same period there was an increase in the workforce of 2.8% per year.⁷⁷ The Mexican labor force grew from 32.3 million in 1994 to 43.4 million in 2005,⁷⁸ and to 45

sphere, CARNEGIE ENDOWMENT FOR INT'L PEACE, 2004,

<http://www.carnegieendowment.org/files/nafta1.pdf>, (last visited Feb. 23, 2009) (hereinafter *Carnegie Report*); M. Angeles Villareal, *U.S.-Mexico Economic Relations: Trends, Issues, and Implications*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, RL32924, 2005, at 17.

⁷¹ Nobel Laureate Joseph Stiglitz argues, "Doing what little America could do to enhance growth in Mexico would be good for Mexico, and good for America; and it was the right thing to do for our neighbor to the south." Joseph E. Stiglitz, Editorial, *The Broken Promise of NAFTA*, N.Y. TIMES, Jan. 6, 2004, at A23 (hereinafter *Stiglitz, Broken Promise of NAFTA*).

⁷² Office of the U.S. Trade Representative, NAFTA: A STRONG RECORD OF SUCCESS (Mar. 2006), http://www.ustr.gov/Document_Library/Press_Releases/2006/March/Joint_Statement_from_the_Meeting_of_the_NAFTA_Free_Trade_Commission.html (last visited Mar. 23, 2009); Stiglitz, *Broken Promise of NAFTA*, *supra* note 71; Matthew Davis, *Mexico's Problems: Don't Blame NAFTA*, NBER. DIG. Sept. 2004, at 2, available at <http://www.nber.org/digest/sep04/w10289.html> (last visited Mar. 23, 2009).

⁷³ See, Fernandez-Kelly, NAFTA and Beyond, *supra* note 31; Morton, *Neoliberalism in Mexico*, *supra* note 33.

⁷⁴ See, e.g., Rudiger Dornbusch & Alejandro Werner, *Mexico: Stabilization, Reform, and No Growth*, 1994 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 253 (1994); Rudiger Dornbusch, et al., *Currency Crises and Collapses*, 1995 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 219 (2005). For a good introduction to the dominant view, see Krugman 2009, *supra* note 47.

⁷⁵ *Id.*

⁷⁶ Mark Weisbrot, et al., *Getting Mexico to Grow with NAFTA: The World Bank's Analysis*, 3 CTR. FOR ECON. & POL'Y RES. (2004) (hereinafter *Weisbrot 2004*) available at http://www.cepr.net/documents/publications/nafta_2004_10.pdf (last visited Feb. 27, 2009) (note: it must be visited through the cepr home page, not via the web address).

⁷⁷ Christian Stracke, *The Sick Man of NAFTA*, 20:2 WORLD POL'Y J. 29 (2003), available at <http://www.worldpolicy.org/journal/articles/wpj03-2/stracke.pdf>. at 2 (last visited Mar. 23, 2009).

⁷⁸ Index Mundi, <http://www.indexmundi.com/g/g.aspx?c=mx&v=72> (last visited Feb. 27, 2009). Susan Fleck & Constance Sorrentino, *Employment and Unemployment in Mexico's Labor Force*, MONTHLY LABOR REV., Nov. 1994, at 3.

"Approximately one million new workers enter the labor force annually; however, the Mexican economy

million in 2008.⁷⁹ While there is more unemployment now than there was before NAFTA went into effect, the evidence suggests that without NAFTA the unemployment problem would be worse.⁸⁰ Mexico's higher economic growth in the 1960's and 1970's⁸¹ is explained by increased competition from low labor cost countries.⁸² Mexico's manufacturing and raw materials exports have grown both as a share of the world's trade and in absolute terms. NAFTA was not the problem.⁸³

NAFTA shifted Mexico away from plans assembling goods with foreign produced parts and exporting the assembled product ("maquiladoras") and toward manufacture of parts as well as assembly of goods by eliminating tariffs on Mexican produced components imported into the United States as well as by stimulating a huge increase in foreign direct investment in manufacturing operations.⁸⁴ NAFTA removes the tariff incentive to import parts from the U.S. because Mexican made parts are no longer subject to tariffs. *Migration News* reported that 1.3 million jobs were created by maquiladoras by 2000, however, 300,000 of the 700,000 created by NAFTA moved to China as China's lower costs of production decimated the Mexican textile industry.⁸⁵ NAFTA's tariff reductions account for the creation of 250,000 jobs related to export manufacturing while factors such as peso devaluation, reduced transportation costs (some resulting from NAFTA) and other factors account for the rest of the growth.⁸⁶

C. THE EFFECT OF NAFTA ON AGRICULTURAL PRODUCTION AND EMPLOYMENT IN MEXICO

typically creates only about half as many new jobs." LIBRARY OF CONGRESS, MEXICO PROFILE 16 (2005), available at <http://lcweb2.loc.gov/frd/cs/profiles/Mexico.pdf> (last visited Feb. 27, 2009). Eighteen percent of the labor force is found in agriculture, 24% in industry, and 58% in services.

⁷⁹ Gobierno Federal de Mexico, Estadísticos del Mercado Laboral,

http://www.empleo.gob.mx/wb/BANEM/BANE_informacion_destacada (last visited Feb. 27, 2009).

⁸⁰ M. Angeles Villareal & Marisabel Cid, *NAFTA and the Mexican Economy*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS at 14-16 (2008).

⁸¹ Weisbrot 2004, *supra* note 76.

⁸² Jane Bussey, *Mexico's Industries Finding It Hard to Compete with China's Low Wages*, ARK. DEMOCRAT-GAZETTE, Jan. 29, 2006, at G10, G10.

⁸³ See Juan Carlos Moreno-Brid, et al., *NAFTA and the Mexican Economy: A Look Back on a Ten-Year Relationship*, 30 N.C. J. INT'L L. & COM. REG. 997, 1003-10 (2005); Geraldo Vazquez Gomez, *The Liberalization of Financial Services in Mexico and its Relation with NAFTA, MEFTA and GATS*, 11 L. & BUS. REV. AM. 49, 64-65 (2005) (discussing the increase in volume of trade from Mexico to the United States and Canada); Joseph E. Stiglitz & Andrew Charlton, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT at 23 (2005) (hereinafter *Stiglitz, Fair Trade*).

⁸⁴ Trade creating means that NAFTA created new trade as opposed to diverting trade from other supplying countries subject to tariffs, Andreas Waldkirch, *The Effects of Foreign Direct Investment in Mexico Since NAFTA*, 4th MN. INT'L ECO. DEV. CONF. 2008, at 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115300 (last visited Mar. 17, 2009).

⁸⁵ NAFTA at 10, MIGRATION NEWS, Jan. 2004,

[http://migration.ucdavis.edu/mn/more.php?id=2991J\)_2_0](http://migration.ucdavis.edu/mn/more.php?id=2991J)_2_0) (last visited Mar. 23, 2009), hereinafter, *NAFTA at 10*; John Cavanagh & Sarah Anderson, *Happily Ever NAFTA?*, FOREIGN POLICY, Sept. 1, 2002, at 6.

⁸⁶ The Impact of Trade Agreements: Effect of the Tokyo Round, U.S.-Israel FTA, U.S.-Canada, FTA, NAFTA and the Uruguay Round on the U.S. Economy, U.S. INT'L TRADE COMMN (2003) available at <http://hotdocs.usitc.gov/docs/pubs/2111/pub3621/pub3621.pdf> (last visited Mar. 2, 2009).

