FRIEDRICH EBERT STIFTUNG

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POLITICAL ANALYSIS

Collective Bargaining Agreements for Employer Protection ("Protection Contracts") in Mexico

Carlos de Buen Unna

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1. What are Collective Bargaining Agreements for Employer Protection ("Protection Contracts")? Advantages and Disadvantages

On February 5th, 2009, the International Metalworkers Federation filed a complaint against the Mexican Government before the International Labor Organization's Committee on Freedom of Association, questioning their labor relations system for its "widespread practice of collective bargaining agreements designed for employer protection" (hereafter referred to as "Protection Contracts" or "CCPPs," their acronym in Spanish).[1]

On March 1st, 2010, the Mexican government responded, denying the existence of these contracts, arguing that the Mexican legal system does not contemplate their creation. This simplistic response leads us to believe that the Mexican labor authorities would like to avoid this sensitive topic, rather than confront or explore solutions.

The practice of CCPPs was developed over the course of seven decades during which the Institutional Revolutionary Party

1. International Labor Organization, *359th report of the Committee of Freedom of Association*, 310th meeting, Geneva, March 2011, Case 2694.

(Partido Revolucionario Institucional, or PRI) governed the nation (1931-2000). During this period, the National Action Party, (Partido Acción Nacional, or PAN) then the opposition party, forcefully criticized the corporatist system which led to the rise of this particular kind of labor contract. However, now that the PAN is in power it has backtracked from its earlier criticism, as evidenced by the actions of its leadership, in particular the Secretary of Labor (Secretaría del Trabajo y Previsión Social).

An inexperienced lawyer would find it strange that an aggressive union, while threatening an employer with a strike if it does not sign a collective bargaining agreement, would simultaneously present the thinnest of bargaining proposals which simply requests the legal minimum benefits already provided for by the Federal Labor Law (Ley Federal del Trabajo, or LFT). It will add that the employer may only hire workers provided by this same union and that any workers who disaffiliate or who are expelled from it must also be fired from their jobs, according to an "exclusion clause" (cláusula de exclusión). This mechanism, rather than guaranteeing worker unity – the supposed purpose of the clause– ensures that workers may be controlled with the threat of job loss if they show any democratic leanings that could threaten union's "leader" (who in reality is the union's owner).

This young lawyer, after having gained a little experience, would know that the conduct described above is the norm in Mexico and would therefore recommend to his or her corporate client that the way to end a strike is to negotiate to pay the union an amount "to cover expenses" incurred in carrying out the strike, and then sign an identical collective bargaining agreement with different union. In all likelihood, the new union will belong to the same union Central or Confederation as the replaced union. What is more important is that the new union leader enjoys the lawyer's trust, and almost certainly, his or her earnings. For many corporate law firms, handling protection unions in this manner has become a major, even principal, source of revenue.[2]

The union representative who agreed to step aside will have also carried out a nice little business deal, perhaps not the most lucrative, but he or she will have made a profit with little effort. It's highly likely that she or he does not know a single worker at the worksite, in other words, the whole performance was to signal to the employer that the union may count on the full support of the workforce, when in fact, the system does not ask a union to prove its majority support until after initiating a strike.

In rare cases, the union will have started the recruitment and mobilization of workers to support its position, but it will nearly always sacrifice those workers in exchange for money. The amount of money often corresponds to the level of betrayal committed against the workers who trusted the union leadership.

The second union, for its part, embarks upon a long-term business arrangement with the company, through which it receives a modest

2. It is a stretch to refer to these individuals as leaders and to their illicit businesses as unions, but allow us to use these terms here, by force of custom and also to avoid repeated and lengthy explanations.

retainer, which may be shared with the lawyer who selected the union, in exchange for simply maintaining its legal status as a registered union. This may be achieved by tipping, which expedites registration and bypasses the process that verifies the union meets legal requirements, minimal as they are.

For the entrepreneurial employer, this whole process represents one more cost of doing business, one which allows him or her to avoid dealing with a real union. All in all, this system allows the real cost to fall on the workers, who will have to settle for minimal legal benefits and will have effectively lost their right to bargain their wages, benefits and working conditions collectively.

