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## Binational Guestworker Unions: Moving Guestworkers Into the House of Labor

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# Binational Guestworker Unions: Moving Guestworkers Into the House of Labor

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## **Abstract**

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## BINATIONAL GUESTWORKER UNIONS: MOVING GUESTWORKERS INTO THE HOUSE OF LABOR

*Jennifer Hill\**

### INTRODUCTION

In the mid-1990s, Francisco Hernandez Juarez, head of the Mexican telephone workers' union, proposed the establishment of "an International Union for Migrant Workers."<sup>1</sup> This idea never came to fruition, but the recent success of three unions in organizing groups of agricultural guestworkers<sup>2</sup> again raises the question of how unions might best represent workers who cross borders for employment.

Agricultural guestworkers are temporary employees hired in their home country who travel to the host country to work for a limited period of time. Under U.S. and Canadian immigration laws, agricultural guestworkers are intended to fill positions when a shortage of domestic workers exists.<sup>3</sup> Each country's guestworker

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1. Julie Watts, *Mexico-U.S. Migration and Labor Unions: Obstacles to Building Cross-Border Solidarity* 11 (The Ctr. for Comparative Immigration Studies, Univ. of Cal. San Diego, Working Paper No. 79, 2003).

2. The Farm Labor Organizing Committee and United Farm Workers unions organized bargaining units of guestworkers in the United States, and the United Food and Commercial Workers won representation elections in Canada. *See infra* Part I.D.

3. In the U.S., the H-2A program is established by the Immigration Reform and Control Act of 1986 § 301, 8 U.S.C. § 1188 (2006). For the Canadian program, see COMM'N FOR LABOR COOPERATION, PROTECTION OF MIGRANT AGRICULTURAL WORKERS IN CANADA, MEXICO AND THE UNITED STATES 7-8 (2002) [hereinafter PROTECTION OF MIGRANT WORKERS] (citing Memorandum of Understanding

program includes provisions that make guestworkers more expensive to hire than workers already in the host country; the goal is to ensure that domestic workers and labor standards are not undermined.

Unions generally have not seen guestworkers as either desirable or feasible groups for organizing.<sup>4</sup> In fact, unions often opposed guestworker programs, arguing that employers facing a shortage should improve wages and working conditions to attract domestic workers rather than import others.<sup>5</sup> In addition to being undesir-

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(“MOU”) between the Government of Canada and the Government of the United Mexican States Concerning the Mexican Seasonal Agricultural Workers’ Program, 1974), available at <http://www.naalc.org/english/pdf/study4.pdf> (explaining that workers are authorized to enter “under section 10(c) of the Immigration Act and the Immigration Regulations, 1978. . . . Section 20 of the Regulations permits the entry into Canada of foreign workers in accordance with international agreements between Canada and one or more foreign country”).

4. Guestworker programs are neither new nor primarily a North American phenomenon. For a complete overview of guestworker programs, including the attitudes of unions, see CINDY HAHAMOVITCH, *THE FRUITS OF THEIR LABOR: ATLANTIC COAST FARMWORKERS AND THE MAKING OF MIGRANT POVERTY: 1870-1945* (Univ. of N.C. Press 1997) [hereinafter HAHAMOVITCH, *FRUITS OF THEIR LABOR*]. See generally Cindy Hahamovitch, *Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective 1*, in 44 *LABOR HIST.* 69 (2003) [hereinafter Hahamovitch, *Creating Perfect Immigrants*]; GUNTHER PECK, *REINVENTING FREE LABOR: PADRONES AND IMMIGRANT WORKERS IN THE NORTH AMERICAN WEST, 1880-1930* (Cambridge Univ. Press 2000); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (Princeton Univ. Press 2004); Emily B. White, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 *BERKELEY J. EMP. & LAB. L.* 269 (2007).

5. Union opposition has been common, if not universal, and has been couched in terms of support for domestic workers and, more recently, support for guestworker rights. See Hahamovitch, *Creating Perfect Immigrants*, *supra* note 4, at 79-88 (describing many European and North American unions’ efforts starting in the early twentieth century to minimize guestworker use by advocating for mechanisms that made guestworkers as costly and temporary as possible). Many U.S. unions—though not all—have opposed expansion of guestworker programs in recent years, arguing in part that guestworkers’ rights must be more effectively protected to win union support. See, e.g., AFL-CIO Executive Council, *Responsible Reform of Immigration Laws Must Protect Working Conditions for all Workers in the U.S.* (March 1, 2006), <http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec02272006e.cfm>.

The traditional progressive opposition to guestwork, among unionists and immigrant rights activists, has changed. See Manuel Pastor & Susan Alva, *Guest Workers and the New Transnationalism: Possibilities and Realities in an Age of Repression*, 31 *SOC. JUST.* 92, 94 (2004) (describing the results of interviews and stating “[a]ctivists expressed the usual worries about labor exploitation, but they also recognized that permanent residence might not be the goal of some immigrant workers and that creating easier mechanisms for such transnational existence might therefore be important”); see also Rachel L. Swarns, *Union Leader Supporting Guest Worker Proposal*, *N.Y. TIMES*, Feb. 24, 2006, at A14 (describing the statements of “Eliseo Medina, [who] is vice president of the Service Employees International Union, the nation’s second-largest union. He is also an advocate of one of President Bush’s most contentious

able, guestworkers have been seen as largely “unorganizable” because they are hyper-contingent workers—inherently temporary, dependent on employers for jobs and immigration authorization, and often isolated because of geography or language.<sup>6</sup>

The view that guestworkers are impossible to organize has changed, at least among agricultural worker unions. In the United States, the Farm Labor Organizing Committee (“FLOC”) won union recognition for roughly 8500 guestworkers employed by the North Carolina Growers Association (“NCGA”) in 2004, and the United Farm Workers (“UFW”) organized 3000 employees working for Global Horizons in 2006.<sup>7</sup> In 2006, the United Food and Commercial Workers (“UFCW”) in Canada organized several farms as part of a long-term outreach program.<sup>8</sup> These successes stand out in the midst of declining overall union density numbers<sup>9</sup>

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proposals: the effort to legalize 11 million illegal immigrants and create what could be the largest temporary guest worker program for foreigners in more than 40 years.”).

6. Guestworkers are like “super-temps,” workers whose job and work authorization are contingent. See VANESSA TAIT, *POOR WORKERS’ UNIONS: REBUILDING LABOR FROM BELOW 7* (South End Press 2005) (“Many in the traditional labor movement did not believe poor workers could be organized, either because of their fluctuating job status, or because of prejudices against their race, ethnicity, gender, poverty, or immigration status.”); Eve S. Weinbaum, *Organizing Labor in an Era of Contingent Work and Globalization, in WHICH DIRECTION FOR ORGANIZED LABOR?* 37, 39 (Bruce Nissen ed., 1999) (describing the move to contingent work as having a “devastating” impact on unions).

7. For descriptions of the FLOC campaign, see Julie M. McKinnon, *FLOC Sets its Sights on Future Fights*, TOLEDO BLADE, Oct. 3, 2004; see also Steven Greenhouse, *Growers’ Group Signs the First Union Contract for Guest Workers*, N.Y. TIMES, Sept. 17, 2004, at A16 [hereinafter Greenhouse, *Growers’ Group*]. For information about the UFW campaign, see Steven Greenhouse, *Farmworkers’ Union Is Set to Announce First National Contract for Guest Workers*, N.Y. TIMES, Apr. 11, 2006, at A17 [hereinafter Greenhouse, *Farmworkers’ Union*]; see also *H-2A, H-2B Programs*, 12 RURAL MIGRATION NEWS (2006), available at [http://migration.ucdavis.edu/rmn/comments.php?id=1157\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/comments.php?id=1157_0_4_0); Paul Nyhan, *Guest Farm Workers Get Contract*, SEATTLE POST-INTELLIGENCER, Apr. 12, 2006, available at [http://seattlepi.nwsourc.com/business/266352\\_farmworker12.html](http://seattlepi.nwsourc.com/business/266352_farmworker12.html); Andrew Sirocchi, *Global Horizons to Unionize With United Farm Workers*, TRI-CITY HERALD, Apr. 16, 2006, available at <http://www.tri-cityherald.com/tch/local/story/7619848p-7531663c.html>

8. See *Man., Que. Migrant Workers Vote to Join Union; Similar Vote Unlikely in Ont.*, WOODSTOCK SENTINEL-REVIEW, Sept. 22, 2006, at 2 [hereinafter *Man., Que. Migrant Workers*]; *Migrant Workers Vote on Union Membership; Working Conditions, Wages Top Issues*, WINNIPEG SUN, Sept. 22, 2006, at 34; Press Release, UFCW Canada, Manitoba Labour Board Says Migrant Farm Workers Can Join UFCW Canada (June 26, 2007), <http://www.ufcw.ca/Default.aspx?SectionId=af80f8cf-ddd2-4b12-9f41-641ea94d4fa4&LanguageId=1&ItemId=ce05a541-73ac-43f1-92f5-c346032bd57d>, [hereinafter Manitoba Labour Board]

9. News Release, United States Department of Labor, Bureau of Labor Statistics, Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 20, 2006), <http://www.bls.gov/news.release/union2.t03.htm>.

and abysmally low numbers among agricultural workers in particular.<sup>10</sup>

Organizing guestworkers is just a first step. Whether a union can effectively monitor and enforce contract improvements or other legal entitlements is still an open question. To do this, guestworkers need the same thing any other union member needs—an organization that can fully engage and represent members, as well as use organizing, education, bargaining, political action, legal advocacy, coalition work, and other tools to promote members' interests.