NAFTA has been trade creating in the agricultural sector; however, in specific sectors, farmers have been displaced.⁸⁷ The evidence suggests that the decline in employment of Mexican farmers of between 1.5 million⁸⁸ and 2.5 million was caused by Mexico's integration into global markets and resulting increases in productivity of Mexican agriculture⁸⁹ not by NAFTA.⁹⁰ Prior to the early 1980s Mexico imposed high tariffs on agricultural imports and provided subsidies to farmers to promote growth and domestic food self sufficiency.⁹¹ That changed in 1986 when Mexico agreed to the terms of the General Agreement on Tariffs and Trade (GATT) and dismantled price supports for corn,⁹² thus shifting agriculture from an ejido system of communal land farmed by subsistence farmers (created in 1934 and officially eliminated in 1991⁹³) as part of the shift to an export based economy which made subsistence farming uneconomic.⁹⁴ The agricultural workforce declined from 27% of the population in 1991 to less than 15% in 2006.⁹⁵ As labor moved out of agriculture into manufacturing, services and the informal sector, the Mexican economy grew too slowly to absorb them.⁹⁶ In addition to persistent rural

⁸⁷ Dwi Susanto, C. Parr Rosson, III, and Flynn J. Adcock, *Trade Creation and Trade Diversion in the North American Free Trade Agreement: The Case of the Agricultural Sector*, 39 J. AGR. & APP. ECON. 121 (2007).

⁸⁸ NAFTA at 10, *supra* note 85.

⁸⁹ Mexican President Felipe Calderon conceded as much. See 'El país paga un "costo muy alto" para evitar aumentos de precios', Angélica Enciso, LA JORNADA, 20th May 2008, <http://www.jornada.unam.mx/2008/05/20/index.php?section=economia&article=021n1eco> (last visited Feb. 26, 2009).

⁹⁰ Maria Dickerson, *Placing Blame for Mexico's Ills*, L.A. TIMES, Jul. 1, 2006, at C1 (citing Mexican government statistics).

⁹¹ See, e.g., M. Mohanty, *Structural Characteristics of the Mexican Economy, 1942-1982*, 18 SOC. SCI. 42 (1990).

⁹² Norbert Fiess & Daniel Liederman, *Mexican Corn; The Effects of NAFTA*, WORLD BANK GROUP TRADE NOTE NO. 18, 2004, available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/04/22/000090341_20050422105517/Rendered/PDF/321090TradeNote18.pdf (last visited Mar. 23, 2009); Scott Bury, *Maize Farmers Unhappy with NAFTA's Price*, TRIO: THE NEWSLETTER OF THE NORTH AMERICAN COMMITTEE FOR ENVIRONMENTAL COOPERATION, Winter 2004, available at <http://www.ccc.org/trio/stories/index.cfm?ed=12&ID=143&varlan%20=%20english> (last visited Mar. 24, 2009).

⁹³ See Antonio Yúnez-Naude & Fernando Paredes, *Lessons from NAFTA: The Case of Mexico's Agricultural Sector, Final Report to the World Bank*, 2002, <http://ctr.c.sice.oas.org/geograph/north/yunez.pdf> (last visited Feb. 26, 2009 (hereinafter *Lessons from NAFTA*)).

⁹⁴ Ronald H. Schmidt & William C. Gruben, *Ejido Reform and the NAFTA*, 92-34 Fed. Reserve Bank of San Francisco Weekly Letter (2002); Jennifer Brown, *Ejidos and Comunidades in Oaxaca, Mexico: Impact of the 1992 Reforms*, RURAL DEV. INST. REP. ON FOREIGN AID & DEV. #120, Oct. 2, 2004.

⁹⁵ Andrés Rosenzweig Pichardo, *Mexican Agricultural Trade Under NAFTA: An Assessment After Five Years of Implementation*, FARM FDN. AGRIC. & FOOD POL'Y SYS. INF. WORKSHOPS, PROC. 2000 (hereinafter *Rosenzweig Pichardo, Agricultural Trade*), <http://ageconsearch.umn.edu/handle/16844> (last visited Mar. 1, 2009). See also, Alicia Puyana & José Romero, *Diez años con el TLCAN, las experiencias del sector agropecuario mexicano*, Centro Otras Publicaciones, ISBN 970-9967-00-2, 2006. Both U.S. and Mexican subsidies on agricultural products now disproportionately favor larger producers; John Burstein, U.S.-MEXICO AGRICULTURAL TRADE AND RURAL POVERTY IN MEXICO (Woodrow Wilson Center 2007).

⁹⁶ *Lessons from NAFTA*, *supra* note 93. Farmers have sought revisions of the agricultural trade provisions of NAFTA that would benefit them. See, e.g., Crawford Falconer, Report to the Trade Negotiations Committee by the Chairman of the Special Session of the Committee on Agriculture, World Trade Organization, Committee on Agriculture, Special Session, 11 August 2008.

poverty, small-scale Mexican farmers also have limited access to infrastructure, credit, appropriate technology, and a variety of outdated rural production systems.⁹⁷

Agricultural trade with the U.S. is not the cause of the problem. In 1993, U.S. agricultural exports to Mexico were \$3.6 billion and U.S. agricultural imports from Mexico were \$2.7 billion. By 2005, agricultural exports to Mexico had risen to \$9.3 billion; however, U.S. agricultural imports from Mexico had more than tripled to \$8.3 billion. In 2007, U.S. agricultural exports to Mexico had risen to \$13.3 billion and U.S. agricultural imports from Mexico were \$11 billion.⁹⁸ Mexico's agricultural exports to the U.S. have expanded by nearly 10% per year, growing twice as fast as they did before NAFTA.⁹⁹ At the same time, U.S. exports to Mexico have grown by about 9% per year, reflecting the mutually beneficial outcomes NAFTA has provided to the agricultural sectors in both countries.¹⁰⁰ Under NAFTA, Mexico has a comparative disadvantage in corn, wheat, rice, oilseeds, cattle rearing and forestry, and a comparative advantage in fruits, vegetables sugar cane, and coffee.¹⁰¹

D. THE EFFECT OF NAFTA ON REAL WAGES IN MEXICO

Both manufacturing production worker real wages and real wages in non-manufacturing sectors are at or below pre-NAFTA levels.¹⁰² In 1993, the minimum wage

⁹⁷ *Id.*

⁹⁸ U.S. – MEXICO AT A GLANCE: AGRICULTURAL TRADE, SEPT. 2008, U.S. EMBASSY MEXICO CITY. Retrieved 1/30/2009 from http://mexico.usembassy.gov/eng/eataglance_trade.html#agricultural (last visited Feb. 27, 2009).

⁹⁹ U.S. exports of grain and animal products to Mexico have increased along with an increase in Mexican exports of fruits and vegetables to the U.S., John Burstein, *U.S.–Mexico Agricultural Trade and Rural Poverty in Mexico* (Woodrow Wilson Center 2007), http://www.wilsoncenter.org/topics/pubs/Mexico_Agriculture_rpt_English1.pdf (last visited Mar. 19, 2009). Mexico grows primarily white corn for human consumption while the U.S. sells primarily yellow corn to Mexico, which is used primarily for feeding livestock, Sara Miller Liana, *Battle Escalates Over Cheap U.S. Corn Popping into Mexico*, USA TODAY, Aug. 8, 2006, at 6B.

¹⁰⁰ U.S. Embassy Mexico City, U.S. Department of Agriculture, FOREIGN AGRICULTURAL SURVEY, U.S.–MEXICO AT A GLANCE: AGRICULTURAL TRADE: FEBRUARY 2009, http://www.usembassy-mexico.gov/eng/eataglance_trade.html (last visited Feb. 26, 2009).

