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Totalization with Mexico: A Path to Immigration Reform

Rajeeve Thakur

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Totalization with Mexico: A Path to Immigration Reform

Rajeeve Thakur*

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Introduction

Maintaining a reasonable standard of living after retirement is an important concern. With the increased mobility of labor, more people are working in more than one country throughout their career.¹ Many workers have undoubtedly benefited from increased opportunities made possible by having access to different employment markets around the world. These increased opportunities have also created the possibility of double social security taxation and impediments to social security benefit entitlement.² Recognizing the issue of benefits coordination for workers that split their career between two countries, many countries have entered into agreements allowing such workers to "totalize" their

1. Sophie Nonnenmacher, *International Labour Mobility in the Evolving Global Labour Market*, in *WORLD MIGRATION* 33 (2008) ("[T]rade liberalization is generally said to increase outward labour migration in the short term . . .").

2. See *infra* Part I.C.1 (discussing the purposes of social security taxation agreements, including reducing the burden of double taxation).

benefits.³ The coordination of benefits is not as easy as it sounds. Countries may face significant challenges when it comes to coordination, as benefits contributions, entitlement, resources and even philosophies differ.

The United States has not yet concluded a Social Security Totalization Agreement (SSTA) with Mexico.⁴ Although entering into an SSTA with Mexico presents unique challenges, these challenges are not insurmountable. With the appropriate responses, the impediments to reaching a U.S.-Mexico SSTA can be overcome and both the United States and Mexico can derive substantial benefit from such an agreement.

Part I of this Note will give an overview of the United States Social Security system, then examine Mexico's current social security framework. It will also provide a general overview of social security taxation agreements and the policy grounds behind creating such agreements.

Part II of this Note will discuss commonly cited potential negative consequences of entering into an SSTA with Mexico. It suggests those concerns can be addressed prior to entering into such an agreement. Part II will examine potential reforms to existing social security laws that could solve the problem of benefits being provided to individuals for the time they spent working without authorization. It also suggests that the prospect of a totalization agreement with Mexico may be used to incentivize improvements in the Mexican social security system. Possible issues with data verification systems that can lead to erroneous benefit payments can be combated by conditioning an SSTA on strengthening Mexico's data verification systems and increased independent verification by U.S. social security officials.

Part III will then address and offer potential solutions to address the major issues that have prevented the conclusion of an SSTA with Mexico and permit net gains to be realized on both sides of the border. A U.S.-Mexico SSTA will motivate existing illegal workers to attain legal status. It will also promote legal immigration to the United States from Mexico, which will benefit the U.S. social security system. United States workers that spend part of their career in Mexico may also benefit

3. See *U.S. International Social Security Agreements*, *infra* note 48 and accompanying text (listing the countries that have a Social Security Totalization Agreement (SSTA) with the United States).

4. See *id.* (noting that Mexico is not on that list).

from having their contributions "totalized." Additionally, a U.S.-Mexico totalization agreement will strengthen relations with Mexico and promote the most favoured nations principle, the national treatment principle and the transparency principle, which are all embodied in the North American Free Trade Agreement (NAFTA).⁵ An SSTA will also remove the inducement on Mexican workers to remain in the United States until their retirements benefits vest. The United States will also realize economic benefits by virtue of a U.S.-Mexico SSTA.

Finally, Part IV concludes by suggesting that a totalization agreement will lead to a more equitable result than the result under the current regime, because there will be an increased likelihood that a Mexican worker that contributes to the U.S. social security system will receive a return on his or her contribution.

I. Background

A. The U.S. Social Security System

1. Overview

Social security benefits include Title II benefits, Supplemental Security Income (SSI), and Medicare benefits.⁶ Title II benefits consist of retirement benefits—the focus of this Note—disability benefits, and derivative and survivor benefits.⁷ Social security is paid out of a trust fund on the books of the Treasury called the "Federal Old-Age and Survivors Insurance Fund" (the Fund).⁸ The Fund consists of securities held by the Secretary of the Treasury.⁹ One of the primary objectives of

5. See Preamble to NAFTA, NAFTA SECRETARIAT SECRÉTARIAT DE L'ALÉNA, SECRETARIADO DEL TLCAN, <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpi ID=120> (last visited Jan. 3, 2011) (describing the principles and goals embodied in NAFTA) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

6. See *The Official U.S. Government Site for People with Medicare*, MEDICARE, <http://www.medicare.gov/> (last visited Jan. 3, 2011) (explaining various aspects of Medicare) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also *A Glossary of Social Security Terms*, SOC. SEC. ADMIN., <http://www.ssa.gov/glossary.htm#S> (last visited Mar. 8, 2010) (defining Supplemental Security Income and Title II benefits) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. See 42 U.S.C.A. § 401 (West 2004) (explaining the outline of the trust fund process for Federal Old-Age, Survivors, and Disability Insurance Benefits).

8. 42 U.S.C.A. § 401(a) (West 2004).

9. *Id.*

the Fund is to help provide for the material needs of the elderly.¹⁰ It is administered by the Social Security Administration (SSA), which is an independent executive agency.¹¹

2. Funding

Social security is primarily funded by the payroll tax FICA (Federal Insurance Contributions Act).¹² The tax is collected from employers, employees, and the self-employed.¹³ The tax rate on wages earned in 1990 or thereafter is 6.2%.¹⁴ The basic idea is that contributions will fund the program's current payments and any excess of contributions over payments, to the extent they exist, will be held in reserve.¹⁵ This system will continue to function as long as the contributions coming in are equal to or greater than the payments going out. If, however, contributions are consistently below outgoing payments, the system is not sustainable. Unfortunately, long-term projections reveal "[a]nnual cost will exceed tax income starting in 2017, at which time the annual gap will be covered with cash from redemptions of special obligations of the Treasury that make up the trust fund assets until these assets are exhausted in 2041."¹⁶ The primary reasons for the social security system's limited viability are increases in life expectancy, low fertility rates, and the retirement of the baby-boomers.¹⁷

10. See SOC. SEC. ADMIN., SOCIAL SECURITY HANDBOOK 100.1 (Apr. 18, 2006) [hereinafter HANDBOOK], available at http://www.ssa.gov/OP_Home/handbook/handbook.01/handbook-0100.html (explaining the purposes of social security) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

11. See 42 U.S.C.A. § 901(a) (West 1994) (establishing the SSA as an independent agency).

12. 42 U.S.C.A. § 401 (West 2004).

13. HANDBOOK, *supra* note 10, at 136.1.

14. 26 U.S.C.A. § 3101(a) (West 2004).

15. See HANDBOOK, *supra* note 10, at 141.1 (describing the trust funds available for benefits).

16. THE BD. OF TRS., FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, THE 2008 ANNUAL REPORT OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS II(A) (2008) [hereinafter 2008 ANNUAL REPORT], <http://www.socialsecurity.gov/OACT/TR/TR08/trTOC.html> (last visited on April 22, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

17. See *id.* (discussing the long range financial status of the U.S. social security system).

3. Entitlement

An individual is entitled to old-age insurance benefits if he/she "(1) is a fully insured individual, (2) has attained age 62, and (3) has filed application for old-age insurance benefits" ¹⁸ Under 42 U.S.C. § 414 a "fully insured individual" is any individual who has had:

- [N]ot less than: (1) one quarter coverage (whenever acquired) for each year after 1950 (or, if later, the year he attained age 21) and before the year in which he died or (if earlier) the year in which he attained age 62, except that in no case shall an individual be a fully insured individual unless he has at least 6 quarters of coverage; or
- (2) 40 quarters of coverage; or
- (3) in the case of an individual who died before 1951, 6 quarters of coverage ¹⁹

An individual that is not a U.S. citizen or national must also meet other criteria in order to qualify as a "fully insured individual" and thereby, for social security benefits. ²⁰

B. The Mexican Social Security System

1. Overview

There have been significant changes in the Mexican social security system over the last two decades. The Instituto Mexicano del Seguro Social, or the Mexican Institute of Social Security (IMSS), was founded in 1944. ²¹ It manages social security programs, including old-age, disability, and life insurance. ²² After a failed attempt at privatization reform in 1992, the system was successfully reformed and privatized in 1997. ²³ Under the

18. 42 U.S.C.A. § 402(a) (West 2004).

19. 42 U.S.C.A. § 414(a) (West 2004).

20. See 42 U.S.C.A. § 414(c) (West 2004) (listing other requirements); see also *supra* Part II.A.1 (discussing how illegal immigrants that later obtain legal status may be able to receive social security benefits for the time they worked illegally).

21. See CONG. BUDGET OFFICE, SOCIAL SECURITY PRIVATIZATION: EXPERIENCES ABROAD 59 (1999) [hereinafter EXPERIENCES ABROAD], available at <http://www.cbo.gov/ftpdocs/10xx/doc1065/ssabroad.pdf> (examining a select portion of countries with social security systems different from America's system, and analyzing their pros and cons).

22. See *id.* (discussing the history of Mexico's social security system and its transition from a public system to a private system).

