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UNRESOLVED LABOR DISPUTES UNDER THE USMCA'S RAPID RESPONSE MECHANISM: PROBING THE APPLICABILITY OF THE ATS IN LIGHT OF *NESTLÉ V. DOE*

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In 2018, former President Donald Trump signed the United States-Mexico-Canada Agreement (USMCA), also known as NAFTA 2.0, fulfilling a campaign promise to renegotiate "the worst trade deal ever made." NAFTA 2.0 contains major changes that are consequential to trade relations in North America. Most notably, in a concession to congressional Democrats, the agreement contains improved labor standards and an updated labor dispute settlement mechanism—the Rapid Response Mechanism (RRM)—which was designed to cure the antiquated, ineffective labor dispute settlement body created by the original NAFTA agreement. In light of two highly publicized labor dispute settlements involving U.S. owned auto-parts manufacturers in Mexico, known as 'Maquiladoras,' the RRM appears to be a success. But while these two settlements certainly illustrate a historic victory for labor rights, the RRM, as it currently stands, contains loopholes that leave labor abuse and human rights victims without adequate remedy. This Note, while highlighting the strengths of the RRM, argues that it nonetheless contains gaps that leave employees in both Mexico and the U.S. without adequate remedy when their labor rights are violated. This Note probes the viability of remedying such violations through the Alien Tort Statute given recent Supreme Court precedent that narrows the statute's applicability via the presumption against extraterritoriality doctrine. While recent Supreme Court precedent in Nestlé v. Doe limits the statute's viability in certain contexts, this Note contends that vindicating labor violations through litigation

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in U.S. courts is the best way to ensure that the USMCA's goals are fulfilled and to ensure that the benefits of globalization are achieved for everyone.

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INTRODUCTION

Globalization, the "interdependence of the world's economies, cultures, and populations, brought about by cross-border trade," has changed the world considerably over the last thirty years.[1] One key phenomenon of globalization is the export of

1. Melina Kolb, *What is Globalization? And How Has the Global Economy Shaped the United States?*, PETERSON INST. INT'L ECON. (Aug. 24, 2021), https://www.piie.com/microsites/globalization/what-is-globalization.

cheap labor from developed, high-income states to developing, low-income states.[2] Proponents argue that the reallocation of workforces by multi-national corporations provides income to impoverished communities that otherwise lack employment opportunities, while critics argue that this reallocation merely provides a windfall to multi-national corporations by allowing them to evade human rights standards through low wages and dangerous working conditions.[3]

Nowhere is this dichotomy more present than at the United States-Mexico border, where both nations, for the better part of the twentieth century, have enacted various policies encouraging the movement of labor across state lines.[4] Most notably, the United States provides temporary visas to Mexican workers in order to attract low-cost seasonal and daily labor,[5] while Mexico operates the "Maquiladora Program," which incentivizes foreign corporations to set up wholly owned subsidiary factories in Mexico—"Maquiladoras"—that can take advantage of lower labor standards while also receiving preferential tariff treatment.[6] Maquiladoras, which attract foreign investment and local employment opportunities, proliferated after the enactment of the North American Free Trade Agreement (NAFTA),[7] which created the largest free-trade area in the

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2. Paul Krugman, *In Praise of Cheap Labor*, SLATE (Mar. 21, 1997), https://slate.com/business/1997/03/in-praise-of-cheap-labor.html.

3. *Id.*

4. *The History of the Maquiladora Program in Mexico*, TETAKAWI (Feb. 10, 2020), https://insights.tetakawi.com/the-history-of-the-maquiladora (discussing the shift from the 'Bracero Program' to the 'Maquiladora Program').

5. Claire Klobucista & Diana Roy, *U.S. Temporary Foreign Worker Visa Programs*, COUNCIL ON FOREIGN RELS. (last updated Apr. 25, 2022, 3:25 PM), https://www.cfr.org/backgrounder/us-temporary-foreign-worker-visa-programs. *See also* Michael A. Clemens & Lant Pritchett, *Temporary Work Visas: A Four-Way Win for the Middle Class, Low-Skill Workers, Border Security, and Migrants*, CTR. FOR GLOB. DEV. (Apr. 2013), https://www.cgdev.org/sites/default/files/archive/doc/full_text/CGDBriefs/3120183/time-bound-labor-access.html (discussing the benefits of temporary work visas). *See also* Tula Connell, *Unknown Men Kidnap, Beat, and Threaten to Kill Mexican Worker Rights Activist*, SOLIDARITY CTR. (May 18, 2012), https://www.solidaritycenter.org/unknown-men-kidnap-beat-and-threaten-to-kill-mexican-worker-rights-activist/ (discussing the kidnapping and torture of a Mexican worker rights activists, whose "kidnapping is only the latest in a series of systematic attacks.").

6. The History of the Maquiladora Program in Mexico, *supra* note 4.

7. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289.

world.[8] But despite these perceived economic benefits, wages in Mexico decreased after the ensuing explosion of Maquiladoras,[9] which are consistently accused of violating human rights and labor standards based on poor working conditions, below average wages, and labor violence.[10] Moreover, the conditions for Mexican employees working on U.S. soil under temporary visa programs also allegedly violate generally accepted standards of labor and human rights.[11] Inadequate labor conditions of this nature subsequently degrade labor standards for workers throughout the U.S.[12] Furthermore, the negotiating interests of NAFTA's parties—for Mexico, prioritizing its comparative advantage of cheap labor, and for the United States, prioritizing its national sovereignty to regulate its own labor standards—contributed to the ineffectiveness of NAFTA's dispute settlement mechanism, which left victims of labor violations without proper legal remedies.[13]

Issues of this nature have been central to U.S. politics for both labor activists lobbying for improved labor standards and

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8. The History of the Maquiladora Program in Mexico, *supra* note 4.

9. *Fracaso: NAFTA's Disproportionate Damage to U.S. Latino and Mexican Working People*, PUB. CITIZEN'S GLOB. TRADE WATCH & THE LAB. COUNCIL FOR LAT. AM. ADVANCEMENT (Dec. 2018), https://www.citizen.org/wp-content/uploads/Public-Citizen-LCLAA_Latinos-and-NAFTA-Report.pdf.

10. *See* Mia Alemán, *Maquiladoras, Human Rights, and the Impact of Globalization on the US-Mexico Border*, FOREIGN AFFAIRS REVIEW (June 16, 2022), https://jhufar.com/2022/06/16/maquiladoras-human-rights-and-the-impact-of-globalization-on-the-us-mexico-border/ ("To keep production costs low, Maquila workers suffer the consequences as middleman minorities, operating under harsh work environments with low wages, forced overtime, and illegal working conditions for minors.").

11. *See, e.g.*, Raymond G. Lahoud, *Some Immigrants Uncomfortable Reporting Labor Violations*, NAT'L L. REV. (Apr. 1, 2022), https://www.natlawreview.com/article/some-immigrants-uncomfortable-reporting-labor-violations (describing the reluctance immigrants often exhibit during federal investigations of labor violations); Joe Yerardi, *Cheated at Work*, CTR. FOR PUB. INTEGRITY (Mar. 11, 2022), https://publicintegrity.org/topics/inequality-poverty-opportunity/workers-rights/cheated-at-work/ (discussing the widespread wage theft practice by U.S. employers).

12. Daniel Costa, *Temporary Work Visa Programs and the Need for Reform*, ECON. POL'Y INST. (Feb. 3, 2021), https://www.epi.org/publication/temporary-work-visa-reform/ ("That in turn degrades labor standards for workers in a wide range of industries. Reforming work visa programs, therefore, would help to improve working conditions and raise wages for all workers.").

13. Rainer Dombois, *The North American Agreement on Labor Cooperation: Designed to Fail?*, 6.1 PERSPECTIVES ON WORK 19, 20 (2002).

protectionist domestic interests lobbying against the loss of American jobs. Central to this debate was former President Trump, who vowed during his campaign to rewrite NAFTA, which he deemed "one of the worst trade deals" in history.[14] In 2020, the former president signed the United States-Mexico-Canada Agreement (USMCA), and at the insistence of congressional democrats, included in the agreement heightened labor standards and an innovative labor dispute settlement mechanism[15] known as the Rapid Response Mechanism (RRM).[16] The RRM provides "for expedited enforcement of workers' free association and collective bargaining rights at the facility level."[17]

Indeed, the RRM appears to be a significant improvement to the antiquated labor dispute settlement mechanism under NAFTA. The RRM has already achieved two highly publicized, successful remediations of labor disputes involving U.S.-owned Maquiladoras in Mexico.[18] Despite these successes, this Note contends that the RRM still has loopholes that leave victims of labor abuse without an adequate remedy.[19] But recognizing the unlikelihood of a reformed USMCA given the transactional costs associated with inter-state negotiation,[20] this Note explores avenues of relief via the U.S. courts, particularly through the Alien Tort Statute (ATS).[21] This Note probes

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14. Ana Swanson & Jim Tankersley, *Trump Just Signed the U.S.M.C.A. Here's What's in the New NAFTA*, N.Y. TIMES (Jan. 29, 2020), https://www.nytimes.com/2020/01/29/business/economy/usmca-deal.html.

15. *Id.* ("In response to the concerns of congressional Democrats, it sets up an independent panel that can investigate factories accused of violating labor rights and stop shipments of that factory's goods at the border.").

16. OFF. OF THE U.S. TRADE REP., CHAPTER 31 ANNEX A; FACILITY-SPECIFIC RAPID-RESPONSE LABOR MECHANISM, https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/fta-dispute-settlement/usmca/chapter-31-annex-facility-specific-rapid-response-labor-mechanism.gov (last visited Feb. 10, 2022).

17. *Id.*

18. U.S. DEP'T OF LAB.: BUREAU OF INT'L LAB. AFFS., USMCA CASES, https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca-cases (last visited Apr. 9, 2022).

19. *See infra* Section III.B.

20. *See* Charlotte De Bruyne & Itay Fischendler, *Negotiating Conflict Resolution Mechanisms for Transboundary Water Treaties: A Transaction Cost Approach*, 23 GLOB. ENV'T CHANGE 1841 (2013) (discussing the transaction costs of negotiating conflict resolution mechanisms in transboundary water treaties).

21. 28 U.S.C. § 1350.

whether victims of labor violations on both sides of the border can utilize the ATS in light of the recent Nestlé, Inc. v. Doe decision that significantly limited the reach of the ATS under the Court's presumption against extraterritoriality doctrine.[22]

This Note is comprised of five parts. Part II provides a background on the history of labor policy in North America and the creation of Maquiladoras in Mexico. It also highlights the history of abuse in Maquiladoras and the inability of NAFTA to properly resolve labor disputes due to the ineffectiveness of its dispute settlement mechanism. Part III provides background on the recently enacted USMCA, its enhanced labor provisions, and the highly anticipated RRM, along with an overview of recent victories for labor rights at the Maquiladoras. Part III then argues that the RRM, while a significant improvement, still contains notable loopholes with respect to the remediation of individual rights south of the border and the resolution of labor disputes north of the border. Part IV provides a background on the ATS and its history enforcing human rights violations abroad, as well as the Supreme Court's recent limitation of its use under the Court's presumption against extraterritoriality doctrine. Part IV then probes whether the ATS can effectively fill the gap left over by the RRM's loopholes, considering the presumption against extraterritoriality and the Court's recent holding in *Nestlé*.

This Note concludes that the ATS is likely an effective mechanism for the enforcement of labor violations north of the border but may face an uphill battle for labor victims south of the border. However, while the holding in *Nestlé* certainly appears to restrict the ability of Mexican employees to bring suit in U.S. courts under the ATS, plaintiffs in Maquiladoras may still be able to argue—based on factual distinctions, theories of agency law, primary versus secondary liability, the direction of international law, and domestic law among developed states—that U.S. corporate complicity and its domestic conduct are sufficient to meet the ambiguous threshold set forth in *Nestlé*.

22. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

I.
Background on Maquiladoras and Labor Dispute Settlement

A. *A History of Maquiladoras Before NAFTA*

To contextualize the innovation behind the RRM, it is important to review the history of North American labor rights and how those rights were shaped by trade relations between the United States and Mexico. The "Bracero Program," which began in 1942 through a series of domestic statutes and diplomatic agreements between the two states, allowed millions of Mexican agricultural workers to gain seasonal employment on farms in the U.S. while simultaneously resolving U.S. labor shortages stemming from World War II.[23] Due to the desperate economic situation in Mexico, Mexican laborers were willing to endure arduous, low-paying work that U.S. residents were unwilling to perform.[24] However, due to the growth of mechanization, evidence that the Bracero Program fueled illegal immigration and worker abuse, and lobbying by protectionist labor organizations in the United States, the United States terminated the Bracero Program 1964.[25]

To address the resulting high rates of unemployment, encourage foreign investment, and grow its domestic markets, the Mexican Government developed the Maquiladora Program.[26] Maquiladoras are low-cost factories or manufacturing plants, commonly located in Mexico close to the U.S. border, that are owned by foreign corporations—typically U.S. corporations—and benefit from preferential tariff programs that permit them to cheaply import raw goods from the United States, manufacture those raw goods into final products at a reduced labor cost, and then cheaply export those products back across the border to the United States[27] Through the Ma-

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23. *1942: Bracero Program*, Libr. of Cong., https://guides.loc.gov/latinx-civil-rights/bracero-program (last visited Mar. 27, 2022).

24. *About*, Bracero Hist. Archive, https://braceroarchive.org (last visited Mar. 27, 2022).

25. *1942: Bracero Program*, *supra* note 23; Philip Martin, *Mexican Braceros and US Farm Workers*, Wilson Ctr. (July 10, 2020), https://www.wilsoncenter.org/article/mexican-braceros-and-us-farm-workers.

26. *The History of the Maquiladora Program in Mexico*, *supra* note 4.

27. Will Kenton, *Maquiladora*, Investopedia (June 22, 2021), https://www.investopedia.com/terms/m/maquiladora.asp#toc-history-of-maquiladoras.

quiladora program, "all raw materials imported into the country for manufacturing purposes became duty-free with one stipulation: the final product had to be exported back to the country of origin or to a third party."[28]

The number of Maquiladoras along the United States-Mexico border remained relatively limited until 1994, when the United States, Canada, and Mexico entered into NAFTA, which created the world's largest free trade area along the United States-Mexico border, linking 400 million people that produced over $11 trillion in goods and services.[29] Under NAFTA, Mexico's reputation and visibility as a manufacturing partner for multi-national companies skyrocketed, and the quantity of Maquiladoras proliferated as a result of the waived Mexican import duties and preferential rates on duties.[30] While the precise quantifiable benefits of NAFTA and Maquiladoras have been debated, employment grew by 110% in the communities along the border in the six years after NAFTA, compared with 78% in the previous six years,[31] and two-way trade between the U.S. and Mexico increased by 465 percent from 1993 to 2015.[32]

One of the primary benefits of Maquiladoras for U.S. and multi-national corporations is access to cheap labor in Mexico. However, with cheap labor comes an assortment of problems. Critics of Maquiladoras argue that they exploit local populations by providing extremely low wages, often below the poverty line,[33] and expose workers to numerous health risks due

28. *The History of the Maquiladora Program in Mexico*, *supra* note 4.

29. *Id.*

30. *Id.*

31. JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 65 (W. W. Norton & Co. ed., 2006).

32. Trade volumes between the U.S. and Mexico, in millions, was $85,224 in 1993, and $481,543 in 2015. This is a 465% nominal increase, and a 255% real increase. *See* David Floyd, *NAFTA's Winners and Losers*, INVESTOPEDIA (Jan. 11, 2022), https://www.investopedia.com/articles/economics/08/north-american-free-trade-agreement.asp#:~:text=trade%20Volumes&text=that%20combined%20%241.0%20trillion%20in,adjusted%E2%80%94increase%20was%20125.2%25.

33. In 1998, Maquiladora workers made on average 70 pesos a day, or $8.50. *Mexico: Wages, Maquiladoras, NAFTA*, MIGRATION DIALOGUE (Feb. 1998), https://migration.ucdavis.edu/mn/more.php?id=1451_0_2_0. In 2019, that number increased to 176.20 pesos a day, or $9.28. Mark Stevenson, *Mexican President AMLO Unleashes Labor Unrest at Border Maquiladora Factories*, EL PASO TIMES (Feb. 3, 2019), https://www.elpasotimes.com/story/

to unsafe working conditions and inadequate housing.[34] Based on studies conducted in the 1990s, nearly 70% of Maquiladora workers were migrants from central Mexico, and nearly two thirds of Maquiladora employees are women,[35] many of whom suffered human rights abuses related to women's health and mandatory pregnancy testing.[36] Gender violence was also pervasive. For example, in the 1990s, media outlets widely reported the notorious "Maquiladora Murders," where over three-hundred Mexican women and girls were murdered in one border city alone.[37]

Labor rights were practically non-existent because labor unions, while existing on paper, had been designed to benefit employers without the participation or knowledge of the workers themselves. These unions were aptly named "Paper Unions."[38] Some of them had the ability to sell control over members and their collective contracts to employers without employee knowledge. Others only received payment from employers while their constituent employees lacked agency over any employment decisions.[39] Labor activists were reportedly subjected to gross human rights violations intended to intimidate them from organizing.[40] Such allegations included la-

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news/2019/02/03/mexico-border-factories-maquiladora-strike-follows-minimum-wage-increase/2762912002/.

34. *See* Stephanie Navarro, *Inside Mexico's Maquiladoras: Manufacturing Health Disparities*, STANFORD, https://med.stanford.edu/content/dam/sm/schoolheltheval/documents/StephanieNavarro_HumBio122MFinal.pdf (last visited Feb. 4, 2022) (discussing "[d]aily health threats that Maquiladora workers face including handling toxic chemicals, using unsafe equipment and poorly designed workstations, working in extreme heat or cold and in conditions of poor ventilation and lighting, working in spaces with harmful noise levels, and performing work according to dangerously high production quotas.").

35. *Id.*

36. *See* Mexico's Maquiladoras: Abuses Against Women Workers, HUMAN RIGHTS WATCH (Aug. 17, 1996, 12:00 AM), https://www.hrw.org/news/1996/08/17/mexicos-maquiladoras-abuses-against-women-workers#.

37. Elvia R. Arriola, *Accountability for Murder in the Maquiladoras: Linking Corporate Indifference to Gender Violence at the U.S. Mexico Border*, 5 SEATTLE J. SOC. JUST. 603, 603 (2007).

38. Cirila Quintero Ramírez, Fi*ghting for Independent Unions in the Maquilas*, NACLA (Apr. 24, 2014), https://nacla.org/news/2014/4/24/fighting-independent-unions-maquilas.

39. *Id.*

40. *See* Dan La Botz, *Farm Labor Organizer is Murdered in Mexico*, LABOR NOTES (Apr. 29, 2007), https://labornotes.org/2007/04/farm-labor-orga-

bor violence like kidnapping and torture.[41] Employer-affiliated protection unions retained at the behest of the Maquiladoras frequently agreed to low wages and miserable working conditions without consulting the workers they allegedly represented.[42]

B. *Labor Disputes Under NAFTA*

In response to accusations of labor abuse, NAFTA's negotiating parties "considered labor issues of such paramount importance" that they executed a side agreement known as the North American Agreement on Labor Cooperation (NAALC).[43] The NAALC included objectives such as the recognition of eleven basic labor principles covering working conditions, labor standards, and other labor rights including freedom of association, right to organize, and right to collective bargaining.[44] The NAALC required parties to "promote compliance with and effectively enforce its labor laws through appropriate government action," as well as access to "fair, equita-

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nizer-murdered-mexico ("While the murder of labor activists was common in Mexico in the late 1960s and 1970s, few have been murdered in recent years.").

41. *See* Connell, *supra* note 5 (discussing the kidnapping and torture of a Mexican worker rights activists, whose "kidnapping is only the latest in a series of systematic attacks."); *see also Protest Torture Attack on Labor Activists' Family in Mexico*, INTERNATIONALIST (May 2018), http://www.internationalist.org/protesttortureattackonmexicolaboractivists1805.html.

42. Tom Conway, *An Accomplice to Murder*, UNITED STEEL WORKERS (Oct. 21, 2019), https://www.usw.org/blog/2019/an-accomplice-to-murder ("These fake unions agree to low wage rates and miserable working conditions without bothering to consult the workers they're supposed to represent.").

43. Magdeline R. Esquivel & Leoncio Lara, *The Maquildaora Experience: Employment Law Issues in Mexico*, 5 L. & BUS. REV. AMS. 589, 590 (1999), https://scholar.smu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1772&context=lbra.

44. North American Agreement on Labor Cooperation, Dec. 17, 1992, 10 Stat. 2057, 32 I.L.M. 1499, arts. 2, 3, 4, 5, 6, 7 & annex 1 (entered into force Jan. 1, 1994) [hereinafter NAALC] (The eleven labor principles in NAALC are the (1) freedom of association and protection of the right to organize, (2) the right to bargain collectively, (3) the right to strike, (4) prohibition on forced labor, (5) child labor protections, (6) minimum labor standards with regard to wages, hours and conditions, (7) non-discrimination in employment, (8) equal pay for equal work, (9) health and safety protection, (10) workers compensation, (11) protection of the rights of migrant workers).

ble, and transparent" enforcement proceedings including "administrative, quasi-judicial, judicial, or labor tribunals" for labor disputes.[45]

Despite this optimistic language, the labor provisions in NAFTA and the NAALC were unenforceable and ineffective.[46] This was largely because they asked each party to enforce its own domestic labor law[47] while providing inadequate dispute settlement procedures for complaining parties.[48] The inadequacy of dispute settlement procedures can be attributed to the domestic interests of the three negotiating parties, who did not want to expose "their labor institutions to external pressure and sanctions" or have their "national sovereignty re-

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45. *Id.*

46. Jamieson L. Greer et al., *Companies Face Risk From the USMCA's New Rapid Response Mechanism to Enforce Labor Rights*, KING & SPALDING (July 15, 2020), https://www.kslaw.com/news-and-insights/companies-face-risk-from-the-usmcas-new-rapid-response-mechanism-to-enforce-labor-rights ("Historically, NAFTA included unenforceable provisions on labor protections that were limited and largely ineffective.").

> Much of the criticism of the NAALC has focused on its lack of supranational standards, the negotiated rather than adjudicated nature of the application and enforcement process, the absence of trade sanctions penalties against a Party country found to have engaged in many types of systemic violations of the Agreement, and the preclusion of any penalties directed at employers whose blatant violations of workers' rights establish the party country's systematic breach of its obligations.

Marley S. Weiss, *Two Steps Forward, One Step Back-Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyon*d, 37 U.S.F.L. REV. 689, 698 (2002).

47. Franz Christian Ebert & Pedro A. Villarreal, *The Renegotiated "NAFTA": What is in it for Labor Rights?*, EJIL BLOG (Oct. 11, 2018), https://www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labor-rights/ ("At its core, it required parties to enforce their own domestic labor law, set up a Commission for Labor Cooperation, and established a complaint mechanism for third parties. It also allowed, in certain cases, for state-to-state arbitral dispute settlement with possibilities to impose limited fines as a last resort measure."); Lance Compa, *NAFTA's Labor Side Accord: A Three-Year Accounting*, 3 L. & BUS. REV. AM. 6, 7 (1997) ("Instead, the NAALC stresses sovereignty in each country's internal labor affairs, recognizing 'the right of each Party to establish its own domestic labor standards.").

48. Kimberly A. Nolan García, *Labor Rights Enforcement Under the NAFTA Labor Clause: What Comes Next Under a Potential Renegotiation?*, WILSON CTR. (May 3, 2017), https://www.wilsoncenter.org/article/labor-rights-enforcement-under-the-nafta-labor-clause-what-comes-next-under-potential.

stricted on labor matters"[49] but also wanted to preserve Mexico's comparative advantage as the region's source of unskilled, low-cost labor.[50]

As a result, a complaining party had to go through multiple levels of dispute settlement before being able to possibly invoke fines or trade sanctions.[51] Under NAALC, each country was required to set up a National Administrative Office (NAO) within its Ministry of Labor, which could review labor complaints arising in other countries upon its own initiative or in response to a complaint lodged by a nongovernmental organization.[52] After a complaint was filed, a labor minister could then request consultation with the minister of the other country to engage in high-level discussions regarding the alleged labor violation.[53] Following the ministerial consultation, a country could then invoke a review by a panel of experts at the NAALC, who could then make a recommendation for dispute resolution by an arbitral panel, which could investigate and develop an action plan to respond to an "alleged persistent pattern of failure . . . to effectively enforce occupational safety and health, child labor or minimum wage standards."[54] The formal dispute settlement mechanism excluded participation by aggrieved workers and only provided for state-to-state par-

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49. Dombois, *supra* note 13, at 20.