In the modern language of "human resources" administration, the name of this game is "win, win, win and win" since the employer wins, along with the lawyer, the union's owner and the authorities. The only losers are the workers, victims of this clever model.

Alfonso Bouzas and Mercedes Gaitán define a CCPP as "that which arms an employer with a union, or more accurately, a person who holds a union registration and who guarantees that the employer can work unbothered by union opposition or worker complaints in exchange for payment to the "union" who offers these services."[3]

And what are the advantages of such a model? In reality, one of its basic features is that it can only function in the short term and from the perspective of insane conduct.

The typical Mexican employer is convinced that a true and representative union is a menace to its business, or at a minimum an intrusion on its right to exploit its workers with impunity and profit as much as possible from their work. As such, it is worth the investment, often a modest one, to please the union leader who knows how to protect his or her business - or in reality, their shared business.

The company's unscrupulous lawyer will have discovered the advantages of this system, which allows him or her to double their income by charging legal fees to the client, plus a significant portion –around 50%– of the fee charged by the union leader which was invited to "collaborate" with the company. Clearly, the lawyer is always careful not to reveal this arrangement to the company, which would raise ethical questions. After all, our lawyer will think that it is thanks to his skills and useful relationships that the company can be relatively free from attacks by predatory unions.

As to the advantages to the so-called union leader, there are many. The CCPP system is no less that a modus vivendi which allows a leader to mingle with the owning class and overcome the stigma of being born a worker (or the son or grandson of a worker, as these union positions are often inherited, just as business are passed down generations). He may feel inclined to show off in ostentatious vehicles or maybe even invite the employer to his ranch during one of his large parties, and mix with the elite corporate lawyers –who are the most important operators within the

3. Bouzas Ortiz, José Alfonso and María Mercedes Gaitán Riveros, "Collective Bargaining Agreements for Protection," in Alfonso Bouzas, *Union Democracy*, México, Economic Research Institute/UNAM, UAM, AFL-CIO, FAT, 2001, pp. 52.

Conciliation and Arbitration Boards– or the occasional legislator, and of course the mayor who, from his or her government post, will continue to serve the union leader.

The labor authorities are also quite satisfied to have few strikes to contend with and to see contract negotiations stay within levels that keep local treasury officials happy, allowing them to claim that inflation, "the most harmful tax for the working class," is under control. All is kept under tight control so that salaries continue to decline as employers' earnings rise.

These same labor authorities will be inclined to support those unions and employers who stick to the rules of the game and to pressure others who stray from the norm, to the extent that the costs of their rebelliousness will always end up greater that the benefits they were seeking. The local Labor Boards are likely to declare strikes called by subversive unions illegal, not due to any reasons found in the federal labor law but for considerations the government finds more compelling, such as keeping an economic status quo that allows companies to "create the jobs the nation needs" (without improving their terrible quality), attract sorely-needed investment, and guarantee our competitiveness in the global economy.

The disadvantages, as has been said, are for the large masses of workers who are deprived the rights of freedom of association, collectively bargaining and to strike.

Over the long term however, the supposed advantages of protection contracts evaporate and the disadvantages grow because without genuine collective bargaining, worker salaries lose their acquisitive power and companies feel the effects of a weak internal market upon that does not allow them grow strong enough to compete internationally. The subsidies meted out by the government through their misnamed Social Development programs –which amount to mere handouts– increase the population's dependency while still inadequate at creating demand for goods and services.

2. Outline of the Federal Labor Law

What is the legal basis for the existence of CCPPs? The explanation may seen complex at first glance, but becomes simpler once one looks beyond the legislation's discursive language. However, it is not entirely clear if the system is a Machiavellian scheme with the specific aim of allowing owners and labor authorities to control the Mexican union environment while appearing to respect labor rights; or a more casual phenomenon, product of a few shameless but creative actors who used a deficient law to invert the natural order of things and hold the workforce accountable to the union leadership.

It is clear in the end is that CCPPs are an old tradition within our corporatist model of labor relations, as described by Graciela Bensusán, who holds that CCPPs are an essential element of the union regimen constructed during the 1920's. She reminds

us that towards the end of that decade the Regional Confederation of Mexican Workers (Confederación Regional Obrera Mexicana, or CROM) complained of "ghost unions" and "protection contracts."[4]

One should not lose sight of the fact our labor law is not the result of labor struggles, but rather the product of political leaders who sympathized with the working class but were not motivated to recognize its autonomy or its need to fight for its own cause. Improvements were granted as favors out of governmental paternalism, with the intention of being able to call upon those favors during political campaigns and at the voting booth.