23. See *id.* (discussing Mexico's current privatized social security system).

current system, workers choose from a number of private investment firms to administer contributions.²⁴ The new system is regulated by the Comisión Nacional del Sistema de Ahorro para el Retiro, or the National Commission for the Pension System (CONSAR).²⁵ The CONSAR sets and enforces standards relating to the Mexican social security system.²⁶ However, many workers in Mexico are employed in the informal sector; they do not make contributions to the system and do not receive benefits.²⁷ Approximately fifty-eight percent of the population lacks social security coverage.²⁸

2. Funding

From its inception, the Mexican social security system has been funded by contributions from workers, employers, and the government.²⁹ The worker contributes 1.125% of earnings to old age benefits and 0.625% for disability and survivor benefits.³⁰ The employer contributes 5.15% of earnings to old age benefits and 1.75% to disability and survivor benefits.³¹ The government contributes 0.225% of the worker's salary to social insurance old age benefits and 0.125% to disability and survivor benefits.³² The future of the system largely depends on the rate of return on private contributions.³³ Workers that made contributions under the old state-run

24. *Id.* at 64.

25. *Id.* at 68–69; *see also* Home Page to CONSAR, COMISIÓN NACIONAL DEL SISTEMA DE AHORRO PARA EL RETIRO, <http://www.consar.gob.mx/ingles/ingles.shtml> (last visited Mar. 8, 2010) (explaining, in English, how the Mexican system of social security works) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

26. EXPERIENCES ABROAD, *supra* note 21, at 64.

27. *See* Gustavo Merino, Deputy Minister of Soc. & Human Dev., Mex., Social Policy and Job Creation in Mexico, Policy Forum: Creating More and Better Jobs, OCDE-World Bank 4 (May 7, 2008) (unpublished presentation), *available at* www.oecd.org/dataoecd/19/12/40600614.ppt (last visited Mar. 8, 2010) (discussing the implications of insufficient job creation in the formal Mexican labor market) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

28. *Id.*

29. EXPERIENCES ABROAD, *supra* note 21, at 63.

30. *See* U.S. SOC. SEC. ADMIN. OFFICE OF RET. & DISABILITY POL'Y, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: THE AMERICAS, MEXICO (2007) [hereinafter PROGRAMS THROUGHOUT THE WORLD], www.ssa.gov/policy/docs/prog/desc/ssptw/2006-2007/americas/mexico.pdf (examining the Mexican social security system in-depth).

31. *Id.*

32. *Id.*

33. *See* EXPERIENCES ABROAD, *supra* note 21, at 71 (discussing the possible future costs of the privatization of the Mexican Social Security System).

system may opt to receive benefits under that system, which entitles a worker to a percentage of his nominal wage for the last five years.³⁴ A worker will chose to opt for the old system if the return on his or her current pension is lower than the amount payable under the old system.³⁵ If private investments made by the new system consistently yield low returns, withdrawals will be higher than contributions, causing depletion of the fund's assets.³⁶ This is more of a transitory cost because once individuals that made contributions under the old system have all retired, retirees that only paid into the private systems will only be entitled to benefits under that system.³⁷

3. Entitlement

The age of retirement is sixty-five and the vesting period is 1,250 weeks (approximately twenty-four years).³⁸ The 1,250 weeks vesting period entitles the worker to a guaranteed minimum pension, if the worker's savings are less than the guaranteed minimum pension.³⁹ The guaranteed minimum pension is equal to Mexico City's minimum wage.⁴⁰ If, however, a worker reaches sixty-five, but has not met the vesting requirements, he may withdraw the total balance as a lump sum.⁴¹ Such a withdrawal disqualifies the worker from receipt of the guaranteed minimum pension.⁴² Also, as mentioned above, workers that contributed to the old system may opt to receive benefits under that system.⁴³ For most workers, the system will yield benefits that are only equal to their contributions plus interest.⁴⁴

34. *See id.* at 67–68 (discussing transitory costs of Mexico going from public to a private social security).

35. *See id.* at 65 (discussing the choices available to workers, based on their accumulated balances in individual accounts).

36. *Id.* at 71.

37. *See id.* at 66 (discussing transitory costs involved in Mexico transitioning from a public to a private social security).

38. *See* EXPERIENCES ABROAD, *supra* note 22, at 38 (dividing 1,250 weeks by 52 weeks in a year, which equals 24.0385).

39. *Id.* at 65–66.

40. *See id.* (discussing withdrawal of benefits under the post-1997 Mexican Social Security System).

41. *Id.*

42. *Id.*

43. EXPERIENCES ABROAD, *supra* note 22, at 65.

44. *See* Petition from Daniel J. O'Connell et al., Chairman, The Senior Citizens League, to The Presidential Transition Team, In re: Social Security and Immigration

C. Totalization Agreements

1. Purpose

Workers that work in a foreign country may be subject to social security taxes in that foreign country. This leads to two possible problems. Firstly, the worker may be subject to social security tax in both the country they are from and the country they are currently working in, leading to a "double-tax."⁴⁵ Secondly, if the worker pays social security taxes in the foreign country, but leaves that country without meeting the vesting requirements of its social security system, they will have paid into a system that they derive no benefit from. In some cases, the worker may not even know where he plans on retiring, so he may end up paying into the social security systems of two countries, but fail to meet the vesting requirements in either country. In a global economy with increased mobility of labor, the frequency of these situations has increased.⁴⁶

In order to remedy some of these issues, many countries have entered into Social Security Tax Agreements (SSTAs).⁴⁷ The United States currently has totalization agreements with twenty-four countries.⁴⁸ These agreements have three purposes. Firstly, they are intended to eliminate dual

Reform Measures, TSCL Petition in Support of Social Security Protection, and in Opposition to Bush Administration's United States-Mexico Totalization Agreement 14 (Dec. 17, 2008) (discussing some of the differences between the U.S. and Mexican systems); *see also* PROGRAMS THROUGHOUT THE WORLD, *supra* note 30 (describing entitlement benefits that pay into the Mexican Social Security System).

45. *See, e.g.*, Gordon Klepper, *Restricted Stock Units: The Practical Alternative in Equity Compensation for the U.S. Multinational Employer*, 13 INT'L HUM. RESOURCES J. 2 (2004) (discussing the very real potential for mobile employees to face a double-tax situation).

46. *See, e.g.*, OECD OBSERVER, OECD IN FIGURES 2009 (OECD et al. eds., 2009), available at browse.oecdbookshop.org/oecd/pdfs/browseit/0109061E.pdf (including statistics on immigrant labor by country).

47. *See Social Security Treaties Avoiding Dual Social Security Taxation*, FOREIGNBORN, http://www.foreignborn.com/self-help/social_sec/8treaties.htm (last visited Mar. 9, 2010) (explaining the concept of dual taxation for social security purposes and the agreements the United States has with other countries to mitigate that issue) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

48. *See U.S. International Social Security Agreements*, SOC. SEC. ADMIN., http://www.ssa.gov/international/agreements_overview.html (last visited Aug. 11, 2009), (listing the countries the United States currently has SSTAs with as Italy, Germany, Switzerland, Belgium, Norway, Canada, United Kingdom, Sweden, Spain, France, Portugal, the Netherlands, Austria, Finland, Ireland, Luxembourg, Greece, South Korea, Republic of Chile, Australia, Japan, Denmark, the Czech Republic, and Poland) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

social security coverage and taxation.⁴⁹ Secondly, SSTAs are supposed to prevent the preclusion of benefits to workers that have divided their careers between two countries.⁵⁰ Finally, SSTAs promote the proliferation of "benefit portability."⁵¹

Policy reasons for SSTAs include equity and fluidity in the international labor market.⁵² Totalization agreements provide a more equitable outcome because they increase the likelihood that an individual will benefit from the contributions he makes to a social security system.⁵³ SSTAs also promote fluidity in the international labor market because fewer workers seeking to work in a different country will be faced with the extra impediment of the prospect of double social security taxes and/or a negative impact on social security entitlement.

2. How Totalization Agreements Work

a. Totalization Agreements Are Executive Agreements, Distinct from Treaties

Treaties are international agreements, which, under the U.S. Constitution, must be signed by the President and ratified by the advice and consent of two-thirds of the Senate.⁵⁴ Under the Constitution, this is not the only means by which the President can bind the United States internationally. The President may also bind the United States by an executive agreement.⁵⁵ Executive agreements require only majority

49. See HANDBOOK, *supra* note 17, at 107.3, available at <http://www.ssa.gov/OPHome/handbook/handbook.01/handbook-0107.html> (discussing the purposes of SSTAs).

50. *Id.*

51. *Id.*

52. See, e.g., Eds. of the HR Series: Policies & Practices, *Compensating Expatriates and Third-Country Nationals*, 14 INT'L HUM. RESOURCES J. 5 (2005) (discussing some of the general principles driving the creation of agreements like an SSTA).