50. Danielle Trachtenberg, *Local Labor-Market Effects of NAFTA in Mexico: Evidence from Mexican Commuting Zones* (Inter-Am, Dev. Bank, Working Paper No. 1078, 2019), https://publications.iadb.org/publications/english/document/Local_Labor-Market_Effects_of_NAFTA_in_Mexico_Evidence_from_Mexican_Commuting_Zones_en.pdf. Trachtenberg went on to comment:

> Relative to the United States and Canada, Mexico specialized in unskilled-labor-intensive manufacturing industries . The implementation of NAFTA increased the ability of all three countries to engage in regional product-sharing, with Mexico serving as the region's source of unskilled-labor-intensive intermediate inputs and a center for processing and assembly of final goods to be exported to the north.

Id.

51. Esquivel & Lara, *supra* note 43, at 592–93.

52. Esquivel & Lara, *supra* note 43, at 592; Dombois, *supra* note 13, at 20 ("The NAALC assigns an important function to nongovernmental organizations and their transnational networks: these organizations identify labor problems and lodge complaints, thereby contributing to the legacy of the NAALC.").

53. Esquivel & Lara, *supra* note 43, at 592.

54. *Id.* at 593.

ticipation in the arbitration.[55] Furthermore, only three subjects were arbitrable: child labor, minimum wage and hour laws, and occupational safety and health. At the final enforcement stage, the arbitral panel had the power to fine a country up to $20 million or reimpose pre-NAFTA tariffs up to the fine amount if the violating country failed to pay.[56] However, through the course of NAFTA, no complaint ever made it to the arbitration stage.[57] During the first seven years of NAFTA, twenty-three labor complaints were filed, and none resulted in sanctions or enforcement action.[58] Violation of freedom of association, one of the most important labor rights, was only subject to ministerial consultations, without any possibility of arbitration or penalties.[59] Furthermore, under NAFTA's dispute settlement procedures, there were multiple avenues for a party to "block the establishment of a panel, thereby preventing resolution of the dispute."[60]

Critics have described the NAALC labor resolutions as "promises to talk about labor violations and not punish them with trade sanctions."[61] The labor dispute settlement provisions in NAFTA resulted in zero arbitrations or trade sanctions across the life of NAFTA,[62] despite continued deterioration of labor conditions in Maquiladoras. As a result of the NAALC's lack of teeth, labor rights in Mexico remained stagnant. For

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55. David A. Gantz et al., *Labor Rights and Environmental Protections Under NAFTA and Other U.S. Free Trade Agreements*, 42.2 U. MIA. INTER-AM. L. REV. 297, 319–20 (2011).

56. *Id.* at 319.

57. Nolan García, *supra* note 48; Gantz et al., *supra* note 55, at 319–20.

58. *NAFTA Labor Accord Ineffective*, HUMAN RIGHTS WATCH (Apr. 15, 2001), https://www.hrw.org/news/2001/04/15/nafta-labor-accord-ineffective.

59. Nolan García, *supra* note 48.

60. Nina M. Hart, *USMCA: A Legal Interpretation of the Panel-Formation Provisions and the Question of Panel Blocking*, CONGRESSIONAL RESEARCH SERVICE (Jan. 30, 2020), https://sgp.fas.org/crs/row/IF11418.pdf.

61. Nolan García, *supra* note 48.

62. *Id.* García went on to say:

> These changes would strengthen labor rights enforcement by making violations subject to trade sanctions, which is not currently the case under NAFTA . . . the long road to trade sanctions for most cases, and the inability to get to them at all for freedom of association cases, is the main reason why the protection of labor rights in North America overall has been slow and limited to certain rights.

Id.

example, during the course of NAFTA, corporations like Sony often fired employees who raised labor concerns and frequently employed riot police to physically assault and intimidate employees who protested, while enjoying continued political protection from Mexican authorities.[63] In 2016, Maquiladora workers at plants owned by multiple U.S. corporations protested $30 per week wages, unsafe working conditions, sexual harassment, and discrimination.[64] In response, those U.S. corporations initiated a spree of mass firings, specifically targeting those workers engaged in union activity.[65]

By 2012, ninety percent of Mexican collective bargaining agreements were still classified as "protection contracts," which are created through the "practice of official unions or corrupt lawyers negotiating a union contract without the knowledge of workers."[66] Government complicity was frequent, with Mexican labor boards arbitrarily rejecting union registration, providing employers with the names of union applicants who employers could then target for firing, and then failing to respond to legal claims of unjust dismissal.[67] Complaints filed under NAALC cited labor violations including "favoritism toward employer controlled unions; firing for workers' organizing efforts; denial of collective bargaining rights; forced pregnancy testing; mistreatment of migrant workers; life-threatening health and safety conditions; and other violations of the eleven 'labor principles.'"[68] Despite the many complains, NAFTA's structural and institutional inefficiencies did not lead to any successful remediations.

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63. David Bacon, Health, Safety, and Workers' Rights in the Maquiladoras, 22 J. Pub. Health Pol'y 338, 339 (2001).

64. Cathy Feingold, *Worker Protests in Ciudad Juárez Shine a Light on Ongoing Workers Rights Violations in Mexico*, AFL-CIO (Jan. 11, 2016), https://aflcio.org/2016/1/11/worker-protests-ciudad-juarez-shine-light-ongoing-workers-rights-violations-mexico.

65. *Id.*

66. *Protecting Workers' Rights to Freedom of Association & Collective Bargaining in Mexico*, FAIR LAB. ASSOC. (Feb. 14, 2012), https://www.fairlabor.org/protecting-workers-rights-to-freedom-of-association-collective-bargaining-in-mexico/.

67. *Id.*

68. *NAFTA Labor Accord Ineffective*, *supra* note 58.

II.
USMCA's Novel Rapid Response Mechanism

From the outset, USMCA negotiators sought to modernize NAFTA's antiquated labor mechanisms. At the insistence of U.S. congressional democrats, labor provisions from the NAALC that had resided in a side letter of NAFTA were moved to the main body of the agreement, pushing issues like the right to organize under the USMCA's normal dispute settlement procedures.[69] Most notably, the USMCA set up an "innovative Facility-Specific Rapid Response Labor Mechanism between the United States and Mexico," designed to be better equipped to investigate Maquiladoras accused of violating labor rights and enforce compliance through the use of penalties.[70] The RRM was added into the USMCA to improve wages and foster stronger unions in Mexico in order to improve labor rights and reduce incentives for companies to offshore U.S. jobs.[71]

The RRM can be initiated under the USMCA if a party believes in good faith that "workers at covered facilities are being denied the right of free association and collective bargaining."[72] Specifically, it provides for "expedited enforcement of workers' free association and collective bargaining rights at the facility level," and therefore has numerous benefits compared to the old labor dispute settlement process under NAFTA.[73]

One innovative feature of the RRM is that it is not solely state-to-state. Instead, any member of the public can submit a

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69. Swanson & Tankersley, *supra* note 14.

70. Off. of the U.S. Trade Representative, *supra* note 16. There is also a Facility Specific Rapid Response Labor Mechanism between Canada and Mexico. *See* United States–Mexico–Canada Agreement, annex 31-B, art. 31-B.10, Oct. 1, 2018, 134 Stat. 11 (entered into force July 1, 2020) [hereinafter USMCA].

71. David Shepardson & David Lawder, *U.S. Reaches Deal with Mexican Auto Parts Factory in USMCA Labor Complaint*, Reuters (Aug. 10, 2021), https://www.reuters.com/business/us-reaches-deal-with-mexican-auto-parts-subsidiary-tridonex-2021-08-10/ ("The new 'rapid-response' labor enforcement mechanism was negotiated into the United States-Mexico-Canada Agreement (USMCA) on trade to try to foster stronger unions and drive up wages in Mexico to reduce incentives for companies to move jobs south of the U.S. border.").

72. USMCA, *supra* note 70, annex 31-A, art. 31-A2.

73. Off. of the U.S. Trade Rep., *supra* note 16.

petition alleging a denial of right, which can result in enforcement directed toward the specific facility responsible for the violation, as opposed to the state party where the facility is located.[74] The RRM's "rapidness" is another key component of its novelty.[75] While the NAFTA mechanism often languished at various stages of the settlement process due to government inaction, the RRM provides for an expedited process in which the Interagency Labor Committee must review a claim within thirty days and decide whether there is "sufficient, credible evidence of a denial of rights."[76] If the Interagency Labor Committee finds a "denial of rights," it then requests the government of the covered facility[77] to conduct its own assessment, and if that government agrees, it then has forty-five days to make its determination.[78] In contrast to NAFTA, if that government refuses to conduct a review or conducts a review and finds no violation, the other party may request a panel to conduct a separate review under the USMCA, which can result in a ten-day consultation period between the parties for remediation, avoiding the inaction problem of NAFTA.[79] Unlike NAFTA, which often died at various stages of the settlement

74. Aaron R. Hutman, *The U.S.M.C.A.'s Rapid Response Mechanism for Labor Complaints: What to Expect Starting July 1, 2020*, GLOBAL TRADE & SANCTIONS LAW (July 1, 2020), https://www.globaltradeandsanctionslaw.com/the-usmca-rapid-response-mechanism-for-labor-complaints/.

75. M. Angeles Villarreal, *The United States-Mexico-Canada Agreement (USMCA)*, CONGRESSIONAL RESEARCH SERVICE 36 (Dec. 28, 2021) ("The implementation of the labor provisions, which include the novel rapid response mechanism meant to resolve labor disputes rapidly, is one of the primary areas of interest for some Members of Congress.").

76. Hutman, *supra* note 74.

77. USMCA, *supra* note 70, annex 31-A, art. 31-A.1. ("Covered Facility means a facility in the territory of a Party that (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party, and is a facility in a Priority Sector . . . Priority Sector means a sector that produces manufactured goods, supplies services, or involves mining."); Art. 31-A.15, fn. 4. ("For greater certainty, manufactured goods include, but are not limited to, aerospace products and components, autos and auto parts, cosmetic products, industrial baked goods, steel and aluminum, glass, pottery, plastic, forgings, and cement.").

78. Hutman, *supra* note 74.

79. *Id.*

process due to parties blocking the formation of panels, the RRM specifically prevents panel blocking.[80]

Some of the largest advantages of the RRM include its arbitrable subject matter and enforcement capabilities. Unlike NAFTA, the RRM can call for a review of violations to the rights of free association, collective bargaining, and other labor rights that were provided for in NAALC but lacked an adequate forum for adjudication and enforcement under the old NAFTA mechanism.[81] If the labor panel determines that a denial of rights occurred at a covered facility, the other country "may impose remedies including (a) suspension of preferential treatment of goods manufactured at the covered facility; (b) imposition of 'penalties' on the covered facility; and (c) denial of entry for such goods, which can be invoked if a covered facility has received at least two prior denial of rights determinations."[82] In addition, these penalties can be directed toward the individual facility responsible for the labor violation, whereas in NAFTA, the penalties are imposed solely on the state.[83] Penalties are also permitted when a USMCA party fails to act in good faith with regard to the RRM.[84]

In these ways, RRM appears to correct many of the problems present in NAFTA's old labor dispute settlement procedures. It expands the arbitrable subject matter, allows for participation by aggrieved workers and individual facilities, requires expedited review and enforcement with finite time frames to avoid the obstruction and infinite delay by state parties, and provides realistic enforcement mechanisms to ensure compliance.

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80. *USMCA: Labor Provisions*, CONGRESSIONAL RESEARCH SERVICE (last updated Jan. 20, 2022), https://crsreports.congress.gov/product/pdf/IF/IF11308 ("Prevention of panel blocking in dispute settlement. Ensures the formation of a panel in dispute cases where a party refuses to participate in the selection of panelists.").

81. Hutman, *supra* note 74.

82. *Id.*

83. Nina M. Hart, *USMCA: Legal Enforcement of the Labor and Environmental Provisions*, CONGRESSIONAL RESEARCH SERVICE (May 14, 2021), https://crsreports.congress.gov/product/pdf/R/R46793.