Each of the agricultural unions has explored some sort of work in Mexico, where the overwhelming majority of North American agricultural guestworkers live. FLOC is the only union that has built a program in Mexico to communicate with members, educate workers about their rights, and confront abuses. FLOC opened an office in Monterrey, Mexico, in 2005, and FLOC organizers started running outreach programs to educate workers in Mexico about their rights.<sup>11</sup> Soon after, FLOC began to receive threats.<sup>12</sup> The threats escalated in 2007 after FLOC began educating workers about an agreement reached with an employer prohibiting recruiters in Mexico from charging fees for visa applications, travel costs, or other expenses.<sup>13</sup> In the spring of 2007, Santiago Rafael Cruz, a FLOC organizer recently assigned to Monterrey, was attacked in the FLOC office and beaten to death by agents believed to be associated with corrupt recruiters.<sup>14</sup> If corrupt agents are willing to assassinate an organizer whose death is bound to receive attention, the likelihood that individual workers in remote towns will be able to avoid exploitation without significant help appears low. FLOC's work is a model of the importance of Mexico-based work in order to stop abuses and protect gains. Because of

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10. E-mail from Marc Levesque, Statistics Canada, to Jennifer Hill (Nov. 26, 2005, 14:26:37 EST) (on file with author) (stating that agriculture industry unionization rates are less than 1% in Canada). The U.S. has slightly higher agriculture industry unionization rates at 3.5%, as compared with an average 18-20% unionization rate for workers overall. See News Release, United States Department of Labor, Bureau of Labor Statistics, Union Members in 2006 (Jan. 25, 2007), <http://www.bls.gov/news.release/union2.nr0.htm>.

11. Dan La Botz, *Farm Labor Organizer is Murdered in Mexico*, LABOR NOTES, <http://labornotes.org/node/800> (last visited Jan. 20, 2008).

12. *Id.*; see also Farm Labor Organizing Committee, Take Urgent Action: Stop Deportation of FLOC Organizer from Mexico (2005), *quoted in* E-mail from Allison Fletcher Acosta, Jobs with Justice, to Jennifer Hill (Dec. 19, 2006 09:59:22 EST) (on file with author) [hereinafter Take Urgent Action].

13. Elisabeth Malkin, *Graft Mars the Recruitment of Mexican Guest Workers*, N.Y. TIMES, May 24, 2007, at A3.

14. *Id.*

FLOC's lack of status as a union in Mexico, however, some mechanisms that might further the union's goals are not available, and these limits undermine the effort to provide full representation.

Part I briefly describes U.S. and Canadian guestworker programs and recent organizing campaigns. Part II lays out the notion of full representation, arguing that a program of Mexico-based work is necessary to represent agricultural guestworkers fully; moreover, union status under Mexican law is required to have access to the entire range of activities and protections that would make union work more effective. Part II then reviews some of the activities FLOC has carried out in Mexico as well as others that might be relevant to the union's success. Finally, Part II describes elements of the UFW and UFCW approaches that call for Mexico-based work.

Part III discusses Mexico's registration system. Registering is mandatory under Mexican law to function as a union in Mexico, though the process is supposed to be a formality that does not prevent legitimate unions from gaining legal status. Mexican officials, however, have been criticized for abusing the registration process and denying the petitions of independent unions seeking to register.<sup>15</sup> In the case of guestworkers, there are two provisions of Mexican law that are likely obstacles to registration: the requirement of an employment relationship in Mexico and the bar on foreigners as trade union officials. Part III suggests that given the broad scope of protective labor laws under Mexican law as a whole and the requirement that ambiguities be interpreted in favor of workers, neither provision should be applied so as to bar a guestworker union from registering.

If the obstacles in current Mexican law were eliminated, the door would be open for the creation of binational guestworker unions, a new phenomenon. While there already are international unions that include members from both Canada and the United States, these unions are formed when domestic workers in each country, in effect, hold hands across the border. In contrast, a binational

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15. LANCE COMPA, *JUSTICE FOR ALL: THE STRUGGLE FOR WORKER RIGHTS IN MEXICO: A REPORT BY THE SOLIDARITY CENTER* 13, n.9 (2003), <http://www.solidaritycenter.org/files/SolidarityMexicofinalpdf111703.pdf> (citing U.S. . STATE DEPT' T COUNTRY REPORT ON HUMAN PRACTICES (2002), stating the Mexican government authorities "occasionally have withheld or delayed registration of unions" and arguing that "[t]his is an essential problem of freedom of association in Mexico: authorities' favoritism toward unions friendly to government policies and influential employers, and authorities' reprisals against independent unions that challenge government policies, influential employers, and pro-government, pro-employer unions.").

guestworker union presents the image of one transnational worker straddling the border with a foot on each side. The image of a binational guestworker union presents challenges to the primarily domestic nature of labor law, but also allows for imagining a way to bring immigrant workers fully into the house of labor.<sup>16</sup>

## I. GUESTWORKER PROGRAMS AND VICTORIES

### A. Historical Context: The “Perfect Immigrant”

Guestworker programs have been called a “distinctively modern form of transnational migration.”<sup>17</sup> It is possible to trace the evolution of guestworker programs from the early Polish agricultural workers in 19th century Prussia, to South African diamond miners brought in first from what is now Mozambique and later other areas, to domestic workers from the Philippines working throughout Asia and the Middle East, and finally to the North American agricultural guestworker programs.<sup>18</sup> All of these temporary labor programs were:

compromises designed to maintain high levels of migration while placating anti-immigrant movements. They offered employers foreign workers who could still be bound like indentured servants but who could also be disciplined by the threat of deportation. They placated trade unionists who feared foreign competition by promising to restrict guestworkers to the most onerous work and to expel them during economic downturns. And they assuaged nativists by isolating guestworkers from the general population. Finally, states got development aid from poor countries in the form of ready workers, without the responsibility of having to integrate those workers or provide for their welfare. The perfect immigrant was born.<sup>19</sup>

The Canadian Seasonal Agriculture Worker Program (“CSAWP”) and the H-2A agricultural guestworker program in the U.S. are modeled on this “perfect immigrant” theory. The

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16. Many scholars have examined the consequences of greater globalization for national labor law regimes as well as the prospects for the development of stronger international or regional systems of labor regulation. See, e.g., Mark Barenberg, *Law and Labor in the Global Economy: Through the Lens of United States Federalism*, 33 COLUM. J. TRANSNAT'L L. 445, 453-54 (1995); Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117, 128-48 (1993); Katherine Van Wezel Stone, *Labor in the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987 (1995).

17. Hahamovitch, *Creating Perfect Immigrants*, *supra* note 4, at 71.

18. *Id.*

19. *Id.* at 73.



guestworker cycle starts with recruitment, hiring, visa processing, and travel in the home country. This is followed by travel to—and actual work in—the host country, and then a return to the home country.<sup>20</sup> When workers return, they carry with them the ongoing effects of any abuse, injuries, or deprivations suffered in the host country. Since most guestworkers seek repeat engagements, rehiring is also an important part of home country activity. Most guestworkers who work in the United States and Canada are from Mexico,<sup>21</sup> making Mexico the springboard for the current “perfect immigrants.”

### **B. The Rules: Making Guestworkers Expensive**

Many countries with guestworker programs attempt to establish rules making guestworkers more expensive to employ than workers already in the host country. Both the Canadian and U.S. agricultural guestworker programs include such rules.

The current agricultural guestworker program in the U.S. is the H-2A program, a successor to the original H visa program established in the Immigration and Nationality Act in 1952,<sup>22</sup> and amended by the Immigration Reform and Control Act of 1986 (“IRCA”).<sup>23</sup> The IRCA reflects a balance between two policy goals “to assure . . . employers [of low-skilled laborers] an adequate labor force while at the same time protecting the jobs of U.S. workers.”<sup>24</sup> In order to authorize hiring of guestworkers, the Department of Labor must certify that there is a shortage of U.S.

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20. Some guestworkers do not return to their home countries, but overstay visas in the host country, thus joining the ranks of undocumented agricultural workers. See PHILIP L. MARTIN, *MANAGING LABOR MIGRATION: TEMPORARY WORKER PROGRAMS FOR THE 21ST CENTURY*, INTERNATIONAL INSTITUTE FOR LABOUR STUDIES 28 (2003), <http://www-ilo-mirror.cornell.edu/public/english/bureau/inst/download/migration3.pdf> (“Most migrants do return, but a small percentage of stayers among a large number of migrants may still be ‘too many.’”); see also INT’L LABOUR OFFICE (ILO), REPORT VI, *TOWARDS A FAIR DEAL FOR MIGRANT WORKERS IN THE GLOBAL ECONOMY*, 118 (2004), available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/meetingdocument/kd00096.pdf> (“The experience of many countries is that ‘there is nothing more permanent than temporary workers.’”).

21. See *H-2A, H-2B Programs*, *supra* note 7 (reporting 22,141 admissions in Fiscal Year 2004 and 31,892 visas issued in Fiscal Year 2005, of which 89% were issued to Mexican workers, and referring to U.S. government statistics). Mexicans make up about “55% of all the workers” in the Canadian CSAWP. Pastor & Alva, *supra* note 5, at 98 n.13.

22. See Hahamovitch, *Creating Perfect Immigrants*, *supra* note 4, at 70 n.4.

23. Immigration Reform and Control Act of 1986 § 301, 8 U.S.C. § 1188 (2006).

24. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, *THE H-2A PROGRAM: PROTECTIONS FOR U.S. FARMWORKERS* 12 (1988), available at <http://archive.gao.gov/t2pbat16/137107.pdf>.

workers available and that there will be no adverse effect on U.S. workers if guestworkers are employed.<sup>25</sup> There is no numerical cap on H-2A visas, and 31,774 H-2A visas were issued by the Department of State in fiscal year (“FY”) 2004, a dramatic increase from the 6445 in FY 1992 but still “quite small relative to total U.S. agricultural employment, which stood at 3.2 million in 2002. . . .”<sup>26</sup> H-2A workers receive visas for seasonal work of up to one year, with a maximum extension of up to three consecutive years.<sup>27</sup>

The H-2A statute includes provisions that seem to offer guarantees better than any accorded domestic farmworkers, namely:

free transportation to and from the worksite, free housing during employment, workers’ compensation insurance, a guarantee of at least three-fourths of the total amount of work offered in the job announcement, and payment at the highest of three minimum wages: (1) the federal or applicable state minimum wage; (2) the local, job-specific “prevailing hourly wage;” or (3) the H-2A “adverse effect wage” or AEWR.<sup>28</sup>

In Canada, the guestworker program is quite different in form—as the product of bilateral negotiations—but contains similar provisions to discourage the overuse of guestworkers. CSAWP brings roughly 19,000 workers per year to Canada to work temporarily for agricultural employers under bilateral agreements with each sending nation, among which is Mexico.<sup>29</sup>

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25. *See id.* at 12-13; 8 U.S.C. § 1188(a); *see also* Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT’L L. & COM. REG. 521, 524 (2002); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 592 (2001).