¹⁰¹ *Id.* Supporters of the old system continue to argue, “NAFTA guaranteed that the drastic structural reforms imposed on agriculture would be maintained for 14 years and become institutionalized agricultural policies, despite the devastating effects on producers, especially rural farmers.” Mexico is an example of imposition of an international agricultural market on a system previously characterized by state protection and subsidies ... despite differences in production costs, performances, or agricultural subsidies....” Ana de Ita, *Fourteen Years of NAFTA and the Tortilla Crisis*, AMERICAS PROGRAM SPECIAL REPORT, 2008, at 1, <http://americas.irc-online.org/am/4879> (last visited Feb. 26, 2009).

¹⁰² Instituto Nacional de Estadística y Geografía, *Serie desestacionalizada del índice de remuneraciones reales promedio en los establecimientos comerciales: al por menor, 2003-2008*, 2003 = 100, http://www.inegi.org.mx/est/contenidos/espanol/tematicos/coyuntura/img/emec/estcom_g12.asp?c=8474 (last visited Feb. 28, 2009); Antonia López & Julio López Gallardo, *Manufacturing Real Wages in Mexico*, 26 BRAZILIAN J. OF POLITICAL ECONOMY 459, (2006); Gordon H. Hanson, *What Happened to Wages in Mexico since NAFTA?* NBA WORKING PAPER 9563 (2003), http://irpshome.ucsd.edu/faculty/gohanson/mexico_wages.pdf (last visited Feb. 28, 2009). Productivity, measured as GDP per hour worked, was negative in the years 1994 through 1997. ORG. OF ECON. COOPERATION AND DEV., OECD FACTBOOK 2006: ECONOMIC, ENVIRONMENTAL, AND SOCIAL STATISTICS 51 (2006), available at <http://oberon.sourceoecd.org/pdf/fact2006pdf/02-03-01.pdf>; THE WORLD BANK

per day for Mexican workers was \$4.62, declining to \$3.44 in 1999, and increasing by region to between \$4.51 and \$4.86 in 2006.¹⁰³ In addition, indices of inequality have increased steadily between 1987 and 2004. In 1984 Mexico's GINI index was 42.5; in 1994, 47.7; in 1994, 48.1; in 2000, 48.1.¹⁰⁴ The peso crisis of 1994-1995 and work force growth rather than NAFTA are responsible for the decline.¹⁰⁵ The growth in trade caused by NAFTA caused wages in the manufacturing sectors tied to exports to increase.¹⁰⁶ However, the huge increase in the labor force in Mexico relative to Mexico's capacity to increase non-NAFTA related employment prevented an aggregate increase in the level of wages.

While Mexico's population doubled between 1970 and 2008, increasing from 52.8 million to an estimated 109.9 million,¹⁰⁷ the labor force nearly tripled, increasing from 13 million in 1970 to 45.4 million in 2007.¹⁰⁸ The declining birth rate has not yet affected entry into the labor market because there has been a huge increase in the number of women in the labor force.¹⁰⁹ Women accounted for 28% of the labor force in 1990 and 43% in 2004.¹¹⁰ In addition to labor force expansion, state operation of the petroleum and electricity industries,¹¹¹ corruption including payoffs to government officials,¹¹² an ineffective system of taxation, inadequate infrastructure, suboptimal levels of human cap-

REPORT NO. 2861-ME, POVERTY IN MEXICO: AN ASSESSMENT OF CONDITIONS, TRENDS, AND GOVERNMENT STRATEGY 85, 129-32. .

¹⁰³ *Mexico's Minimum Wage the Most Eroded in Latin America*, MEXICAN LABOR NEWS & ANALYSIS, Feb. 2006, http://www.ueinternational.org/Mexico_info/mlna_articles.php?id=98#530.

¹⁰⁴ A GINI coefficient is derived from a Lorenz Curve and measures income distribution, 100 being perfect inequality and 0 being perfect equality, Karl E. Case & Ray C. Fair, *PRINCIPLES OF ECONOMICS* 435 (3d ed. Prentice Hall 1994).

¹⁰⁵ Krugman 2009, *supra* note 47, at 32-50.

¹⁰⁶ *Id.*

¹⁰⁷ U.S. Census Bureau, IDB Summary Demographic Data for Mexico, <http://www.census.gov/ipc/www/idb/country/mxportal.html>, (select Mexico) (last visited Feb. 28, 2009).

¹⁰⁸ *Id.*; Int'l Labor Org., LABORSTA Internet Database, <http://laborsta.ilo.org> (select Mexico; select a data range including 1970; select Table ID); CIA, *Mexico*, in *THE WORLD FACTBOOK* (2005), available at <https://www.cia.gov/cia/publications/factbook/geos/mx.html> (last visited Feb. 28, 2009).

¹⁰⁹ Fifty one percent of the population was of working age, Christian Stracke, *The Sick Man of NAFTA*, 20:2 *WORLD POL'Y J.* 29 (2003), available at <http://www.worldpolicy.org/journal/articles/wpj03-2/stracke.pdf> (last visited March 23, 2009); CIA, *Mexico*, in *THE WORLD FACTBOOK* (2005), available at <https://www.cia.gov/library/publications/the-world-factbook/docs/faqs.html> (last visited Mar. 24, 2009).

¹¹⁰ Sandra Polaski, *Jobs, Wages, and Household Income*, in *Carnegie Report*, *supra* note 20, at 36.

¹¹¹ In 1982, the Mexican government held total or partial control of 1155 entities. These included important industries such as petroleum, but the government also owned and managed airlines, hotels, railroads, shipping companies, and commercial movie theaters. Stephen Zamora, et al., *MEXICAN LAW* 38 (2004), at 381.

¹¹² Mary Jordan, *The Bribes that Bind Mexico--and Hold It Back*, *WASH. POST*, Apr. 18, 2004, at B1. There are over 100 million transactions involving bribes totaling \$1.6 billion a year to obtain services from government officials ranging from traffic police to bureaucrats and elected officials, Apama Mathur & Kartikeza Sing, *Foreign Direct Investment, Corruption, and Democracy*, Am. Enter. Inst. for Pub. Pol'y Research, Working Paper No. 135, 2007; Bonnie J. Palifka, *Trade Liberalization and Bribes* 11 (Oct. 1997) (unpublished pa per, available at <http://homepages.mty.itesm.mx/bpalifka/customs.pdf>); Mary Jordan, *The Bribes that Bind Mexico--and Hold It Back*, *WASH. POST*, Apr. 18, 2004, at B1; Bonnie J. Palifka, *Corruption and Entrepreneurship in Brazil*, <http://homepages.mty.itesm.mx/bpalifka/customs.pdf>, May 27, 2006; Robert M. Kossick, Jr., *Mexico's Emerging E-Government Program: The Role of the Internet in Promoting Economic Development, Democratic Governance, and the Rule of Law*, 8 *LAW & BUS. REV. AM.* 141, 153 n.44 (2003).

ital investment¹¹³ and increased world competition for sale of goods to developed countries all have contributed to lack of increase in wages.¹¹⁴

IV. EVALUATION OF THE DISPUTE RESOLUTION, LABOR AND ENVIRONMENTAL PROVISIONS OF NAFTA, NAAEC, AND NAALC

The above analysis shows that tariff free movement of goods between NAFTA countries has been beneficial to both the U.S. and Mexico. President Obama has indicated that he may seek review of the implementing provisions under which such trade occurs, “[M]r. Obama ... is no longer emphasizing the idea of reopening NAFTA. Instead, ... the White House [is suggesting] ... revamping side agreements on environmental and labor protections.”¹¹⁵ He may also revisit the enforcement and dispute resolution provisions as an extensive literature has raised questions about contract enforceability and dispute resolution procedures and urged changes in those portions of NAFTA.¹¹⁶

Efforts to create multinational agreements addressing these concerns are found partly in international agreements and partly in bilateral agreements like NAFTA.¹¹⁷ Current dispute resolution structures rely heavily on arbitration. Some claim this has produced inconsistent results and created uncertainty among both governments and investors.¹¹⁸ Questions have arisen concerning (1) how should multinational agreements and global arrangements be modified to make dispute resolution more effective; (2) who should be protected by the agreements; (3) to what extent should property be protected from changes in regulation, taxation or other government policies; (4) what should be the standard of compensation for a regulatory taking; and (5) are there legitimate reasons to allow a country to discriminate between foreign and domestic firms?¹¹⁹

What should be revised and how is a matter of substantial dispute. The Chicago School of Law and Economics argues that the legal structure should be designed to maximize free market competition so as to ensure efficiency, largely by protecting property rights and enforcing contracts related to international and domestic trade so as to make competitive agreements enforceable.¹²⁰ Market economists on the other side of the neo-

¹¹³ Stiglitz, Fair Trade, *supra* note 83.

