SUBMISSION TO THE UN COMMITTEE ON MIGRANT WORKERS REGARDING THE LIST OF ISSUES TO BE ADOPTED FOR MEXICO'S SECOND PERIODIC REVIEW

1. Global Workers Justice Alliance, in conjunction with the Immigrant Justice Clinic at American University Washington College of Law, respectfully submits the following list of issues for consideration by the U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (the "Committee") with respect to Mexico's recent submission under Article 73 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the "Convention").

2. We respectfully request that the Committee consider the following issues: portable justice, and the rights of Mexican laborers who participate in the H-2 visa program in the U.S.

ABOUT GLOBAL WORKERS JUSTICE ALLIANCE & THE IMMIGRANT JUSTICE CLINIC

Global Workers Justice Alliance

3. Global Workers Justice Alliance (GWJA) is a non-for-profit organization created to challenge the increasing and unaddressed denial of justice to legally wronged migrant workers who return home to their families. GWJA works to combat worker exploitation by promoting portable justice for transnational migrants through a cross-border network of worker advocates and resources. Global Workers coined the term "portable justice" to describe the right and ability of transnational migrant workers to access justice in the countries of employment even after they have departed for their home countries.

4. To meet these objectives, GWJA created the Global Workers Defender Network ("Defender Network"), a coalition of human rights organizations and individual advocates in migrant-sending states. These advocates facilitate employment law cases for migrant workers so that they might have an opportunity of redress for the employment abuses they suffered while abroad. The Defender Network also works to identify cases of migrant workers who have suffered labor exploitation, as well as, educate migrant workers on workplace and other legal rights. GWJA currently works in Mexico and Guatemala as sending countries, and the U.S. and Canada as destination countries. It also continues to work on expanding its operations to other countries. More information on

GWJA's Global Workers Defender Network is available online at http://www.globalworkers.org/GWDN.html.

Immigrant Justice Clinic

5. The Immigrant Justice Clinic (IJC) at American University Washington College of Law provides representation on a broad range of cases involving individual immigrants, migrants, and their communities in the Washington, D.C. metropolitan area and internationally. These include cases of exploited low-wage immigrant workers, including trafficked individuals, asylum and non-asylum immigration cases, and language rights cases.

6. With respect to migrant workers, the IJC has represented workers on wage and hour claims, compensation claims, and has engaged in education and outreach to workers on both sides of the U.S.-Mexico border. Student attorneys from the IJC have also performed advocacy work, and co-authored a recent report on the experiences of female Mexican migrant workers in the Maryland crab industry.

ISSUES TO CONSIDER

7. Global Workers Justice Alliance and the Immigrant Justice Clinic present two issues for inclusion in the Committee's agenda for Mexico's second periodic report: (1) the consequences of the lack of portable justice for Mexican migrant workers; and (2) the concerns surrounding the H-2 Visa Program administered by the U.S. government.

Portable Justice

8. In preparation for its second review before the Committee, Mexico has released its Second Periodic Report. While Mexico has implemented many commendable programs asserting and recognizing the rights of workers who have migrated *to* Mexico, the Report fails to mention efforts to assist its nationals legally wronged in another state by their employer. There is a clear disparity in the Second Periodic Report between provisions guaranteeing justice for migrant workers in Mexico and provisions addressing the availability of portable justice for Mexican nationals who have returned after being employed abroad.

Mexico's Obligation to Promote Portable Justice

9. As a ratifying member of the Convention, Mexico has obligations to protect the rights of its nationals who seek employment in other states. While the Convention does not explicitly require Mexico to ensure portable justice for its nationals, this obligation can be

inferred from the Convention's provisions. Mexico has certainly taken steps to assist its nationals in their efforts to achieve portable justice, but the number of legally wronged Mexican migrant workers who are without any form of redress demonstrates the insufficiency of these measures.

10. Under Article 22.6 of the Convention, Mexico has an obligation to protect the right of its nationals to wages rightfully earned in the employer state. Article 22.6 states that "In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities."