At times, governments showed a marked distance from the owner class. This was especially true of presidents Luis Echeverría (1970-1976) and José López Portillo (1976-1982), but not even in these times was the concept of union autonomy promoted. These populist governments also tolerated corrupt union leaders, sheltered CCPPs, and repressed those who sought collective rights. Today, as we see governments openly bowing to employers' wishes, the hope that labor rights will be defended by the government is held by no more than a few dreamers.

A little of both things are to be found in the roots of CCPPs. On one hand, we have a corporatist model which has always viewed unions as a tool to mobilize votes and control the labor force and even –why not?– some employers, who were vulnerable to strikes from time to time, situation in which the government would intervene in favor of workers' rights and possibly even give economic support to the workers to help them carry on their struggle, at least in cases where an employer is reluctant to accept certain conditions, usually unrelated to labor conditions. On the hand, we have a neglected legal framework with significant loopholes, which at first seem to be simple technical requirements but have wound up being the State's best weapons in blocking independent unions' access to collective bargaining (or that of unions operating outside the corporatist model).

It is clear, then, that this model has existed for a long time, but also that it is continually growing and inversely, reducing the possibilities for Mexican workers to claim their collective rights. For those of us who entered the world of labor law in the 1970's, CCPPs were already an unconcealed reality. In our naïveté, they surprised us, but we learned to live with them as one more phenomenon in a complex world of labor relations. We have known honest and genuinely representative unions, which are uncomfortable for their employers and the government; we have worked with others who have attempted to stay in good graces with both sides, bargaining changes in a CBA behind closed doors, and then later discussing it theatrically at the table with committee members present until reaching the secretly-agreed upon agreement while still raising some additional improvements in working conditions. And we have also been asked to deal with "ghost" strike injunctions by unions who represent only the representatives themselves and

4. Bensusán, Graciela, "Institutional Determinants of Protection Contracts," in José Alfonso Bouzas Ortiz and Aleida Hernández Cervantes, presenters, *Collective Protection Contracts in Mexico, Report to the Regional InterAmerican Labor Organization (ORIT)*, 2nd printing, México, Fundación Friedrich Ebert and others, 2008, pp. 19 y 20.

who will settle only by obtaining a CCPP or by a "fee" to cease and desist in their strike threat.

Testament to the most toxic union practices, this reference to ghost or straw unions from a 1949 edition of Derecho Mexicano de Trabajo, by Mario de la Cueva: "the organization, apparently encompasses the forms and principals of a professional association, but at its core, is an organization created or protected by the employer to impede the laborers' free movement."[5] De la Cueva stated that the practice "constitutes an illicit act, as it is prohibited by Article 112, section III."[6]

This part of the Federal Labor Law of 1931 prohibits employers to force their employees "by coercion or any other means, to leave the union or group to which they belong…." The situation today is even clearer, as Sections IV and V of Article 133 of the current Federal Labor Law prohibits employers, "to affiliate or leave the union or any other group to which they belong…." as well as "intervene in any way with the internal functioning of the union."

We must underscore the illegality of CCPPs, since the lawyers who use them tend to allege that these practices are a perfectly legal construction under the Federal Labor Law, which is not true. It shows rather, as we have said, the simulations of legal action, and as is common in these cases, uses the appearance of legality to hide an action that is not just illegitimate, but illegal.

Protection contracts violate the freedom of association by forcing workers to belong to a particular union; violate workers' rights to collective bargaining by subjecting them to the employers will with a false CBA they did not negotiate; and also violate the right to strike, as these types of union, even when presenting a strike injunction do it only to cover appearances, not with any intention of executing it.