26. ANDORRA BRUNO, CONGRESSIONAL RESEARCH SERVICE: IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS CRS-4 (2006), <http://trac.syr.edu/immigration/library/P333.pdf>.

27. 8 C.F.R. § 214.2(h)(5)(iv)(A); *see also* BRUNO, *supra* note 26, at CRS-2 (noting that extended time periods are not readily approved by the CIS (formerly INS) or DOL for H-2A and H-2B workers).

28. Holley, *supra* note 25, at 592.

29. *See* PROTECTION OF MIGRANT WORKERS, *supra* note 3, at 7-8 (explaining workers are authorized to enter “under section 10(c) of the Immigration Act and the Immigration Regulations, 1978 . . . . Section 20 of the Regulations permits the entry into Canada of foreign workers in accordance with international agreements between Canada and one or more foreign country” and citing Memorandum of Understanding (MOU) between Government of Canada and the Government of the United Mexican States Concerning the Mexican Seasonal Agricultural Workers’ Program, 1974.). *See generally* THE NORTH-SOUTH INSTITUTE, MIGRANT WORKERS IN CANADA: A REVIEW OF THE CANADIAN SEASONAL AGRICULTURAL WORKERS PROGRAM, (2006) [http://www.nsi-ins.ca/english/pdf/MigrantWorkers\\_Eng\\_Web.pdf](http://www.nsi-ins.ca/english/pdf/MigrantWorkers_Eng_Web.pdf) [hereinafter MIGRANT WORKERS].

The first CSAWP agreements were concluded in the 1960s with Caribbean countries, and Mexico began sending workers in 1974.<sup>30</sup> Roughly 85% of the guestworkers travel to Ontario, and most work cultivating and harvesting “apples, tomatoes, tobacco, cucumbers, peaches, cherries, ginseng, and greenhouse tomatoes and cucumbers.”<sup>31</sup> The maximum stay is eight months, with an average of 17-20 weeks.<sup>32</sup> Under Canadian law, employers must pay for travel to the farm from the point of arrival of the guestworkers in Canada and must provide housing along with either meals or cooking facilities, all without charge.<sup>33</sup> Workers are guaranteed a minimum of 240 hours of work for six weeks at the prevailing wage rate.<sup>34</sup> Employers are required to make sure workers are covered under the provincial health plan and workplace safety insurance plan.<sup>35</sup>

### C. The Facts: “Close to Slavery”

Despite statutory guarantees, H-2A workers do hard work under difficult conditions that rarely, if ever, rise to the level proscribed by law. Instead, guestworkers

are systematically exploited and abused . . . . Bound to a single employer and without access to legal resources, guestworkers are routinely cheated out of wages; forced to mortgage their futures to obtain low-wage, temporary jobs; held virtually captive by employers or labor brokers who seize their documents; forced to live in squalid conditions; and, denied medical benefits for on-the-job injuries. House Ways and Means Committee Chairman Charles Rangel recently put it this way: “This guestworker program’s the closest thing I’ve ever seen to slavery.”<sup>36</sup>

Workers are isolated in remote farms and migrant camps. They work long hours for wages well below the prescribed adverse effect wage rate, doing dangerous work;<sup>37</sup> H-2A workers are not eligible

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30. *MIGRANT WORKERS*, *supra* note 29, at 2.

31. *Id.* at 3.

32. *Id.* at 2.

33. *Id.* at 4, 17.

34. *Id.* at 4.

35. *Id.*

36. MARY BAUER, SOUTHERN POVERTY LAW CENTER, *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 1-2* (2007), <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>.

37. Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program’s Purposes, Regulations, and Realities*, 29 *VT. L. REV.* 185, 187 (2004). The article outlines conditions for all farmworkers as follows:

for safety net programs, can be terminated at will, and have no rights to be rehired in subsequent seasons.<sup>38</sup> U.S. guestworkers have some options for enforcement of substantive rights in state and federal court, as well as through regulatory agencies, but such options have proven ineffective.<sup>39</sup> H-2A workers may be represented by legal services lawyers, though these lawyers have been barred from helping clients during the contracting stage of the work cycle in Mexico.<sup>40</sup> H-2A workers do not have any method of “earned” legalization under U.S. immigration law, and are barred from admission as a guestworker if they plan to seek to become a lawful permanent resident.<sup>41</sup> Moreover, H-2A workers are excluded from the National Labor Relations Act,<sup>42</sup> and, ironically, also excluded from the Migrant and Seasonal Agricultural Workers’ Protection Act.<sup>43</sup>

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The median income for farmworkers ranges from \$2500 to \$7500 annually. Contrary to popular belief, very few farmworkers use, or are even eligible for, public social services such as Medicare, food stamps, or the Women, Infants, and Children Supplemental Nutrition Program (WIC). Farm work is one of the most dangerous industries in the United States. Thus, Mexican farmworkers ‘suffer from the highest rates of toxic chemical injuries of any workers in the [United States].’ Farmworkers also suffer higher rates of heat stress, dermatitis, influenza, pneumonia, urinary tract infections, pesticide-related illness, and tuberculosis.

*Id.*

38. See Hall, *supra* note 25, at 523 (describing the exclusion of H-2A workers from safety net programs); LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 208, 221 (2000), <http://hrw.org/reports/pdfs/us/uslbr008.pdf> (explaining the implications of H-2A’s workers’ at-will status and describing H-2A’s workers’ fear of being blacklisted).

39. See Hall, *supra* note 25, at 614-15.

40. *Id.* at 614 (“LSC regulations have been interpreted as prohibiting LSC-programs from conducting outreach in other countries, and thus H-2A workers are effectively denied the opportunity to make their complaints from the safety of their own communities. Rather, in order for an H-2A worker to gain representation, he usually needs to contact the legal aid program while working in the United States—that is, while housed at the grower’s labor camp or during the brief transit period back to Mexico.”).

41. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006) (providing that a worker must have “a residence in a foreign country which he has no intention of abandoning . . .”).

42. “The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer . . .” See National Labor Relations Act, 29 U.S.C. § 152(3) (2006). Of course, given the stringent restrictions on secondary activities under the Act, which likely would have constrained the UFW and FLOC in their boycott activities, continued exclusion may have been a blessing in disguise.

43. 29 U.S.C. § 1802 (8)(B)(ii) (2006) (“The term ‘migrant agricultural worker’ does not include . . . (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a)

Reports of abuses under the Canadian guestworker program are not as widespread as under the U.S. guestworker programs, but problems such as pesticide use, unsafe housing, mistreatment, failures to pay promised wages or meet other contractual guarantees, inadequate medical attention and/or fear of reporting ailments, inconsistent rules and regulations, and discrimination all have been reported as taking place in the Canadian program.<sup>44</sup> In addition, guestworkers must pay for a significant portion of their airfare to Canada, the entire cost of a work permit, and contributions to the Employment Insurance and Canada Pension Plan, money most will never again see.<sup>45</sup>

According to the bilateral agreement, the Mexican State Employment Service, under the Ministry of Labor, recruits workers, and Mexican consular officers “have the mandate to supervise the employers in order to ensure that they respect the rights and well-being of the workers as well as to help them at all times.”<sup>46</sup> The employer has the right to send a worker home before the end of the contract term, but the consular officer is supposed to try to transfer the worker to another employer before acceding to deportation.<sup>47</sup> The consular officers suffer from mixed messages, however, as one institute has pointed out that,

[o]n the one hand, they [the consular officers] are designated as the workers’ representatives for the purposes of the Employment Agreements. On the other hand, the CSAWP Operational Guidelines state that the agents’ duty is to help “ensure the smooth functioning of the program for the mutual benefit of both the employers and the workers.” This requires the agents

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and 1184(c) . . . .”); *see also* 29 U.S.C. § 10(B)(iii) (2006) (excluding H-2A workers also from the definition of “seasonal agricultural worker.”).

44. *See* *MIGRANT WORKERS*, *supra* note 29, at 10, 12 (noting, for example, that there were “high rates of reported sickness or injury among migrants, affecting one in three workers from . . . Mexico, . . .” and “one-quarter of Mexican workers reported that their employers had mistreated them on occasion . . .”).

45. *Id.* at 8.

46. Mexican Consular Office in Montreal, Canada, Seasonal Agricultural Worker Program, <http://www.consulmex.qc.ca/versionenglish/ptat.htm> (last visited Jan. 20, 2008). For general information about the Seasonal Agricultural Worker Program, see Service Canada, Government of Canada, Agricultural Programs and Services: Overview, <http://www1.servicecanada.gc.ca/en/on/epb/agri/overview.shtml> (last visited Jan. 20, 2008). *See also* DR. KERRY PREIBISCH, CANADA’S SEASONAL AGRICULTURAL WORKERS PROGRAM AS A MODEL OF BEST PRACTICES IN MIGRANT WORKER PARTICIPATION IN THE BENEFITS OF ECONOMIC GLOBALIZATION PROJECT, SOCIAL RELATIONS PRACTICES BETWEEN SEASONAL AGRICULTURAL WORKERS, THEIR EMPLOYERS, AND THE RESIDENTS OF RURAL ONTARIO (2004), [http://www.nsi-ins.ca/english/pdf/exec\\_sum\\_preibisch.pdf](http://www.nsi-ins.ca/english/pdf/exec_sum_preibisch.pdf).

47. *See* *MIGRANT WORKERS*, *supra* note 29, at 17.

to act as ‘mediators’ or ‘neutral arbiters’ in worker-employee disputes in conflict with their role as worker representatives.<sup>48</sup>

“The lack of representation afforded to workers” is “the fundamental flaw” in Canada’s guestworker program.<sup>49</sup> Critics claim that consular officers make poor representatives in Canada because of an inherent conflict of interest, as consular officers are reluctant “to be too strict with employers for fear of losing labour placements to another labour source country.”<sup>50</sup> Consular officers are both promoters of Mexican labor and protectors of Mexican laborers, a dual role that can create conflicts if the attractiveness of Mexico as a source country is in part dependent on the willingness of Mexican workers to accept conditions and treatment that is less than what the program guarantees.