53. See *U.S. International Social Security Agreements*, *supra* note 48 (providing as one reason for an SSTA: "the agreements help fill gaps in benefit protection for workers who have divided their careers between the United States and another country") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

54. See U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

55. See FOREIGN AFFAIRS MANUAL, CHAPTER 700 TREATIES AND OTHER INTERNATIONAL AGREEMENTS 721.2(b) (1985), available at <http://www.state.gov/g/oes/rls/rpts/175/1319.htm> (describing the three ways, other than a two-thirds Senate vote, by which international agreements may be made).

approval of Congress, rather than a super majority of the Senate, as required by treaties.⁵⁶ The President's constitutional authority to conclude an executive agreement is derived from other treaties, legislation, and that underlying constitutional authority.⁵⁷ Congress has pre-authorized the President's authority to enter into totalization agreements pursuant to the Social Security Act:

[The] President is authorized to enter into agreements establishing totalization arrangements between the social security system established by this title and the social security system of any foreign country, for the purposes of establishing entitlement to and the amount of old-age, survivors, disability, or derivative benefits based on a combination of an individual's periods of coverage under the social security system established by this title and the social security system of such foreign country.⁵⁸

An SSTA, like a treaty, is not binding until its conditions are satisfied and both contracting parties ratify it.⁵⁹

b. How They Address Dual Contributions

Totalization agreements eliminate dual contributions by exempting a worker from having to contribute to one of the two systems to which they would otherwise have to contribute.⁶⁰ Collection authority of contributions is based on source, meaning that the country where the worker is employed has the primary right to tax.⁶¹ So, as a default rule, a resident of a foreign country who is working in the United States would contribute to the U.S. social security system and a U.S. resident who is working in a foreign country would contribute to that country's social security system.⁶²

SSTAs do, however, provide exceptions to the source rule. One such exception is the temporary worker exception.⁶³ Under this exception, a

56. *Id.*

57. *Id.*

58. 42 U.S.C.A. § 433(a) (West 1994).

59. See Allison Christians, *Taxing the Global Worker: Three Spheres of International Social Security Coordination*, 26 VA. TAX REV. 81, 86 (2006) (discussing the distinctions between treaties and executive agreements).

60. See *id.* at 94 (discussing contributions to social security when an individual is working in a foreign country that has an SSTA with his home country).

61. *Id.*

62. *Id.* at 96.

63. 20 C.F.R. § 404.1913(b)(4) (2006)

worker who is working temporarily may be exempt from paying into the social security system of the host country for up to five years.⁶⁴ Absence of such an exception would mean that a worker working only temporarily in the host country would still be subject to social security contributions in the host country. The temporary worker exception illustrates that without an SSTA in place, workers may be subject to social security contributions, even if they are only working temporarily in the host country and have no desire to remain within the country after retirement. This has been a source of controversy for many temporary workers in the United States.⁶⁵

c. Avoidance of Situations in Which Workers Do Not Get Benefits Because They Have Divided Their Career Between Two Countries

SSTAs generally allow workers to combine periods in which they made contributions to more than one country, for purposes of vesting.⁶⁶ Under a totalization agreement, such workers may qualify for partial United States or foreign benefits based on combined work credits from both countries.⁶⁷ The individual must have at least six quarters of coverage under the U.S. social security system and some coverage under the foreign system.⁶⁸ If the individual seeks retirement benefits in the United States, credit accumulated in a foreign country is not directly transferred to the U.S. system.⁶⁹ The credits, however, will be

64. *Id.*; see also Christians, *supra* note 59, at 96 (discussing the "temporary" exception).

65. For example, there is no totalization agreement between India and the United States—Indian workers that work in the United States temporarily (maximum of six years) on H1B Visas are subject to social security taxes in the United States even though they will not meet the vesting requirement and do not gain any benefit from the contributions they make. See *Indo-Asian News Serv., India May Get Social Security Money on Return from U.S.*, SILICONINDIA, Dec. 4, 2006, http://www.siliconindia.com/shownews/Indians_may_get_social_security_money_on_return_from_US-nid-34176.html (considering the possibility of refunding social security payments to Indians temporarily in the United States) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also N. Vidyasagar, *India to Push for 'Totalisation' Pact with U.S.*, TIMES OF INDIA, Aug. 10, 2001 (discussing the possibility of the United States and India entering into an SSTA).

66. See 42 U.S.C.A. § 433(c)(1)(A) (West 2008) (detailing the requirements necessary to allow workers to combine their periods of work for the purpose of social security).

67. See generally EXPERIENCES ABROAD, *supra* note 21 (examining a select portion of countries with social security systems different from the United States' system).

68. 42 U.S.C.A. § 433(c)(1)(A) (West 2008).

69. See Christians, *supra* note 59, at 104 ("Credits are not transferred from the foreign

used to meet the forty quarters required to receive coverage in the United States.⁷⁰ Consequently, the individual will only receive benefits for the time when income was earned and contributions were made in the United States.⁷¹

There is a common misconception that individuals are permitted to bring over credit from a foreign jurisdiction under an SSTA and receive benefits based on that credit here in the United States.⁷² However, foreign credit may only be used to meet the forty quarters vesting requirement for eligibility.⁷³ The sum of benefits received will be proportional to contributions made in the United States, not full benefits.⁷⁴ The foreign jurisdiction may also provide the individual benefits based on credit that the individual accumulated in the foreign jurisdiction.⁷⁵ Additionally, benefits are only combined if the individual would not otherwise be covered under either system.⁷⁶ Moreover, if an individual qualifies for full benefits in both countries, U.S. benefits may even be reduced by the amount of foreign benefits received.⁷⁷ This is significant because a totalization agreement may lead to reduced benefit payments to an individual who otherwise would qualify for full benefits in the United States.⁷⁸

country to the United States, but remain on record in the foreign country, where the worker may also receive a partial benefit.").

70. *Id.*

71. *Id.*

72. *See id.* at 103 (explaining that only under certain circumstances are foreign credits allowed to be transferred or combined, such as when an individual would not have enough credits to qualify for benefits under one system).

73. 42 U.S.C.A. § 433(c)(1)(A) (West 2008).

74. 42 U.S.C.A. § 433(c)(1)(C) (West 2008).

75. *See, e.g., Social Security Tax Information for Foreign Scholars, Workers, and Exchange Visitors*, UNIV. CORP. FOR ATMOSPHERIC RESEARCH, <http://www.fin.ucar.edu/hr/visitors/manual/taxinfo2.html> (last visited Mar. 14, 2010) ("That is, a foreign individual may be entitled to a foreign tax credit for the U.S. FICA tax under the income tax laws of his/her home country.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

76. *See generally* *Georgiou v. Apfel*, No. 99-1886, 2000 U.S. App. LEXIS 29118 (8th Cir. 2000) (holding that a retiree, because he qualified for benefits under the U.S. system, was not eligible to have his work credits from the United States and Greece combined).

77. *See* Christians, *supra* note 69, at 104 (citing *Vanlerberghe v. Apfel*, 82 F. Supp. 2d 1212, 1215 (D. Kan. 2000)) (discussing benefit eligibility and the combination of benefits).

78. *Id.*

II. U.S.-Mexico SSTA: Unique Challenges and Possible Solutions

SSTAs serve a worthwhile, if not essential, purpose in today's global economy.⁷⁹ But they are not free from problems. Because an SSTA's application is largely determined by the existing social security and immigration laws that make up the framework of totalization agreements, gaps in those laws can lead to abuse.⁸⁰ It is without question that the proximity and immigration patterns of the contracting parties present unique challenges. In the case of a possible SSTA between the United States and Mexico, for example, illegal immigration from Mexico to the United States, lack of coverage of Mexican workers under the Mexican social security system, and ensuring the sufficiency of document verification systems are significant obstacles.⁸¹ Reforming general social security entitlement, SSTA law, and prudent bargaining can overcome these obstacles.⁸²

A. Potentially Leaving the System Open to Having Now-Legal Immigrants More Easily Claim Benefits for Time When They Were Working in the United States Without Authorization

1. The Problem

The number of unauthorized Mexican workers within the United States has caused many to be apprehensive about the United States entering into an SSTA with Mexico.⁸³ Estimating the illegal immigrant population in the United States is difficult. Nonetheless, many private interest groups

79. See *supra* Part I.C.1 (discussing the purposes of totalization agreements).

80. See *supra* Part I.A.1 (outlining the legislative framework from which totalization agreements draw their basic structure).

81. See U.S. GEN. ACCT. OFFICE, PROPOSED TOTALIZATION AGREEMENT WITH MEXICO PRESENTS UNIQUE CHALLENGES 10 (Sept. 2003) [hereinafter *UNIQUE CHALLENGES*] (listing some of the issues faced in the case of an SSTA between the United States and Mexico).

82. See *infra*, Part II.A.2 (discussing in more detail these possible solutions).

83. See *UNIQUE CHALLENGES*, *supra* note 81 (discussing the uncertainty of the cost of an SSTA with Mexico because of the large population of undocumented workers in the United States); see also Trea Senior Citizens League, *To the United States Congress: A Petition for Redress of Grievances Concerning a Proposed Social Security Totalization Agreement Between the United States and Mexico*, THE SENIOR CITIZENS LEAGUE, Jan. 5, 2006 [hereinafter *Petition*], <http://www.tscl.org/NewContent/102618.asp> (voicing some of the concerns felt by petitioners in relation to a possible SSTA with Mexico) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

and governmental agencies have attempted to estimate the number of unauthorized immigrants within the United States⁸⁴ The estimates clearly indicate that the numbers are increasing over the long run.⁸⁵ Recent studies specify that approximately 11.8 million illegal immigrants are living in the United States.⁸⁶ More than half of illegal immigrants come from neighbouring Mexico,⁸⁷ making totalization with Mexico especially controversial.