11. To assist its nationals in collecting wages after they have left their employer state, Mexico created the Institute for Mexicans Abroad. Paragraph 314 of the U.N. Consideration of Reports describes that the program "was set up to promote strategies, put together programs and gather proposals and recommendations from organizations and advisory bodies for strengthening Mexican communities abroad." Mexico has also created a number of agreements with the governments of the U.S. and Canada to help ensure greater protection for Mexican migrant workers.

12. While these programs and agreements are important and commendable, they are insufficient to secure portable justice for Mexican migrant workers. A high percentage of Mexican migrant workers still return to Mexico without the wages they rightfully earned during their employment. To comply with its obligations under the Convention, Mexico must take further action to ensure that its nationals return home with the wages they were promised; alternatively, it must support efforts to recover those wages once the workers have returned home.

13. Articles 25, 54, and 55 of the Convention obligate Mexico to ensure that its nationals are treated on an equal basis with nationals of the state where Mexican migrant workers are employed, particularly in front of the employer state's courts. Article 25 of the Convention states that "[m]igrant workers shall enjoy treatment not less favorable than that which applies to nationals of the State of employment in respect of remuneration…" Article 54 expands on this ideal:

> Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of: (a) Protection against dismissal; (b) Unemployment benefits; (c) Access to public work schemes intended to combat unemployment; (d) Access to alternative employment in the event of loss of work or termination…

Finally, Article 55 notes that "[m]igrant workers who have been granted permission to engage in a remunerated activity, subject to the conditions attached to such permission, shall be entitled to equality of treatment with nationals of the State of employment in the exercise of that remunerated activity."

14. Mexico also has an obligation to help its nationals address their workers' rights violations before competent authorities in employer states by Articles 54.2 and 61.2 of the Convention. Article 54.2 explains that "[i]f a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention."

15. Likewise, Article 61.2 declares that "[i]f a project-tied worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State which has jurisdiction over that employer…". Mexico must therefore implement programs to assist its nationals in seeking redress for legal wrongs before competent authorities in employer states. Mexico's efforts to fulfill this obligation will be crucial for ensuring portable justice for its nationals.

16. Finally, articles 33, 37, and 65.1 of the Convention obligate Mexico to ensure access of pre-departure information to its nationals prior to migrating to another state for employment. As Article 37 explains,

> "Before their departure, or at the latest at the time of their admission to the State of employment, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions."

Article 65.1 reiterates this obligation with its statement that "States Parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families."

17. Mexico has taken steps to fulfill its obligations of: ensuring that its nationals are treated as equals in employer states and particularly before the employer states' courts; helping its nationals address labor rights violations before a competent authority in the state of their employment; and providing pre-departure information to its nationals prior to

migrant to another state for employment. These steps are described in paragraphs 367-369 of the U.N. Consideration of Reports.

18. First, the Mexican government distributes information outlining the rights of Mexican migrant workers in the U.S. and Canada. In addition, Mexican consulates in the U.S. have signed agreements with the U.S. government concerning safety and equality in workplaces and the protection and promotion of the labor rights of Mexican migrant workers. As a final measure, Mexican consulates and preventive protection programs in the U.S. are distributing information to help make Mexican migrant workers aware of their labor and civil rights and encourage them to report any violations of these rights.

19. Mexico should continue with and expand these agreements and programs to encourage portable justice for its nationals whose labor rights have been violated in the U.S. or Canada. Steps should also be taken to implement some of these measures in other states employing Mexican migrant workers, as these programs and agreements certainly assist Mexican migrant workers in seeking redress for labor violations. In their current form, however, these programs and agreements are insufficient. The large number of Mexican migrant workers who do not receive any form of justice for the labor violations they suffer in an employer state is clear evidence of the need to offer enhanced protections to Mexican nationals.