84. *Id.*

A. *Successful Application of the RRM*

Since the enactment of the USMCA, the RRM has been put to work twice to initiate expedited enforcement action against specific factories in Mexico that reportedly denied workers the rights of freedom of association and collective bargaining under Mexican law.[85]

1. *GM Silao*

On May 12, 2021, one day after Democratic lawmakers sent a letter to the General Motors (GM) CEO regarding "disturbing reports of gross labor rights violations at a General Motors plant in Silao, Mexico,"[86] United States Trade Representative (USTR) Katherine Tai asked the Interagency Labor Committee of Mexico to review whether GM workers were "being denied the right of free association and collective bargaining."[87] The USTR's request was the first time any country used the novel RRM, and alleged "serious violations of . . . workers' rights in Silao . . . in connection with a recent worker vote, organized by the existing union, to approve their collective bargaining agreement."[88] Specifically, workers at the plant were asked to vote whether or not they recognized the union of which they were purportedly members.[89] The union that allegedly represented the workers engaged in a practice known as "protection contracts,"[90] where the union deducted fees from employee's salaries even though many of the employees were not aware that they were even part of the

85. U.S. DEP'T OF LAB.: BUREAU OF INT'L LAB. AFFS., *supra* note 18.

86. Letter from U.S. Reps. Dan Kildee, Bill Pascrell Jr., & Earl Blumenauer, H. Comm. on Ways & Means, to Mary Barra, Chief Exec. Officer, Gen. Motors Co. (May 11, 2021), https://dankildee.house.gov/sites/dankildee.house.gov/files/5-11-21%20-%20Oversight%20Letter%20to%20GM%20on%20Silao%20Labor%20Response.pdf.

87. Press Release, Off. of the U.S. Trade Rep., United States Seeks Mexico's Review of Alleged Worker's Rights Denial at Auto Manufacturing Facility (May 12, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-seeks-mexicos-review-alleged-workers-rights-denial-auto-manufacturing-facility-0.

88. *Id.*

89. Mark Stevenson, *US Files First Trade Complaint with Mexico Under USMCA*, ABC NEWS (May 12, 2021, 7:25 PM), https://abcnews.go.com/International/wireStory/us-files-trade-complaint-mexico-usmca-77651571.

90. For a definition of "protection contracts," see *infra* note 149 and accompanying text.

union.[91] After the vote, allegations arose that the union destroyed the "no" votes.[92]

On July 8, 2021, the U.S. and Mexico announced, in the first ever successful use of the RRM, a comprehensive plan that would guarantee GM workers the ability to vote on their collective bargaining agreement and remediate the denial of their rights of free association and collective bargaining.[93] Specifically, the plan laid out steps to ensure an election free from interference for the over 6,000 workers at the facility.[94] Seven months later, the workers overwhelmingly voted in favor of a new, independent union that had recently been organized by workers of the plant.[95] Supporters credited the RRM with vindicating labor rights in Mexico while preventing the outsourcing and depression of American wages.[96]

2. *Tridonex*

On May 10, 2021, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the Service Employees International Union (SEIU), Public Citizen, and the Mexican union Sindicato Nacional Independiente de Trabajadores de Industrias y de Servicios Movimiento 20/32 (SNITIS) filed a complaint against the Mexican auto parts factory Tridonex, a subsidiary of U.S.-based Cardone Industries, accusing it of violating labor rights guaranteed under the USMCA.[97] The complaint alleged that through "mass firings,

91. Stevenson, *supra* note 89.

92. *Id.*

93. Press Release, U.S. Dep't of Lab., US, Mexico Announce Enforcement of Worker Protection Agreement (July 9, 2021), https://www.dol.gov/newsroom/releases/ilab/ilab20210709?_ga=2.35181154.2137891952.1634056431-862597107.1634056431.

94. *Id.*

95. Danielle Noel, *GM Silao Facility Workers Vote Overwhelmingly in Favor of the SINTTIA Union*, AFL-CIO (Feb. 4, 2022), https://aflcio.org/2022/2/4/gm-silao-facility-workers-vote-overwhelmingly-favor-sinttia-union.

96. Press Release, U.S. Sen. Sherrod Brown, Senators Brown, Wyden Release Joint Statement Following Vote for Independent Union by General Motors Workers in Silao, Mexico (Feb. 3, 2022), https://www.brown.senate.gov/newsroom/press/release/brown-wyden-release-statement-vote-independent-union-general-motors-workers-silao-mexico.

97. Press Release, Pub. Citizen, New Lawsuit Filed Against Mexican "Tridonex" Subsidiary of U.S. Autoparts Maker Targeted in First USMCA Labor Case Brought by Unions (July 23, 2021), https://www.citizen.org/news/new-lawsuit-filed-against-mexican-tridonex-subsidiary-of-u-s-autoparts-

refusal to recognize an independent union and imprisonment of [a] union lawyer",[98] the company and state officials had denied workers the right to organize with SNITIS. Specifically, the complaint alleged that the workers were not able to elect union leaders or ratify their collective bargaining agreement and that in retaliation for the attempted organizing, over 600 workers had been fired from Tridonex.[99]

On August 10, 2021, the USTR and Tridonex announced a settlement of these labor violations via the RRM.[100] The settlement agreement required Tridonex to provide severance and six months back pay to at least 154 dismissed workers, totaling over $600,000.[101] Among several other promises, the agreement required Tridonex to:

> Support the right of its workers to determine their union representation without coercion, including by protecting its workers from intimidation and harassment and welcoming election observers in the plant leading up to and during any vote; Provide training to all Tridonex workers on their rights to collective bargaining and freedom of association; Remain neutral in any election for union representation at its facility; Maintain and strengthen safety protocols to protect its workers from COVID-19 and financially support any employees who are unable to report to work due to COVID-19 exposures or infection; Revise its procedures and train its managers on fair workforce reduction procedures; [and] Maintain and staff an employee hotline phone number to receive

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maker-targeted-in-first-usmca-labor-case-brought-by-unions-public-citizen/; Press Release, Off. of the U.S. Trade Rep., United States Reaches Agreement with Mexican Auto Parts Company to Protect Workers' Rights (Aug. 10, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/united-states-reaches-agreement-mexican-auto-parts-company-protect-workers-rights.

98. *Id.*

99. Thomas Kaplan, *Complaint Accuses Mexican Factories of Labor Abuses, Testing New Trade Pact*, N.Y. TIMES (May 10, 2021), https://www.nytimes.com/2021/05/10/business/economy/mexico-trade-deal-labor-complaint.html.

100. United States Reaches Agreement with Mexican Auto Parts Company to Protect Workers' Rights, *supra* note 97.

101. *Id.*

> and respond to complaints of violations of workers' rights in the facility.[102]

As part of the agreement, the Mexican government also agreed to "help facilitate workers' rights training for employees, monitor any union representation election at the facility, and investigate any claims by employees of workers' rights violations."[103] The agreement between the United States and Tridonex was applauded by multiple stakeholders and leaders as a successful application of the RRM.[104] Less than seven months after the agreement, in an election closely watched by the U.S. government, the employees of Tridonex overwhelmingly voted to appoint SNITIS to be its new, independent union.[105] The RRM was credited to have laid the groundwork for this overwhelming victory in labor rights.[106]

B. *The RRM's Limitations*

The RRM, compared to pre-USMCA labor standards and the original NAFTA labor dispute system, represents a historic win for labor rights along the U.S.–Mexico border. Workers in Maquiladoras finally have a mechanism capable of remediating labor grievances through rapid review and enforcement capabilities. But despite the improvement, there are still significant loopholes in the USMCA that can leave workers without a proper remedy.

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102. *Id.*

103. *Id.*

104. Press Release, U.S. Rep. Rosa DeLauro, Chair DeLauro Applauds Historic Victory for Workers at Tridonex Auto Parts Factory in Mexico (Mar. 1, 2022), https://delauro.house.gov/media-center/press-releases/chair-delauro-applauds-historic-victory-workers-tridonex-auto-parts; Press Release, Richard Neal, Chairman, H. Ways & Means Comm., Neal, Blumenauer Statement on Agreement Reached Under USMCA Rapid Response Mechanism with Mexican Auto Parts Facility (Aug. 11, 2021), https://waysandmeans.house.gov/media-center/press-releases/neal-blumenauer-statement-agreement-reached-under-usmca-rapid-response.

105. Daina Beth Solomon, *Independent Union Wins Workers' Vote at Mexico's Tridonex Plant*, REUTERS (Mar. 1, 2022, 1:06 AM), https://www.reuters.com/article/mexico-labor/update-1-independent-union-wins-workers-vote-at-mexicos-tridonex-plant-idINL1N2V40DO.

106. Press Release, U.S. Sen. Sherrod Brown, Brown, Wyden Release Statement Following Vote for Independent Union By Tridonex Workers in Mexico (Mar. 1, 2022), https://www.brown.senate.gov/newsroom/press/release/brown-wyden-statement-vote-independent-union-tridonex-workers-mexico.

1. *Remediation of Individual Harm*

The RRM was designed to remediate a specific facility's labor issues at a macro level, as opposed to remedying labor violations directed toward individual workers. This is evident in the language of the USMCA, which states that "[n]o Party shall fail to effectively enforce its labor laws through a *sustained or recurring course of action or inaction* in a manner affecting trade or investment between the Parties."[107] A footnote to the text of the USMCA further clarifies that "[f]or greater certainty, a 'sustained or recurring course of action or inaction' is 'sustained' if the course of action or inaction is consistent or ongoing, and is 'recurring' if the course of action or inaction occurs periodically or repeatedly and when the occurrences are related or the same in nature."[108] To further clarify the USMCA's avoidance of individual incidents, the footnote concludes that a "course of action or inaction does not include an isolated instance or case."[109]

The Labor Advisory Committee on Trade Negotiations and Trade Policy (LAC) points out that this leaves a significant loophole for "single egregious acts that fail to form a sustained or recurring course . . . even though such acts could be used to coerce thousands or tens of thousands of workers not to exercise their labor rights."[110] Critics point out that under the USMCA's language, murdering a trade union activist to intimidate thousands of employees against exercising their labor rights would lack RRM coverage because the single murder would constitute an "isolated instance" failing to satisfy the "sustained or recurring course of action" standard.[111] Even worse, gross human rights abuses such as a single mass murder of fifty employees may lack coverage under this language.[112] If

107. USMCA, *supra* note 70, art. 23.5(1) (emphasis added).

108. *Id.* art. 23.5 (1) n. 10.

109. *Id.*

110. LAB. ADVISORY COMM. ON TRADE NEGOTS. & TRADE POL'Y, REPORT ON THE IMPACTS OF THE RENEGOTIATED NORTH AMERICAN FREE TRADE AGREEMENT 21 (2018), https://aflcio.org/sites/default/files/2018-09/LAC%20Report%20NAFTA%20Final%20Final%20PDF.pdf.

111. Owen E. Herrnstadt, *Why NAFTA's 2.0 Current Labor Provisions Fall Short*, ECON. POL'Y INST. (Mar. 28, 2019, 8:30 AM), https://www.epi.org/blog/why-naftas-2-0-current-labor-provisions-fall-short/.

112. LAB. ADVISORY COMM. ON TRADE NEGOTS. & TRADE POL'Y, *supra* note 110.

fifty employees attempting to organize are murdered in a single incident, Mexico could refuse to allow RRM review by arguing that "no related or identical tragedy occurred," and therefore, the single mass murder was not "sustained," "recurring," "consistent," or "ongoing."[113]

This lack of remedy is not a hollow concern; there are numerous allegations of anti-union thugs murdering employees that attempt to organize. In a single incident in 2019, at least three labor leaders were murdered at Mexico's Media Luna Gold Mine.[114] In 2007, an organizer for the Farm Labor Organizing Committee (FLOC) was bound hand and foot and beaten to death, allegedly by labor contractors.[115] And in 2018, a labor activist was killed during a workers' strike at the Torex Gold Mine.[116]

Furthermore, in individual instances like this, employees are often unable to enforce their rights domestically. The Mexican government declined to investigate the Luna Gold Mine murder[117] despite a lawsuit and request for investigation.[118] In fact, "violence against labor organizers is seldom investigated, much less prosecuted," despite new domestic laws in Mexico establishing courts to adjudicate labor disputes.[119] As part of

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113. *Id.*

114. Press Assocs. Union News Serv., Murders of Latin American Labor Leaders Anger Unions and Lawmakers, People's World (Nov. 26, 2019, 2:39 PM), https://www.peoplesworld.org/article/murders-of-latin-american-labor-leaders-anger-unions-and-lawmakers/.