We cannot agree that the mere act of meeting a few legal formalities makes the simulation of a legal act legal. María Xelhuantzi tells us, for example, "Formally and legally the company complies with Mexican labor legislation, but only on paper."[7] However, as she also points out, it's all a simulation, including that there is rule of law, and a simulated right - we posit - cannot produce legality in any form. We agree with Mauricio Aguilera that:

Mexico is the only nation where employers choose the union with which they will sign a collective bargaining agreement and have it registered without fuss with the labor authorities. They are a fraud, because those who administer them get wealthy selling the rights of the workers […] They are corrupt because they are agreed upon by employers and simulated unions behind the backs of the workers […] they are illegal because they shred the internationally accepted principals of freedom of association…."[8]

Néstor de Buen also offers the opinion that CCPPs are illegal:

The employer's participation in the union's internal life presents itself

5. De la Cueva, Mario, *Mexican Labor Law, t. II*, México, Porrúa, 1949, p. 365.
6. *Ibídem.*
7. Xelhuantzi López, María, "What is a Protection Contract?" in José Alfonso Bouzas Ortiz and Aleida Hernández Cervantes, presenters, *Collective Protection Contracts in Mexico, Report to the Regional InterAmerican Labor Organization (ORIT)*, op. cit., p. 110.
8. Aguilera, Mauricio R., "Collective Bargaining Agreements for Employer Protection: the Dungeon of the Labor World in Mexico", in Inés González Nicolás, *40 years, 40 answers. Ideas for the Democratization of the World of Work*, México, Fundación Friedrich Ebert, 2009, p. 131.

in our nation, then, in illicit terms, but the ineffectiveness of the legislation has allowed a fecund development of collusive unionism. The solution is always found in the abuses and dishonesty, conduct which both false union leaders and employers enthusiastically embrace. While it is true that our union leaders, save a few heroic exceptions, enjoy the deserved reputation of bastard miscreants, the same description may be applied to our country's business class.…"[9]

Bensusán enunciates five institutional aspects which "make up the legal basis of corporatist arrangements and CCPPs."[10] We will summarize them here, as they give a precise frame of reference to use as we later describe the specific provisions of the LFT. They lay out the mechanisms which restrict collective autonomy, concretely: the need to register the union and its leaders; the arbitrary division of legal regimes in local and federal jurisdictions; the restrictive and discretionary use of union categories; the coercive powers of unions over employers and their members; the lack of transparency and reporting of finances to workers and the negligible participation they have in the internal management of the union; and the unions' lack of space for representational work inside the companies.

By what means can we define the great majority of collective bargaining agreements as Protection Contracts?[11]

Certainly, we will not find the answer in the Constitution of the United States of Mexico, although in Article 123 we do see the roots of corporativism, since many significant decisions are left in the hands of various tripartite bodies of an unspecified composition, such as determining minimum wage (section VI), the calculation of profit-sharing which the companies should grant their employees (section IX), the administration of the workers' housing fund (section XII) and, above all, the resolution of labor conflicts by public administration, a task turned over to the Conciliation and Arbitration Boards (Juntas de Conciliación y Arbitraje, or henceforth, Labor Boards) (section XX).

But this does not fully explain the existence and proliferation of CCPPs except that in most cases, the local Labor Boards carry out the administrative tasks of registering unions, their leaders and their CBAs, in addition to their jurisdictional functions at the state level. Without excusing their role, the truth is that the blame of CCPPs does not rest in administrative or jurisdictional authorities, but rather the rules discreetly scattered throughout the LFT which puts them at the disposition of the unions.

Let's look at the most important. First, what stands out is the monopoly a union holds over signing a collective bargaining agreement, which stems from the definition of a CBA in Article 386 of the LFT, "the agreement signed between one or various unions and one or various employers or one or various unions of employers, with the purpose of establishing the conditions in which work should be carried out at one or more companies or worksites." Article 387 confirms the monopoly by stating that if an employer hires workers who are

9. De Buen Lozano, Néstor, *Labor Law, t. II*, 22nd Ed., México, Porrúa, 2010, pp. 639 y 640.
10. Bensusán, Graciela, *op. cit.*, note 4, pp. 28-30
11. It is not the intention of this brief study to give a presentation of the statistics related to CCPP and their proliferation, but we can refer the reader to the detailed analysis on CBAs registered with Mexico City's Labor Board done by José Alfonso Bouzas, which support the claim that the great majority are, in reality, protection contracts. Ortiz, José Alfonso, coordinator, *Evaluation of Collective Bargaining in Mexico City*, México, Fundación Friedrich Ebert, 2009.

members of a union, "it will be required to sign, when requested, a collective bargaining agreement." A CBA, therefore, may not be signed by a coalition, commission, committee or any other organization of workers, only by a union of workers.