¹¹⁴ Jane Bussey, *Mexico's Industries Finding It Hard to Compete with China's Low Wages*, ARK. DEMOCRAT-GAZETTE, Jan. 29, 2006, at G1, G10.

¹¹⁵ Sheryl G. Stolenberg, *NAFTA Looming Over Obama's Canada Trip*, N.Y. TIMES, Feb. 19, 2009; Michael D. Shear, *Renegotiating NAFTA on Hold, President Says*, S.F. CHRON., Feb. 20 2009.

¹¹⁶ For example, see Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008); Daniel N. Adams, *Back to Basics: The Predetermined Failure of NAFTA Chapter 19 and its Lessons for the Design of International Trade Regimes*, 32 EMORY INT'L L. REV. 205 (2008) (hereinafter *Adams, Back to Basics*); Zachary Jacobs, *One of Those Things is Not Like the Other* (hereinafter *Failure of NAFTA Chapter 19*); *U.S. Participation in International Tribunals and Why Chapter 19 of NAFTA Does Not Fit*, 45 COLUM. J. TRANSNAT'L L. 868 (2007); Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights and Responsibilities*, 23 AM. U. INT'L L. REV. 451 (2008) (hereinafter *Stiglitz, Cross-Border Legal Frameworks*); see also Joseph E. Stiglitz, *Making Globalization Work* (2006).

¹¹⁷ Stiglitz, *Cross-Border Legal Frameworks*, *supra* note 116, at 453.

¹¹⁸ *Id.* at 456.

¹¹⁹ *Id.* at 462.

¹²⁰ See e.g., Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); Richard A. Posner, *LAW AND ECONOMICS* (Richard A. Posner & Francesco Parisi eds., 1997); Ronald H. Coase, *The Problem of Social*

liberal school, such as Stiglitz, argue that the market alone is often inadequate to the task except under highly artificial conditions posited by the Chicago School. He argues that some overt government activity is required.¹²¹ Stiglitz relies on theories based on imperfect information and imperfect markets to justify government policies that protect consumers, workers, investors, and companies.¹²² Thus, while there is general agreement that there must be trade rules and adjudicators, there is less agreement on what those rules should be. For example, some call for an international commerce court¹²³ while others argue that such an approach would be counter productive.¹²⁴ The stakes are large since critics contend that present NAFTA rules can deprive a country of the ability to impose its own laws,¹²⁵ and they can interfere with a country's ability to maximize its citizens' social welfare.¹²⁶

A. REFORMATION OF NAFTA DISPUTE MECHANISMS

There are three different dispute resolution mechanisms included in NAFTA. Chapter 20 addresses all disputes not covered by other procedures. It establishes a Free Trade Commission comprised of cabinet-level representatives of each country that supervise mediation and review arbitration of disputes.¹²⁷ Dispute resolution is administered by designees of the Free Trade Commission.¹²⁸ Conflicting interpretations of NAFTA are resolved in accordance with consultations at the Free Trade Commission, which, if unsuccessful, may be followed by compulsory arbitration.¹²⁹ Arbitration is governed by procedures specifying how to request an arbitral panel,¹³⁰ maintenance of a panel of arbitrators,¹³¹ qualifications of arbitrators,¹³² procedures for panel selection,¹³³ and arbitration

Cost, 3 J. L. & ECON. 1, 22-23 (1960) (arguing that properly defined and enforced property rights addressed all relevant social concerns); *but see* Joseph Farrell, *Information and the Coase Theorem*, 1 J. ECON. PERSP. 113, 125 (1987) (claiming that the approach may not work as well as inter-country negotiation in reaching a mutually beneficial outcome).

¹²¹ Stiglitz, Cross-Border Legal Frameworks, *supra* note 116; Joseph Farrell, *Cheap Talk, Coordination and Entry*, 18 RAND J. ECON. 34, 34 (1987), arguing that where there are sunk costs, competition need not guarantee economic efficiency.

¹²² Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. (2002).

¹²³ Stiglitz, Cross-Border Legal Frameworks, *supra* note 116.

¹²⁴ Adams, Back to Basics, *supra* note 116; Dani Rodrik, *A Plan B for Global Finance*, ECONOMIST Mar. 14, 2009 at 80 (hereinafter *Rodrick, Constitutional Rights*.)

¹²⁵ *See, e.g.* David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW.U. L. REV. 1277 (2008); George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities and Some Proposals for its Reform*, 25 ARIZ. J. INT'L & COMP. LAW 665 (2008).

¹²⁶ Stiglitz, Cross-Border Legal Frameworks, *supra* note 116, at 465.

¹²⁷ NAFTA arts. 2001, 2007, 2008. Some have argued that the Free Trade Commission could become a supranational court, *see* Jay Lawrence Westbrook, *Legal Integration of NAFTA Through Supranational Adjudication*, 43 TEX. INT'L L.J. 349, 351 (2008) (hereinafter *Westbrook, Supranational Adjudication*).

¹²⁸ NAFTA art. 2001

¹²⁹ *Id.* arts. 2003-2006.

¹³⁰ *Id.* art. 2008.

¹³¹ *Id.* art. 2009.

¹³² *Id.* art. 2010; NAAEC art. 5

¹³³ NAFTA art. 2011.

procedural rules.¹³⁴ Chapter 19 contains dispute resolution provisions concerning allegations that a NAFTA country “dumped goods in another NAFTA country at below cost.”¹³⁵ Chapter 11 includes dispute resolution provisions addressing investments and regulatory takings.¹³⁶

Chapter 19 concerns one country dumping its products in another country at below cost and provides for imposition of countervailing duties where dumping has been found to have occurred. Each country applies its own anti-dumping and countervailing duty law to goods imported from any other party, but replaces judicial review of final anti-dumping and countervailing duty determinations with a bi-national panel of arbitrators who review the matter and render an opinion.¹³⁷ The decisions of the panel are not reviewable by a country’s courts,¹³⁸ and a panel can overturn a court’s ruling.¹³⁹ Chapter 19 permits enforcement of anti-dumping statutes by investors, producers, and their countries.¹⁴⁰ Each country may apply both its anti-dumping and countervailing duty laws (as they may be changed from time to time) to goods imported from any other NAFTA country provided notice requirements are met and the changes are consistent with international agreements on tariffs and trade.¹⁴¹

Antidumping and countervailing tariff determinations in the United States are first made by the Court of International Trade.¹⁴² They can then be appealed to the U.S. Court of Appeals for the Federal Circuit Court.¹⁴³ If the claim is a NAFTA claim, appeal is to a bi-national panel, which is supposed to rule in accordance with the law of the importing country.¹⁴⁴ Panel selection is handled like selection of arbitrators from each country’s list of qualified panelists.¹⁴⁵ In addition, NAFTA requires each country to agree to be in compliance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration.¹⁴⁶ The rules require that each country is required “to the maximum extent possible provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.”¹⁴⁷

The efficacy of the dispute resolution mechanism is a matter of more than a little controversy.¹⁴⁸ Some argue that the process discriminates against the U.S.¹⁴⁹ Others argue

¹³⁴ *Id.* arts. 2012-2017.