#### D. Organizing Victories

Against this backdrop, the recent organizing campaigns stand out, offering the possibility of improving conditions for an exploited workforce. Each of the campaigns is distinct, based on an analysis of worker interest, employer vulnerability, legal options, and other factors. The approaches to organizing and bargaining foreshadow, to some extent, the role that Mexico-based work subsequently plays in union efforts.

##### 1. *The FLOC Campaign*

In September 2004, FLOC won an agreement to represent the 8500 H-2A guestworkers employed by the North Carolina Growers Association (“NCGA”).<sup>51</sup> The win capped a five and a half-year campaign.<sup>52</sup> The NCGA, a farm labor contractor providing work-

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48. *Id.* at 12.

49. UFCW CANADA, NAT’L REPORT ON THE STATUS OF MIGRANT FARM WORKERS IN CANADA 8 (2005) [hereinafter UFCW 2005], available at <http://www.ufcw.ca/Theme/UFCW/files/PDF2006/UFCW5thMigrantWorkersReport2005.pdf>; see also UFCW CANADA, NAT’L REPORT ON THE STATUS OF MIGRANT FARM WORKERS IN CANADA (2004) [hereinafter UFCW 2004], available at <http://www.ufcw.ca/Theme/UFCW/files/AgWorkersReport2004ENG.pdf>.

50. PREIBISCH, *supra* note 46, at 5.

51. Greenhouse, *Growers’ Group*, *supra* note 7; McKinnon, *supra* note 7.

52. David Griffith, *Challenges to Farmworker Organizing in the South: From the Southern Tenant Farmers Union to the Farm Labor Organizing Committee’s Mt. Olive Campaign*, 26 CULTURE & AGRIC. 25, 34 (2004) (arguing the FLOC campaign was “innovative for at least three reasons: 1. It unites workers based on their production of a specific processed commodity rather than a specific grower, firm, or industry. 2. It targets integrators, who contract with growers, rather than farms. 3. It is transnational, which allows or encourages linkages between productive and reproductive labor.”); see also COMPA, *supra* note 38, at 210-11 (describing FLOC’s North Carolina

ers to more than 1000 growers, was the formal employer of the guestworkers and signed the contract, but the deal was reached because FLOC targeted the Mt. Olive Pickle Company, the principal “integrator,” with a consumer boycott.<sup>53</sup> After Mt. Olive agreed to pay more for the cucumbers it bought, the NCGA agreed to pass on increases to workers and sign a union contract.<sup>54</sup> The agreement was the first signed by agricultural employers in North Carolina and includes another first, as well: “the contract provides for a union hiring hall in Mexico to help supply guest workers.”<sup>55</sup>

## 2. *The UFW Campaign*

In April 2006, the UFW announced an agreement with Global Horizons, a farm labor contractor employing one to three thousand guestworkers in up to a dozen states.<sup>56</sup> Global Horizons “signed the union contract in part to help improve its image after Washington State revoked its license to do business there because of violations alleged by state investigators.”<sup>57</sup> The contract included provisions guaranteeing protection from retaliation, firing only for just cause, a two percent raise in wages above the wage required under H-2A rules, paid medical care and workers’ compensation coverage, paid work breaks, seniority protections for hiring and layoffs, a death benefit, burial insurance, and bereavement leave

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campaign as building on its earlier “landmark” campaign against the Campbell’s corporation).

53. Griffith, *supra* note 52, at 34.

[T]he targeting of the integrator—in this case, the pickle processor, which integrates the harvesting and processing of cucumbers—is innovative because, as noted earlier, subcontracting arrangements are becoming more common throughout the economy and integrators, as the designation implies, integrate several different and different kinds of producers into one production process. Subcontracting relations, which bind cucumber farmers to the pickle companies through seasonal production contracts, while benefiting integrators, often make it difficult for contract workers to voice their opinions about production processes because they risk having their contracts canceled at the end of their current contract period.

54. *Id.* See McKinnon, *supra* note 7.

55. Greenhouse, *Growers’ Group*, *supra* note 7; see also Lisa Marie Gomez, *Following Footsteps of Cesar Chavez*, SAN ANTONIO EXPRESS-NEWS, May 7, 2006, at 1A; Jerry Hirsch, *Farm Labor Contractor, Union in Pact: The Agreement Between Global Horizons and the UFW Offers Benefits for Guest Workers*, L.A. TIMES, Apr. 12, 2006, at C2.

56. See Greenhouse, *Farmworkers’ Union*, *supra* note 7; Nyhan, *supra* note 7; Sirocchi, *supra* note 7.

57. Greenhouse, *Farmworkers’ Union*, *supra* note 7.

including paid travel to their country of origin.<sup>58</sup> Also under the contract, “Global promised to recruit in Mexico before Thailand.”<sup>59</sup>

### 3. *The UFCW Campaign*

In Canada, the UFCW established Migrant Agricultural Worker Support Centres in the early 1990s to assist migrants with legal support, training, and advocacy.<sup>60</sup> In September 2006, the union won union elections at one farm in Manitoba and three farms in Quebec.<sup>61</sup> These were the first guestworker units to organize in Canada, and the employer in Manitoba challenged the certification, claiming that the Manitoba Labour Relations Act (“MLRA”) did not cover seasonal workers.<sup>62</sup> In June 2007, the Manitoba Labour Board decided in favor of the workers, ruling that migrant workers were covered under the MLRA.<sup>63</sup> Certification applications for the Quebec units still were pending as of June 2007.<sup>64</sup> The UFCW has not been able to organize in Ontario—where the overwhelming majority of the roughly 18,000 agricultural guestworkers in Canada work—and guestworkers are still “banned from joining a union under provincial legislation.”<sup>65</sup>

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58. United Farm Workers, Global Horizons-UFW Contract Summary, [http://www.ufw.org/\\_page.php?menu=organizing&inc=keycampaign/globalhorizons/GHcontract.htm](http://www.ufw.org/_page.php?menu=organizing&inc=keycampaign/globalhorizons/GHcontract.htm) (last visited Jan. 20, 2008).

59. *H-2A, H-2B Programs*, *supra* note 7. Another encouraging sign, at least for farmworkers organizing in California, was the 2002 passage of a mandatory mediation law:

The law requires mediation to reach a contract between grower and union after workers vote to be represented by a union. Previously, growers could use a variety of tactics to prolong the contract process indefinitely . . . The first payoff came in February, when the UFW signed a contract with Pictsweet Mushrooms in Ventura—17 years after employees there voted for UFW representation. As a result, Lorenz [James Lorenz, an Oakland attorney who co-founded California Rural Legal Assistance with Chavez] believes the union’s prospects are bright . . . ‘Right now they’re positioned better than they were since about 1982,’ he said.

*UFW’s New Path: Help Millions*, 11 RURAL MIGRATION NEWS (2004), available at [http://migration.ucdavis.edu/rmn/more.php?id=854\\_0\\_8\\_0](http://migration.ucdavis.edu/rmn/more.php?id=854_0_8_0).

60. UFCW 2005, *supra* note 49, at 1.

61. *See Man., Que. Migrant Workers*, *supra* note 8.

62. *See* Manitoba Labour Board, *supra* note 8.

63. *Id.*

64. *Id.*

65. *Man., Que. Migrant Workers*, *supra* note 8. The Agricultural Employees Protection Act of Ontario gives agricultural workers the right of freedom of association, but the union says that the lack of “enabling legislation providing a legal framework for collective bargaining” means that workers do not, in fact, have the “legislative right to form or join a trade union.” UFCW 2004, *supra* note 49, at 22; *see also World*



Nevertheless, the union called its victory a “historical breakthrough”<sup>66</sup> and remains committed to organizing farmworkers. Moreover, the UFCW has recommended that the government of Canada “make it a condition of the CSAWP that migrant farm workers belong to a union and acknowledge UFCW Canada as the union representative for migrant farm workers in Canada and . . . provide funding to run the Migrant Agricultural Worker Support Centres on their behalf.”<sup>67</sup>

## II. FULL REPRESENTATION OF TRANSNATIONAL WORKERS

### A. Full Representation I: Transnational Work Cycles, Problems, and Lives

Agricultural guestworkers live a transnational life, “cyclically-sojourning” from Mexico to the U.S. or Canada, and back again.<sup>68</sup> Because poor workers in Mexico are desperate for employment, many seek to be rehired year after year. Thus, the cycle is a repeating one.

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*Briefs*, 13 RURAL MIGRATION NEWS (2007), available at [http://migration.ucdavis.edu/rmn/more.php?id=1184\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1184_0_4_0) (noting that “[f]our mushroom pickers with over five years experience were fired in . . . Ontario after they signed cards authorizing the United Food and Commercial Workers to represent them. . . . Under Ontario’s 2003 Agriculture Employees Protection Act, farm employers do not have to bargain with farm worker unions.”).

66. *Man., Que. Migrant Workers*, *supra* note 8.

67. UFCW 2005, *supra* note 49, at 4. It is not unprecedented that a union should play a formal representative role within a guestworker program. Temporary nonimmigrant workers seeking entry to the United States under the O or P visa categories, for example, must include copies of advisory opinions from “peer groups,” specifically including labor unions, when they apply for their visa. Those opinions are considered in the determination of whether the applicant has the required extraordinary ability. See Amy E. Worden, *Gaining Entry: The New O and P Categories For Nonimmigrant Alien Athletes*, 9 MARO. SPORTS L.J. 467, 479-80 (1999). The fact that these unions have tended to play a gatekeeper role, not an organizing role, does not mean that farmworker unions could not develop a different strategy. More generally, “union-supervised migration”—taking the form of a “union-organized underground railroad” moving workers from southern to northern jobs during World War II years—is an interesting option that served members of the Southern Tenant Farmers Union, allied unions, and even employers and government farm labor agencies well. See HAHAMOVITCH, *FRUITS OF THEIR LABOR*, *supra* note 4, at 182-99.