A common misconception is that SSTAs change existing immigration law and bestow social security benefits on illegal immigrants.⁸⁸ Totalization agreements deal with international benefit contribution, which is a narrow subset of social security law. They do not deal with immigration law.⁸⁹ Although there may be indirect consequences to illegal immigrants as a result of SSTAs, these agreements do not directly change the rights of illegal immigrants.⁹⁰

Under current social security law, "no monthly [social security] benefit . . . shall be payable to any alien in the United States for any month during which such alien is not lawfully present in the United States . . ."⁹¹ Similarly, under current immigration law, "an alien who is not a qualified alien . . . is not eligible for any Federal public benefit."⁹² This includes

84. See Michael Hoefler, Nancy Rythina, & Bryan C. Baker, U.S. DEP'T OF HOMELAND SEC., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007*, POPULATION ESTIMATES DHS (Sept. 2008) (stating that "an estimated 11.8 million unauthorized immigrants were living in the United States in January 2007 compared to 8.5 million in 2000 . . . [t]he annual average net increase in the unauthorized population during this 7-year period was 470,000").

85. *Id.*

86. *Id.*; see also Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, PEW HISPANIC CTR., 1 (Mar. 21, 2005), available at pewhispanic.org/files/reports/44.pdf (giving estimated statistics on numbers of illegal Mexican immigrants in the United States).

87. Passel, *supra* note 86, at 1.

88. See, e.g., *Petition, supra* note 83 (voicing concerns about the impact a U.S.–Mexico SSTA will have on Social Security and its related Trust Funds).

89. See *SSN High-Risk Issues: Hearing Before the H. Subcomm. on Soc. Sec.*, 106th Cong. (2006) (statement of Martin H. Gerry, Deputy Comm'r, Disability & Income Sec. Programs, Soc. Sec. Admin.) (dispelling common misconceptions about SSTAs).

90. See *id.* ("Another common misconception is that totalization agreements allow SSA to pay Social Security benefits to undocumented or illegal aliens. In reality, totalization agreements cannot change U.S. law except for the three narrow areas . . . and . . . have no effect on the prohibition against payment of benefits to illegal aliens.").

91. 42 U.S.C.A. § 402(y) (West 2004).

92. See 8 U.S.C.A. § 1611(a) (West 1998) (defining a "qualified alien").

social security benefits.⁹³ Thus, illegal immigrants that pay into the social security system and never attain legal status do not have any hope of benefiting from the contributions they make.

However, illegal immigrants that later attain legal status may be permitted to receive benefit for their prior contributions, which were made while they were not authorized to work in the United States.⁹⁴ If all the standard criteria for U.S. citizens claiming social security benefits are met,⁹⁵ an individual who is not a U.S. citizen or national may qualify for social security benefits by receiving credit for the time he or she was an illegal immigrant.⁹⁶ Immigrants are granted access to benefits "at such time as their status is so changed as to make it lawful for them to engage in such employment"⁹⁷ Earnings accrued while working illegally may be used to determine benefit eligibility when legal status is obtained.⁹⁸

If the United States enters into an SSTA with Mexico, the fear is that former illegal immigrants that are now legally working in the United States will also be able to have the time they worked illegally totalized, allowing them to more easily claim social security benefits.⁹⁹ The time an unauthorized worker is employed in the United States can be used to help meet vesting requirements when the worker attains legal status.¹⁰⁰ If the vesting requirement of forty quarters is met by illegal or legal employment in the United States the immigrant is entitled to full social security benefits.¹⁰¹ This is true regardless of whether an SSTA is in place. An SSTA would, however, allow such a person to receive credit for illegal and legal employment in the United States even if he or she did not meet the

93. *Id.* at § 1611(c)(1)(B).

94. 42 U.S.C.A. § 414(c)(1) (West 2004).

95. *See supra* Part I.A.3 (listing standard criteria for obtaining social security benefits).

96. 42 U.S.C.A. § 414(c)(1) (West 2004).

97. 42 U.S.C.A. § 405(c)(2)(B)(i)(I) (West 2008).

98. *See* S. REP. NO. 108-176, at 23 (2003), *available at* www.gpo.gov/fdsys/pkg/CRPT_108srpt176/pdf/CRPT-108srpt176.pdf (stating that "individuals who begin working illegally and later obtain legal status could still use their illegal earnings to qualify for Social Security benefits").

99. *See id.* at 24 ("Individuals who were never legally permitted to work in the United States should not be able to collect Social Security benefits on the basis of their illegal earnings.").

100. *Id.*

101. *See* UNIQUE CHALLENGES, *supra* note 81, at 1 (discussing the forty-hour vesting requirement and the possibility that an SSTA with Mexico could allow illegal aliens to circumvent that rule and get credit for their partial work periods).

forty-quarter vesting requirement.¹⁰² If the immigrant spent time working in a foreign jurisdiction, which had an SSTA with the United States, that time could be used to meet the U.S. vesting requirements. Thus, an SSTA with Mexico could also allow illegal immigrants to receive partial benefits in the United States for time that they worked both legally and illegally.

2. Possible Solutions

Reformation of social security benefit entitlement denying illegal immigrants any present or future benefit upon attaining legal status will prohibit them from obtaining social security benefits via an SSTA based on the time they worked illegally. The goal of prohibiting individuals from gaining social security credit for unauthorized work can likely be achieved by making any one of a number of amendments to the Social Security Act, although some are more extreme than others. These types of total prohibitions eliminate any credit for contributions made while a worker was unauthorized to work in the United States, even if they later attain legal status. Proposed reforms include the Social Security for Americans Only Act¹⁰³ and the No Social Security for Illegal Immigrants Act.¹⁰⁴ There has been pressure to implement such immigration reforms.¹⁰⁵

The Social Security for Americans Only Act amends § 415(e) of the Social Security Act.¹⁰⁶ The amendment would prohibit "any wages paid to such individual after December 31, 2005, while such individual is not a citizen or national of the United States"¹⁰⁷ to be counted towards social security entitlement. The No Social Security for Illegal Immigrants Act would amend § 410 of the Social Security Act by limiting the definition of employment to exclude "[s]ervice performed by an alien while employed in the United States for any period during which the alien is not authorized to be so employed."¹⁰⁸ The intent of both of these bills is to prevent illegal immigrants from receiving credit for social security benefits for the time they worked illegally in the United States. Significantly for this discussion,

102. *Id.*

103. Social Security for Americans Only Act of 2005, H.R. 858, 109th Cong. (2005).

104. No Social Security for Illegal Immigrants Act, H.R. 1438, 109th Cong. (2005).

105. *See Petition, supra* note 83 (pushing Congress to pass certain legislation which would prevent an SSTA with Mexico).

106. Social Security for Americans Only Act of 2005, H.R. 858, 109th Cong. (2005).

107. *Id.* § 2(2)(A).

108. No Social Security for Illegal Immigrants Act, H.R. 1438, 109th Cong. (2005).

an outright prohibition on receiving credit for unauthorized work would eliminate any possibility that a worker who worked illegally in the United States would be able to circumvent social security vesting requirements by relying on the partial credit structure available in an SSTA.

A second, less direct approach would be to amend the statute that pre-authorizes the President to enter into SSTAs.¹⁰⁹ Bill H.R. 132 was recently reintroduced into the House of Representatives. H.R. 132 provides "[l]imitations on coverage of individuals based on earnings by individuals in the United States while such individuals were not citizens, nationals, or lawful permanent residents of the United States and were not authorized to be employed in the United States."¹¹⁰ Although this will not forestall workers from pooling the time they spent working illegally and legally in the United States for purposes of meeting Social Security's forty-quarter vesting requirement, these workers will not be able to use the time they spent working illegally for purposes of "totalization."

A practical consideration that is worth noting is that, although the current state of the law provides an opportunity for individuals now legally in the United States to receive social security credit for the time they worked illegally, it is not likely that this opportunity will be exploited. First, the burden is on the contributor to produce documents to substantiate a claim of past contributions made while an individual was unauthorized to work.¹¹¹ It may be difficult for a worker to carry this burden. If an authorized worker with a valid social security number in her own name has to prove prior withholdings, he or she can easily submit a W-2 that has his or her name and social security number on it. If, however, a worker has to prove that he or she was working without authorization in the past by using a stolen or fraudulent social security number, he or she will have to prove that it was in fact himself or herself, and not someone else, working and paying withholdings tax with that false or fraudulent social security number. Second, even if the worker was able to carry the burden of substantiating his or her contributions, he or she may refrain from claiming benefit entitlement based on this information out of fear of being penalized for working without authorization.¹¹² Given these realities, illegal-turned-

109. 42 U.S.C.A. § 433(a) (West 1994).

110. Total Overhaul of Totalization Agreements Law of 2009, H.R. 132, 111th Cong. § 3 (2009).

111. See Francine Lipman, *Francine Lipman on Social Security Benefits for Immigrants*, 2008 EMERGING ISSUES 1114, 1116 (LexisNexis 2007) (discussing who is entitled to social security benefits and restrictions on payments of earned entitlement).