¹³⁵ NAFTA ch. 19.

¹³⁶ *Id.* ch. 11.

¹³⁷ NAFTA, art. 1901-1904; Annex 1901.2 Establishment of Bi-national Panels; Annex 1904.13, Extraordinary Challenge Procedure.

¹³⁸ NAFTA art. 1904(11). Chapter 19 generally follows the World Trade Organization dispute resolution model, Ralph Folsom, *NAFTA IN A NUT SHELL* (1999) at 58-61.

¹³⁹ John H. Knox, *The 2005 Activity of NAFTA Tribunals*, 100 AM. J. INT’L L. 429, 434-38 (2006) (discussing the softwood dumping dispute between the U.S. and Canada) (hereinafter *Knox, NAFTA Tribunals*).

¹⁴⁰ NAFTA chs. 19, 20.

¹⁴¹ NAFTA art. 1904.

¹⁴² 19 U.S.C. §1516a(b)(1)(B)(i).

¹⁴³ 28 U.S.C. §1295(a).

¹⁴⁴ NAFTA art. 1904. “No party may provide for a right of action under its domestic law against any other party on the ground that a measure of another party is inconsistent with this agreement.” NAFTA art. 2021.

¹⁴⁵ NAFTA Annex 1901.2.

¹⁴⁶ *Id.*

¹⁴⁷ NAFTA art. 2022.

¹⁴⁸ Patrick J. Glen, *United States Anti-Dumping Policy and the Negotiation of a Free Trade Area of the Americas: The Impact of Protectionist Measures on Regional Trade Integration*, 7 ASPER REV. INT’L BUS.

the process works well.¹⁵⁰ The critics claim that panels have rejected U.S. dumping claims more often than U.S. courts, but not more often than Canadian courts, which, they claim, suggests some type of bias.¹⁵¹ It is difficult to see how the provision should be changed since the existing provisions appear to be quite unbiased, and it is generally agreed that the panelists making the decisions are of uniform high quality.¹⁵²

Chapter 11 provides for dispute resolution in connection with disputes related to foreign investment as well as disputes concerning the provision of services. It provides an avenue for redress if an investor of another country is not treated the same as an investor of the host country,¹⁵³ or is not treated equitably and with “full protection and security.”¹⁵⁴ The arbitration procedures used are those of the International Convention for the Settlement of Investment Disputes (ICSID).¹⁵⁵

NAFTA requires, “No Party may adopt any measure restricting any type of cross-border trade in financial services by cross-border financial service providers of another Party that the Party permits on the date of entry into force of the Agreement [subject to minor constraints in Annex VII].”¹⁵⁶ A NAFTA country must accord another NAFTA country’s investors treatment “no less favorable than that it accords its own investors, in like circumstances. . . .”¹⁵⁷ Investment issues have arisen with respect to the possibility of expropriation through legislative or administrative regulatory action.¹⁵⁸ NAFTA provides that no country will “directly or indirectly nationalize or expropriate an investment” of an investor of another NAFTA country except “(a) for a public purpose; (b) in a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1) [requiring fair and equitable treatment]; and (d) on [prompt] payment of fair market value of

& TRADE L. 47, 48 (2007), claims, “the North American Free Trade Agreement (“NAFTA”) between the U.S., Canada, and Mexico has been operating rather smoothly for years.” Contrast that view with Matthew T. Simpson, *Chopping Away at Chapter 11: The Softwood Lumber Agreement’s Effect on the NAFTA Investor-State Dispute Resolution Mechanism*, 22 AM. U. INT’L L. REV. 479 (2007) (hereinafter *Simpson, The Softwood Lumber Agreements*).

¹⁴⁹ Juscelino F. Colares & John W. Bohn, *NAFTA’s Double Standards of Review*, 42 WAKE FOREST L. REV. 199 (2007) (hereinafter *Colares, Double Standards*).

¹⁵⁰ Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American “Unfair” Trade Laws*, 50 INT’L ORG. 541 (1996); John M. Mercury, *Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?*, 15 NW. J. INT’L L. & BUS. 525 (1995).

¹⁵¹ Colares, *Double Standards*, *supra* note 153, at 210-14.

¹⁵² See, e.g., Robert Cassidy, *Dispute Resolution under NAFTA: A U.S. Perspective*, 23 CAN.-U.S. L.J. 147, 148 (1997) (“The panelists, by and large, know a great deal more about the law than do the judges who typically hear the cases.”); John M. Mercury, *Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?*, 15 NW. J. INT’L L. & BUS. 525, 527 (1995) (discussing a general consensus among commentators that FTA Chapter 19 panel decisions have been of high quality).

¹⁵³ NAFTA art. 1102.

¹⁵⁴ *Id.* art. 1105.

¹⁵⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

¹⁵⁶ NAFTA, arts. 1404, 1403 and 1405-1407 provide additional assurances that investors of one country may compete for provision of financial services on the same basis as financial services providers of the country in which services are offered.

¹⁵⁷ NAFTA art. 1405.

¹⁵⁸ See, e.g. David L. Gunton, *Liability Begins at Home: An Alternative Compensation Scheme for NAFTA Expropriations*, 40 N.Y.U. J. INT’L L. & POL. 219 (2007) (hereinafter *Gunton, Liability Begins at Home*).

the expropriated investment. . . .¹⁵⁹ An investor may bring an action claiming expropriation on its own behalf¹⁶⁰ or on behalf of an enterprise¹⁶¹ by following the dispute settlement procedures outlined in Chapter 20 of NAFTA.¹⁶² Each party is required by NAFTA to consent to submission of investment claims to arbitration pursuant to: “(a) Chapter II of the ICSID Convention¹⁶³ (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; (b) Article II of the New York Convention for an agreement in writing; and (c) Article I of the Inter-American Convention for an agreement.”¹⁶⁴ Loss of national sovereignty inevitably attends rules governing compensation for expropriation since arbitrators may compel governments to pay compensation when they permit an investment and subsequently impose restrictions that prevent the investors from benefiting from the investment.¹⁶⁵

Some critics complain that because arbitration decisions are not thought of as having precedential value, the principles of *stare decisis* are weak and as a result arbitrations have produced a number of inconsistent results.¹⁶⁶ In addition to arguments based on concerns about arbitration, some express concern that Chapter 11 effectively permits multinational corporations to sue governments on grounds that some action they took resulted in the corporation’s inability to continue to operate profitably and therefore amounted to an expropriation.¹⁶⁷ Some argue that the arbitration system is biased in favor of corporations and against government action that affects the environment or local citizens¹⁶⁸ while others argue that the process has resulted in “a significant step in the democratization of international environmental law.”¹⁶⁹

¹⁵⁹ NAFTA, art. 1110.

¹⁶⁰ *Id.* art. 1115.

¹⁶¹ *Id.* art. 1116.

¹⁶² *Id.* art. 1115. NAFTA art. 1116 provides that the claim that another party has breached an obligation under NAFTA art. 1503, state enterprises, or art. 1502(3)(a) monopolies may, under NAFTA arts. 1122, and 1131, be submitted to arbitration under NAFTA provisions and international arbitration rules.