68. See Fran Ansley, Mexican Guestworkers in *Carolina del Norte*: Social Movement Lawyering on Transnational Ground 4 (unpublished paper, on file with author) (detailing accounts of changing communities among workers who may be “linearly-immigrating” or “cyclically-sojourning”). See generally LEON FINK, *THE MAYA OF MORGANTON: WORK AND COMMUNITY IN THE NUEVO NEW SOUTH* (Univ. of N.C. Press 2003); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); David Bacon, *Transnational Communities Redefine Citizenship for a Globalized World* (2005), <http://dbacon.igc.org/Imigrants/2005transnational.html>.

To fully represent guestworkers, a union must be present throughout the work cycle. Although unions often are not involved at the hiring stage, there are two ways in which unions get involved, both of which are applicable to the guestworker cycle. First, where gross abuses such as discrimination, harassment, extortion, or coercion occur during hiring or where union members face discrimination in rehiring, unions have grounds for taking action. In addition, where a union seeks to act as a hiring hall, the union becomes central to managing the process of hiring and rehiring.

In Mexico, workers are hired by recruiters who may harass, discriminate, or retaliate, as well as use coercion to extort exorbitant fees.<sup>69</sup> Stopping those abuses is not easy. One might wish that it were as simple as negotiating an agreement with the employer in the host country stating that the employer will end its contract with any recruiter shown to commit abuses. Yet finding proof of recruiter abuses is difficult as workers are scared of retaliation against themselves or family members if they speak out, even if they know to whom to speak. Thus a witness to corroborate such abusive behavior is not likely to be found. Even harder may be identifying a “clean” contractor, one that can be identified as willing to commit to respecting worker rights and effectively monitored to ensure continued compliance.<sup>70</sup>

Several individual Mexican states are serving as recruiters for guestworkers as part of a pilot national program in which some states are participating.<sup>71</sup> Some activists hope that an increased

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69. See Holley, *supra* note 25, at 596 (citing Jen McCaffery, *Virginia's Migrants Easily Exploited*, ROANOKE TIMES, Dec. 10, 2000, at A1, and Esther Schrader, *Widening the Field of Workers*, L.A. TIMES, Aug. 26, 1999, at A1); see also BAUER, *supra* note 36, at 9 (describing the indebtedness of guestworkers recruited in a similar fashion for the H-2B program); *infra* text accompanying notes 86-90 for a discussion of FLOC's efforts to stop recruiters from charging fees and the subsequent violent backlash.

70. Unions, as well as other groups, often use a strategy that involves convincing a decision-maker to contract for services or goods from a supplier willing to abide by certain standards. See, e.g., Worker Rights Consortium, Designated Supplier Program—Revised (2006), <http://www.workersrights.org/DSP/Designated%20Suppliers%20Program%20-%20Revised.pdf> (outlining a project to identify sources for university gear that comply with applicable labor standards, to win agreements whereby universities agree to use such “clean” sources, and to monitor implementation of the agreements). To make such agreements meaningful, there has to be both companies that can be put on the list as “clean” contractors and a mechanism for effective monitoring to ensure continued compliance. In the guestworker context, there is no clear “clean” option, nor is there a well-developed monitoring system.

71. E-mail from Rachel Micah-Jones, *Centro de los Derechos del Migrante*, to Jennifer Hill (Nov. 26, 2007, 16:46:45 PDT) (on file with author) [hereinafter Micah-Jones Email 1].

state role in recruiting could “break the chain of trafficking”<sup>72</sup> that characterizes guestworker hiring now, but there is little evidence to suggest that the Mexican state will be highly effective in ending corruption. Investigating recruiter violations during the hiring and rehiring stages of the guestworker cycle, as well as creating mechanisms to either correct problems or end the employer’s relationship with an abusive recruiter, are key aspects of full representation.

These are not the only elements, however. Reaching workers in their hometowns in Mexico offers an opportunity to communicate away from employer surveillance and outside of the intense work schedules that generally characterize guestworkers’ host country time. Workers who are fired or suffer lasting injuries generally can only be reached in Mexico. If a union is to educate guestworkers about their rights, train leaders to enforce guestworker contracts, and investigate problems left over after a host country visit by a guestworker, Mexico is the only place to do so. In addition, there is the chance to talk with workers after hiring but before they embark on their travels if they can be reached while in Monterrey for visa processing. For all these reasons, what happens in Mexico is an important part of the work cycle to be scrutinized by the union.

There also is a broader community-building function of Mexico-based work. At their best, unions provide an opportunity for people of different races, classes, and genders—people who cross all sorts of boundaries—to struggle together for a common goal. Unions provide for a chance to learn, to help others, to take on leadership roles, to enjoy fellowship, and otherwise to build a union community. Guestworker unions doing work in Mexico might be considered to be engaged in the project of building a “transnational community” that ties together guestworkers, their home country communities, and other union members in the host country.<sup>73</sup>

Guestworker unions, in this aspect, are part of “an upsurge in hometown associations, cross-border indigenous groups, and other [groups] that suggest a growing identification [among Mexicans] as

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72. *Id.* (citing Rodolfo Cordova, Centro de Alternativas para el Desarrollo Social, AC.).

73. See Griffith, *supra* note 52, at 33-35. For more on transnational community-building, particularly hometown associations and political activism, see also David Fitzgerald, *State and Emigration: A Century of Emigration Policy in Mexico* 2-3 (Ctr. for Comparative Immigration Studies, Univ. of Cal. San Diego, Working Paper No. 123, 2005), available at <http://www.ccis-ucsd.org/PUBLICATIONS/wrkg123.pdf>; Pastor & Alva, *supra* note 5.

trans or bi-nationals.”<sup>74</sup> Immigrant rights advocates building “transnational communities” fought, for example, to win the right of Mexicans abroad to vote in the last Mexican elections.<sup>75</sup> In a similar vein, guestworker union leaders recognize “that permanent residence might not be the goal of some immigrant workers and that creating easier mechanisms for such transnational existence might therefore be important.”<sup>76</sup>

### B. Full Representation II: Worker Interests and Union Tools

If the first axis of full representation is to be active throughout the work cycle, the second axis is extending the union’s reach to include all possible tools available for promoting workers’ interests.

Stopping abuses in recruitment will require all the tools the union can muster, as well as innovative experiments in legal advocacy, direct action, and policy efforts. Some experiments are underway, including exploration of the use of articles 25 and 28 of the Mexican *Ley Federal del Trabajo* [Federal Labor Law]. Both articles 25 and 28 of the Mexican Federal Labor Law cover Mexican citizens recruited in Mexico to work outside the country, and article 28 states that employers must pay for transportation and food, as well as ensure that workers receive their full salaries, are covered by workers’ compensation protections, and have adequate housing.<sup>77</sup> Employers must post a bond with the Mexican authori-

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74. Pastor & Alva, *supra* note 5, at 93.

75. See, e.g., Anna Fink, Voting from *El Norte*: Political Participation and Transnational Citizenship Across the U.S.-Mexico Border 26 (May 2006) (unpublished M.A. thesis, University of Tex. at Austin) (on file with author) (arguing that Mexican immigrant “Hometown Associations” advocated for the right to vote in Mexican elections from abroad and “played a key role in the movement and final passage of the absentee voting bill in June of 2005”); see also David Bacon, *Cross-Border Organizing*, Z MAGAZINE ONLINE, Dec. 2002, <http://zmagsite.zmag.org/Dec2002/baconprint1202.htm> (describing the efforts of the Binational Indigenous Oaxacan Front to promote participation in Mexican politics by members in both the U.S. and Mexico).

76. Pastor & Alva, *supra* note 5, at 94.

77. Victoria Gavito, *The Pursuit of Justice is Without Borders: Binational Strategies for Defending Migrants’ Rights*, 14 HUM. RTS. BRIEF 5 (2007). The article provides a translation of article 28 as follows:

The expenses for transportation . . . and food for the worker and his family . . . shall be to the exclusive charge of the employer. The worker shall receive his entire corresponding salary, without any discounts for any amount related with the referred items . . . . The worker shall have the right to the benefits given by the welfare institutions to foreign citizens in the country where they will render their services. In all cases they shall have to right to indemnity for work related risks . . . . They shall have the right to decent and clean housing at the place of work or nearby location . . . . For all

ties to guarantee the fulfillment of these obligations<sup>78</sup> as well as provide a written contract to workers and pay visa costs.<sup>79</sup> Recruiters, as well as employers, are required to comply with the terms of article 28.<sup>80</sup> Although the law is a virtual dead letter, there are experiments underway trying to breathe life into this law and a related provision in the *Ley General de Poblacion* [General Population Law].<sup>81</sup>

Researching the relationships among recruiters and employers and the geography of recruitment for particular employers is important. Unions need to know whether the employer is evading the contract, and identify what competitors are doing in order to expand organizing efforts. Organizing new guestworker units builds union numbers and thus power, contributes to raising standards more generally to prevent undercutting competition, and creates momentum that can lead to future victories. Because guestworker organizing so far has relied on identifying and pressuring employers vulnerable because of past abuses, the research on Mexican sources and abuses is particularly important. Ideally, guestworker unions would be able to create enough pressure so that eventually a “clean” recruiting option would emerge; this could take the form of a bargained agreement with recruiters to follow a particular code, the development of the union as a hiring hall itself, or an agreement with state or private recruiters allowing for monitoring.

Workers’ interests may be broader than the workers’ problems outlined in the previous Section. Workers have an interest, for example, in ensuring that their jobs continue to exist. For guestworkers, that means union involvement in immigration policy debates, among other things. Guestworkers have a limited impact on U.S. or Canadian policy, but could have a greater impact on Mexican policy debates or renegotiation of the Mexico-Canada bilateral guestworker agreement. Mexican guestworkers also have

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legal effects, the employer shall designate his domicile as being inside the Republic . . . .

*Id.* The original, Spanish text of article 28 is available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>.