112. See 8 U.S.C.A. § 1325(a) (West 1991) (describing the penalties for illegal

legal immigrants may never use this apparent gap in the system to their advantage.

B. The Need for Increased Coverage of Mexican Workers Domestically

1. The Problem

National social security systems differ from one country to the next. Differences include: the scope of coverage, the segment of the population that is entitled to coverage, and the resources of the system.¹¹³ Yet the regulations applicable to U.S. SSTAs, while recognizing the inevitability of variation also demand a degree of approximation. Section 433 of Title 42 of the United States Code states that "agreements may only be negotiated with foreign countries that have a social security system of general application in effect. The system shall be considered to be in effect if it is collecting social security taxes or paying social security benefits."¹¹⁴ This regulation demonstrates that the other contracting country must have a general social security system in place in order for an SSTA to be negotiated. To date, all of the totalization agreements that have been concluded with the United States have been with countries that have comparable programs.¹¹⁵

The importance of the two countries having comparable systems is underscored by the following situation: a contracting party that does not collect social security taxes from a large subset of its population who is also exempted under an SSTA from paying taxes in the host country because he or she is a temporary worker, will avoid paying social security taxes altogether and not be entitled to coverage. This undermines one of the central purposes of social security totalization: preventing preclusion of social security benefits to workers that split their careers between two countries.¹¹⁶

Lack of domestic coverage coupled with the existence of an SSTA would also put American workers at a comparative disadvantage because employers in the United States, holding all else equal, would be able to pay

immigration; penalties include fines and up to six months in prison).

113. See EXPERIENCES ABROAD, *supra* note 21 (examining different countries' social security systems).

114. Negotiating Totalization Agreements, 20 C.F.R. § 404.1903 (1994).

115. See *U.S. International Social Security Agreements*, *supra* note 48 (listing the countries with which the United States has SSTAs).

116. See *supra* Part I.C.1 (discussing the purposes of SSTAs).

these foreign workers less because their gross income would not be reduced by social security taxes. The temporary foreign workers would not pay social security taxes to their country of origin because their country of origin does not require them to pay such taxes or it does require them to pay such taxes but has a weak enforcement mechanism. Also, the temporary foreign workers would not pay social security taxes in the United States if an SSTA is in place between their country of origin and the United States because of the temporary worker exception.¹¹⁷ The amount of deductions of gross income would be lower so these temporary foreign workers actually would take home more of their salary. U.S. companies that hire these workers could pay them less than domestic workers who do pay social security taxes because of the decreased deductions. This is undesirable for U.S. workers because they will have to either accept lower wages or risk being priced out of the market. It is also bad for foreign workers because they will not have social security retirement benefits when they retire.¹¹⁸

Mexico's system appears to meet the minimum requirements of the regulation, which requires a contracting country to an SSTA with the United States to have a social security system that collects social security contributions and pays benefits.¹¹⁹ However, a limited percentage of the population is covered under the Mexican system and there is a discrepancy between benefits received by contributors in the two countries.¹²⁰ These realities make negotiating an SSTA between the United States and Mexico increasingly challenging.

2. Possible Solution

The United States may be able to use the prospect of a totalization agreement with Mexico to incentivize improvements in Mexico's benefits entitlement and benefits payments. Another country that is eager to enter into an SSTA with the United States is India.¹²¹ India has a large population of high-skilled workers that travel to the United States and work there

117. See *supra* Part I.C.2.b (discussing dual contributions).

118. *Id.*

119. See *supra* Part I.B (providing an overview of the Mexican Social Security System).

120. See Merino, *supra* note 27, at 4 ("58% of the population lacks coverage through the social security institutions.").

121. See N. Vidyasagar, *supra* note 65 (noting India's push for a "totalisation" agreement with the United States.)

temporarily.¹²² Being temporary workers and having no totalization agreement between the United States and the foreign country that the workers are from means that the workers are subject to social security taxation, but they do not receive credit for their temporary employment.¹²³ Given this situation, it is not surprising that India has been putting pressure on the United States to enter into an SSTA.

An initial roadblock was that India did not meet the requirement of having a social security system that collected social security taxes and paid benefits.¹²⁴ Coverage in India historically has been limited to very poor individuals and only a certain number of individuals per household.¹²⁵ Since talks of a U.S.-Indian SSTA commenced, India has made substantial strides in their social security policy.¹²⁶ It has extended coverage for all citizens that are over 65 and below the poverty line.¹²⁷ It has also lifted restriction on the number of individuals entitled to coverage in a single household.¹²⁸ Although the reforms to India's social security system may not all be attributed to its desire to enter into a totalization agreement with the United States, it is evident that the prospect of such an agreement with the United States was a factor in India's decision to make these reforms.

The Indian example reveals that the prospect of entering into an SSTA with the United States may motivate a country to make changes domestically that will increase the likelihood of an agreement being reached. The incentive of a totalization agreement with the United States

122. *Id.*

123. *Id.*

124. *Id.*

125. See U.S. SOC. SEC. ADMIN. OFFICE OF POL'Y, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: ASIA AND THE PACIFIC, 2006 INDIA, www.ssa.gov/policy/docs/progdsc/ssptw/2006-2007/asia/india.pdf (last visited Dec. 28, 2010) (providing the coverage available under the Indian Social Security System in 2006).

126. See U.S. SOC. SEC. ADMIN. OFFICE OF POL'Y, INTERNATIONAL UPDATE: RECENT DEVELOPMENTS IN FOREIGN PUBLIC AND PRIVATE PENSIONS 126 (November 2007), available at http://www.socialsecurity.gov/policy/docs/progdsc/intl_update/2007-11/2007-11.pdf (providing updates on the Indian Social Security System).

127. See *Old Age Pension for All Elderly Poor*, HINDU BUS. LINE, Oct. 1, 2007, <http://www.thehindubusinessline.com/2007/10/02/stories/2007100252361000.htm> (last visited Apr. 10, 2010) (discussing reform to India's Social Security System that extends coverage to all poor citizens) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also *Government Announces Pension for Elderly BPL Citizens*, THE HINDU, Sept. 14, 2007 (discussing Indian government's announcement to extend old age pension payments to all people below poverty line and over sixty-five).

128. See N. Vidyasagar, *supra* note 65 (noting that entitlement to benefits would be easier to obtain).

may promote changes in the Mexican social security system that will increase the portion of the population that receives retirement benefits and increase the return on contributions made by workers in Mexico. These reforms will not only make a totalization agreement with Mexico more appealing for the United States, they will also improve Mexico's system and increase benefits entitlement to a greater number of Mexican workers.

C. Strengthening Data Verification Systems

1. The Problem

When two countries enter into an SSTA, they, to some extent, have to rely on the other country's data verification systems for measuring benefit entitlement.¹²⁹ Important information includes birth, death, earnings and other eligibility data. Under some existing SSTAs that the United States is a party to, the contracting countries have agreed to depend on each other's verification systems.¹³⁰ This eliminates the need for double verification and reduces costs.¹³¹ It also, however, subjects the contracting countries to exclusive reliance on each others' data verification efforts, increasing the possibility of abuse.¹³²

In the past, when data has been verified by the United States, it has been done through informal means.¹³³ Routine computer matches performed to check the eligibility status of domestic beneficiaries are not performed on foreign beneficiaries due to lack of capacity.¹³⁴ Instead, the United States primarily relies on periodic surveys and personal questionnaires that are conducted in the foreign country that has an

129. See *supra* Part II (discussing possible negative effects of SSTAs).

130. See *Testimony Before the H. Comm. on Ways and Means Subcomm. on Soc. Sec., 109th Cong. (Mar. 2, 2006)* (testimony of Martin H. Gerry, Deputy Comm'r for Disability and Income Sec. Programs), available at http://www.ssa.gov/legislation/testimony_030206.html (discussing the integrity of foreign data in totalization agreements) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

131. *Id.*

132. *Id.*

133. See U.S. GOV'T ACCOUNTABILITY OFFICE, A MORE FORMAL APPROACH COULD ENHANCE SSA'S ABILITY TO DEVELOP AND MANAGE TOTALIZATION AGREEMENTS, GAO-05-250, 5-6, 9-11 (Feb. 2005) [hereinafter A MORE FORMAL APPROACH], available at <http://www.gao.gov/new.items/d05250.pdf> (discussing how SSTAs are developed and the need for a more formal approach going forward).

134. *Id.* at 14.

agreement with the United States¹³⁵ Depending on the country, surveys are conducted as frequently as once every five years and as infrequently as once every thirty years.¹³⁶ Surveys are performed by SSA staff; they visit the homes of foreign beneficiaries to verify eligibility and identity.¹³⁷ Personal questionnaires are sent out every two years and the onus is on the foreign beneficiaries to accurately self-report.¹³⁸ In the past, the SSA has also trained foreign social security employees to be more vigilant in verifying documentation.¹³⁹

Concluding a totalization agreement with Mexico will require an increased emphasis on data reliability,¹⁴⁰ the SSA has reported that Mexico's social security reporting policies and controls are adequate.¹⁴¹ After reviewing a selected sample of actual Mexican documents, the SSA also concluded that most documents were reliable.¹⁴² Even if Mexico currently has document verification systems that are on par with countries that the United States already has SSTAs with, the high immigration levels from Mexico to the United States raise the stakes in this context, increasing the importance of document accuracy. The current emphasis on informal document verification and reliance on the other party's verification system may lead to costly errors. Improvements in the United States' ability to independently verify data of Mexican beneficiaries may, however, lead to the United States bearing the financial burden of such improvements.