Secondly, we must consider that the LFT does not require unions to prove their representativeness of the workers; it is enough that a union sign a CBA and that one of the parties register it with the Labor Board, for the CBA to be considered in effect, according to Article 390.

While the LFT classifies unions of workers into categories: by trade, company-wide, industry-wide, by national industry and by "miscellaneous duties" (Article 360), in practice the most common are trade unions, company unions, and industrial unions, given that unions of national industry are simply a variation of the latter and "miscellaneous duties" (workers of different professions in a common municipality who join together because alone they do not meet the required minimum number of workers to form a trade union) are not important, if they exist at all.

It is specifically the industrial unions who lend themselves to this style of pretense to sign CBAs, since once they have obtained their legal registration, the union representative may sign a CBA with any company in that industry or sector. In theory, they must represent at least 20 workers from two or more companies to obtain the registration, and since the registry authorities are not required to verify the affiliation nor that affiliated workers are indeed current employees, as established in Article 364. So, it is not hard to see how the official registration, also called "toma de nota" is granted to this kind of union, nor is it strange that one person may appear as the General Secretary of 10 or more unions in multiple industries, from restaurants and private schools to chemical and pharmaceutical plants, not to mention the broad categories of retail stores and employment agencies.

As if opening a shoe catalog or spreading out Christmas cards, these unions unfold a long list of unions in every conceivable industry before the company lawyers, offering to meet the needs of any company, whether local or national. As mentioned, Article 387 of the LFT forces employers who hire workers who are previously affiliated to a union to sign a CBA with this union. The second paragraph adds that if the employer refuses, the union may strike. In other words, a CBA may be signed "in good faith," when both parties agree to the terms without a strike injunction, or "in bad faith," due to a strike injunction or actual strike.

Now, the process for a union to seek a strike injunction and eventually carry it out does not require that the union demonstrate it represents all the workers at the worksite. Before a strike begins, the only necessary process is strictly administrative (Article 920 and following) and the labor board may not prejudge the existence of the union or the causes invoked when requesting the injunction.

It's possible, then, for an industrial union to file for a strike injunction to demand a CBA,

without ever knowing the workers it purports to represent. Since the Labor Boards are not allowed to "make declarations which prejudge the existence or nonexistence of a strike" (Article 926), it must look for ways to avoid a strike, which in these circumstances may not be found unless a collective bargaining agreement is signed or the union desists.

The norm in this situation is that the company argues that the union does not represent its workers and the union leader responds that it represents all, or a majority, but they have instructed the workers not to formally affiliate so as to avoid repercussions from the employer. It is not uncommon, on the other hand, that the same union is actually representative of the workers in other companies, and has conducted authentic collective bargaining resulting in reasonable working conditions for those members.

Frequently, the threat of a strike is accompanied by the leader announcing the day and hour in which the union will bring in enough people to close the worksite and force the employees to suspend labors. It is not unusual for this type of threat is to be carried out and that the police step aside, alleging that as a labor conflict it should be settled by the Labor Boards.

And indeed, the employer can ask the Labor Board to declare the strike illegal within the first 72 hours after a strike is initiated (Article 929), under the argument that the stoppage does not have the support of a majority of the workers (Article 459, section I and Article 451, section II), which cannot be questioned "before the cessation of labors."

The main problem is, while the employer can ask for a strike to be declared illegal, this will have already caused damage to the company. Moreover, the resolution will not be reached expeditiously, as the Labor Boards must carry follow a procedure (Article 930) which includes convening both parties to a hearing within five days of the request; since the employer has claimed that the strike is illegal because it does not have majority support among the workforce, this will need to be proven via a *"recuento"* (or a vote) to establish how many are in favor and how many against. While the Labor Boards should carry this out as quickly as possible, the LFT does not specify a timeframe. After the vote, a new hearing will take place to offer and hear objections and so on, so when the issue is finally resolved, the damage to the company will be extensive, if not irreparable.