78. Watts, *supra* note 1, at 27.

79. E-mail from Rachel Micah-Jones, *Centro de los Derechos del Migrante*, to Jennifer Hill (July 28, 2006, 11:32:19 PDT) (on file with author) (citing and explaining various aspects of article 28, *Ley Federal De Trabajo* [Federal Labor Law]) [hereinafter Micah-Jones Email 2].

80. *Id.*

81. *Id.*

an interest in lobbying for the time they work abroad to be used in calculating social benefits.

Direct action, research, organizing, bargaining, innovative legal strategies, and political action all may be important to achieving full representation of guestworkers. For some of these activities, it would not be enough to just do work in Mexico; the union also would need to have legal status as a union. For example, unions that operate simply as nonprofits, rather than unions, do not have access to *Juntas de Conciliacion y Arbitraje* (“JCA”), the labor tribunals, to seek protection under labor laws. Though the JCAs often are criticized, they provide a forum and a set of legal provisions that can be used to protest abuses. Guestworker unions are not part of any Mexican federation or confederation of trade unions, and guestworker unions cannot participate in tripartite social dialogue on issues such as immigration policy or employment benefits without status. Filing charges as the representative of the worker usually requires formal status, and bringing claims to various international labor rights forums requires recognition as a domestic union. For example, a guestworker union likely could file claims under the labor side agreement to the North American Free Trade Agreement (“NAFTA”) or through the International Labour Organization based on its status as a Mexican union. There is no one tool that allows guestworker unions to radically transform the industry and stop abuses, but each tool adds significantly to the arsenal and helps protect workers’ interests.

The bottom line is that restriction of a guestworker union’s ability to be involved with members’ lives throughout the work cycle, and to take action to defend members’ work interests should not be permitted absent a significant justification.

### C. FLOC’s Program

FLOC’s experience so far demonstrates the importance of Mexico-based work. FLOC has focused on grievance investigations, rights education, monitoring recruiters in a limited fashion, and responding to threats or attacks against its organizers. Such work is vital but ultimately represents only the first steps in exploring cross-border union work. To develop a stronger program, legal union status would be helpful. In particular, union status would enable FLOC to represent workers before domestic and international labor bodies, file claims representing its members, participate in tripartite social dialogue and political actions related to

immigration or other relevant policies, and perhaps gain greater protection against harassment, at least from official sources.

### 1. *Early Outreach*

FLOC won improvements in its initial collective bargaining agreement with the NCGA, including modest raises and the creation of a grievance process for resolving problems.<sup>82</sup> By 2006, over 4000 grievances had been filed.<sup>83</sup> Resolving those grievances, in some cases, required investigative work in Mexico involving workers injured on the job, fired, or at home during the off-season.<sup>84</sup>

Educating workers about their rights generated a backlash from those who benefit from workers' lack of knowledge. One FLOC organizer was threatened with deportation in 2005, after being "detained seven times by local, state, and federal Mexican police for simply conducting meetings in villages educating workers about their rights . . . ."<sup>85</sup>

### 2. *Responding to Violence*

In 2007, as part of the settlement of an earlier FLOC lawsuit, the NCGA agreed that the employer, not workers, would pay all recruiting fees for two years.<sup>86</sup> FLOC's activities in Monterrey included monitoring Manpower of the Americas, the recruiting agency used by NCGA.<sup>87</sup> Union staff contacted workers to explain the terms of the settlement and prevent recruiters from continuing to collect fees.<sup>88</sup> This, reported Baldemar Velasquez, president of FLOC, "took away a gold mine" from recruiters.<sup>89</sup> Corrupt recruiters, perhaps in association with corrupt authorities, retaliated by breaking into FLOC offices, threatening organizers, and finally murdering Santiago Rafael Cruz.<sup>90</sup>

Velasquez does not blame the recruiting agency or the NCGA for the murder, although presumably, it was someone linked to one of their agents who was responsible. The president of Manpower

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82. See McKinnon, *supra* note 7.

83. See Stephen Franklin, *Sides Find Scarce Common Ground*, CHI. TRIB., Nov. 11, 2007, at 11.

84. See Take Urgent Action, *supra* note 12; Franco Ordonez, *Union Wrestles with Uncertainty*, CHARLOTTE OBSERVER, July 7, 2006.

85. Take Urgent Action, *supra* note 12.

86. See Malkin, *supra* note 13.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

of the Americas has stated that “his company kept a tight rein on his local recruiters,” but in a system where corruption is pervasive, top-down control may not be enough.<sup>91</sup> FLOC can complain of recruitment violations to NCGA, but bargaining in the U.S. has not yet resulted in transparency or fairness in Mexico-based recruiting.

Two Mexican human rights groups, *el Centro de Derechos Humanos de la Montana Tlachinollan* and the Project of Economic, Social and Cultural Rights (“ProDesc”) filed a petition protesting the assassination of Cruz and the failure of the government to adequately investigate Cruz’s murder with the Inter-American Commission on Human Rights.<sup>92</sup> The Commission asked the Mexican government to take precautionary measures to ensure that FLOC organizers and leaders were safeguarded while in the country, including urging the government to move the investigation forward, installing closed-circuit security cameras in the FLOC office in Monterrey, and providing satellite phones to organizers so they could maintain contact from outlying areas.<sup>93</sup> Although it is important that labor rights violations get attention in human rights fora, what is currently missing is FLOC’s ability to press its own claims in labor tribunals.<sup>94</sup>

### 3. Organizing

Organizing is central to promoting the interests of members. Ultimately, the goal is to organize enough workers to “take wages out of competition,” but lacking that, unions may target immediate competitors that violate workers’ rights to employ low-cost labor.<sup>95</sup>

For agricultural guestworkers, the competition might consist of lower-cost undocumented workers or non-union guestworker providers.<sup>96</sup> The “NCGA is losing customers, as farmers complain

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91. *Id.*

92. See Micah-Jones Email 1, *supra* note 71; see also Letter, *Solicitud de Medidas Cautelares, Proyecto de Derechos Economicos, Sociales, y Culturales*, ProDESC (2007) [hereinafter Prodesc Letter] (on file with author).

93. See Prodesc Letter, *supra* note 92.

94. Of course, FLOC and other agricultural worker unions have a limited ability to gain such protections in the U.S., given the exclusion of agricultural workers from coverage under the National Labor Relations Act.

95. Ordonez, *supra* note 84. On the more general point, see Paul F. Clark et al., *Private-Sector Collective Bargaining: Is This the End or a New Beginning?*, in COLLECTIVE BARGAINING IN THE PRIVATE SECTOR (Paul F. Clark et al. eds., 2002) (“Unions were successful in the past, in part, because they were able to ‘take wages out of competition.’”).

96. See Eduardo Porter, *Who Will Work the Farms?*, N.Y. TIMES, Mar. 23, 2006, at C1; see also MARTIN, *supra* note 20, at 30 (explaining more generally the “numbers versus rights” dilemma as follows: “If all migrants are legal, and they receive the same



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about increased costs of obtaining H-2A workers, about \$950 a worker, up from the previous \$500.”<sup>97</sup> Baldemar Velasquez, president of FLOC, gave a characteristically optimistic understatement when noting that “challenging times are ahead.”<sup>98</sup>

Farmworker employers want to have access to both undocumented workers already here and to increased numbers of guestworkers; high unemployment in Mexico means workers will continue to travel north looking for work, although guestworkers may become more desirable to many employers because of tighter immigration restrictions.<sup>99</sup> There is evidence that an increase in the use of guestworkers is beginning; in Florida, for example, there was an estimated 500% increase in the use of guestworkers in 2006.<sup>100</sup>

This creates an opportunity for unions to expand their toehold in the industry. In Mexico, FLOC could learn which U.S. employers are recruiting guestworkers, from what regions, and how to contact workers prior to their journey north. FLOC might be able to direct work to certain recruiters, creating pressure to bring recruiters to the bargaining table. Union registration is particularly key to this strategy:

Without registration, unions can still hold meetings, elect officers, make demands on employers, issue public statements and the like, in keeping with the principle of freedom of association. However, other parties need not respond to their actions since unregistered unions are treated as lacking the required legal capacity.<sup>101</sup>

A union with legal status could seek to get involved with tripartite social dialogue—open only to unions, employers, and government officials—on immigration policy; by advocating for a more just immigration policy in Mexico as well as in the U.S., a

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benefits as local workers, employers are likely to request fewer, posing a numbers versus rights dilemma.”). Some argue that employers falsely claim a shortage in order to increase political will to step up guestworker limits but forestall efforts toward greater enforcement of minimum standards. See David Bacon, *Farmworkers' Plight: No Fruits for Their Labor*, S.F. CHRONICLE, Oct. 11, 2006, at B-9.

97. *H-2A, H-2B Programs*, *supra* note 7.

98. Ordonez, *supra* note 84.

99. Gavito, *supra* note 77.

100. *Id.* Note that this includes all types of guestworkers, not just agricultural guestworkers.

101. HUMAN RESOURCES AND SKILLS DEVELOPMENT-GOVERNMENT OF CANADA, REVIEW OF PUBLIC COMMUNICATION CAN 2003-1: REPORT ISSUED PURSUANT TO THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION 4-4 (2005), <http://www.hrsdc.gc.ca/en/lp/spila/ialc/pnaalc/pdf/report.pdf> [hereinafter CAN 2003-1].

guestworker union might be better positioned to increase protections for workers and also opportunities for organizing. This strategy might be even more useful to the UFCW, were it to expand operations in Mexico, because the guestworker program is negotiated bilaterally.