2. Possible Solution

The United States can add provisions into an SSTA requiring Mexico to improve its domestic social security system's data verification system. This approach is analogous to the adoption and ratification of the North American Agreement on Environmental Cooperation (NAAEC, commonly referred to as the Environmental Side Agreement). Prior to the adoption of

135. *Id.* at 3, 13.

136. *Id.* at 13.

137. *Id.*

138. *Id.* at 3–4.

139. A MORE FORMAL APPROACH, *supra* note 133, at 3–4.

140. See Nicole A. Kersey, *Misplaced Opposition: Immigration Incentives of the Proposed Social Security Totalization Agreement with Mexico*, 22 GEO. IMMIGR. L.J. 57, 58, 80 (2007) (stating that data verification concerns should be addressed before entering into a totalization agreement with Mexico).

141. *Id.* at 9–10.

142. *Id.*

NAFTA, there was speculation that Mexico's weak enforcement of environmental regulations would put U.S. companies at a comparative disadvantage relative to their Mexican counterparts and would eventually cause them to relocate in Mexico.¹⁴³ This would hurt the Mexican environment and the surrounding region.¹⁴⁴ Out of this concern, the NAFTA Environmental Side Agreement was concluded as part of the NAFTA ratification process.¹⁴⁵ One of the Environmental Side Agreement's objectives is to "enhance compliance with, and enforcement of, environmental laws and regulations . . ."¹⁴⁶ To the surprise of some, the results have been positive; Mexico has strengthened its environmental protection efforts.¹⁴⁷

If a U.S.-Mexico totalization agreement is concluded that incorporates specific provisions aimed at strengthening Mexican data verification systems, the risk of erroneous benefit entitlement can be reduced.¹⁴⁸ These provisions could target any existing weaknesses in reliability of Mexican data. Improvements to Mexican data verification systems will not lead to an increased cost to the United States and they have the potential of reducing costs for erroneous benefit payments.

A U.S.-Mexico SSTA may also include provisions that ease the United States' ability to independently verify Mexican data. Provisions that call for integration of United States and Mexican data storage systems will allow each country to independently verify the other's data.¹⁴⁹ The start-up

143. See MARK DRUMBL ET AL., ADMINISTRATIVE LAW AND REGULATION: NAFTA, WTO, INVESTMENT, AND THE ENVIRONMENT 100 (2008) (unpublished manuscript) (discussing the impetus behind the adoption of the NAFTA side agreement).

144. *Id.*

145. *Id.*

146. North American Agreement on Environmental Cooperation, art. I(g), Can.-Mex.-U.S., Sept. 8, 9, 12, & 14, 1993, 32 I.L.M. 1480.

147. See PIERRE MARC JOHNSON, JENNIFER A. HAVERKAMP & DANIEL BASURTO, TEN-YEAR REVIEW & ASSESSMENT COMM., TEN YEARS OF NORTH AMERICAN ENVIRONMENTAL COOPERATION 28 (June 15, 2004), available at http://www.ccc.org/Storage/79/7287_TRAC-Report2004_en.pdf (discussing the environmental impacts of the NAFTA).

148. See *Testimony Before the H. Comm. on Ways and Means Subcomm. on Soc. Sec.*, 109th Cong. (Mar. 2, 2006) (testimony of Martin H. Gerry, Deputy Comm'r for Disability and Income Sec. Programs), available at <http://www.ssa.gov/legislation/testimony/030206.html> (discussing the integrity of foreign data in totalization agreements) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

149. See A MORE FORMAL APPROACH, *supra* note 133, at 5-6, 9-11 (discussing how SSTAs are developed and the need for a more formal approach going forward). The United States is developing computerized projects with Italy and Germany that would allow independent benefit eligibility verification. *Id.* at 14.

costs of such an initiative will likely be large. In order to lessen the financial impact on a single contracting country, the costs of implementing such a system can be shared. Once the system is established, maintenance costs will likely be low. Considering the number of Mexicans in the United States, the costs of integrating data storage systems in the two countries may be warranted.¹⁵⁰

III. Benefits of a Totalization Agreement with Mexico

A. Motivation of Illegal Workers to Attain Legal Status

Unauthorized workers with false documentation pay taxes through paycheck withholdings.¹⁵¹ Their employer, just as with legal workers, will withhold a portion of their earnings for federal income tax, state income tax, Medicare and Social Security, and, in many cases, local tax.¹⁵² However, most illegal immigrants do not file a tax return.¹⁵³ So taxes are withheld, but there is no prospect for these unauthorized workers to ever receive a corresponding benefit, unless they attain legal status at some point.¹⁵⁴ Annual Social Security tax collection from illegal immigrants is estimated at approximately nine billion dollars.¹⁵⁵

Under current law, these workers will only receive credit for the time they were employed illegally if and when they attain legal status.¹⁵⁶ In the absence of a totalization agreement, they will not be able to claim benefit for time they spent working in the United States, legally or illegally, unless they meet the forty-quarter vesting requirement.¹⁵⁷ A U.S.-Mexico

150. Hoefler, Rythina & Baker, *supra* note 85.

151. See Travis Loller, THE ASSOCIATED PRESS, *At Tax Time, Illegal Immigrants Are Paying Too Much*, MSNBC, Apr. 10, 2008, <http://www.msnbc.msn.com/id/24054024> (last visited Apr. 10, 2010) (discussing the positive financial impact by illegal immigrants on the American Social Security System) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also *How Immigrants Saved Social Security*, N.Y. TIMES, Apr. 2, 2008 (discussing the positive financial impact by illegal immigrants on the American Social Security System).

152. *How Immigrants Saved Social Security*, *supra* note 151.

153. *Id.*

154. *Id.*; 42 U.S.C.A. § 405(c)(2)(B)(i)(I).

155. Loller, *supra* note 151.

156. See *supra* Part II.A.1 (discussing how illegal immigrants may receive social security benefits for the time spent working illegally, if they later obtain legal status).

157. See *supra* Part I.C.2.c (discussing how SSTAs prevent workers that split their careers between two countries from being denied social security benefits).

totalization agreement would impact the motivations of workers who are illegally employed in the United States for less than the forty quarters needed to qualify for social security benefits. If a totalization agreement is established between the United States and Mexico, these workers can qualify for partial benefits under the U.S. social security system by working a minimum of six quarters in the United States and in Mexico for the remainder of the U.S. vesting period, if they attain legal status at some point.¹⁵⁸ This class of workers, even if they are present in the United States for only a short time, will have an additional motive to attain legal status: the benefit for the time they work in the United States.¹⁵⁹ Providing benefits for workers for time they spend illegally working in the country may not be the most desirable result, but it will provide workers that are presently working illegally for a short period of time (longer than six quarters) with an incentive to obtain legal status.

A more desirable, and perhaps less controversial, result will be achieved after first establishing a reform that denies illegal immigrants social security benefits for time they worked in the United States without authorization, even if they later receive legal status. By denying social security benefits for income received while working illegally and establishing an SSTA, the motivations for obtaining legal status are even stronger. Currently, Mexican workers that spend part of their career in Mexico and part in the United States, whether authorized or unauthorized to work in the United States, have no hope of receiving social security benefits in the United States, unless they work within the United States for forty quarters.¹⁶⁰ A totalization agreement that allows benefits to be received after a minimum of six quarters combined with a prohibition on unauthorized work ever counting towards social security entitlement will motivate unauthorized workers that work for more than six quarters to work legally. An unauthorized worker that is contributing to the social security system will no longer see paying social security taxes as a necessary cost of working in the United States temporarily, but rather a cost of working illegally. Under this scheme, Mexican workers that work within the United

158. *Id.*

159. *See* Kersey, *supra* note 140, at 58, 80 (arguing that a totalization agreement with Mexico will only change incentives for Mexican workers who need to combine credits earned in Mexico and the United States to qualify for social security benefits in either country). This Note takes a similar stance on the immigration incentives of a U.S.-Mexico totalization agreement, but argues that immigration laws must be reformed in order to promote the right incentives.

160. *See supra* Part I.A.3 (discussing entitlement to U.S. social security benefits).

States legally will be rewarded and workers that are here illegally will be punished.

An individual's working life is a finite number of years. The more time an individual spends working illegally and contributing to a system that they will not receive any benefit from, the less working years they will have to make contributions that will bestow future retirement benefits upon them. A totalization agreement combined with the forgoing reforms would motivate workers to attain legal status sooner.