¹⁶³ International Centre for Settlement of Investment Disputes (ICSID), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement of Investment Disputes, Washington 1965, Entered into Force: Oct. 14, 1966.

¹⁶⁴ NAFTA, art. 1122. The rules for arbitration are discussed in NAFTA art. 1123-1137 and Annexes 1120.1 and 1138.2.

¹⁶⁵ See, e.g., *Metalclad Corporation v. The United Mexican States*, (ICSID Case No. ARB(AB)/97/1, Award of the Arbitral Tribunal (August 30, 2000) (hereinafter *Metalclad*); with respect to indirect expropriation see Rachel D. Edsall, *Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 B.U.L. Rev. 931 (2006); see generally, Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 A.J.I.L. 475 (2008).

¹⁶⁶ See Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaption, and NAFTA Leadership*, 54 KAN. L. REV. 1339 (2006).

¹⁶⁷ Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11*, 25 NW. J. INT’L L. & BUS. 279, 289, 294-302 (2005).

¹⁶⁸ Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 375-79 (2003).

¹⁶⁹ 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, 145 (2007) (hereinafter, *Dorn, Environmental Law Enforcement*). See also Kal Raustiala, *Citizen Submission and Treaty Review in the NAAEC*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (David L. Markell & John H. Knox, eds. 2003.)

International dispute resolution raises sovereignty issues. For example, in *Loewen Group v. U.S.*, a Mississippi court issued a ruling that was subsequently appealed to an international arbitration.¹⁷⁰ The reviewing authority found that the court's decision amounted to a manifest injustice that amounted to an expropriation of the investor's investment; however, the panel avoided overruling the Mississippi court on the technicality that *Loewen* had failed to exhaust its remedies by appealing to the U.S. Supreme Court before commencing arbitration.¹⁷¹ Whether the principle that the U.S. should cede authority of its courts to an international authority is good or bad depends on one's point of view. It imposes a check against countries that discriminate against foreign interests in violation of NAFTA.¹⁷² On the other hand, countries tend to be reluctant to give up sovereignty to organizations whose view of the world may be at odds with their own.¹⁷³

A related problem arises with respect to inconsistent bankruptcy laws governing bankruptcy proceedings in the three NAFTA countries. In Canada and Mexico shareholders are entitled to show solvency of a company in a reorganization proceeding as a basis of recovering part of their investment; in the U.S. the ability to make such a showing can be severely circumscribed.¹⁷⁴ Following the *Loewen* reasoning, Canadian and Mexican stockholders could seek an arbitration claiming that the U.S. Bankruptcy Court expropriated the stockholder interest they would have retained under Canadian or Mexican Law.¹⁷⁵ A super-national adjudicator of bankruptcy disputes could prevent a country from becoming liable for expropriation resulting from a bankruptcy proceeding. Whether a super-national court, new adjudication process, alternative rules on expropriations, or removal of current expropriation language from NAFTA can be agreed upon is far from clear.¹⁷⁶

Enforcement of decisions poses another problem. Today, decisions are enforced by political pressuring and imposition of countervailing tariffs.¹⁷⁷ The provisions are subject to abuse. For example, the U.S. continues to deny Mexican Truckers their NAFTA right to operate trucks in the United States beyond the 25 mile border region¹⁷⁸ notwithstanding NAFTA language authorizing such operations¹⁷⁹ and a 2001 arbitration panel ruling that Mexican Truckers may operate in the United States.¹⁸⁰ The U.S. has effectively ignored the ruling, most recently by deleting funds from a pilot project to permit such op-

¹⁷⁰ *Loewen Group, Inc. v. U.S.*, ICSID (W. Bank) Case No. ARB(AF)/98/3 (2003), ¶¶ 52-54, 119-23.

¹⁷¹ *Id.* ¶¶ 207-14.

¹⁷² Debra Herz, *Effects of International Arbitral Tribunals in National Courts*, 28 N.Y.U. J. INT'L L. & POL'Y. 217, 247-148 (1998).

¹⁷³ Rodrick, *Constitutional Rights*, *supra* note 124.

¹⁷⁴ See Westbrook, *Supranational Adjudication*, *supra* note 127, at 356-7.

¹⁷⁵ *Id.*

¹⁷⁶ Metalclad, *supra* note 169; *Methanex Corp. v. United States (Can. v. U.S.)*, 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005) (Final Award) (hereinafter *Methanex*); Gunton, *Liability Begins at Home*, *supra* note 162 (arguing for an alternative to the unworkable system illustrated by the *Metalclad* and *Methanex* cases).

¹⁷⁷ NAFTA art. 802.

¹⁷⁸ Brent E. Butzin, *The Effects of Transportation Regulation on the Transborder Metropolitan Areas of the U.S.-Mexico Border Region: NAFTA and the Mexican Truck Plan – Where Do We Go from Here?*, 34 TRANSP. L. J. 391 (2007)

¹⁷⁹ See NAFTA annex 1212.

¹⁸⁰ *A Small and Dangerous Spat*, N.Y. TIMES, Mar. 19, 2009 (hereinafter *Dangerous Spat*). The authority is provided by NAFTA, art. 12 and NAFTA annex 1212; *No Truck With Free Trade*, THE ECONOMIST, Aug 2, 2001.

erations on an experimental basis.¹⁸¹ Mexico leveled tariffs against \$2.4 billion of U.S. goods exported to Mexico¹⁸² pursuant to NAFTA Article 2019 providing that if the arbitration award is not implemented, the complaining party may “suspend the application to the Party complained against of benefits of equivalent effect [to the harm found] until such time as they have reached agreement on a resolution of the dispute.”¹⁸³ Mexico is likely to view enforcement as a target for review and reevaluation.¹⁸⁴

The long running dispute over whether Canada dumped lumber in the U.S. provides another example. In 2002, the U.S. Department of Commerce claimed that the Canadian government was subsidizing softwood lumber producers who were dumping their product in the U.S. Canadian producers and the Canadian government challenged the U.S. determinations in Chapter 19 arbitrations and sought enforcement of the resulting arbitration judgments before the U.S. Court of International Trade, claiming that the United States was failing to comply with the decisions.¹⁸⁵ In the meantime, the U.S. lumber industry brought a constitutional challenge to Chapter 19 in U.S. federal court.¹⁸⁶ Finally, after having reached no satisfactory conclusion for over four years, Canada and the U.S. compromised their differences in The Softwood Agreement of 2006.¹⁸⁷ How the process could have been improved is the subject of substantial discussion but little consensus.¹⁸⁸

B. ENVIRONMENTAL RULES: THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

Environmental issues are addressed in a separate treaty: the North American Agreement on Environmental Cooperation (NAAEC), executed in 1994, which addresses environmental issues involving trade under NAFTA. The treaty is largely aspirational in nature, urging that the environment be protected, but providing few means for one NAFTA country to compel another to improve environmental laws or enforce existing environmental laws. The treaty reiterates that the goal is to seek “high levels of environmental protection” through environmental laws and regulations and to “strive to continue to im-

¹⁸¹ The U.S. Department of Transportation data show that Mexican Trucks and drivers in the U.S. where they are allowed to operate have a better inspection record and few violations than their American counterparts. Dangerous Spat, *supra* note 180.

¹⁸² *Id.*

¹⁸³ NAFTA art. 2019.

¹⁸⁴ Jacobs, Failure of NAFTA Chapter 19, *supra* note 122, at 214-215. *See, e.g.*, Daniel B. Pickard & Tina Potuto Kimble, *Can U.S. Safeguard Actions Survive WTO Review?: Section 201 Investigations in International Trade Law*, 29 LOY. L.A. INT'L & COMP. L. REV. 43 (2007).