115. La Botz, *supra* note 40.

116. *Mexico: Labour Activist Quintín Salgado Killed Amidst Workers' Strike at Torex Gold Mine; Company Comments*, BUS. & HUM. RTS. RES. CTR. (Feb 5, 2018), https://www.business-humanrights.org/en/latest-news/mexico-labour-activist-quint%C3%ADn-salgado-killed-amidst-workers-strike-at-torex-gold-mine-company-comments/.

117. Conway, *supra* note 42 ("Police haven't bothered to look for Oscar, so his family, friends and fellow workers conducted their own search. Local thugs have warned them to call it off. . . . Oscar's family members, who are now in hiding, demanding that the government investigate his disappearance.").

118. Ben Davis, U*SW Calls on Mexican Government to Locate Disappeared Union Activist*, UNITED STEEL WORKERS (Oct. 1, 2019), https://www.usw.org/news/media-center/releases/2019/usw-calls-on-mexican-government-to-locate-disappeared-union-activist.

119. Conway, *supra* note 42 ("But violence against labor organizers is seldom investigated, much less prosecuted, and Mexico's highly publicized new labor law hasn't changed that. . . . [I]t establishes courts to adjudicate labor disputes.").

USMCA negotiations, Mexico was required to enact domestic legislation overhauling its labor laws. Part of this overhaul included the establishment of "independent labor courts . . . responsible for the adjudication of labor disputes."[120] However, the Independent Mexico Labor Expert Board (IMLEB), which was established to assess the progress of Mexican labor reforms, concluded that "efforts have been hampered by missed deadlines in the states, conservative forecasts resulting in inadequate resources, and a backloaded rollout of federal and local conciliation centers and labor courts."[121] The IMLEB determined that this botched rollout resulted in a "confusion among workers . . . prolonging the time Mexican workers are subjected to the old, failed labor justice system."[122] The failure of the new labor courts, in conjunction with an already failing criminal justice system that results in impunity for over 90% of crimes,[123] leads to the conclusion that the RRM will fail to remedy a significant portion of violent labor abuse.

2. *Labor Rights North of the Border*

The RRM was not just created to remediate labor violations in Mexico; it was also established to remediate labor violations occurring in the United States.[124] Since World War I, well before the first official Bracero Program, the U.S. government continuously operated various forms of temporary worker programs that permitted agricultural laborers from

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120. INFOGRAPHIC: MEXICO'S NEW LABOR REFORM, WILSON CENTER (Apr. 18, 2019), https://www.wilsoncenter.org/article/infographic-mexicos-new-labor-reform.

121. INDEP. MEX. LAB. EXPERT BD., REPORT TO THE INTERAGENCY LABOR COMMITTEE PURSUANT TO SECTION 734 OF THE USMCA IMPLEMENTATION ACT 26 (July, 7, 2021), https://www.maquilasolidarity.org/sites/default/files/attachment/IMLEB%20Report%20and%20Separate%20Stmt%20of%20Members%20Fortson%20et%20al.%202021.07.7.pdf.

122. *Id.* at 27.

123. María Novoa, T*he Wheels of Justice in Mexico Are Failing. What Can Be Done?*, AMERICAS QUARTERLY (July 9, 2020), https://www.americasquarterly.org/article/the-wheels-of-justice-in-mexico-are-failing-what-can-be-done/.

124. USMCA, *supra* note 73, annex 31-A, art. 31-A.1 ("The United States and Mexico are agreeing to this annex . . . [t]he purpose of the Facility Specific Rapid Response Labor Mechanism, including the ability to impose remedies, is to ensure remediation of a Denial of Rights . . . for workers at a Covered facility . . . [t]his annex applies only as between Mexico and the United States.").

Mexico to work on U.S. farms through daily or seasonal work visas.[125] Temporary foreign workers have long supported the U.S. economy during times of labor shortages while also improving the economy during periods of upturn by accepting jobs with conditions and salaries that domestic workers are unwilling to accept.[126] Despite the economic benefits, temporary workers from Mexico have also been the source of political ire due to lobbying from domestic labor interests and protectionist groups opposed to immigration.[127]

The number of temporary worker visas has sharply increased in recent decades, with over 800,000 visas granted in 2019.[128] In practice, migrant workers seeking temporary employment in the U.S. "have limited rights and face challenges including illegal recruitment fees and debt bondage, lower wages, employment that ties them to a single employer, lack of protections in the workplace, family separation, . . . and no path to permanent residence or citizenship."[129] Although temporary migrant workers are authorized to work in the United States, their rights still mirror those of unauthorized immigrants in the sense that they "suffer and fear retaliation and deportation if they speak up about wage theft, workplace abuses, discrimination, or other substandard working conditions."[130]

In 2021, after six people were killed and dozens more were injured in a serious industrial accident at a poultry plant in Georgia, the U.S. Department of Labor launched a workplace safety investigation.[131] The investigation uncovered safety violations that placed the plant's workers at significant risk.[132] Perhaps most worrisome, the investigation found that many foreign workers were reluctant to accept medical aid and refused to participate in the investigation for fear of retaliation.[133] These results were consistent with a report published by the Center for Public Integrity, which found that foreign

125. Klobucista & Roy, *supra* note 6.
126. *Id.*
127. *Id.*
128. *Id.*
129. Costa, *supra* note 12.
130. *Id.*
131. Lahoud, *supra* note 11.
132. *Id.*
133. *Id.*

workers, despite having full rights under U.S. law to confidentially report labor violations, declined to do so out of fear of reprisal.[134]

Despite widespread evidence of labor violations committed by U.S. employers against temporary migrant workers on U.S. soil, the RRM has unique and significant limitations for use in the United States.[135] Specifically, with respect to U.S. facilities, "a claim can be brought only with respect to an alleged Denial of Rights owed to workers at a covered facility under an enforced order of the National Labor Relations Board [(NLRB)]."[136] In addition, the "covered facility" must be in a "priority sector."[137] From 2016 to 2020, of the approximately 164 U.S. facilities subject to an NLRB enforced order, approximately five constituted a "priority sector."[138] In addition, despite the fact that 71% of the 2.4 million farmworkers laboring in the United States are classified as non-U.S. citizens, with the overwhelming majority from Mexico, agricultural facilities are entirely excluded from the definition of priority sector.[139] Given the gaping loophole regarding agricultural facili-

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134. *Id.*

135. Hutman, *supra* note 74 ("The Rapid Response Mechanism has limitations for use in the United States that do not apply for Mexico. Specifically, a claim can only be brought against a U.S. facility where it is covered by a U.S. National Labor Relations Board order.").

136. USMCA, *supra* note 70, annex 31-A, art. 31-A.2 n. 2 ("With respect to the United States, a claim can be brought only with respect to an alleged Denial of Rights owed to workers at a covered facility under an enforced order of the National Labor Relations Board.").

137. USMCA, *supra* note 70, annex 31-A, art. 31-A.15 ("Covered Facility means a facility in the territory of a Party that (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party, and is a facility in a Priority Sector . . . Priority Sector means a sector that produces manufactured goods, supplies services, or involves mining."); *id.* art. 31-A.15 n. 4 ("For greater certainty, manufactured goods include, but are not limited to, aerospace products and components, autos and auto parts, cosmetic products, industrial baked goods, steel and aluminum, glass, pottery, plastic, forgings, and cement.").

138. Hutman, *supra* note 74.

139. *Id.* ("In addition, the Covered Facility must be in a 'priority sector.' Priority sectors are those sectors that manufacture goods, supply services, or involve mining (agriculture is not included)."); *Selected Statistics on Farmworkers (2015-16 Data)*, FARMWORKER JUSTICE, https://www.farmworkerjustice.org/wp-content/uploads/2019/05/NAWS-Data-FactSheet-05-13-2019-final.pdf ("According to the NAWS, approximately 75% of farmworkers

ties and the fact that RRM jurisdiction would have only covered five U.S. facilities from 2016 to 2020, it appears that temporary migrant workers in the U.S. are all but foreclosed from obtaining relief through the RRM.

Unfortunately, this prediction has held up so far. Before Tridonex and GM Silao, the first USMCA labor complaint was filed against the U.S. by women organized through Centro de los Derechos (CDM), alleging gender-based discrimination directed toward migrant workers in the recruitment and hiring processes for U.S. agricultural jobs.[140] CDM, joined by a binational coalition of civil society organizations and two migrant women,[141] submitted the complaint to Mexico's Labor Ministry requesting RRM remediation against the United States.[142] Specifically, the complaint alleged that "women applying for visas in the United States are being disproportionately channeled into obtaining H2B labor visas instead of H2A agricultural visas, which does not allow them access to higher paying jobs in agriculture," and that the United States "is not enforcing the provision of the USMCA agreement, which protects workers to exercise their labor rights in a climate free from violence, threats, and intimidation."[143] Although U.S. and Mexican officials met and discussed the complaints in June 2021, the "dispute appears not to have moved beyond the consultation phase of the dispute resolution mechanism."[144] In March 2022, after 373 days without any promises or calls to

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are immigrants, the overwhelming majority form Mexico. About 29% of the farmworkers are United States citizens, 21% are lawful permanent residents and another 1% have other work authorization.").

140. Evy Peña, *Migrant Worker Women File First Complaint Against the U.S. Government Under the United States-Mexico-Canada Agreement*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC. (Mar. 23, 2021), https://cdmigrante.org/migrant-worker-women-file-first-complaint-against-the-us-government-under-the-united-states-mexico-canada-agreement/.

141. *Id.*

142. Amended Petition on Labor Law Matters Arising in the United States Submitted to the Labor Policy and Institutional Relations Unit Through the General Directorate of Institutional Relations in the Secretariat of Labor and Social Welfare of the Mexican Government (Mar. 23, 2021), https://cdmigrante.org/wp-content/uploads/2021/03/USMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf.

143. M. Angeles Villarreal, CONG. RSCH. SERV., R44981, THE UNITED STATES-MEXICO-CANADA AGREEMENT (USCMA), at 37 (Dec. 28, 2021), https://sgp.fas.org/crs/row/R44981.pdf.

144. *Id.*

action from the U.S. government, the CDM filed additional evidence of discrimination and sexual violence, but received no response from the U.S. government.[145] Clearly, relief for Mexican migrant workers employed at U.S. facilities appears all but precluded under the current RRM regime.

3. *Incapacity of the RRM to Remedy All Labor Violations*

The RRM is admittedly a vast improvement over the ineffective dispute resolution system created under NAFTA, and the Tridonex and GM Silao cases certainly appear promising. But the RRM has serious gaps nonetheless. There are simply too many serious labor violations happening in Mexico for the RRM to facilitate real, permanent change as it stands.[146] From 2008 to 2012, after conducting twenty-seven independent external monitoring and verification visits in Mexico, the Fair Labor Association (FLA) found that 41% of the audits cited Freedom of Association noncompliance.[147] As of December 2021, Mexican labor officials and experts estimated that of the over 500,000 registered collective bargaining agreements in Mexico, 80-90% were "protection contracts."[148] Protection contracts are union contracts formed without the knowledge or consent of the workers covered by the agreement, usually at the behest of the corporation and in direct conflict with the

145. *Migrant Worker Women Submit First-Ever Petition Against the U.S. Under the USMCA*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC. (last updated Mar. 31, 2022), https://cdmigrante.org/migrant-worker-women-usmca/. As of April 17, 2022, the U.S. Department of Labor does not have information available on its website regarding this complaint. See U.S. Department of Labor: Bureau of International Labor Affairs, USMCA Cases, (last visited Apr. 17, 2022).

146. Daniel Rangel, *USMCA: A New Frontier for Labour Rights in Trade Deals*, BUS. & HUM. RTS. RES. CTR. (July 28, 2021), https://www.business-humanrights.org/es/blog/usmca-a-new-frontier-for-labour-rights-in-trade-deals/ ("Although promising, the RRM cannot by itself spur better working conditions and higher wages in Mexico. It would be impossible to elevate every case of infringement of the rights to organise in Mexico to the level of an international dispute. There are simply too many cases.").

147. *Protecting Workers' Rights to Freedom of Association & Collective Bargaining in Mexico*, *supra* note 66.