B. Promotion of Legal Immigration

A totalization agreement coupled with a prohibition on social security benefit entitlement for time spent working illegally will not only effect illegal workers that are currently working within the United States, it will also promote legal immigration from Mexico, thereby increasing long-term sustainability of the Social Security Trust Fund.¹⁶¹ With increases in life expectancy, low fertility rates, and the retirement of the baby-boom generation, having a larger number of workers contributing to the social security system is becoming increasingly important.¹⁶² SSTAs increase labor mobility between countries because workers can freely work in a country that has a totalization agreement with their home country without worrying about limiting their ability to collect social security benefits. An SSTA with Mexico will encourage more Mexicans to legally work in the United States. Immigrants that would otherwise have illegally immigrated to the United States will have more reason to pursue legal entry and work authorization.

More generally, an SSTA may have some symbolic importance. Many Americans share a negative sentiment towards illegal immigration.¹⁶³ Negativity is usually targeted towards illegal immigration from Mexico, but

161. See Kersey, *supra* note 140, at 58, 79 (stating SSTAs encourage legal immigration and that the Social Security Protection Act decreases incentives for workers to work in the United States without authorization).

162. See 2008 ANNUAL REPORT, *supra* note 16, at II(A)(2) (discussing generally the future of the U.S. Social Security fund).

163. See, e.g., STOP ILLEGAL IMMIGRATION & AMNESTY NOW, <http://www.conservativeusa.org/immigration.htm> (last visited Apr. 10, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); END ILLEGAL IMMIGRATION, <http://www.endillegalimmigration.com> (last visited Apr. 10, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); AMERICANS FOR LEGAL IMMIGRATION, <http://www.alipac.us/> (last visited Apr. 10, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

there is likely some impact on legal Mexican immigrants as well. Currently, the United States has SSTAs with twenty-three countries.¹⁶⁴ Most of these countries have a relationship with the United States that is less substantial than the relationship Mexico has with the United States.¹⁶⁵ A U.S.-Mexico SSTA will send the message that the United States welcomes legal immigration from Mexico. Mexicans considering working legally within the United States will likely feel more welcome if they are able to receive social security credit for time spent working on the other side of the border.

C. Economic Impact

Under the current law, social security entitlement is available to individuals that now have legal status on earnings that they obtained while working legally or illegally.¹⁶⁶ This could result in significant costs for the U.S. social security system.¹⁶⁷ These potential costs are difficult to estimate because of the lack of reliable data quantifying the large number of undocumented workers in the United States.¹⁶⁸ Recent studies indicate that approximately 11.8 million illegal immigrants are living in the United States.¹⁶⁹ Estimates also indicate that more than half of illegal immigrants come from neighbouring Mexico.¹⁷⁰ If even a fraction of these individuals claimed social security benefits under a totalization agreement, the costs would be staggering. Estimates also indicate that the number of illegal immigrants is increasing over the long-run.¹⁷¹ So a totalization agreement that permits individuals to more easily claim benefits for the time they spent

164. *U.S. International Social Security Agreements*, *supra* note 48.

165. U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS (2008), <http://www.census.gov/foreign-trade/top/dst/2008/12/balance.html> (last visited Apr. 10, 2010) (showing that Mexico is the United States' third largest trading partner) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

166. *See* discussion *supra* Part II.A.1 (discussing how illegal immigrants may receive social security benefit for the time spent working illegally, if they later obtain legal status).

167. *See* UNIQUE CHALLENGES, *supra* note 83, at 9–11 (discussing how the lack of reliable data on unauthorized workers makes estimating the cost of an SSTA with Mexico uncertain, but some studies have estimated costs to be quite large).

168. *Id.*

169. Hoefler, Rythina & Baker, *supra* note 86.

170. Passel, *supra* note 87 at 1.

171. Hoefler, Rythina & Baker, *supra* note 86.

working illegally could lead to a continual negative impact on the fund's long-term sustainability.

On a positive note, over a five-year time span, a totalization agreement with Mexico would save U.S. workers and employers approximately \$140 million in contributions to Mexico.¹⁷² Additionally, external economic benefits, such as increased propensity to spend, would likely result because of lower taxes for U.S. workers and employers. U.S. workers in Mexico would have a higher disposable income, as they would only be paying social security taxes to one country at a time.¹⁷³ This may encourage them to increase their spending in the United States. A similar argument could be made for authorized Mexican workers within the United States who, because of a U.S.-Mexico SSTA, would only be paying social security taxes in one country. Presumably, their disposable income would also increase, which could cause them to increase their spending while in the United States.

If social security law is reformed, denying benefit payments to individuals for time spent working illegally, the costs of entering into a totalization agreement with Mexico will decrease and the associated economic benefits will likely remain the same. This will likely lead to a net benefit for the United States. Gains can be recognized by domestic and foreign workers, U.S. employers, and the economy as a whole.

D. Promotion of Better Relations Between NAFTA Parties and Consistency with Key NAFTA Principles

The NAFTA between the United States, Canada, and Mexico came into force on January 1, 1994.¹⁷⁴ It embodies the national treatment provision,¹⁷⁵ the most favoured nations principle,¹⁷⁶ and the transparency principle.¹⁷⁷ These principles do not pertain to the flow of labor; NAFTA does not change existing labor or immigration laws dealing with the flow of

172. SOC. SEC. ADMIN., FACT SHEET SOCIAL SECURITY UNITED STATES/MEXICO TOTALIZATION AGREEMENT (June 2004) <http://www.ssa.gov/pressoffice/factsheets/USandMexico-alt.htm> (last visited Apr. 10, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

173. *See supra* Part I.C (discussing totalization agreements).

174. North American Free Trade Agreement, U.S.-Mex.-Can., Dec. 17, 1992, 32 I.L.M. 605 (entered into force Jan. 1, 1994).

175. *Id.* at arts. 301, 1003, 1102, 1202, 1405, 1703.

176. *Id.* at arts. 308, 1103, 1203, 1406.

177. *Id.* at arts. 1306, 1411.

labor between NAFTA parties.¹⁷⁸ However, applying these principles to Mexican workers in the United States strongly supports the conclusion that a totalization agreement with Mexico will strengthen U.S.-Mexico relations.

National treatment requires that each party to the NAFTA treat other NAFTA parties no less favourably than it treats its own nationals, under like circumstances.¹⁷⁹ Applying this concept to the entitlement of Mexicans that work in the United States means benefit entitlement in the United States based on time spent working in the United States would be equalized for Mexican workers that work in the United States and U.S. workers that work in the United States. Under the proposed U.S.-Mexico SSTA

A person who is or has been subject to the applicable laws of one Party and who resides in the territory of the other Party . . . shall receive equal treatment with nationals of the other Party in the implementation of the applicable laws of the other Party regarding entitlement to and payment of benefits.¹⁸⁰

So nationals of either Mexico or the United States will be treated equally when it comes to social security benefits in the United States, under a U.S.-Mexico SSTA.

This may appear to be inconsistent with national treatment because a U.S. worker that works less than forty quarters will not have his benefits vest,¹⁸¹ whereas, under an SSTA, a Mexican worker may have his benefits vest by working as few as six quarters in the United States.¹⁸² This, however, is not the case. A Mexican worker will still only be entitled to benefits in the United States if he has met the forty-quarters vesting requirement, but, with an SSTA in place, he can use the time he worked in Mexico to meet the vesting requirements.¹⁸³ Moreover, a U.S. worker that works in Mexico for part of his career may also use the time he worked in

178. *See id.* (liberalizing the flow of labor between NAFTA parties is not mentioned).

179. North American Free Trade Agreement, U.S.-Mex.-Can., art. 1102, Dec. 17, 1992, 32 I.L.M. 605 (discussing national treatment in the context of investment under the NAFTA).

180. Agreement on Social Security Between the United States of America and the United Mexican States, U.S.-Mex., art. 3, June 29, 2004, available at http://www.tscl.org/NewContent/Totalization_Agreement.pdf. The Agreement on Social Security between the United States of America and the United Mexican States has not been ratified, and Congress has issued resolutions disapproving of the Agreement. H.R. Res. 18, 110th Cong. (2007); H.R. Res. 394, 111th Cong. (2009).

181. 42 U.S.C. § 414(a).

182. 42 U.S.C. § 433(a) (2008).

183. *Id.*

Mexico to meet U.S. social security vesting requirements.¹⁸⁴ Therefore, an SSTA between the United States and Mexico is consistent with the principle of national treatment.

Most favoured nation treatment is somewhat aspirational. The idea is you should treat NAFTA countries at least as favourably as you treat non-NAFTA countries.¹⁸⁵ The United States has many SSTAs with countries that are not parties to the NAFTA.¹⁸⁶ Application of the most favoured nation principle in this context would require the United States to negotiate an SSTA with Mexico, as the preferential treatment that is given to some non-NAFTA parties, must also be given to NAFTA parties.

The transparency principle requires information that is available in one NAFTA country to be made publically available in other NAFTA countries.¹⁸⁷ For example, in the international trade context, information regarding entering into domestic industries, such as regulations, capital requirements, etc., must be made publically available to all NAFTA parties. Application of this principle in the labor context is not only consistent with the conclusion of a U.S.-Mexico totalization agreement, it will also promote United States monitoring of reforms to the Mexican social security system and support U.S. entitlement to information regarding Mexican data verification systems.