¹⁸⁵ *See* Certain Softwood Lumber Products from Canada, No. USA-CDA-2005-1904-01 (challenging Commerce Department administrative review of CVD determination), No. USA-CDA-2005-1904-03 (challenging ITC implementation of WTO decision on material injury), No. USA-CDA-2005-1904-04 (challenging Commerce Department implementation of WTO decision on AD); *In re* Certain Softwood Lumber Products from Canada, No. USA-CDA-2002-1904-03 (Aug. 13, 2003; June 7, 2004; Dec. 1, 2004; May 23, 2005; Oct. 5, 2005).

¹⁸⁶ Rossella Brevetti, *Lumber Industry Files Federal Court Challenge to Constitutionality of Chapter 19*, 22 INT'L TRADE REP. (BNA) 1477 (Sept. 15, 2005).

¹⁸⁷ The Softwood Lumber Agreement 2006, U.S.-Can., Sept. 12, 2006 (amended Oct. 12, 2006).

¹⁸⁸ *See* Simpson, The Softwood Lumber Agreements, *supra* note 148, and Knox, NAFTA Tribunals, *supra* note 139.

prove those laws and regulations.”¹⁸⁹ Each NAFTA country has the right to establish its own levels of domestic environmental protection and associated policies and priorities.¹⁹⁰ Each party is, in the first instance, left to enforce its own environmental laws and regulations.¹⁹¹ NAAEC specifies that each country must provide judicial, quasi-judicial, or administrative enforcement to remedy violations.¹⁹² Private parties may request investigation of alleged violations, and enforce any legally recognized interests they possess under the host country’s law and the host country “shall give such requests due consideration in accordance with law.”¹⁹³

NAAEC establishes a Commission for Environmental Cooperation that makes recommendations by consensus as to environmental laws that should be passed by NAFTA countries;¹⁹⁴ however, it is unclear whether the Commission can compel a country to follow its decisions or recommendations. The Counsel supervises a Secretariat,¹⁹⁵ which prepares reports and to whom non-government organizations and persons may appeal if a country is failing to effectively enforce its environmental law.¹⁹⁶ Allegations by an interested third party of a country’s failure to enforce its own environmental laws may be brought to arbitration by a two-thirds Counsel vote.¹⁹⁷ Penalties, including monetary penalties, can be enforced by the offending country agreeing to comply with a ruling or by the country complaining taking action under NAFTA to withhold benefits of equal dollar value to the harm caused by non-compliance.¹⁹⁸ However, a country may not “undertake environmental law enforcement activities in the territory of another Party,”¹⁹⁹ nor is there any private right of action beyond that provided in a country’s internal law.²⁰⁰

Environmentalists argue that environmental issues ranging from climate change to depleted fisheries are affected by international trade and must be considered in the context of trade policy.²⁰¹ Concern about air pollution, depletion of resources, or general degradation of the environment may generate calls for revision to NAAEC.²⁰² To the extent free trade shifts production from a country with strong environmental regulations to one with weak restrictions it increases pollution and aggravates the world’s environmental problems. However it is not clear whether politicians will address these issues in the context of any NAFTA renegotiation.²⁰³

¹⁸⁹ *Id.*

¹⁹⁰ NAAEC art. 3

¹⁹¹ NAAEC art. 5.

¹⁹² *Id.*

¹⁹³ NAAEC arts. 6, 7.

¹⁹⁴ *Id.* art. 8.

¹⁹⁵ *Id.* arts. 10-13.

¹⁹⁶ *Id.* art. 14.

¹⁹⁷ *Id.* art. 24, 29.

¹⁹⁸ NAAEC art. 36, ann. 34, ann. 36B.

¹⁹⁹ NAAEC art. 37.

²⁰⁰ *Id.* art. 38.

²⁰¹ Terence Corcoran, *Comment*, FINANCIAL POST (Canada), Mar. 3, 2009, at 15.

²⁰² One example of concerns about environmental provisions is raised by Methanex’ action in bringing a NAFTA expropriation action claiming that California’s prohibition of use of their gas additive on environmental grounds amounted to expropriation. See Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475 (2001); see also, Neil Craik & Joseph DiMento, *Global Networks: The Environment and Trade*, 8 CHI. J. INT’L L. 479 (2008).

²⁰³ Elizabeth Malkin, *Re-examining NAFTA in Hopes of Curing U.S. Manufacturing*, N.Y. TIMES, April 22,

One complaint within the U.S. is that environmental impact statements are not required in connection with NAFTA rules, notwithstanding the language of the Trade Act of 2002.²⁰⁴ The issue has arisen with respect to operation of Mexican trucks in the U.S.²⁰⁵ The other concern that may warrant revision is the potential for expropriation claims that arise because of environmental laws passed subsequent to a foreign company's investment in plant or equipment.

Development of environmental restrictions interplays with the NAFTA Chapter 11 restrictions on expropriation of investments. In *Metalclad* the producer of a gasoline additive claimed that California's introduction of restrictions on the use of their product in gasoline because it allegedly caused harm to the environment reduced the value of the company's investment in production facilities; however the court ruled that no expropriation occurred.²⁰⁶ Similarly, in *S.D. Myers*²⁰⁷ arbitrators refused to provide relief to a company the Canadian government prevented by regulation from hauling PCBs from Canada to the U.S. for remediation.²⁰⁸ While recent arbitrations have tended to uphold imposition of even questionable environmental rules as not constituting an expropriation of an investor's property, the rulings are not consistent.²⁰⁹

Expropriation may be claimed where the state exercises its power to protect public health, safety, welfare, or the environment,²¹⁰ which is supposed to give foreign investors an unfair advantage over domestic investors.²¹¹ Critics argue that the provision fails to promote efficient regulation and makes poor economic sense.²¹² Environmentalists are often vocal about the chilling effect the expropriation provision has on enacting environmental regulations.²¹³ Proposed alternatives range from abandoning the expropriation provisions to having the investor's home government indemnify the investor then seek to recover from the country in which the investment occurred if the expropriation was not for a qualifying purpose.²¹⁴ The environmental community is not necessarily united in its

2008 (reporting that Jeffrey J. Schott, senior fellow at the Peterson Institute for International Economics, argues environmental concerns are significant, though not as important as energy and security).

²⁰⁴ Pub. L. 107-210; 116 Stat. 933 (2002); see *Public Citizen v. United States Trade Representative*, 5 F.3d 541, 551 (D.C. Cir. 1992); Jeffrey P. Nieznanski, *The Trade Act of 2002: Will it Live up to Its Promise to Protect the Environment, or will it Share the Fate of the National Environmental Policy Act?*, 11 ALB. L. ENVTL. OUTLOOK 333 (2007) hereinafter *Nieznanski, Trade Act of 2002*.

²⁰⁵ Nieznanski, *Trade Act of 2002*, *supra* note 220, at 362.

²⁰⁶ *Metalclad*, *supra* note 169.

²⁰⁷ *S.D. Myers Inc. (U.S.) v. Canada*, First Partial Award, paras. 117, 123, 127, 281 40 LL.M. 1408 (2001) (NAFTA. Ch. 11. Arb. Trib. 2000).

²⁰⁸ *Id.* ¶ 287.

²⁰⁹ See Kara Dougherty, *Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation*, 27 NW. J. INT'L L. & BUS. 735 (2007); Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. TRANSNAT'L L. & POL'Y 275 (2007).

²¹⁰ Marc R. Poirer, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L., 851-53 (2003).

²¹¹ See Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 43 (2004); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 129 (2003) (hereinafter *Been, The Global Fifth Amendment*.)

²¹² *Been, The Global Fifth Amendment*, *supra* note 197, at 88.

²¹³ Gunton, *Liability Begins at Home*, *supra* note 162, at 230.