148. *Legitimating Collective Bargaining Agreements in Mexico: What Have We Learned to Date?*, MAQUILA SOLIDARITY NETWORK at 3 n.1 (Dec. 2021), https://www.maquilasolidarity.org/sites/default/files/attachment/Legitimating_CBAs_in_Mexico_Dec_2021.pdf.

interests of the employees.[149] Considering the sheer quantity of labor violations in Mexico, it is simply impossible for the RRM to successfully remediate every labor rights infringement.

Furthermore, even when labor violations are successfully raised and remediated through the RRM, workers may still fall through the cracks. Take Tridonex, for example, which is seen by many as the RRM's triumphant victory for labor rights. According to the AFL-CIO, Tridonex terminated the employment of over 600 workers after they attempted to organize with an independent labor union.[150] However, according to Tridonex's agreement with the USTR, Tridonex only has to provide six months of back pay to at least 154 workers dismissed from the factory.[151] While it is not entirely clear why upwards of 400 employees may miss out on relief under the terms of the RRM-imposed settlement, the Tridonex case was still publicized as the RRM's flagship, symbolic success. If the Tridonex case, observed by people around the world and remediated with the full strength of the USTR, cannot provide full and adequate relief, then the RRM clearly has limitations.

III.
Remedying Unresolved Labor Violations Through the ATS

While the RRM appreciably improves the impotent labor dispute mechanisms created by NAFTA, there are still loopholes. Most notably, it fails to remediate labor violations against temporary workers from Mexico in U.S. facilities and fails to remediate individual instances of labor violations at the micro-level occurring in Mexican facilities. Furthermore, because of the sheer quantity of labor violations currently occurring at Mexican facilities, the RRM may prove insufficient even at remedying labor violations properly under its jurisdictional purview. Therefore, Mexican laborers on both sides of the border will need alternate avenues to vindicate their rights. This Note probes the feasibility of remedying these rights through the ATS in U.S. courts, especially in light of recent U.S. Su-

149. *Id.*

150. Villarreal, *supra* note 75. ("According to the AFL-CIO, over 600 workers were fired from their positions at Tridonex, as a result of attempting to organize with SNITIS.").

151. Office of the United States Trade Representative, *supra* note 100.

preme Court precedent limiting the ATS' reach under the Court's presumption against extraterritoriality doctrine.

A. *Background on the ATS and the Presumption Against Extraterritoriality*

1. *The ATS and Human Rights Abroad*

The ATS provides original jurisdiction to federal district courts for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[152] The ATS, adopted in 1789, allows non-U.S. citizens to file civil suits in federal court for torts committed in violation of international law.[153] The ATS was rarely used from the time of its drafting until the late 1900s because during that the time, international law mainly focused on the regulation of diplomatic relations and the outlawing of crimes such as piracy.[154] However, as international law expanded to include the protection of human rights, the ATS gained "renewed significance in the late twentieth century . . . giv[ing] survivors of egregious human rights abuses, wherever committed, the right to sue the perpetrators in the United States."[155] In the 1980s, the ATS began to be successfully used to prosecute cases including "torture, state-sponsored sexual violence, extrajudicial killing, crimes against humanity, war crimes and arbitrary detention."[156] For example, in the 1980 case *Filartiga v. Pena-Irala*, the Second Circuit found that non-U.S. citizen plaintiffs could sue a foreign police inspector that was currently present in the U.S. under the ATS to recover damages for torture that had occurred abroad.[157] The Second Circuit reasoned that because the plaintiffs were aliens, torture is a tort, and torture violates customary international law, the claim fit the requirements of the ATS.[158]

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152. 28 U.S.C. § 1350.

153. *The Alien Tort Statute*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/ (last visited Apr. 17, 2022).

154. *Id.*

155. *Id.*

156. *Id.*

157. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

158. William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-impli-

Beginning in 2004 with *Sosa v. Alvarez-Machain*,[159] the Supreme Court began limiting the reach of the ATS.[160] In *Sosa,* the Court found that the ATS did not create separate grounds for suits alleging violations of the law of nations. Instead, ATS claims "based on the present-day law of nations [must] . . . rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[161] The Court reasoned that the ATS, when first enacted, was only meant to allow claims related to offenses against ambassadors, violation of safe conducts, and piracy, which at the time were universal, specific, and obligatory norms.[162] Therefore, claims alleging violations of international law must implicate international legal norms that are (1) universally recognized; (2) obligatory in nature; and (3) specific.[163] The Court in *Sosa* found that the ATS is a jurisdictional statute that does not prescribe substantive law, meaning that federal courts are not required to recognize just any tort that infringes on individual rights under international law; instead, justiciable torts are limited to those that violate norms which are universally recognized, obligatory, and specific.[164] The Court found that Alvarez-Machain's claim of arbitrary detention failed to meet this standard.[165]

2. *The Presumption Against Extraterritoriality and Corporate Liability*

The presumption against extraterritoriality, an interpretive principle, instructs federal courts to avoid applying U.S.

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cations-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/ ("In 1980, the Second Circuit held in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), that non-U.S. citizen plaintiffs could use the ATS to sue a foreign police inspector who had come to the United States to recover damages for torture that occurred abroad, reasoning that the plaintiffs were 'aliens,' that torture is a tort, and that torture violates modern customary international law.").

159. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

160. *See* Dodge, *supra* note 158 (summarizing multiple cases, beginning with Sosa, that limit the reach of the ATS)

161. Sosa, 542 U.S. at 725.

162. *Id.* at 732.

163. *Id.*

164. *Id.*

165. *Id.* at 738.

statutes abroad, unless there is clear congressional intent indicating otherwise.[166] Justification for this presumption derives from both principles of comity and the idea that, absent clear legislative intent, Congress, when enacting statutes, generally focuses on domestic concerns.[167] In *RJR Nabisco, Inc. v. European Community*, the Court refined a two-step test that memorializes these interests.[168] First, under the presumption that all statutes only apply at the domestic level, the Court assesses whether the presumption against exterritoriality has been rebutted by asking "whether the statute gives clear, affirmative indication that it applies extraterritorially."[169] If the Court finds that the statute was not meant to apply extraterritorially, the Court proceeds to step two by examining the statute's "focus" to determine whether "the case involves a domestic application of the statute."[170] Here, the Court asks whether plaintiffs established that "the conduct relevant to the statute's focus occurred in the United States . . . even if other conduct occurred abroad."[171]

Over the last decade, the Court has used the presumption against extraterritoriality to limit the ATS' reach in cases regarding corporate liability. In *Kiobel v. Royal Dutch Petroleum*, the Court explicitly held that the ATS does not rebut the presumption against extraterritoriality.[172] Here, citizens of Nigeria alleged that Dutch, British, and Nigerian corporations aided and abetted the Nigerian government in committing violations of customary international law during oil exploration.[173] While the Court declined to answer whether corpora-

166. RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. § 203 (Am. L. Inst. 2018). *See e.g.*, *US Courts Retreat From Applying Major Federal Statutes to Extraterritorial Activity*, NORTON ROSE FULBRIGHT (Dec. 2018), https://www.nortonrosefulbright.com/en/knowledge/publications/ae5cfa02/us-courts-retreat-from-applying-major-federal-statutes-to-extraterritorial-activity.

167. James Janison, *Justifying the Presumption Against Extraterritoriality: Congress as a Foreign Affairs Actor*, 53 J. INT'L L. & POL. ONLINE F. 1 (2020).

168. RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2101 (2016).

169. *Id.* at 337.

170. *Id.*

171. *Id.*

172. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) ("Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.").

173. *Id.* at 111.

tions could ever be sued under the ATS, the Court found that the ATS fails to rebut the presumption against extraterritoriality under the first step because these claims did not "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[174] The Court found that "mere corporate presence" in the U.S. failed to constitute a domestic application of the statute under the second step.[175] In *Jesner v. Arab Bank, PLC*, non-U.S. Citizens claimed that they, or their relatives, were victims of terrorist attacks in Israel and that Arab Bank facilitated the terrorist attacks by allowing the terrorists to maintain bank accounts and transfer funds.[176] The Court rejected this claim, finding that under the presumption against extraterritoriality, ATS claims do not extend to foreign corporations.[177]

Most recently, in *Nestlé USA, Inc. v. Doe*, the Court again limited the scope of the ATS through the presumption against extraterritoriality, but this time as applied to corporate defendants based in the United States.[178] Here, six Malian plaintiffs who had been forcibly trafficked as children to work on farms in Côte d'Ivoire alleged that defendant corporations Nestlé and Cargill aided and abetted child slavery by purchasing cocoa from farms that utilized child slavery.[179] The Court rejected this claim under the *RJR* two-step test. First, the Court determined that "the ATS does not rebut the presumption of domestic application."[180] Under the second step, the Court found the plaintiffs "impermissibly seek extraterritorial application of the ATS" because "[n]early all the conduct they allege aided and abetted forced labor–providing training, equipment, and cash to overseas farmers–occurred in Ivory Coast."[181] The Court explained that "[p]leading general corporate activity, like 'mere corporate presence,' does not draw a sufficient connection between the cause of action respondents seek and domestic conduct."[182] The crux of the holding was

174. *Id.* at 124–25.
175. *Id.* at 125.
176. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).
177. *Id.* at 1407.
178. Nestlé, 141 S. Ct. at 1937.
179. *Id.* at 1933.
180. *Id.* at 1933–34.
181. *Id.*
182. *Id.*

that "general corporate activity common to most corporations" is insufficient domestic activity to constitute a domestic application of the ATS.[183] Specifically, it was insufficient that the defendant's major operational decisions took place in the U.S. because "allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS."[184] *Nestlé* has been interpreted to be a sweeping limitation on human rights litigation, marking "the end of the *Filartiga* line of ATS cases against individual defendants whose relevant conduct occurs outside the United States" and limiting "the ATS cause of action to claims against U.S. corporations based on conduct in the United States that goes beyond making decisions about how to conduct operations abroad."[185]

B. *Applying the ATS to the RRM's Unresolved Disputes*

While *Nestlé* on its face appears to limit claims by aggrieved laborers under the ATS, it certainly leaves an opening. While the majority in *Nestlé* failed to address the question of corporate liability, five justices declined to distinguish between corporations and natural persons as defendants.[186] A majority of justices in *Nestlé* explicitly rejected the notion that corporations are immune from suit under the ATS.[187] Therefore, assuming that the other requirements of *Sosa* and *RJR Nabisco* are met, under *Nestlé*, "future plaintiffs will be able to proceed against U.S. corporations under the ATS so long as they can show tortious conduct happening in the United States."[188]

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183. *Id.*

184. *Id.* at 1937.

185. Dodge, *supra* note 158.

186. *Id.* ("Although the majority opinion in Nestlé did not address the question of corporate liability, five justices saw no reason to distinguish between corporations and natural persons as defendants.").

187. Nestlé, 141 S. Ct. at 1940, 1948, 1950 (Gorsuch, J., concurring) ("The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding."); (Alito, J., dissenting) ("Corporate Status does not justify special immunity."); (Sotomayor, J., concurring) ("As Justice Gorsuch ably explains, there is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons.").

188. Beth Van Schaack, *Nestlé v. Cargill v. Doe: What's Not in the Supreme Court's Opinions*, JUST SECURITY (June 30, 2021), https://www.justsecurity.org/77120/nestle-cargill-v-doe-whats-not-in-the-supreme-courts-opinions/.

1. *Evaluating Whether Unresolved Labor Violations Are Cognizable Under Sosa*

Before evaluating whether U.S. corporations meet the "domestic conduct" standard required to satisfy the two-step presumption against extraterritoriality test, it is necessary to determine whether the labor violations north and south of the border constitute cognizable claims under the ATS in light of *Sosa*. In *Sosa,* the Supreme Court rejected arguments that claims should "be limited to the three violations of the law of nations that the First Congress had in mind in 1789" and "recognized an implied, federal-common-law cause of action for violations of modern international law that are as generally accepted and specifically defined as the three historical paradigms . . . . "[189] So to determine whether the RRM's unresolved labor violations constitute cognizable claims under the ATS, courts must determine whether these labor violations (1) rest on a norm of international character accepted by the civilized world and (2) are defined with specificity comparable to violations of international law that existed at the time the ATS was enacted: violations of safe conduct, infringement of the rights of ambassadors, and piracy.[190]

Labor rights are backed by a comprehensive body of international law.[191] First, the International Labour Organization (ILO), founded in 1919 with 187 member states, has set and defined standards for fundamental human rights for workers throughout the twentieth century.[192] The ILO has adopted

189. Dodge, *supra* note 158.

190. Virginia Monken Gomez, *The Sosa Standard: What Does It Mean for Future ATS Litigation?*, 33 PEPP. L. REV. 469, 471–72 (2006).

191. Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants* (Jan. 2005), https://www.hrw.org/reports/2005/usa0105/usa0105.pdf ("Over the past fifty years, a comprehensive body of international law has developed affirming a range of rights to which all workers are entitled.").

192. *Mission and Impact of the ILO*, INT'L LAB. ORG., https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang—en/index.htm (last visited Apr. 22, 2022); *ILO: International Labour Organization*, UNITED NATIONS, https://www.un.org/youthenvoy/2013/08/ilo-international-labour-organization/#:~:text=the%20ILO%20was%20created%20in,agency%20of%20the%20United%20Nations (last visited Oct. 7, 2022) ("The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if its based on social justice.").

185 international labor standards, called "conventions," that protect "workplace health and safety, workers' compensation, workers' organizing rights, and migrant workers' rights."[193] The ILO considers freedom of association as "the bedrock right on which all others rest . . . includ[ing] workers' efforts at organization and association in the workplace and . . . the right to bargain collectively with employers and the right to strike."[194]

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also all contain provisions protecting some or all of the following labor rights:

(1) a safe and healthful workplace,

(2) compensation for workplace injuries and illnesses,

(3) freedom of association and the right to form trade unions and bargain collectively,

(4) equality of conditions and rights for immigrant workers.[195]

Labor rights related to freedom of association and collective bargaining are what the RRM was designed to resolve, and the main labor violations occur in Maquiladoras south of the border and in labor facilities north of the border.[196] In addition, factories and plants on both sides of the border are alleged to have committed gender and workplace discrimination in their hiring practices.[197] Based on the extensive body of international law that articulates and promotes these rights across a multitude of legal instruments, it is reasonable to conclude that a court may find that these violations constitute appropriate claims under the ATS. In fact, it has been argued

193. Human Rights Watch, *supra* note 191.

194. *Id.*

195. *Id.*; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, at 49 (Dec. 16, 1966); G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, at 52 (Dec. 16, 1966); G.A. Res. 45/158, Convention on the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990).

196. *See supra* Part II.

197. *See supra* Part II.

that violations of ILO conventions and standards related to child labor are cognizable under the ATS because of "sufficient universal opposition to specific child labor practices to establish a cause of action under customary international law."[198] The frequency of labor standards in the same conventions protecting collective bargaining, freedom of association, equality of conditions, and safe workplaces begs the same conclusion.

Other than arguing that labor violations meet the Sosa standard, there are also other avenues for aggrieved workers to file suit under ATS. First, the murder of labor activists may violate separate international legal principles related to the "universal acceptance that arbitrary deprivations of life constitute serious human rights violations . . . ."[199] If a labor activist is murdered to intimidate unions against organizing, aggrieved employees can focus on the violent conduct as opposed to the labor intimidation. For example, in Mexico, torture has been employed on numerous occasions to intimidate labor activists.[200] The prohibition of torture is one of the most universally recognized human rights, attaining the status of a jus cogens peremptory norm.[201] It is enshrined in multiple conventions, including the U.N. Convention Against Torture, the American Convention on Human Rights, and the Universal Declaration of Human Rights.[202] Furthermore, female employees on the border who are victims of gender discrimination, gender-based violence, and sexual and reproductive health violations

198. Vanessa Waldref, *The Alien Tort Statute After Sosa: A Viable Tool in the Campaign to End Child Labor?*, 31 BERKELEY J. EMP. & LAB. L. 160 (2010) ("This Article argues that recent International Labour Organization (ILO) conventions and declarations that focus on 'core' labor rights and call for an end to the 'worst forms' of child labor illustrate sufficient universal opposition to specific child labor practices to establish a cause of action under customary international law.").

199. Kate Thompson & Camille Giffard, *Reporting Killings as Human Rights Violations*, HUM. RTS. CTR. 3 (2002), https://www.refworld.org/pdfid/4ec105562.pdf.

200. Connell, *supra* note 5; *see also Protest Torture Attack on Labor Activists' Family in Mexico*, *supra* note 41.

201. *Torture*, INTERNATIONAL JUSTICE RESOURCE CENTER, https://ijrcenter.org/thematic-research-guides/torture/, (last visited Apr. 27, 2022).

202. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984); American Convention on Human Rights, art. 5 (Nov. 22, 1969); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948).

can pursue claims under the ATS by citing international legal norms outlawing discrimination based on sex, which is currently prohibited in almost every human rights treaty.[203] Because of the pervasive, universal, and obligatory nature of these norms against torture and discrimination based on sex, aggrieved Mexican labor activists are not limited to alleging violations of labor rights but can also pursue ATS claims based on human rights violations committed in the pursuit of labor intimidation.

Second, aside from torts committed in violation of the law of nations, the ATS also provides original jurisdiction for torts "committed in violation of . . . a treaty of the United States."[204] Victims of labor violations and human rights abuses can bring suit under the ATS based on violations of treaties of which the United States is a party, rather than bringing suit under the ATS based on general violations of the law of nations. To provide a few examples, the United States was the principal author, sponsor, and signer of the Universal Declaration of Human Rights, the United States signed and ratified the International Covenant on Civil and Political Rights (ICCPR), and the United States signed the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[205] Furthermore,

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203. *Human Rights and Gender*, UNITED NATIONS AND THE RULE OF LAW, https://www.un.org/ruleoflaw/thematic-areas/human-rights-and-gender/ (last visited Apr. 27, 2022) ("Discrimination based on sex is prohibited under almost every human rights treaty, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which under their common article 3 provide for the rights to equality between men and women in the enjoyment of all rights. In addition, the Convention on the Elimination of Discrimination Against Women (CEDAW) is dedicated to the realization of women's human rights.").

204. 28 U.S.C. § 1350.

205. Human Rights Watch, *International Law: Workers; Human Rights, Government Obligations, and Corporate Responsibility* (Jan. 2005), https://www.hrw.org/reports/2005/usa0105/3.htm ("The United States government has committed itself to protecting [a safe and healthful workplace, compensation for workplace injuries and illnesses, freedom of association and the right to form trade unions and bargain collectively, and the equality of conditions and rights for immigrant workers]. It was a principal author, sponsor, and signer of the Universal Declaration; it has signed and ratified the ICCPR; and it has signed the ICESCR."). While the U.S. has not ratified the ICESCR, "well-settled international law obliges it to respect the terms and purposes of the Covenant and to do nothing to damage them." *Id.*

labor victims can plausibly argue that these actions violate provisions of the USMCA itself.[206] Under this avenue, labor victims may be able to pursue ATS claims against both U.S. and Mexican parties, assuming courts find violations of specific treaty provisions to which corporate defendants were obligated to adhere.

Considering the many international legal instruments outlining human rights and labor norms, aggrieved victims of labor and human rights violations who fall through the cracks of the RRM's remediation mechanism may nonetheless have a cognizable claim under the ATS. While the Sosa standard may appear onerous, there is at least a plausible argument that these violations fit the types of norms that the ATS was meant to address.

2. *Evaluating Whether Unresolved Labor Violations Are Attributable to Domestic Conduct*

After demonstrating that labor or human rights violations meet the *Sosa* standard, plaintiffs must still satisfy *RJR Nabisco*'s two-part presumption against extraterritoriality test. It is already clear under *Kiobel* that the ATS does not rebut the presumption against extraterritoriality.[207] For plaintiffs alleging labor violations in Maquiladoras in Mexico, that poses an obstacle. However, for temporary Mexican workers alleging labor violations on U.S. soil—like the CDM complainants—their suits can likely proceed because they are not seeking to apply the ATS extraterritorially.[208]

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206. CONG. RSCH. SERV., USMCA LABOR PROVISIONS (2022) ("USMCA . . . requires parties to [adopt and maintain in statutes and regulation, and practices, worker rights as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, in addition to acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, [n]ot waive or otherwise derogate from its statutes or regulations, [n]ot fail to effectively enforce labor laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between parties, [p]romote compliance with labor laws through appropriate government action, such as appointing and training inspectors or monitoring compliance and investigating suspected violations.").

207. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) ("Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.").

208. *See supra* Section III.A.

For labor and human rights violations occurring in Mexico, plaintiffs will have an uphill battle satisfying step two because of the Court's holding in *Nestlé*. Under step two, plaintiffs must establish that "the conduct relevant to the statute's focus occurred in the United States . . . even if other conduct occurred abroad."[209] Under *Nestlé*, a "mere corporate presence" cannot "establish domestic application of the ATS."[210] Since *Nestlé*, courts have rejected "aiding and abetting" claims against U.S. entities,[211] suits against U.S. corporations that receive supplies from foreign actors violating the Trafficking Victims Protection Reauthorization Act,[212] and claims alleging loan decision-making and oversight in the United States.[213]

On its face, *Nestlé* appears to limit claims by Mexican nationals for alleged labor violations occurring in Mexico. However, there are certain factual distinctions from *Nestlé* that may allow Mexican plaintiffs to argue that its precedent does not apply. *Nestlé* was an aiding and abetting claim related to U.S. corporations who sourced cocoa from farms using child slavery and provided "those farms with technical and financial resources."[214] In this respect, the actual violations were committed by separate foreign actors—the farms— that were distinct from the U.S. entities, and the U.S. corporations allegedly aided and abetted those violations by engaging in an economic relationship with those farms through an exclusive supplier relationship. The domestic conduct alleged by the plaintiffs was that the U.S. corporations, in their U.S. offices, had made a strategic choice to source cocoa from those farms.

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209. Nabisco, 136 S. Ct. at 2101.

210. Nestlé, 141 S. Ct. at 1937.

211. Est. of Alvarez v. Johns Hopkins Univ., No. CV TDC-15-0950, 2022 WL 1138000, at *1 (D. Md. Apr. 18, 2022) (granting summary judgment for Johns Hopkins University after it was alleged that they "aided and abetted or conspired to commit nonconsensual human medical experiments in Guatemala"); Reynolds v. Higginbottom, No. 19-CV-5613, 2022 WL 864537, at *16 (N.D. Ill. Mar. 23, 2022) ("Nothing about a claim under the TVPA suggests that courts should be more willing – outside the "realm of domestic law" – to recognize an implied cause of action for aiding and abetting.").

212. Doe I v. Apple Inc., No. 1:19-CV-03737 (CJN), 2021 WL 5774224, at *1 (D.D.C. Nov. 2, 2021).

213. Jam v. Int'l Fin. Corp., 3 F.4th 405, 412 (D.C. Cir. 2021), *cert. denied*, No. 21-995, 2022 WL 1205953 (U.S. Apr. 25, 2022).

214. Nestlé, 141 S. Ct. at 1935.

But the plaintiffs claiming labor violations in Maquiladoras would not base their claims on aiding and abetting based on third-party relationships with foreign actors. Instead, their claims would be based on conduct occurring at a facility owned by a U.S. corporation. Maquiladoras do not have third party business relationships with U.S. corporations; they are subsidiaries wholly owned by U.S. corporations.[215] U.S. corporations that set up Maquiladoras in Mexico choose to own the facilities outright in order to take advantage of preferential tariff treatment.[216] Take the RRM complaint against GM Silao, for example: GM Silao is a wholly owned subsidiary of U.S.-based General Motors.[217] This is a notable difference under both principles of agency and primary vs. secondary liability—which may provide a substantive advantage over secondary liability claims in *Nestlé*.

For example, if a Maquiladora were a distinct entity that merely supplied goods to the U.S. corporation along the chain of distribution, the U.S. corporation could argue that it only had a buyer-supplier relationship with the Maquiladora and owed no duty to the Mexican employees aggrieved by the supplier.[218] Alternatively, if the Maquiladora and U.S. corporation were separate entities but a court found that the buyer-supplier relationship amounted to a principal-agent relationship, the U.S. corporation could insulate itself from liability by argu-

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215. Kenton, *supra* note 27 ("A maquiladora is a low-cost factory in Mexico that is owned by a foreign corporation.").