### III. OBSTACLES TO REGISTRATION IN MEXICO

#### A. General Principles and the Registration Requirement

The right to freedom of association is well-protected, at least in principle, under Mexican law. The Mexican Constitution itself “provides workers the right to freely associate, to organize unions, and to strike,” and agricultural workers are not exempted.<sup>102</sup> The Federal Labor Law reiterates these rights and sets out the rules for collective bargaining.<sup>103</sup> Substantive guarantees of union rights are strong, but enforcement is weak or, more precisely, “selective.”<sup>104</sup>

In Mexico, registration of unions is mandatory<sup>105</sup> and is a “prerequisite for the normal functioning of an organization.”<sup>106</sup> Without being allowed to register, a union cannot gain legal status. Legal status affords protections against anti-union retaliation, grants standing to represent members in labor tribunals and processes, and offers access to mechanisms for advancing members’ interests and defending their rights.<sup>107</sup>

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102. COMMISSION FOR LABOR COOPERATION, *THE RIGHTS OF NONSTANDARD WORKERS: A NORTH AMERICAN GUIDE* 19 (2003), <http://new.naalc.org/english/pdf/study1.pdf> [hereinafter *THE RIGHTS OF NONSTANDARD WORKERS*]; see also *PROTECTION OF MIGRANT WORKERS*, *supra* note 3, at 3; JOEL SOLOMON, *HUMAN RIGHTS WATCH, MEXICO: LABOR RIGHTS AND NAFTA—A CASE STUDY* (1996), available at <http://hrw.org/reports/1996/Mexico3.htm> (paraphrasing the Constitution of Mexico’s Article 123(B)(10) as “[w]orkers will have the right to association to defend their common interests.”).

103. For an overview of Mexican labor law, see Carlos Reynoso Castillo, *Situación de Trabajo y Protección de los Trabajadores: Estudio del caso de México* (1999), <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/wpnr/mexico.pdf>; COMPA, *supra* note 15.

104. See COMPA, *supra* note 15, at 10 (describing the preferential enforcement of laws favoring pro-government unions over independent unions and dissident unionists).

105. *Ley Federal del Trabajo* [Federal Labor Law], art. 365, *Diario Oficial de la Federación*, 1 de Abril de 1970 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>.

106. See INTERNATIONAL LABOUR ORGANIZATION, *FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING: RIGHT OF WORKERS AND EMPLOYERS TO ESTABLISH AND JOIN ORGANIZATIONS*, ¶ 73 n.58 (1994), [http://training.itcilo.it/ils/foa/library/general\\_surveys\\_en/25943.htm](http://training.itcilo.it/ils/foa/library/general_surveys_en/25943.htm) (describing Mexico as an example of a country where “registration is compulsory.”).

107. See generally COMPA, *supra* note 15.

Mexico has been roundly criticized for placing “excessive conditions” amounting to previous authorization on unions seeking to register.<sup>108</sup> By delaying and denying registrations, among other tactics, the official Mexican labor movement has quashed most expressions of independent unionism. It would be highly likely that a guestworker union seeking to register would face obstacles. There are two primary obstacles found in Mexico’s law—the requirement of an employment relationship in Mexico and the ban on foreigners as trade union officials—along with the practical reality that registrations often are denied for completely arbitrary reasons. There are reasons based in Mexican law to argue that neither the employment relationship requirement nor the foreign officer ban should be used to prohibit a guestworker union registration.

### B. Obstacle 1: The Employment Relationship

Mexico is like most countries in conditioning the right to form a union on the existence of a domestic employment relationship.<sup>109</sup> Under the Mexican Constitution, “all workers within the national territory regardless of occupation or status” are afforded the freedom of association and other rights.<sup>110</sup> The baseline requirement is a labor relationship (*relación de trabajo*), defined as existing “when, regardless of the origin of the relationship, a worker performs subordinate work for another person in exchange for remuneration.”<sup>111</sup> Some workers are excluded from collective labor rights, such as “confidential” workers or family members working

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108. Geraldo von Potobsky, *Freedom of Association: The Impact of Convention No. 87 and ILO Action*, 137 INT’L LAB. REV. 195, 206 (1998); see also COMPA, *supra* note 15, at 15; SOLOMON, *supra* note 102.

109. See generally Guy Davidov, *Who is a Worker?* 34 INDUS. L.J. 57 (2005) (describing general uses of employment relationship requirement); see also Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. OF INDUS. REL. 727 (2004); Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002); Brian A. Langille & Guy Davidov, *Employed or Self-Employed? The Role and Content of the Legal Distinction: Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL’Y J. 7 (1999); Alain Supiot, *The Transformation of Work and the Future of Labour Law in Europe: A Multidisciplinary Perspective*, 138 INT’L LAB. REV. 31, 36 (1999); Alan Hyde, *What is Labor Law?* (Cornell Law School, Legal Studies Research Paper Series, Paper No. 06-010, 2005), available at <http://ssrn.com/abstract=896381>.

110. THE RIGHTS OF NONSTANDARD WORKERS, *supra* note 102, at 19.

111. *Id.*; see also INTERNATIONAL LABOUR ORGANIZATION, THE EMPLOYMENT RELATIONSHIP, INTERNATIONAL LABOUR CONFERENCE, REPORT V(1) 20 (2006) ], <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf> [hereinafter ILO, THE EMPLOYMENT RELATIONSHIP].

for a family business,<sup>112</sup> but the explicit exemptions are few and do not include agricultural or guestworkers.

The problem for a guestworker union seeking to register is that guestworkers do not actually perform subordinate work in Mexico for pay. If there is no employment relationship, there are no roots, so to speak, in which the union can grow. That seems straightforward.

Guestworkers, however, have what are called “triangular employment relationships,” which makes the situation more complicated. “Triangular employment relationships” exist when workers are “employed by an enterprise (the ‘provider’) who perform work for a third party (the ‘user’).”<sup>113</sup> Such employment relationships may be “objectively ambiguous,” making it hard for workers to know “what their rights are and who is responsible for them.”<sup>114</sup>

This ambiguity in guestworker relationships has to do with the relative responsibilities of recruiters and the host country employers. Most of those concerned with triangular employment relationships have focused on ensuring that users of labor cannot escape responsibility for obligations like paying wages, providing safe workplaces, or bargaining when employees form a union, even if they are not formally employers.<sup>115</sup> The rationale behind this analysis is purposive; labor and employment laws are aimed at protecting vulnerable workers so coverage should be broad to accomplish that goal.<sup>116</sup>

Mexican law seems to share that goal of broad coverage. Article 28, moreover, holds recruiters co-responsible with employers for ensuring respect for an array of worker rights;<sup>117</sup> this suggests that the employment relationship is created when migrant workers are hired in Mexico and rights guaranteed are enforceable either under Mexican law or the employment law of the host country. If there is an employment relationship cognizable in Mexico for purposes of

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112. THE RIGHTS OF NONSTANDARD WORKERS, *supra* note 102, at 19-20 (citing Article 363 of the Mexican Constitution).

113. ILO, THE EMPLOYMENT RELATIONSHIP, *supra* note 111, at 11.

114. *Id.*

115. See general discussions of employer responsibilities vis-à-vis vulnerable employees in THE RIGHTS OF NONSTANDARD WORKERS, *supra* note 102, and the ILO, THE EMPLOYMENT RELATIONSHIP, *supra* note 111.

116. See generally ILO, THE EMPLOYMENT RELATIONSHIP, *supra* note 111; see also Leah Vosko, “Decent Work”: *The Shifting Role of the ILO and the Struggle for Global Social Justice*, 2 GLOBAL SOC. POL’Y 19 (2002); International Labour Organization R198, Employment Relationship Recommendation (2006), <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R198>.

117. See Micah-Jones Email 2, *supra* note 79.

enforcing minimum substantive guarantees, then there is no reason to think the employment relationship should not also be recognized for purposes of exercising union rights.

If there is an employment relationship and assuming the union meets the formalities of registration,<sup>118</sup> then the union registration should not be denied simply because no work is actually performed for pay in Mexico. The union should have the right to carry out actions with legal status, most notably protest abuses before tribunals, bring parties to the table for bargaining,<sup>119</sup> and participate in social dialogue and other activities.

It is hard to picture how such a binational union would operate. Under this analysis, a guestworker union could bargain with an employer in the host country, trying to hold recruiters responsible through the top-down chain of command. If that did not work, the same union could then try to bring recruiters to the table in Mexico to bargain, without the employer necessarily being present: one job, two possible contracts. Alternatively, one could imagine a system in which a duly recognized union could negotiate jointly with both Mexican recruiters and U.S. or Canadian employers, under some transnational system of rules. It seems awkward because the organizational forms and coordination mechanisms for a binational union are not yet worked out. One of the difficulties of imagining full representation of guestworkers in both home and host countries arises because there are not bilateral, regional, or international models for coordination of labor regimes. Guestworkers are a prime example in which core labor rights of workers suggest that new forms of coordination are needed, even though that would require adjusting notions of national sovereignty in labor relations.

### **C. Obstacle 2: The Ban on Foreign Trade Union Officers**

The prohibition on foreigners as trade union officials is the second obstacle likely to face a host country guestworker union seek-

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118. CAN 2003-1, *supra* note 101, at 4(2)(1)(a) (stating that “[t]he legal requirements for obtaining registration are minimal and the granting of registration should be a purely administrative act” and also pointing out that “Article 365 lists the documents the unions must submit in duplicate, which are: an authorized copy of the formative assembly proceedings; a list showing the number of union members with their names and addresses, and the name and address of the employer, company or establishment in which they are employed; an authorized copy of the union by-laws; and an authorized copy of the assembly proceedings where the executive committee was elected”).

119. Of course, there still would be a question of whether the labor tribunals had any sort of jurisdiction over a foreign employer if it were not registered in the country but just acted through agents.

ing to register and operate in Mexico. Under article 372 of Mexico's Federal Labor Law, no foreigners may serve as officers of trade unions.<sup>120</sup> This provision is connected to the constitutional ban on foreign involvement in politics.<sup>121</sup> The Mexican government, in a case before the ILO's Committee of Experts, explained that section 372 "is based on the spirit of section 33 of the Constitution, which provides that foreigners may not in any way take part in the political affairs of the country, although it is clear that trade unions are established to defend the common interests of the workers, and it is natural that their activities do not exclude acts of a political nature."<sup>122</sup>

If Mexican courts chose to apply this provision to top union officers,<sup>123</sup> not just first-level or national-level organizations, then registration of a cross-border guestworker union would be problematic under Mexican law. An international guestworker union likely would run afoul of this provision for purely democratic reasons. Guestworker unions like the UFW, FLOC, and UFCW represent non-guestworker agricultural and/or other food workers in foreign countries such as the U.S. Guestworkers would be a minority in such unions. As a result, the people elected to top union office likely would be all or mostly foreigners and such a union would probably fail to gain registration under Mexican law.