As mentioned above, one of the unique obstacles to concluding a totalization agreement with Mexico is that only a limited percentage of the Mexican population is covered under the Mexican social security system.¹⁸⁸ Reforms can be made to Mexico's social security system in order to increase social security coverage. The transparency principle will assist the United States in obtaining information about possible reforms or policy changes that Mexico has made that target increasing social security coverage.¹⁸⁹ Gaining insight into the Mexican system may also permit the

184. Agreement on Social Security Between the United States of America and the United Mexican States, U.S.-Mex., art. 5, June 29, 2004, *available at* http://www.tscl.org/NewContent/Totalization_Agreement.pdf. The Agreement on Social Security between the United States of America and the United Mexican States has not been ratified, and Congress has issued resolutions disapproving of the Agreement. H.R. Res. 18, 110th Cong. (2007); H.R. Res. 394, 111th Cong. (2009).

185. North American Free Trade Agreement, U.S.-Mex.-Can, arts. 308, 1103, 1203, 1406, Dec. 17, 1992, 32 I.L.M. 605.

186. *Id.*

187. *Id.* at arts. 1306, 1411.

188. *See supra* Part II.B.1 (discussing the need for increased coverage of Mexican workers).

189. *Id.*

United States to assist Mexico with reforms and, when possible, draw on its own experience when dealing with similar problems. Additionally, the transparency principle will help the United States monitor Mexico's progress in increasing coverage.¹⁹⁰

Concluding a totalization agreement with Mexico also requires strengthening Mexican data verification systems.¹⁹¹ The transparency principle will assist the United States in obtaining vital information regarding Mexico's data verification systems. If positive reforms to data verification are made, continued transparency following the conclusion of a totalization agreement would help ensure those reforms are not later weakened.

Applying the bedrock principles of the NAFTA to the labor context would lead to the conclusion of a U.S.-Mexico SSTA. This would provide a more unified approach to social security totalization between the United States and other NAFTA parties, as Canada already has a totalization agreement with the United States.¹⁹² It would also, undoubtedly, strengthen relations between the United States and Mexico.¹⁹³

E. Facilitation of Mexican Workers' Return Home

Many foreign workers wish to return home after working in the United States.¹⁹⁴ A totalization agreement with Mexico would encourage Mexican workers to return home earlier, as their benefits will be totalized.¹⁹⁵ If a worker is faced with the decision of working in the United States for forty quarters and receiving full social security benefits or returning home prior to working forty quarters and receiving no retirement benefits, he will likely remain in the United States until his benefits vest.¹⁹⁶ By not having an

190. *Id.*

191. *See supra* Part II.C.1 (discussing the need to strengthen data verification systems).

192. *U.S. International Social Security Agreements, supra* note 48.

193. *See* Jared S. Childers, Comment, *Touching the Third Rail: An Analysis of Social Security and the Recently Revealed U.S.-Mexico Social Security Totalization Agreement*, 26 PENN ST. INT'L L. REV. 227, 249 (2007) (explaining a totalization agreement with Mexico is another step towards creating a North American Union, which may ultimately benefit the United States).

194. Dwight Steward, Amy Raub & Jean Elliot, *How Long Do Mexican Migrants Work in the U.S.?*, SOC. SCI. RESEARCH NETWORK, Nov. 28, 2006, available at http://www.econone.com/resource/sections/61/Mexican_imigrants_work_in_theUS.pdf.

195. Kersey, *supra* note 140, at 77-80 (discussing how SSTAs provide foreign workers with an incentive to return home sooner).

196. *See supra* Part I.A.3 (discussing U.S. social security entitlement).

SSTA with Mexico, many workers remain in the United States longer than they would otherwise like to in order to cash in on their retirement benefits.¹⁹⁷ This inhibits the free flow of labor and, in doing so, may cause an unnecessary burden on the American social security system.¹⁹⁸ If this impediment is removed, workers could spend as little as six quarters in the United States and spend the remainder of their career in Mexico, and have their benefits vest as long as the combined total of quarters worked in both countries equals forty.¹⁹⁹ The Mexican worker would only be entitled to partial benefits proportional to the time he spent working in the United States, meaning he would receive less than full benefits in the United States.²⁰⁰ This outcome is desirable from the stand-point of a worker that would like to return home and a social security system that would like to prolong its solvency.

If the prospect of entering into a totalization agreement with the United States is used as a catalyst to seek reforms in the Mexican social security system, eventually leading to a system in which more people are covered and benefit entitlement increases, it is likely that more Mexicans will return to Mexico and claim benefits under the Mexican system.²⁰¹ Increasing the amount of people covered under the Mexican system will allow workers in the informal sector that previously had no prospect of receiving social security benefits to make contributions and claim entitlement in Mexico.²⁰² If these workers spend part of their career in the United States working legally, they can totalize their benefits.²⁰³ This will provide a strong incentive for Mexican workers to return home that, under the present structure, had no prospect of receiving social security benefits in Mexico.

197. Kersey, *supra* note 140, at 77–80.

198. *Id.*

199. *See supra* Part I.C.2.c (discussing how SSTAs prevent workers that split their careers between two countries from being denied social security benefits).

200. *Id.*

201. *See supra* Part II.B.2 (discussing how the prospect of entering into an SSTA with the United States may be used to incentivize positive changes in the Mexican Social Security System).

202. Kersey, *supra* note 140, at 77–80.

203. *Id.*

F. A More Equitable Result

It is easy to argue that illegal immigrants do not deserve to receive social security benefits, but that argument is much harder to make about individuals that are authorized to work in the United States. Unauthorized workers knowingly break the law. They should not receive benefits from the American social security system by virtue of breaking the law. Legal Mexican workers, on the other hand, go through all of the requirements to obtain authorization and are still not permitted to totalize their benefits.²⁰⁴ They are essentially contributing to a system from which they will not receive any benefit, unless they remain and work in the United States for forty quarters.²⁰⁵

Granted, Mexico is not the only country that does not have a totalization agreement with the United States and there are many other workers that do not receive benefits for the contributions they make to the American social security system.²⁰⁶ Many of those individuals, arguably, should receive benefits for their contributions as well. There is, however, a significant difference between other countries that do not have SSTAs with the United States and Mexico—Mexico has consistently represented the birthplace of the largest number of individuals becoming legal permanent residents in the United States.²⁰⁷ In 2006, approximately fourteen percent of new legal permanent residents were born in Mexico.²⁰⁸ This represents a large number of individuals that are likely contributing to a system from which they may never derive any benefit. Additionally, concluding an SSTA with Mexico may provide valuable lessons that will aid in the adoption of totalization agreements with countries that have characteristics that are less like the characteristics of most of the countries that the United States currently has an SSTA with and more like those of Mexico. Consequently, lessons from the U.S.-Mexico totalization experience will help ensure inequities that other foreign workers face by virtue of the

204. *See supra* Part I.C (discussing general purposes and uses of totalization agreements).

205. *See supra* Part I.A.3 (discussing U.S. social security entitlement).

206. *See U.S. International Social Security Agreements, supra* note 48 (listing the countries that do have SSTAs with the United States).

207. *See* DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT, U.S. LEGAL PERMANENT RESIDENTS: 2006, 1–6 (2007), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/IS-4496_LPRFlowReport_04vaccessible.pdf (providing the number of legal permanent residents in the United States and the change in numbers in 2006).

208. *Id.* at 1.

absence of a totalization agreement between the United States and their home country will be eliminated.

Contributions from individuals whose benefits do not vest because of the absence of a totalization agreement with Mexico will increase the Social Security Trust Fund, but such a policy also has the prospect of many other negative effects on U.S.-Mexico relations. As mentioned in this Note, there are other options that would result in an increase in the Fund's long-term solvency and permit Mexican workers that work in the United States legally to benefit from contributions they have made.²⁰⁹

IV. Conclusion

The unique challenges that an SSTA between the United States and Mexico would present can be overcome if the right initiatives are pursued by the United States. Reformation of U.S. social security law to deny benefits to individuals for the time they work illegally will disallow unauthorized work to be used to calculate social security benefits under an SSTA. The possibility of a U.S.-Mexico SSTA may be used to motivate Mexico to improve its social security system. Strengthening of Mexico's data verification systems and independent document verification initiatives may be bargained for prior to concluding an SSTA. Resolution of these issues would allow many benefits to flow to the United States from an SSTA with Mexico.

A U.S.-Mexico totalization agreement would motivate existing illegal workers to attain legal status and promote legal immigration to the United States from Mexico. A U.S. worker that spends part of his career in Mexico could benefit from having his contributions totalized. An SSTA with Mexico would also strengthen relations with Mexico by applying the NAFTA principles of national treatment, most favoured nations, and transparency in the labor context. Additionally, an SSTA would remove the inducement on Mexican workers to remain in the United States until their retirements benefits vest. Economic benefits would likely be realized by foreign and domestic workers, U.S. employers, and the economy as a whole. Finally, an SSTA would lead to a more equitable result, as Mexicans that contribute to the U.S. social security system will more likely be entitled to a return on their contribution.

209. See *supra* Parts II-III (discussing some of the issues, solutions, and benefits associated with a U.S.-Mexico SSTA).