The Consequences of No Portable Justice

20. Mexican migrant workers face many challenges in obtaining portable justice for the legal wrongs they have suffered while abroad. First, migrant workers are often unaware of their legal rights in the workplace, and do not know where to obtain assistance for rights violations. Workers who *do* know their legal rights are often fearful to file claims against their employers due to concerns of retaliatory firing, harassment, or deportation. Thus, many Mexican migrant workers do not even attempt to vindicate the legal wrongs they have endured in workplaces overseas.

21. Mexican migrant workers who do file claims while in the employer state are often forced to abandon their legal claims when they return to Mexico. Migrant workers are often compelled to return to Mexico before their legal claims against their employer have been concluded because of family concerns, or because of the lack of legal status in the state of employment; indeed, in many states, a migrant worker's legal status is tied to their length of authorized employment. This is particularly problematic since, to be successful in their legal claims against employers in the U.S., workers must potentially be available for three phases of civil litigation: the initial case development phase; the pre-trial discovery phase involving depositions, interrogatories, and similar requests for information; and the trial phase, including worker testimony. The inability of workers to be available for the

entire duration of the civil litigation process forces many workers to abandon their claims against an employer and return to Mexico without the opportunity for redress.

22. Once migrant workers return to Mexico, many have difficulty vindicating their rights in the state of employment. Mexican lawyers generally cannot bring suits in the state of employment; typically, only attorneys licensed in the state where the violation occurred can file suit. Some organizations in states of employment have dedicated their mission to assisting Mexican migrant workers, but the difficulties they face are two-fold. First, while Mexico has made commendable efforts in this area, its efforts cannot meet the tremendous need of educating all legally wronged Mexican migrant workers about their right to assert legal claims against their employers. Second, the human and financial costs make effective and efficient representation of Mexican migrant workers in Mexico unsustainable for most attorneys in the employer state. Thus, Mexican migrant workers are often left without redress for the legal wrongs they have suffered while their employers feel free to continue their patterns of violating migrant workers' rights.

H-2 Visa Program

23. A second issue is that the Committee should consider is how Mexico protects the rights of its citizens that participate in the H-2 visa program in the U.S. The H-2 Visa Program allows U.S. employers to hire foreign workers for temporary work in the U.S. There are two types of H-2 visas that are issued by the U.S.: H-2A visas are issued to temporary agricultural workers, while H-2B visas are issued for workers engaged in non-agricultural seasonal or temporary work.

24. There are several concerns regarding the H-2 visa program. Mexicans who participate in the program are at the mercy of powerful recruiters in Mexico who facilitate the employment contract between the laborers and the U.S. employers. Little oversight by the Mexican government allows these recruiters to charge expensive recruitment fees. Additionally, H-2 workers often have to provide for pre-employment costs such as visa application fees and transportation to the U.S. Once in the U.S., many laborers in the H-2 program work long hours and receive little pay. They are also subjected to hazardous and unhealthy working and living conditions. These concerns will be discussed in more detail below.

Mexico's Obligations Under the H-2 Visa Program

25. Under both the Convention and Mexican law, Mexico has an obligation to its citizens who migrate and engage in such temporary work. For example, under the Article 36 of the Convention, Mexico has an obligation to provide workers who are migrating to other countries with information regarding the "conditions applicable to their admission and

particularly to those concerning their stay . . ." Also, Article 25(1)(a) provides a list of conditions such as overtime, hours of work, safety, and the like, which migrant workers shall enjoy similar treatment as nationals of the employment state; Article 25(1)(b) further provides that private employment contracts shall not derogate from that principle of equality.

26. Since employment contracts are executed in Mexico, it is the responsibility of the Mexican government to ensure that those employment contracts provide fair labor conditions for their citizens who will engage in migrant work, and that those conditions comply with the Convention. Indeed, Article 28(III) of Mexico's Labor Law requires employers to submit the employment contracts to the Conciliation and Arbitration Board for its approval.

27. Article 28 of the Federal Labor Law of Mexico provides further rules that apply to Mexican workers who work "outside the Republic." Article 28(I) provides that such workers will not have to bear transportation costs, costs for meals, and will have the right to hygienic housing.