Of course, it is possible the union does in fact represent the majority of the workforce and that the injunction and strike are perfectly legal. The main problem for the employer is that it will not know if the workers really support the leader, though of course this concern is lessened if there is good communication with them. The extortion will reveal itself when the union leader sets a price to ending the injunction, but that does not always mean the workers would not support the union if the strike is carried out. The mere act of making the economic demand implies the leader does not represent anyone or

not the majority, but it is not a reliable signal since occasionally the injunction is preceded with an effort to rally support from the workers and it is hard measure the degree of such support in this context. The employer, therefore, finds himself in a dilemma, deciding between giving into the extortion and avoiding a work stoppage or "rolling the dice," in other words, betting that the strike never materializes or that it may be quickly declared illegal. Most often, employers choose the first.

Unsurprisingly, sinister union leaders have various modus operandi. Some do due diligence, sending trusted infiltrators in to work for the company and from the inside convince the workers to join the union. That way, when the strike injunction is filed in order to win a CBA, if the union does not have a full majority it will at least count on a solid core of supporters. If the infiltrators do their job well, they will co-opt the most respected workers to recruit others. One would hope this would lead to a real collective bargaining process and a legitimate CBA. But all too often, the owners of the union business content themselves with a high fee for desisting and have no qualms about abandoning the workers who believed in them. In the end, the choice is between a juicy profit to be made in the short term or a more modest, though lasting, one.

Other false leaders don't even concern themselves with conversations with workers and roam the streets in search of low-rent but plentiful deals. They file strike injunctions against numerous companies, after learning nothing more than the name, industry and location of the enterprise. At times these injunctions don't work, for example, when the companies already have a CBA in place and the Labor Boards throw out their claim. Otherwise, in the hearing the union leader then invites the company to sign a CBA, which includes a reasonable fee for the union (really for its owner) –perhaps one or two times the monthly minimum wage– plus an additional quantity to cover the "expenses of the injunction." The only alternative for the employer is to offer a larger sum to make the union stand down, and then immediately find a similar union leader –which the company lawyer has surely recommended– and sign a CBA similar to that proposed by the first, probably securing additional business for the lawyer.

All of these circumstances make the best argument an employer can give to justify the use of protection contracts, including when they are established before the hiring of the first worker, though that is when they truly become complicit in the system. They complain of corrupt union leaders but they also feed into a corrupt system. Clearly, they are not blind to what is happening, but are looking out for themselves.

What happens –we should ask ourselves– when the workers realize they have been fooled? The LFT contains a solution: begin legal proceedings so that a genuinely representative union wins "titularidad" (literally "ownership," used here to reflect that it is the legitimate, legally-recognized union that may bargain the CBA for a worksite) and displace the false union. It is a complicated process which is resolved via

a vote (*recuento*) between unions, among the workers. Frequently, under these circumstances, workers who try to exercise their right of freedom of association are fired or suffer reprisals, on behalf of the employer, in support of the old leader. Recuento elections are often violent and expose the Labor Boards' bias. It is not rare to see a third union enter the proceedings, claiming majority support of the workers but with the real agenda of slowing and confusing the process, buying time for the corrupt union to resolve the matter through a mixture of firings and bribes, often time successful.

Recently, recognizing a loophole in the federal labor law, the Mexican Supreme Court established legal precedence that recuento elections much be carried out via a free, direct and secret ballot (2a./J. 150/2008), since what had previously been common was that the Labor Boards organized open, public voting procedures, often asking workers to raise their hands in public, in front of company representatives, and registering every individual vote, resulting in fierce revenge from either the employer or the winning union. The Court's ruling is an important advance, though not nearly enough to completely solve the problem.

3. An Outline of Solutions as a Conclusion

The preceding diagnostic leads us to propose modifications of the law to suppress the contemptible practice of CCPPs, but let us not forget that they deal with only one facet of an entire model of labor relations which is nearly a century old, if we consider the 1917 Constitution or only slightly less if we count back from the 1931 Federal Labor Law which is little changed since the 1970's, with respect to what we are discussing.

We must begin by ensuring freedom and autonomy for unions, eliminating the need for a "toma de nota" (legal acknowledgment) and creating a simple registration process like for any other partnership or association. To this effect, the best solution might be converting unions into asociaciones civiles (a civil society or non-profit organization).