Despite such concerns, it is not clear that Mexican authorities would apply this prohibition to a guestworker union attempting to

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120. See PROTECTION OF MIGRANT WORKERS, *supra* note 3, at 6.

121. See *Constitución Política de los Estados Unidos Mexicanos* [Constitution], as amended, art. 33, *Diario de la Federación* [D.O.], 5 de Febrero de 1917 (Mex.), available at <http://pdba.georgetown.edu/Constitutions/Mexico/mexico2004.html>.

122. CEACR: Individual Direct Request Concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Mexico (ratification: 1950) (1999), <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=9516&chapter=9&query=Mexico%40ref&highlight=&querytype=bool&context=0> [hereinafter CEACR No. 87].

123. No Mexican court or other cases were found addressing this issue in a search made by a Mexican labor attorney. Memo, Ben Davis, Mexican Representative, Am. Ctr. for Int'l Lab. Solidarity (Jan. 2007) (on file with author). The provision might be applied to top officers simply because they are the named officers or because the union's constitution or bylaws delegate specific responsibilities to officers in relation to Mexican units. For example, the Constitution of the United Steelworkers of America states that "The International Union shall be the contracting party in all collective bargaining agreements and all such agreement shall be signed by the international officers." Constitution of Int'l Union, United Steelworkers et al., art. XVII, § 1 (2005), <http://erds.dol-esa.gov/query/getOrgQry.do> (Search File Number 000-094, then select STEELWORKERS AFL-CIO NATIONAL HEADQUARTERS 0, then select 2005InternationalConstitution-FINAL-PROTECTED VERSION.pdf). This might be the sort of provision that creates an issue under Article 372.

register. If it did, another constitutional provision could come into play. Mexico's Constitution requires the incorporation of principles from ratified treaties, such as International Labor Organization (ILO) Conventions, into domestic law. Article 133 of the Constitution states that "duly signed and ratified international labor conventions form part of domestic labor law of Mexico, insofar as they are to workers' benefit."<sup>124</sup> Should there be a conflict between the Federal Labor Law and a ratified ILO Convention, then according to the Mexican government, "the text of the Convention would prevail wherever it is to the advantage of the worker. The Government adds that the foregoing is established in article 133 of the Constitution which gives the Convention precedence over all other laws and incorporates it into domestic legislation."<sup>125</sup> Where the Mexican Constitution, Federal Labor Law, and international treaties do not clearly address an issue, article 18 of the Federal Labor Law states that one should look to the general principles in articles 2 and 3 of the Federal Labor Law for guidance; where there is ambiguity, it should be resolved in favor of the workers.<sup>126</sup>

The ILO on a number of occasions has criticized the article 372 prohibition as being overly broad. Article 3 of ILO Convention 87 on Freedom of Association states that workers' organizations have the right "to elect their representatives in full freedom" and prohibits public authorities from "any interference which would restrict this right or impede the lawful exercise thereof."<sup>127</sup> This right "is an indispensable condition for [unions] to be able to act in full

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124. PROTECTION OF MIGRANT WORKERS, *supra* note 3, at 26; *see also* *Constitución Política* [Constitution], *supra* note 121.

125. CEACR: Individual Observation Concerning Convention No. 90, Night Work of Young Persons (Industry) Convention (Revised), 1948 Mexico (ratification: 1956) (1994), <http://www.ilo.org/ilolex/cgi-lex/single.pl?query=061994MEX090@ref&chspec=06>. The government outlined the process but denied there was a conflict between the Convention and the domestic law in this case. *Id.*

126. *Ley Federal del Trabajo* [L.F.T.] [Federal Labor Law], art. 18, *Diario Oficial de la Federación* [D.O.], 1 de April de 1970 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf> ("[I]nterpretación de las normas de trabajo se tomarán en consideración sus finalidades señaladas en los artículos 2o. y 3o. En caso de duda, prevalecerá la interpretación más favorable al trabajador [interpretation of the labor statutes should take into consideration the goals identified in articles 2 and 3. Where there is doubt, the interpretation most favorable to the worker should prevail]."). For the goals identified in articles 2 and 3 of the Federal Labor Law, see generally *Ley Federal del Trabajo* [L.F.T.] [Federal Labor Law], art. 2, 3, *Diario Oficial de la Federación* [D.O.], 1 de April de 1970 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>.

127. International Labour Organisation, Freedom of Association and Protection of the Right to Organize Convention, Convention No. 87, art. 3, July 9, 1948, <http://www2.ohchr.org/english/law/pdf/association.pdf>.

freedom and to promote effectively the interests of their members.”<sup>128</sup> Because this is an indispensable part of freedom of association rights, governments must “refrain from any intervention . . . in determining the conditions of eligibility of leaders . . . .”<sup>129</sup> The prohibition on foreigners in office is one such problematic condition on eligibility to register as a union, and the ILO has taken the position that “[l]egislation should be made flexible so as to permit the organizations to elect their leaders freely and without hindrance, and to permit foreign workers access to trade union posts . . . .”<sup>130</sup> In 2001, the ILO’s Committee of Experts expressed,

“the firm hope that the Government will find the most appropriate formula for amending the above provision so that foreign workers have access to trade union office, at least after a reasonable period of residency in the host country, or where there is reciprocity between countries, for at least a specific proportion of trade union officers.”<sup>131</sup>

If Mexico were to apply article 372 of the Mexican Federal Labor Law to a guestworker union, it would create a conflict between a federal labor law and the ratified ILO convention. The convention, per article 133 of the constitution, should trump the Federal Labor Law provision.

That would not completely clarify the situation because the ILO convention does not say that no restriction is allowed; reasonable restrictions could require a certain proportion of union officers to be Mexican nationals or take other forms. One could imagine, for example, new regulations requiring that Mexican unions be able to disaffiliate with an international union without facing significant obstacles. There are precedents for this sort of rule, although mostly in debates within trade union federations or international unions with both U.S. and Canadian affiliates about how best to balance concerns of national sovereignty and international unionism.<sup>132</sup> One could imagine a country like Mexico with great con-

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128. INTERNATIONAL LABOUR OFFICE, REPORTS OF THE COMMITTEE ON FREEDOM OF ASSOCIATION 187 ¶ 789 (2007), <http://www.oit.org/public/english/standards/relm/gb/docs/gb299/pdf/gb-4-1.pdf>.

129. *Id.*

130. INTERNATIONAL LABOUR OFFICE, ELIGIBILITY CONDITIONS (RIGHT OF ORGANIZATIONS TO ELECT THEIR REPRESENTATIVES IN FULL FREEDOM) ¶. 420 (2006), <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=226&chapter=23&query=%23docno%3D2320060703&highlight=on&querytype=bool>.

131. CEACR No. 87, *supra* note 122.

132. Preserving the sovereignty of national unions has been a critical issue—some argue the critical issue—in the creation and, even more, the break up of U.S.-Cana-



cerns about foreign domination and national sovereignty seeking to regulate in new ways in the face of any move toward international unionism. Although such regulations would be problematic for other reasons, the point is that the nature of “reasonable restrictions” in the context of binational guestworker unions is unexplored.

It seems clear that the ban on foreign trade union officers should not be used to prevent a guestworker union from registering. It is less clear whether a different form of regulation might be available and appropriate to protect unions and Mexican politics from “foreign” interference.<sup>133</sup>

### **CONCLUSION: BINATIONAL UNIONISM: A CHALLENGE TO DOMESTIC REGIMES**

The idea of a binational guestworker union opens up many possibilities for moving toward full representation of guestworkers by creating a vibrant organization that can represent workers throughout the work cycle, play a meaningful role in the transnational lives and communities of guestworkers, and advocate for the interests and needs of a particularly vulnerable group of workers using all the tools available on both sides of the border.

Jennifer Gordon recently laid out a fascinating picture of what a transnational representation system involving U.S. and Mexican

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dian unions. In 2000, eight locals of the Canadian branch of the Service Employees International Union (“SEIU”) tried to leave SEIU and affiliate with the Canadian Auto Workers. *See generally* Paul Weinberg, *Showdown in Uniontown; it Began with an Exodus of Workers from a US Union, the SEIU, to the CAW*, 34 *THIS MAGAZINE* 30 (2000). According to supporters of the breakaway unions, “the SEIU saga is simply the latest round in a fight that should have been resolved years ago—the right of Canadian workers to determine their own future within, or without, a U.S. parent labour organization.” *Id.* Canadian union leaders had been attempting to re-negotiate the terms to create something like “Canadian self-determination with ‘fraternal ties’ to the SEIU.” *Id.* International union leaders, on the other hand, argued that decisions should be centralized so that the union could focus resources on moving an industry strategy, even if that meant relatively more attention went to organizing in unorganized areas in the U.S. as opposed to representing already-organized workers in Canada. *Id.*

133. Of course, it would be somewhat hypocritical for Mexican authorities to encourage Mexicans to participate in guestwork programs, as the government has done, and to promote binational political involvement, as the government also has done, but then restrict the involvement of a guestworker union in domestic politics. *See* Sonya Geis, *Registration is Low for Mexico’s Absentee Vote*, *WASH. POST*, Jan. 16, 2006, at A12. Mexico does not have a lock on hypocrisy. One could equally imagine U.S. or Canadian unions abandoning the small group of organized guestworkers should it seem possible to organize domestic workers in larger numbers and end guestworker programs.

workers might look like.<sup>134</sup> One might disagree with any or all of the specifics, but what she offers is a more advanced vision of full representation—active, comprehensive, and balancing concerns about autonomy and coordination.<sup>135</sup> The recent successes of guestworker organizing point to the need for some vision of where we are heading and what legal challenges we might encounter along the way. It is important to focus on such a vision because “[u]ntil the right to organize, to protest, to work, and to move transcends national boundaries, guestworker programs will remain what they have always been: the means to create a class of perfect immigrants who live in a no-man’s land, outside the bounds of nationhood and the house of labor.”<sup>136</sup>

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134. See generally Gordon, *supra* note 68.

135. *Id.*

136. Hahamovitch, *Creating Perfect Immigrants*, *supra* note 4, at 94.