216. *What is a Maquiladora in Mexico?*, MANUFACTURING IN MEXICO, https://manufacturinginmexico.org/maquiladora-in-mexico/ (last visited Apr. 27, 2022) ("The Maquiladora Program, which allowed maquiladoras to be 100% foreign owned . . . was created to increase foreign investment and stimulate Mexico's internal market . . . thousands of manufacturing companies, including a substantial number of small to medium-sized American firms, have been able to negotiate the process and establish a maquiladora."); *The History of the Maquiladora Program in Mexico*, *supra* note 4 ("Raw materials can be imported duty- and tariff-free and then export the final product to the company of ownership.").

217. Anthony Esposito & Joseph White, *Game of Chicken: GM Bets on Mexican-Made Pickup Trucks*, REUTERS (Jan. 15, 2018), *https://www.reuters.com/article/us-trade-nafta-autos/game-of-chicken-gm-bets-on-mexican-made-pickup-trucks-idUSKBN1F42G7*.

218. RESTATEMENT (SECOND) OF AGENCY § 14 (AM. L. INST. 1958) ("One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself.").

ing that Maquiladora officials violating labor rights acted beyond the scope of their authority granted by the U.S. corporation.[219] However, once the Maquiladoras are wholly owned subsidiaries of the U.S. corporations, it becomes much harder for the U.S. corporations to argue that their agents were acting beyond the scope of their authority because, by merely allowing a Maquiladora to operate under the name of its parent corporation, the parent corporation is manifesting assent for the Maquiladoras to act on behalf of its parent.[220] Like an employer-employee relationship, this also opens up the potential for liability under principles of respondeat superior because "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment."[221] These differences in foundational principles of agency law can provide additional support for Mexican employees to escape the limitations set forth in *Nestlé*.

Furthermore, allowing parent company liability in this context would align U.S. law with that of the international community.[222] Courts in developed states like the Nether-

219. *Id.* § 219 (2) ("When Master is Liable for Torts of His Servants: A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.").

220. RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. L. INST. 2006) ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonable believes the actor has authority to act on behalf of the principal and that belief *is traceable to the principal's manifestations*.") (emphasis added).

221. *Id.* § 2.04.

222. Ben Ye, *Okpabi v. Shell and Nestlé USA v. Doe: Trend and Divergence on Parent Company Liability for Human Rights Abuse in the United Kingdom and United States,* 54 N.Y.U. J. INT'L L. & POL. 261, 272 (2021) (discussing how the Nestlé decision "places the United States at odds with trends in other developed countries and developments in international human rights law, as demonstrated in the non-binding U.N. Guiding Principle on Business and Human Rights and the most recent draft of a binding treaty regulating business activities and human rights.").

lands[223] and the United Kingdom (UK)[224] have increasingly moved toward a parent company liability approach where parent companies may be liable for the human rights abuses of their foreign subsidiaries. For example, in Okpabi v. Shell, the UK Supreme Court found that Royal Dutch Shell could be held liable after its Nigerian subsidiary was alleged to have negligently caused an oil spill.[225] U.S. courts may look to this emerging trend among developed states as a reason to differentiate *Nestlé*, finding that parent company liability offers a stronger inference of culpability compared to aiding and abetting through a third-party buyer-supplier relationship.

Despite this difference in agency relationship, it would still be difficult to show intentional decision-making in the United States specifically authorizing individual labor violations in Mexico, especially considering the incentive corporate defendants have to seek dismissal prior to discovery, because an insufficient showing of domestic conduct constitutes sufficient grounds for dismissal. Furthermore, the Court in *Nestlé* failed to clarify the focus of the ATS, the kind of conduct encompassed, and the level of intent required.[226] Due to these ambiguities, plaintiffs should allege a "wide variety of U.S.-based conduct to overcome the bar on extraterritoriality."[227] But this difference in agency relationship, combined with an allegation of primary liability as opposed to secondary liability, can have benefits. For example, a U.S.-based corporation that regularly sends executives to Mexico to manage its wholly

223. *See, e.g.,* Hof's-Den Haag 29 January 2021, JOR 2001, 138 m.nt. van Oostrum en C.H.A. van (Oguru en Efanga/Shell Petroleum NV) (Neth.); Hof's-Den Haag 29 January 2021, RvdW (Dooh/ Shell Petroleum NV) (Neth.); Hof's-Den Haag 26 May 2021 JvdW (Vereniging Milieudefensie,/ Royal Dutch Shell, PLC) (Neth.).

224. Okpabi v. Royal Dutch Shell [2021] UKSC 3 [153] (finding it reasonably arguable that Royal Dutch Shell owed parent company liability over the activities of its Nigerian subsidiary for negligently causing oil spills).

225. *Id. See also* Ye, *supra* note 216, at 265. ("Second, the Supreme Court found, through the allegations pleaded by the claimants and examination of internal documents so far disclosed, that it was reasonably arguable that RDS owed parent company liability over SPDC's activities.").

226. Kayla Winarsky Green & Timothy McKenzie, *Looking Without and Looking Within: Nestlé v. Doe and the Legacy of the Alien Tort Statute*, 25 AM. SOC. OF INT'L L. (July 15, 2021), https://www.asil.org/insights/volume/25/issue/12.

227. *Id.*

owned facility with the operational goal of reducing labor costs may appear to be more relevant to the focus of the ATS than the defendants' conduct did in *Nestlé*. Specific instructions by U.S.-based executives to quell labor unrest may better fit the domestic conduct requirement that the justices in *Nestlé* had in mind. Alternatively, a court may find that "willful blindness"[228] to employee action in pursuit of broader operational goals constitutes knowledge and therefore sufficient domestic conduct. Or perhaps, *Nestlé* will encourage sloppiness on the part of U.S. executives, permitting them to discuss their foreign business practices more openly, which could generate better evidence of domestic conduct for human rights plaintiffs.

Or maybe a future court will distinguish *Nestlé* as limited to secondary liability, finding that corporate complicity based on wholly owned subsidiaries constitutes domestic conduct. Tortious conduct by employees abroad certainly feels more within the scope of the ATS than the aiding and abetting of third-party foreign actors. While the domestic conduct standard under *Nestlé* appears to be an uphill battle for aggrieved workers in the Maquiladoras, future plaintiffs should distinguish their claims based on principles of agency and based on primary liability as opposed to secondary liability.

Conclusion

Reasonable minds can differ as to the ultimate value of imputing U.S. labor standards onto Mexican laborers.[229] Critics of this approach will argue that heightening labor standards and legal remedies would eliminate Mexico's comparative advantage as a source of unskilled, low-cost labor and subsequently incentivize U.S. corporations to remove factories from Mexico or stop providing employment to temporary workers, which would ultimately hurt the Mexican people in the long run. But treating the proliferation of sub-human la-

228. Jason B. Freeman, *Willful Blindness and Corporate Liability*, Freeman Law, https://freemanlaw.com/willful-blindness-and-corporate-liability/ (last visited Apr. 28, 2022) ("Willful blindness is generally defined as an attempt to avoid liability for a wrongful act by intentionally failing to make reasonable inquiry when faced with the suspicion or awareness of the high likelihood of wrongdoing.").

229. Krugman, *supra* note 2.

bor standards as a win-win for both countries is overly simplistic and simply wrong.

For U.S. workers, lowering labor standards for Mexican workers with temporary visas reduces employment opportunities for U.S. citizens and degrades labor standards for U.S. citizens seeking employment.[230] Furthermore, subpar labor standards in the Maquiladoras south of the border incentivize U.S. corporations to offshore jobs traditionally held in the United States, further harming employment opportunities for U.S. citizens.[231] For Mexican workers, the proliferation of Maquiladoras failed to increase wages as hoped for and instead caused a decrease in real wages.[232] Even in terms of the mere number of job opportunities in Mexico, the early years of Maquiladora growth after NAFTA saw a dramatic decrease in the amount of available jobs.[233] Lowering labor standards for Mexican workers on both sides of the border creates lasting damage to all parties involved, without providing the promised benefits of globalization. Even beyond the empirical evidence, Mexico and the United States drafted the UMSCA with the goal of increasing labor standards, and the intent of the negotiating parties should be honored instead of allowing multinational corporations to take advantage of unintended loopholes. At the very least, the parties to the USMCA should be held to the language of their agreement.

Income inequality both among and within nation states is historically high.[234] But the world's growing rate of poverty

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230. Costa, *supra* note 12 ("That in turn degrades labor standards for workers in a wide range of industries. Reforming work visa programs, therefore, would help to improve working conditions and raise wages for all workers.").

231. Pub. Citizen's Glob. Trade Watch & The Lab. Council For Lat. Am. Advancement, *supra* note 9 ("Almost one million U.S. jobs have been certified as lost to NAFTA . . . . U.S. median wages are stagnant, and 40 percent of manufacturing workers who lose jobs to trade face major pay cuts if they find new employment.").

232. *Id.* ("Instead of the higher wages promised, in real terms average annual Mexican wages are down 2 percent, and the minimum wage is down 14 percent from pre-NAFTA levels with manufacturing wages now 40 percent lower than in China.").

233. Stiglitz *supra* note 31, at 65 ("After the early years of growth in the maquiladora region, reemployment there too actually started to decline, with some 200,000 jobs lost in the first two years of the new millennium.").

234. Joe Myers, *These Charts Show the Growing Income Inequality Between the World's Richest and Poorest*, World Economic Forum (Dec. 10, 2021), https:/

and inequality[235] is not an inevitable result of globalization. In fact, globalization has the potential to benefit both developing and developed nations.[236] A better managed system of globalization that prioritizes adequate living standards over simple market efficiency will provide economic and social benefits for everyone and improve resiliency in the face of global crises like the COVID-19 pandemic.[237]

The RRM is a significant step toward a better managed system of globalization, especially considering what preceded it under NAFTA. And while its strengths should certainly be recognized, it is also important to recognize its flaws, which are not merely theoretical. There are already real parties, like the Mexican migrant women organizing with the CDM, that are currently unable to attain relief.[238] Because of the large transaction costs of renegotiating regional treaties,[239] it is unlikely that the USMCA will be revisited anytime soon. Therefore, it is imperative to identify alternate avenues for victims of labor violations to obtain relief. For the CDM women facing

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/www.weforum.org/agenda/2021/12/global-income-inequality-gap-report-rich-poor/.

235. Joseph E. Stiglitz, *COVID Has Made Global Inequality Much Worse*, SCIENTIFIC AMERICAN (Mar. 1, 2022), https://www.scientificamerican.com/article/covid-has-made-global-inequality-much-worse/.

236. STIGLITZ, *supra* note 31, at xv-xvi ("In *Making Globalization Work*, I attempt to show how globalization, properly managed, as it was in the successful development of much of East Asia, can do a great deal to benefit both the developing and developed countries of the world.").

237. Henry Farrell & Abraham Newman, *This Is What the Future of Globalization Will Look Like*, FOREIGN POLICY (July 4, 2020), https://foreignpolicy.com/2020/07/04/this-is-what-the-future-of -globalization-will-look-like/ ("In a hyperglobalized economy, it made sense for individual firms to focus heavily on increasing efficiency and achieving market dominance—actions that led to greater returns and rising stock prices. But these trends also generated systemic vulnerabilities, imperiling fragile supply chains in times of crisis and tempting governments to target dominant companies for their own advantage, creating new risks for citizens and states. To move forward from our current crisis of globalization, we need to build something better in its stead: a system that mitigates the risks of economic and political dependency and supports a new vision of global society. Rather than withdrawing from globalization, we would remake it so that it focused on different problems than economic efficiency and global markets.").

238. Villarreal, *supra* note 143 and accompanying text.

239. *See* De Bruyne & Fischendler, *supra* note 20 (discussing the transaction costs of negotiating conflict resolution mechanisms in transboundary water treaties).

gender discrimination based on hiring practices in the United States, the ATS appears to be a sufficient avenue for relief, assuming the violations meet the *Sosa* standard. For aggrieved workers in the Maquiladoras, the viability of an ATS claim is more uncertain. But considering the agency relationship involved and the potential for claims of primary liability, there is still a chance that a U.S. court would be open to hearing a claim brought by aggrieved Mexican employees under the ATS. Perhaps, under the current regime, this is the best possible outcome to promote livable human rights standards for those that provide an important contribution to our global supply-chain and to ensure that all participants can properly enjoy the benefits of globalization. When certain participants are excluded from the benefits of globalization, the very least we can do is ensure they have their day in court.