28. Article 28 of the Federal Labor Law reflects international legal norms. The International Labor Organization's Multilateral Framework on Migrant Labor prescribes in Guideline 13.7 that the migrant workers shall not bear the costs of recruitment or placement either directly or indirectly. This principle has also been recognized by courts in the U.S. in two cases that dealt with American employers and migrant workers. In both *Rivera v. Brickman Group, Ltd.* and *Arriaga v. Florida Pacific Farms, L.L.C.*, federal courts in the U.S. held that where employers are the primary beneficiaries of pre-employment expenses such as transportation costs and visa application fees, the employer must bear those costs.

29. However, despite these international legal norms, which are reflected in the domestic laws of Mexico and the U.S., many H-2 workers have had transportation costs deducted from their wages and have had to live in substandard housing.

30. Since Mexico already has adopted laws and ratified the Convention, it has an obligation to protect the rights of its citizens who participate in the H-2 visa program. Mexico must fully comply with domestic and international norms, so that its citizens who participate in migrant work are treated fairly and not taken advantage of.

Specific Concerns About the H-2 Visa Program

31. When participating in the H-2 visa program, employers in the U.S. work with recruiters in Mexico to find laborers who are interested in performing temporary work in the U.S.

Although Article 28(III) of Mexico's Federal Labor Law requires employers to submit the employment contracts to the Conciliation and Arbitration Board for its approval, the recruiters operate with little oversight. The recruitment process is of particular concern, because Mexican laborers often pay hundreds of dollars in fees and expenses to the recruiters who facilitate the hiring process between the American employers and Mexican employees. While it is against Mexican law for recruiters to demand recruitment fees from the laborers, the lack of enforcement of these laws has enabled recruiters to charge expensive fees with impunity.

32. After dealing with powerful recruiters in Mexico, laborers must then make the difficult journey to the U.S. These journeys are often funded by the laborers themselves. After relocating, laborers often find themselves living in substandard housing and working in environments that can be hazardous to their health and/or safety. Mexican law provides that foreign employers have an obligation to provide temporary Mexican employees with appropriate housing, safe work places, and fair wages.

33. The Conciliation and Arbitration Board of Mexico is charged with approving of employment contracts. These employment contracts are to include provisions regarding transportation, housing standards, occupational safety standards, compensation, type of work to be done, and hours to be worked. For example Article 28(I)(d) of Mexico's Federal Labor Law requires that "[t]he worker shall have the right to enjoy decent and hygienic housing at a work center or a place located nearby." However, because of a lack of oversight, the experience of many H-2 workers has been different. For example, some Mexican H-2B workers who work in the U.S. crab industry have reported poor housing conditions and challenging working conditions. Mexican law provides that its migrant workers should not have to endure such conditions. But since the recruitment process is not being regulated, the Mexican government has not been able to ensure its citizens that they will be treated fairly and justly when they participate in the H-2 visa program.

34. Before the laborers even begin to work and receive compensation, they must pay for several expenses. These include the fees demanded by the recruiters, the fee associated with the visa application, and for transportation costs. In order to meet these illegal expenses, the laborers are often forced to obtain high-interest loans. Most workers, who work for relatively low wages in the U.S., then have to deduct a significant amount of money from their paychecks in order to make their loan repayments. This creates a situation where the laborers are constantly in debt and the wage they are earning does little to improve their livelihoods.

35. The concerns about the H-2 visa program are rooted, in part, in Mexico's lack of oversight and regulation of the recruitment and hiring of Mexican laborers for temporary work in the U.S. While there are laws to protect Mexican laborers, the failure to

vigorously enforce them has created a situation in which those who participate in the H-2 visa program are at the mercy of powerful recruiters and lenders. In 2009, the U.S. issued nearly 86,000 H-2 visas to Mexican laborers. With such a large number of its citizens a part of the H-2 visa program, it is imperative that Mexico applies its own laws and regulates the recruitment process with more scrutiny.

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