Simultaneously, we should encourage the democracy and transparency of unions, including financial reporting to its members and straightforward public information mechanisms and hold leaders accountable. This will entail legal reforms as well as an intensive educational campaign about the rights of union members and the responsibilities of union leaders.

We must return workers' collective bargaining rights, which can be done through unions, but also by worker coalitions or worksite committees, should the workers so choose. We should analyze the varied formulas that other nations have adopted to determine whether an organization is sufficiently representative (not necessarily the most representative) to carry out collective bargaining.

It is necessary to promote collective bargaining by industrial sector on a national

scale, as this is the model least likely to be corrupted by employer control of the unions, though without pre-empting the ability to bargaining locally or by worksite, within limits, over specific conditions of the national CBA. Presumably, the scarce use of the contract/law contemplated in the LFT is not due to its flaws –through there are improvements to be made– but to the conscious decision of successive national administrations to avoid its use and therefore prevent empowering national industrial unions.

We should rigorously combat the simulation and superficialization of legal processes in all aspects of labor relations, but especially in collective bargaining agreements, monitoring that unions be genuinely representative and that they fulfill their purpose –seeking and defending the best labor conditions possible– which should lead to a dynamic and participative collective bargaining process. This will require that CBAs and their content be made public, establishing a system notifying when contracts expire and should be renegotiated, and halt the automatic extension of CBAs, something which has facilitated the long life of many CCPPs. Reviewing the work should play a fundamental role in this effort.

However, these means should not become a new mechanism to control unions, as could be the case in some other existing LFT reform initiatives which would require unions to share member lists, exposing their members to reprisals from employers. Similarly, another unacceptable and frankly ridiculous proposal that is circulating, is to shelter companies that have been sued in a dispute between two or more unions (i.e., over titularidad) so they may not be sued again for one year. This proposal would simply create new business between false union leaders, their associates, and their lawyers to begin suing to be the owner union each time a CBA is set to be renegotiated and thereby prolonging the period of employer protection for another year, over and over, for centuries.

Finally, without losing sight of the fact that this is merely the outline of a solution, we need to do away with the Labor Boards, whose worker and employer representatives are frequently the most interested parties in defending the CCPPs established by their own colleagues.

Bibliography

Aguilera, Mauricio R., "Collective Bargaining Agreements for Employer Protection: The Dungeon of the Labor World in Mexico", in Inés González Nicolás, 40 years, 40 answers. Ideas for the Democratization of the World of Work, México, Fundación Friedrich Ebert, 2009, pp. 131-135.

Bensusán, Graciela, "Institutional Determinants of Protection Contracts," in José Alfonso Bouzas Ortiz and Aleida Hernández Cervantes, presenters, Collective Protection Contracts in Mexico, Report to the Regional Interamerican Labor Organization (ORIT), 2nd printing, México, Fundación Friedrich Ebert and others, 2008, pp. 11-48.

Bouzas Ortiz, José Alfonso, coordinator, Evaluation of Collective Bargaining in Mexico City, México, Fundación Friedrich Ebert, 2009.

Bouzas Ortiz, José Alfonso and María Mercedes Gaitán Riveros, "Collective Bargaining Agreements for Protection," in Alfonso Bouzas, Union Democracy, México, Economic Research Institute/UNAM, UAM, AFL-CIO, FAT, 2001, pp. 49-66.

De Buen Lozano, Néstor, Labor Law, t. II, 22nd Ed., México, Porrúa, 2010.

De la Cueva, Mario, Mexican Labor Law, t. II, México, Porrúa, 1949.

International Labor Organization, 359th Report of the Committee for Freedom of Association, 310th Meeting, Geneva, March 2011.

Xelhuantzi López, María, "What is a Protection Contract?" in José Alfonso Bouzas Ortiz and Aleida Hernández Cervantes, presenters, Collective Protection Contracts in Mexico, Report to the Regional InterAmerican Labor Organization (ORIT), 2nd printing, México, Fundación Friedrich Ebert and others, 2008, pp. 97-120.

FRIEDRICH EBERT STIFTUNG

Yautepec no. 55, col. Condesa, 06140 México, D.F.
Tel +52 (55) 5553 5302, Fax +52 (55) 5254 1554
www.fesmex.org

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Carlos de Buen Unna

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