²¹⁴ *Id.* at 234.

opposition to the status quo; some argue the rulings favor environmental interests.²¹⁵ Thus, while environmental concerns may well lead to attempts to renegotiate, or at least clarify investment adjudication provisions, whether the concerns are sufficient to force a rewrite the investment provisions remains an open question.²¹⁶ If there is a threat, it is less than clear what the appropriate remedy is. Indeed, some oppose any sort of compulsory international adjudication while others feel it is essential.²¹⁷

C. LABOR RULES: THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

The North American Agreement on Labor Cooperation (NAALC) (1994) provides that each country will establish its own domestic labor standards “consistent with high quality and productivity work places, and ... strive to improve those standards...”²¹⁸ Each Country is responsible for enforcing its own labor laws through its own government action.²¹⁹ Private action is only permitted to the extent it is provided for by a country’s administrative, quasi-judicial, judicial, or labor tribunals.²²⁰ The treaty requires that each country provide “fair, equitable, and transparent enforcement” of its labor laws.²²¹ Its objectives are to promote: 1) freedom of association and the right to organize; 2) right to bargain collectively; 3) right to strike; 4) prohibition of forced labor; 5) labor protection for children; 6) minimum employment standards; 7) elimination of employment discrimination, 8) equal pay for men and women; 9) prevention of occupational injuries and illnesses; 10) compensation for occupational illness and injury; and 11) protection of migrant workers.²²²

NAALC has a Secretariat that provides studies and reports, and coordination and discussion among the countries.²²³ National Administrative Offices (NAO) consult through the Secretariat.²²⁴ There is no right of individual action except through a country’s own legal channels. If a country does not enforce its own labor standards, representatives of other countries may initiate consultations and,²²⁵ if they cannot reach agreement, any

²¹⁵ Dorn, *Environmental Law Enforcement*, *supra* note 173.

²¹⁶ *See, e.g.*, Matthew T. Simpson, *Chopping Away at Chapter 11: The Softwood Lumber Agreement’s Effect on the NAFTA Investor-State Dispute Resolution Mechanism*, 22 AM. U. INT’L L. REV. 479 (2007); Jeffrey T. Cook, *The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order*, 34 PEPP. L. REV. 1085 (2007). Those who believe that investment is leaving one country or is harming the country in which investment is occurring would like to rewrite the investment provisions; *see, e.g.*, Witness for Peace, *supra* note 27.

²¹⁷ For example, in opposition are Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (arguing that noncompulsory dispute adjudication is the only role international courts can play); in support are Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005) (arguing that there can be compulsory dispute adjudication in international forums); Stiglitz, *Broken Promise of NAFTA*, *supra* note 71 (arguing for an international court).

²¹⁸ NAALC art. 2.

²¹⁹ *Id.* art. 3.

²²⁰ *Id.* art. 4.

²²¹ *Id.* art. 5.

²²² *Id.* ann. 1.

²²³ *Id.* arts. 6-14.

²²⁴ *Id.* arts. 15-22.

²²⁵ *Id.* arts. 27, 28.

country may bring an arbitration.²²⁶ If a country can be persuaded to bring arbitration against another country and wins, the panel award may be enforced on penalty of suspension of benefits received under NAFTA equal in value to the value of the judgment.²²⁷ A country may not attempt to enforce another country's labor laws and policies in its own country's courts or administrative agencies.²²⁸ Getting another NAFTA country to change that country's labor policies can only be accomplished by consensus.²²⁹ Mexico has a reasonably comprehensive set of labor laws, the major issue is whether they are enforced.²³⁰ The existing enforcement mechanism has thus far proven to be ineffective.²³¹ One possible solution to the problem is to provide a cause of action to adversely affected individuals; however, that is easier said than done.²³² Some precedent for such a change is found in the existing provisions of NAAEC.²³³

The agreement represents a step forward in integrating labor standards of NAFTA countries; however, there may be a better way of enforcing whatever treatment of labor is agreed on than is presently available under NAALC.²³⁴ Unfortunately, the labor provisions in the Central America Free Trade Agreement,²³⁵ signed eight years after NAALC leave each country to establish its own labor provisions just as NAALC does.²³⁶ There may be considerable reason to rewrite the labor provisions.²³⁷ Like so many of the other provisions, however, the difficulty will be getting agreement on how they should be rewritten.

V. CONCLUSION

The economic data demonstrates that NAFTA has increased trade, lowered prices, and left employment unchanged or slightly increased it.²³⁸ Thus, it is difficult to argue against the free trade elements of the treaty. U.S. arguments opposing NAFTA's trading

²²⁶ *Id.* arts. 29.13

²²⁷ *Id.* art. 41.

²²⁸ *Id.* arts. 42, 43.

²²⁹ Kristi Schaeffer, *Mercosur and Labor Rights: The Comparative Strengths of Subregional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States*, 45 COLUM. J. TRANSNAT'L L. 829 (2007).

²³⁰ Frank H. Bieszcat, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHI-KENT L. REV. 1387, 1402 (2008) (hereinafter *Bieszcat, Labor Provisions in Trade Agreements*.)

²³¹ One commentator has characterized the provisions as "window dressing;" Brandie Ballard Wade, *CAFTA-DR Labor Provisions: Why they Fail Workers and Provide Dangerous Precedent for the FTAA*, LAW & BUS. REV. AM. 645, 667 (2007).

²³² The solution was suggested by Bieszcat, *Labor Provisions in Trade Agreements*, *supra* note 230, at 1402.

²³³ NAAEC art. 14.

²³⁴ Kristi Schaeffer, *Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States*, 45 COLUM. J. TRANSNAT'L L. 829 (2007).

²³⁵ Dominican Republic-Central America-U.S. Free Trade Agreement Implementation Act, 107 Pub. L. 109-53, 119 Stat. 462 (2005).

²³⁶ See Lyndsay D. Speece, *Beyond Borders: CAFTA's Role in Shaping Labor Standards in Free Trade Agreements*, 37 SETON HALL L. REV. 1101 (2007).

²³⁷ *Id.*

²³⁸ See II(A).

provisions are rooted in efforts to protect U.S. industry and labor from competition.²³⁹ Similarly, Mexican arguments opposing those provisions are tied to neo-protectionist theories of economic development that Mexico has already tried and abandoned.²⁴⁰

There is no shortage of recommendations with respect to rewriting NAFTA provisions allowing for adjudication of disputes, ranging from development of an international commerce court to leaving the arbitration system in place, but increasing the transparency of the decisions and seeking to increase consistency. Similarly, there are a variety of views as to how the expropriation provisions should be redrafted. There is, however, little consensus.²⁴¹ NAAEC provisions are also candidates for revision; first because of the interplay of the expropriation provisions with environmental provisions passed after an investment is made, and second because of the real or alleged failure of countries to enforce their environmental legislation. Again, however, there is little consensus as to what should be changed.²⁴² Finally, rules for enforcement of labor provisions already in place in all NAFTA countries cannot be enforced by individuals of other than the host country. Many would like more effective enforcement of the rules. Practical questions involving each country's sovereignty are interrelated with discussions about who should be permitted to seek enforcement of a country's labor laws.²⁴³ As with the other issues, it will be difficult to reach agreement as to how labor enforcement provisions should be changed.

NAFTA is not perfect. However, all things considered the NAFTA countries are better off with it than without it. Improvement in the agreements may be warranted; however, the difficulty will be to reach agreement as to what constitutes improvement.

²³⁹ *Id.*

²⁴⁰ *See* II(B)-(D).

²⁴¹ *See* III(A).

²⁴² *See* III(B).

²⁴³ *See* III(C).